Written evidence from The Public Law Project (SIT 19)

Public Administration and Constitutional Affairs Committee
The Scrutiny of International Treaties and other international agreements in the 21st century inquiry

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Introduction and summary of recommendations

1. Public Law Project (PLP) welcomes this opportunity to make a submission to the committee. PLP is an independent national legal charity whose vision is a world in which individual rights are respected and public bodies act fairly and lawfully. Our mission is to improve public decision making and facilitate access to justice. PLP undertakes research, policy initiatives, casework and training in order to achieve its charitable objectives.

2. Our interests in the scrutiny of international agreements centre on three issues:
   - **Sovereignty**: ensuring parliamentary sovereignty is not abrogated in practice by treaties constraining current or future legislation
   - **Accountability**: ensuring that government treaty decisions are well made and held to account effectively
   - **Rights**: ensuring that existing rights are not diminished by treaties and any new treaty rights can be appropriately exercised, which requires representation throughout the treaty process.

3. In our view, treaties are an increasingly important part of the UK's constitutional settlement, not only because of Brexit but because of the growth of the global economy, the impact of global issues such as climate change, and the power of global corporations. Treaties are law that bind the UK, and how Parliament scrutinises the exercise of the executive power that produces this law is of central constitutional importance. The growing breadth, depth and impact of treaties require a corresponding development in scrutiny and accountability if Parliament is to be truly sovereign and concerns of a democratic deficit are to be addressed. Without a considerable increase in transparency and the opportunity to debate the balance between the competing interests inherent in any treaty, the interests of marginalised groups risk being diminished. This risk is compounded by the way in which treaties can form a barrier to developing domestic law.

4. This submission responds to each of the questions in the call for evidence, and sets out the following **recommendations** relating to each of our three main concerns:

- **Sovereignty**:
    - The Government should avoid overly prescriptive terms in treaties that would reduce the UK's ability to change its domestic laws in response to technical, cultural or other changes in the future (para 20)
    - The Government should not introduce any treaty-implementing legislation until the IAC and any relevant Commons committee holding an inquiry on the treaty have published their reports (para 50)
    - The first substantive debate on any implementing legislation should be replaced by a debate on the committee report on the treaty (para 50)
    - Parliamentarians who scrutinised a treaty in committee should be included wherever possible in the committee scrutinising any implementing legislation (para 50)
    - Any implementing legislation needed in devolved areas of competence should wherever possible be made by the devolved institutions rather than the UK ones (para 50)
    - The use of SIs to implement treaties – particularly under the European Withdrawal Agreement Act 2018 – should be subject to clear limits and thoroughly scrutinised by Parliament (para 50)
    - Parliament's role in treaty withdrawal should echo that for joining treaties (para 59)
    - Parliament and the Government should negotiate a public, politically binding concordat setting out their respective roles on treaties (para 71)
    - The Constitutional Reform and Governance Act 2010 should be amended to require the House of Commons' assent to important treaties (para 71)
    - There is a clear need to develop criteria for determining (a) which treaties and amendments require ratification and are therefore submitted to Parliament, (b) which Parliament scrutinises in detail, (c) which it engages with before and during negotiations, and (d) which it needs to approve (para 74)

- **Accountability:**
    - The devolved legislatures should have access to the same treaty information as the UK Parliament, at the same time, where it relates to devolved competencies (para 27)
    - Treaty scrutiny in parliamentary committees across the UK should be better coordinated, so that the concerns of the devolved legislatures can be amplified by Westminster committees (para 27)
    - The Government's commitments to treaty debates should be consolidated and confirmed in a Parliament-Government Concordat on treaties, and/or in the Standing Orders of each House (para 41)
    - The Government should establish a central register of all non-treaty international arrangements concluded by UK public authorities, and a public version that includes all but classified ones. It should also restate its

commitment to informing Parliament of those that involve serious international obligations(para 41)
    - Where a treaty establishes bodies to monitor implementation, Parliament should engage closely with those processes (para 59)
    - Parliament should consider introducing specific reporting requirements for the Government on individual treaties, for example by amending implementing legislation to require transparency for treaty amendments and other decisions made under the treaty, and for dispute resolution (para 59)
    - Parliament should engage systematically with UN treaty monitoring bodies, providing evidence to them and holding the Government to account on their findings (para 59)
    - The role and work of parliamentary assemblies established by treaties should be publicised, and their work integrated with that of domestic parliamentary committees (para 59)
    - Commons select committees should have a new core task "to examine treaties within their subject areas". Ad-hoc committees or sub-committees could be created for treaty scrutiny, and/or there could be more use of 'guesting' provisions (para 71)
    - The Government's commitments on sharing information with Parliament about FTAs should be extended to other important treaties negotiated by other Government Departments (para 83)
    - At a minimum, Parliament should have access to confidential information on all important treaties on the same basis as it currently does with FTAs. It should also have access to the same confidential information as is given to business groups on FTAs, and at the same time (para 85)
    - The devolved legislatures should have the same rights to treaty information as the UK Parliament, where it relates to devolved competencies and interests (para 85)
    - There should be a rebuttable presumption of transparency for all government treaty actions (para 94)
    - Major improvements to public treaty information are needed, ideally a fully searchable, comprehensive treaty database showing the full range of information about a treaty including how it has been scrutinised, implemented and/or amended (para 94)
    - Parliament should appoint experts in treaty processes and procedures in both the Commons and the Lords to provide expert treaty scrutiny information, advice and coordination and to develop and maintain links with government officials and others outside Parliament (para 100)
    - Parliament should develop more flexibility in using subject specialists within Parliament for treaty scrutiny work, and ensure that the international law elements of each subject are well understood internally (para 100)
    - The Government should provide enough time between finalising a treaty and the end of the CRAG period for parliamentary committees to hear from expert witnesses (para 100)

- **Rights:**

- Civil society representatives should have the same access to treaty discussions as business representatives (para 80)
- The Government should hold meaningful public consultations on all important treaties, not just FTAs (para 80)
- Enforceable trade treaty obligations should reinforce rather conflict with non-enforceable obligations on the environment, health, workers' rights and data rights (para 80)
- Treaty explanatory memorandums should include comprehensive impact assessments, with a wide range of information on the impact on rights and equalities. They could also be produced at additional points in the process (para 94)
- All important treaties should be assessed against UK domestic standards by independent experts (para 94)

1) Role and purpose of international treaties/agreements

What roles and functions do treaties and international agreements perform in the 21st century?

5. Globalisation and the growing need for international solutions to international problems mean that there are now more treaties covering more areas than ever. States and international organisations make hundreds of treaties worldwide every year, and these cover almost every aspect of human activity, reaching deep into almost every aspect of the domestic legal system:[1]

    - Until the 20th century, treaties were largely about war and peace, territory and trade.
    - The mid 20th century saw the development of comprehensive international and regional human rights treaties, many with monitoring and reporting mechanisms and some with courts to interpret and apply them.
    - Towards the end of the 20th century another phase of expansion saw treaties such as the Energy Charter Treaty and the WTO's Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) as well as thousands of bilateral and regional treaties that protect foreign investors and intellectual property owners and frequently give them rights to sue governments outside national court systems.
    - More recently, treaties have begun to penetrate deep into many areas of daily life, from food standards to aviation safety, police cooperation to taxation, environmental targets to domestic violence. Even trade treaties have changed in scope in recent decades. No longer limited to removing border taxes, they now aim at substantial alignment of domestic regulation in matters such as employment rights, data flows and healthcare.[2] Many treaties also establish new bodies that can amend the treaty, and/or binding mechanisms for resolving disputes.

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[1] Campbell McLachlan, 'Five conceptions of the function of foreign relations law', in Curtis A Bradley (ed), *Comparative Foreign Relations Law* (2019) p31

[2] Emily Jones and Anna Sands, 'Ripe for reform: UK scrutiny of international trade agreements', GEG Working Paper 144, September 2020

6. In the UK this expansion of the scope and effects of treaties has recently been intensified by regaining responsibility for areas of international cooperation previously handled by the EU, such as trade, fisheries and data regulation.

7. Without a corresponding growth in scrutiny, this amounts to a shift in power to the executive. More norms are being made by executives at the international level, limiting the scope of legislatures at the domestic level.

8. An example is data rights. Digital trade provisions illustrate how the UK's post-Brexit bilateral trade agreements may erode individual rights and constrain Parliament's ability to protect data and privacy rights in future. The EU's stringent legal framework for the protection of digital rights is reflected in its trade treaties with third countries. The UK has however indicated that it wants to liberalise in this area, to help facilitate the efficient trade of services. Its post-Brexit digital trade agreements are already showing a shift to a lower standard of rights protection. Where this is the case, there is an even greater need for adequate Parliamentary scrutiny of treaties, and for clarity of implementing legislation. The

box below illustrates this with the example of the digital trade provisions in the 2020 UK-Japan trade agreement:

Data rights in the UK-Japan trade agreement

The UK-Japan Comprehensive Economic Partnership Agreement (CEPA), signed on 23 October 2020, was the first trade agreement signed by the UK outside the EU. The digital trade provisions of the treaty went beyond rolling over the EU-Japan Economic Partnership Agreement (JEEPA). This aspect of the CEPA was modelled on the corresponding provisions of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), to which the UK government wishes to accede. The UK appears to have agreed similar liberal digital trade provisions with Australia.

These treaties mark a notable departure from the EU approach to digital trade, containing for example general and binding commitments to enable cross-data border flows with restrictions only in limited circumstances, and only general commitments to adopt or maintain legal frameworks that protect personal information. The EU in its trade agreements has by contrast insisted on extensive privacy exceptions (consistent with the status of privacy as a fundamental right in EU law). While the UK's new approach may provide certainty for businesses and trading partners, it entails a sacrifice of regulatory autonomy, and may also limit the future ability of Parliament to legislate for the greater protection of data rights without contravening the UK's international obligations.

Parliamentary scrutiny of CEPA addressed some of these concerns. In their reports on CEPA, both the Lords European Union International Agreements Sub-Committee (IAC) and the Commons International Trade Committee (ITC) identified digital trade and data as the area in which the new treaty most diverged from JEEPA. The IAC, while optimistic about the benefits of the CEPA provisions for industry and financial services, acknowledged that CEPA did not fully address concerns about the protection of personal data and that the UK's departure from the EU data protection regime needed further scrutiny. The ITC cited concerns about whether CEPA would affect the UK's chances of obtaining an EU data adequacy decision, and whether the new digital provisions would have negative implications for the NHS. During a Commons debate on CEPA on 25 November 2020 the Government stated, for example, that neither the NHS nor NHS data would be harmed by CEPA. The Government subsequently published both a response to the ITC report and an explanatory document addressing data protection concerns in CEPA. In these, the Government set out its view that CEPA would not interfere with or undermine existing UK data protection rules under the Data Protection Act 2018.

However, Parliamentary scrutiny of these rights-affecting provisions was limited by the Government's choice to implement CEPA's provisions in general by regulations under the *European Union (Withdrawal) Act 2018* (EUWA). As far as we can see, no regulations have yet been made under EUWA to implement the data provisions of CEPA. If any do materialise, they might not even be debated. While secondary legislation lends itself to the rapid implementation of highly technical subject matter like digital trade, the government's preference for this form of law-making is likely to exacerbate the deficit of Parliamentary scrutiny in the treaty-making and implementing process.

9. Alongside this growth in the breadth and depth of treaties, there has also been a significant growth in non-legally binding instruments on a wide range of topics and with different international actors. These include:

- non-treaty arrangements between states (such as bilateral arrangements on technical or classified matters, and multilateral arrangements such as the OSCE Charter of Paris 1990),
- arrangements supplementing a treaty (such as those accompanying air services agreements) and

- rules developed by the working bodies of inter-governmental organisations, corporations or transgovernmental networks (such as UN Security Council resolutions, model tax treaties, international health regulations and internet governance).

These may be of at least equal importance and domestic impact to treaties. And yet this diversification and informalisation of global rulemaking is even further from effective scrutiny and accountability than treaties.

2) Constitutional relationships

Where should the balance lie between Parliament and Government in developing, agreeing and implementing international treaties?

10. It is important to recognise that the UK already gives Parliament a role in treaties – any change would simply adjust that balance. The consistent direction here, as in many other countries, over the last century or so has been to increase Parliament's role. However, in practice it is up to the Government to decide what further involvement to 'allow' Parliament, and (with the exception of CRAG's incorporation of parts of an earlier convention and its limited delay provisions – see below) it has been very unwilling to formalise those concessions.

11. Comparatively speaking, the UK is still closer to the 'Government' end of the scale than most other developed democracies. The UK Supreme Court in 2017 stated that the UK Government currently has "an unfettered power to make treaties which do not change domestic law".[3] Certainly its treaty powers require no legislative authority, as they are an executive prerogative power. This executive dominance is partly functional and practical: the executive has more expertise and information on foreign affairs than the other branches of government, and there are advantages if a state can speak with one voice in the international arena.

12. But the view that the Government has and should have unfettered treaty powers is open to challenges on grounds of both parliamentary sovereignty and democratic accountability. The rule of law and the value of a deliberative process also indicate a significant treaty role for parliaments.[4] Foreign relations decisions can entail risks and trade-offs that are serious enough to warrant more direct democratic accountability.[5] If the Government does not balance or even hear a range of views, it could bind the UK – potentially in perpetuity[6] – to a flawed or unsupported treaty.

13. Of all written constitutions ever adopted by nation states, 90% include provisions for how treaties are adopted,[7] and the vast majority of these require parliamentary approval of all

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[3] *R(Miller) v Secretary of State for Exiting the European Union*, [2017] UKSC 5, para 58
[4] Jenny S Martinez, 'The Constitutional Allocation of Executive and Legislative Power over Foreign Relations', in Curtis A Bradley (ed), *Comparative Foreign Relations Law* (2019) p97
[5] Curtis A Bradley, 'What is Foreign Relations Law?', in Curtis A Bradley (ed), *Comparative Foreign Relations Law* (2019) p19
[6] Some treaties contain no exit provisions, and the Vienna Convention on the Law of Treaties creates a presumption against leaving them (art 56(1)).
[7] Tom Ginsburg, 'Comparative Foreign Relations Law: A National Constitutions Perspective', in Curtis A Bradley (ed), *Comparative Foreign Relations Law* (2019) p67

or some treaties.[8] The degree of 'sharing' of treaty authority tends to be determined by practicalities, politics and circumstances rather than by abstract theories, which arguably refutes the notion that foreign affairs powers are inherently 'executive' in nature.[9] Worldwide, the most common categories of treaty with an assent requirement are those modifying domestic law, while those involving joining international organisations, domestic spending, human rights, and trade also frequently require parliamentary approval.[10]

14. However, even such approval is normally a take-it-or-leave-it matter, with very high costs of saying no, and little room for any modification at the domestic level. Moreover, practically speaking it can be very hard for domestic lawmakers to assess the effects of complex technical treaties in increasingly interconnected spheres. For example, all UK trade treaties need to take into account how they will interact with the Northern Ireland Protocol, as well as how they might constrain future treaties with other countries. They also need to be assessed against the UK's myriad other existing international commitments such as the environment, workers' rights, gender and development. This not a reason for Parliament not to be involved: instead it demands a high level of information from the government, independent impact assessments, and also enough resources (both people and time) to allow Parliament to scrutinise treaties effectively.

15. The main purpose of increasing Parliament's treaty role is to help build a deeper consent to treaties, partly by increasing transparency around treaties and partly by providing a forum for debate. This matters for many reasons, for instance:

    - It could help build trust and a broader consensus around the UK's post-Brexit priorities and place in the world
    - More expert input, for example from committee witnesses, would help produce better treaties
    - Treaties outlive governments – sometimes even in their negotiations – and are often hard to amend or renounce, so they should not be narrowly party political
    - Even unincorporated treaties may be taken into account by courts in the UK[11] and so should have at least some parliamentary imprimatur

16. The main risk of shifting the balance of treaty powers more towards parliament is that the government may avoid the more onerous requirements by making more use of non-treaty international arrangements instead. In the United States, for example, successive administrations have responded to requirements for the "advice and consent of the Senate" and a two-thirds majority for treaties by making fewer and fewer treaties and

[8] Oona Hathaway, 'A Comparative Foreign Relations Agenda', in Curtis A Bradley (ed), *Comparative Foreign Relations Law* (2019) p89
[9] Jenny S Martinez, 'The Constitutional Allocation of Executive and Legislative Power over Foreign Relations', in Curtis A Bradley (ed), *Comparative Foreign Relations Law* (2019) p98
[10] P-H Verdier & M. Versteeg, 'Separation of powers, treaty-making, and treaty withdrawal', in C. Bradley (ed), *Comparative Foreign Relations Law* (2019), at 140
[11] See for example *Western Sahara Campaign UK v Secretary of State for International Trade and HM Treasury* [2021] EWHC 1756 (Admin), setting out when there might be a sufficient "domestic foothold" for international law arguments (paras 20-21)

more and more "executive agreements". The latter are made by the President without submitting them to the Senate at all.[12] An obvious response to this would be to require greater parliamentary involvement in at least certain categories of non-treaty arrangements, or at the very least better information on them (see below).

To what extent is there a tension between the sovereignty of Parliament and the ability of the Government to sign treaties that require or constrain future legislative changes, and what can be done to resolve any such tension?

17. In formal terms, Parliamentary sovereignty is protected by the concept of dualism: because treaties are not part of UK law and give rise to no legal rights or obligations in domestic law, "the prerogative power to make and unmake treaties is consistent with the rule that ministers cannot alter the law of the land". [13] Conversely, Parliament is free, in principle at least, to pass domestic legislation that contravenes the UK's obligations under international law (such as the controversial provisions of the Internal Market Bill in September 2020 that would have allowed breaches of a treaty the Government had agreed less than a year previously).

18. But in practice, the provisions of any implementing legislation will largely be predetermined by the treaty, without Parliament having had any say in that treaty. There can be some room for manoeuvre, for instance adding requirements for the Government to report on implementation of a treaty, but otherwise it is a fait accompli. There is also an interpretative presumption that parliament does not legislate contrary to international law.

19. Moreover, treaties can in practice constrain other future legislation. They may contain specific obligations not to change laws or regulations (for example, to maintain certain standards). Or they may be difficult to update in the light of new developments, creating a barrier to future domestic amendments – particularly if they are duplicated across multiple agreements.

20. Recommendation:

- **The Government should avoid overly prescriptive terms in treaties that would reduce the UK's ability to change its domestic laws in response to technical, cultural or other changes in the future.**

What role should devolved governments and legislatures, Crown Dependencies and Overseas Territories have in relation to international treaties and arrangements?

21. Devolution poses challenges to the UK's treaty actions (and vice versa). The UK retains responsibility for creating and complying with treaty obligations yet the devolved authorities are often significantly affected and may also be responsible for implementing those obligations. CRAG's statutory framework on treaty ratification is wholly silent on the relationship between treaties and devolution.

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[12] Oona Hathaway, Curtis Bradley and Jack Goldsmith, '*The Failed Transparency Regime for Executive Agreements: An Empirical and Normative Analysis*', *Harvard Law review* vol 134 no2, pp629-725

[13] *R (SC and ors) v Secretary of State for Work and Pensions and ors* [2021] UKSC 26, para 78 (Lord Reed)

22. Under the post-1998 devolution of power to Scotland, Wales and Northern Ireland, treaty-making is reserved to the UK Government. The devolved administrations are responsible for implementing international obligations relating to devolved matters and the UK Government is empowered to ensure they give effect to the UK's international obligations. Thus, although the devolved countries' interests may be different from or even opposed to those of the UK Government, their legislatures may be required to pass treaty-implementing legislation whose content is effectively predetermined by the UK Government.

23. Those legislatures' ability to scrutinise treaties depends on both the extent to which the UK Government involves the devolved administrations in treaty matters, and the extent to which the UK Parliament considers the devolved legislatures' positions – which itself depends partly on the extent and influence of the UK Parliament's role in treaty scrutiny.

24. Under a politically-binding Concordat on International Relations,[14] the UK Government agrees to cooperate with the devolved administrations on exchanging information, formulating UK foreign policy, negotiating and implementing treaties. The Concordat also provides for ministers and officials from the devolved administrations to form part of UK treaty-negotiating teams. However, this was agreed long before the UK left the EU, and there has been pressure from the devolved administrations to revise the arrangements. One welcome development is that FCDO treaty guidance now requires treaty Explanatory Memorandums to state the extent to which the treaty covers or has implications for devolved matters, and "describe the nature of consultations with the Devolved Administrations, including the focus of discussions and responses (to the extent possible)".

25. The links between committees in Westminster and those in the devolved legislatures concerning treaty scrutiny could be developed further. The informal Inter Parliamentary Forum on Brexit – the Chairs and Conveners of Committees scrutinising Brexit-related issues in the Scottish Parliament, National Assembly for Wales, House of Commons and House of Lords – has often been cited as a model for structured interparliamentary dialogue on treaties.[15] In September 2019 it even discussed scrutiny of future international treaties and asked officials to consider models for scrutiny across the legislatures.[16] However, it is not clear what impact if any this has had, and the future of the forum is uncertain.

26. Another model is to increase joint working between committees across the UK. For example, the Commons Welsh Affairs Committee can invite members of any specified committee of the Senedd to attend and participate in its proceedings (but not to vote),[17]

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[14] Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, Scottish Ministers, the Cabinet of the National Assembly for Wales and the Northern Ireland Executive Committee, October 2013

[15] See e.g. written evidence from the External Affairs and Additional Legislation Committee of the Welsh Parliament to the Lords International Agreements sub-Committee, Treaty scrutiny: working practices, TWP0005, para 2.

[16] Lords European Union Committee news, *Interparliamentary Forum on Brexit holds eighth meeting,* 10 September 2019

and any Senedd Committees may meet concurrently with any committee or joint committee of any legislature in the UK.[18] There is no equivalent for Scottish or Northern Irish committees.

27. Recommendations:

- **The devolved legislatures should have access to the same treaty information as the UK Parliament, at the same time, where it relates to devolved competencies.**
- **Treaty scrutiny in parliamentary committees across the UK should be better coordinated, so that the concerns of the devolved legislatures can be amplified by Westminster committees.**

3) Effectiveness of current scrutiny mechanisms

Does Part 2 of the Constitutional Reform and Governance Act 2010 (CRAG) enable effective parliamentary scrutiny of international treaties and other agreements?

28. No. It does not require Parliamentary approval of treaties, nor scrutiny, debates or votes on treaties, or even create any triggers or mechanisms for them. It neither provides nor facilitates a power to influence the terms of a treaty while those terms might still be changed. It does not even cover all treaties (those that come into force on signature alone are not covered, although they may have significant impacts), let alone all treaty actions or non-treaty international arrangements. There is no clear rule on when a UK treaty or treaty amendment should require ratification and therefore trigger the CRAG requirements. And it is easy for the Government to avoid CRAG's treaty requirements, for example with a simple statement of exceptional circumstances.[19] It introduction had no discernible impact on parliamentary engagement.

29. CRAG for the first time gave statutory effect to a Commons vote against ratification, but there are considerable difficulties in practice in exercising this power. These include the challenges of getting time for a debate and vote during the CRAG period, the need to do that repeatedly if the Government brings the treaty back for ratification after a Commons objection, and the fact that the statutory obligations come only once the treaty has been finalised. It is not a true veto power, still less an approval requirement: instead it is best described as a "delaying power, and a largely theoretical one at that".[20]

30. While the UK was a member of the EU, the limitations of CRAG mattered less because many important treaties were negotiated on behalf of the UK by the EU, with considerably greater scrutiny. The UK Parliament's European scrutiny committees scrutinised UK Ministers' actions on EU treaties with third countries in Council of Ministers under their formal scrutiny reserve power. This supplemented the European Parliament's detailed scrutiny of EU's treaties with third countries, its strong and articulated rights to treaty info, and its veto power. Further, the devolved administrations

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[17] House of Commons Standing Order 137A(3)
[18] Standing Orders of the Welsh Parliament, 2021, 17.54
[19] See CRAG s22
[20] Ewan Smith, Eirik Bjorge and Arabella Lang, 'Treaties, Parliament and the Constitution', (2020) *Public Law* 508 at 511

had more say in treaty-making at the EU level, including through the UK's Joint Ministerial Committee (Europe), than through the UK Concordat on International Relations. The UK therefore now has less democratic scrutiny of treaties in areas such as trade that have been repatriated than it did before Brexit.

31. The UK-EU Withdrawal Agreement negotiations brought home the limitations of CRAG. At best it only ensured Parliament access to the signed treaty and an explanatory memorandum for 21 sitting days pre-ratification. This led to Parliament imposing a statutory fetter on the Government ratifying the Withdrawal Agreement – and then voting against the Agreement three times. It has been suggested that if Parliament "had been able to provide formal input earlier, then the government might have been less likely to strike a bargain for which there was no majority". [21]

32. The implementing Bill for the subsequent EU-UK Trade and Cooperation Agreement (TCA) disapplied the CRAG requirements entirely, and was published less than 24 hours before the sole parliamentary day allocated for its passage. This truncated process for parliamentary scrutiny of the treaty and the Bill was referred to as "a farce" and "an abdication of Parliament's constitutional responsibilities to deliver proper scrutiny of the executive and of the law".[22] The TCA "contains countless substantive and procedural obligations that limit sovereign choice in a post-Brexit world".[23]

33. The inadequacy of CRAG's 21 sitting day period is shown by the fact that many of the Lords International Agreements Committee (IAC)'s reports have been published near the end of that period, or even after it had expired. The Government appears to have accepted that 21 days is not always long enough: the UK-Australia FTA will be published three months before being laid under CRAG, to allow parliamentary committees to scrutinise it.[24] Even if a committee has been engaged during negotiations, they still need to read the finalised treaty and supporting documents, obtain evidence from experts and civil society, agree priorities, take any queries to Ministers, draft a report and recommendations, and review and publish their report in time for any debate to be arranged and held.

How effectively are constitutional conventions, such as remaining aspects of the Ponsonby rule on making time for treaty debates, and informing Parliament of non-treaty international agreements, operating alongside CRAG? Do these conventions need to be formalised?

34. The Ponsonby Rule's commitment to making time for debates on "important" treaties during the 21-day period when laid before Parliament before ratification[25] appears to have lapsed. Even treaties as significant as the European Convention on Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, that were laid under the Ponsonby rule in respectively the early 1950s and mid- 1970s, were not debated in parliament before

[21] Ewan Smith, Eirik Bjorge and Arabella Lang, 'Treaties, Parliament and the Constitution', (2020) *Public Law* 508
[22] Brigid Fowler, 'Parliament's role in scrutinising the UK-EU Trade and Cooperation Agreement is a farce', Hansard Society blog, 29 December 2020
[23] Paul Craig, 'Brexit a Drama, The Endgame—Part II: Trade, Sovereignty and Control' (2021) 46 EL Rev 129.
[24] Letter from Liz Truss, Secretary of State for International Trade, to Angus Brendan MacNeil MP, Chair of the Commons International Trade Committee, 6 July 2021
[25] HC Deb Vol 171 cc1999–2005 (1 April 1924).

ratification. Nor were they subject to any implementing legislation, so even the imperfect proxy of debating implementing legislation did not apply.

35. Subsequent Governments made further commitments to holding treaty debates, but very few were held on non-EU treaties until the House of Lords began debating Brexit 'rollover' treaties:
    - In 2000, the Government undertook to provide the opportunity for the debate of any treaty involving major political, military or diplomatic issues, if the relevant select committee and the Liaison Committee so request. But by 2007 it had not received any requests for a debate under this procedure.[26]
    - In the House of Lords, a practice has emerged that where the European Union Committee or the International Agreements Committee draws an agreement to the special attention of the House, and a motion for debate has been tabled (even if it does not use the form of words specified in CRAG), the usual channels will assist in finding time for a debate.[27] This has now happened several times, including the first ever debate on a CRAG motion in March 2019.[28]
    - During the passage of the Trade Bill, the Trade Minister Lord Grimstone also made two commitments on FTA debates (subject to parliamentary time being available), which have been dubbed the 'Grimstone Rule':
        - The Government will facilitate a Lords debate on any FTA negotiating objectives, if the Lords IAC has reported on them and recommends a debate
        - Lord Grimstone "cannot envisage a new FTA proceeding to ratification without a debate first having taken place on it, should one have been requested in a timely fashion by the committee.[29]
    - Similar commitments for debates on FTAs in the Commons were set out by the then Secretary of State for International Trade, Liz Truss, in a letter to the Commons International Trade Committee in March 2021.[30]

36. These new commitments, while honoured for now, are not codified. Without that, there is a high risk that they, like their predecessors, will lapse. A Parliament-Government Concordat on treaties would be an appropriate place to bring together – and potentially expand – the Government's commitment to treaty debates, in a way that can be held to account. A stronger mechanism would be to incorporate requirements for treaty debates into the Standing Orders of each House.

37. The Ponsonby Rule also included a promise to inform the House of Commons of all non-treaty agreements, written or unwritten, that involved serious international obligations.[31] This was to allow the Commons to exercise supervision over these arrangements. However, the Government has recently confirmed that non-treaty arrangements are not currently laid before Parliament as a matter of Government practice.[32] It has also failed to

[26] Jack Straw, Evidence to the Joint Committee on the Draft Constitutional Renewal Bill, 1 July 2008 (Q750)
[27] House of Lords International Agreements Sub-committee, *Treaty scrutiny: working practices*, 2020 para 40
[28] HL Deb 13 March 2019 cc1107–1122 (motion calling for extension of the scrutiny period by 21 days for trade agreements with Eastern and Southern Africa States, Faroe Islands, and Chile)
[29] HL Debate 23 February 2021 c724
[30] Wrongly date in the original
[31] HC Deb 1 April 1924 c1999

give Parliament assurances that they will be routinely disclosed even when they involve significant international obligations, despite repeated requests.[33]

38. There is no public register of these arrangements – commonly called Memorandums of Understanding (MoUs). Some are made public, but there does not appear to be any method for determining which. Not even the FCDO holds a central record of MoUs: FCDO guidance now states that although all draft MoUs should be sent to the relevant FCDO department for clearance, each Government Department is responsible for maintaining up to date records and original documents for MoUs.[34]

39. Non-binding international arrangements have been the subject of some controversy in recent years. For example:

- From the 1990s the UK agreed a series of 'diplomatic assurances' intended to enable it to deport suspected terrorists to countries where they face the risk of torture by obtaining promises of humane treatment. These non-binding agreements with no enforcement mechanisms or individual rights were strongly criticised for breaching the principle of *non-refoulement* in international law.[35] Some were published as MoUs (for instance with Jordan, Libya and Lebanon) and some were not (an exchange of letters with Algeria).

- In 2019, Harry Dunn was killed in a road collision involving the spouse of a US official at a US base in England, who subsequently claimed immunity from prosecution. It emerged that special arrangements in an exchange of notes between the UK and US Governments concerned diplomatic immunity for staff and their families at the base. After the incident, the bilateral immunity arrangements were revised to extend the US waiver of immunity from criminal jurisdiction. However, the Government refused to disclose the arrangements either publicly or in confidence to Parliament.[36]

- In the context of Brexit, the UK has used MoUs to underpin[37] or even determine[38] the UK's treaty relations with other states. It has also used them to make treaty-like agreements with entities that the UK does not recognize as a State, such as the Palestinian Authority. Both uses blur the distinction between treaties and non-treaty agreements.

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[32] Government Response to the House of Lords International Agreements Sub-committee Report: Treaty Scrutiny, Working Practices, pp7-8
[33] Lord Goldsmith, HL Deb 7 September 2020 c106GC
[34] Para 9. Previous versions stated that a photocopy of the final text of an MoU should be sent to FCDO Treaty Section.
[35] See David Anderson QC and Clive Walker QC, Deportation with Assurances, July 2017, Cm 9462
[36] See correspondence between Lord Goldsmith QC and Rt Hon. Dominic Raab MP on the Croughton Annex agreement, October/November 2020
[37] Concordat and four Memorandums of Understanding between the UK and Spain concerning the UK-EU Withdrawal Agreement's Gibraltar Protocol, November 2018
[38] For example a series of Memorandums of Understanding with other countries (Kenya, Pacific States, Cameroon etc) in which EU treaties with those countries were to be treated as continuing in effect between those countries and the UK despite the UK's departure from the EU

40. Given that most non-treaty arrangements are unpublished, it is impossible to know the extent to which they contain important commitments. An important first step, therefore, is to establish a central register of all such arrangements entered into by UK public authorities. There should be a presumption that all these should also appear in a public version, with exceptions for national security etc. This would then help hold to account a Government commitment to inform Parliament of the most important ones.

41. Recommendations:

- **The Government's commitments to treaty debates should be consolidated and confirmed in a Parliament-Government Concordat on treaties, and/or in the Standing Orders of each House.**
- **The Government should establish a central register of all non-treaty international arrangements concluded by UK public authorities, and a public version that includes all but classified ones. It should also restate its commitment to informing Parliament of those that involve serious international obligations.**

Should scrutiny of treaty making be more integrated with scrutiny of corresponding implementing legislation?

42. Yes. Currently there is no formal connection between treaty scrutiny and scrutiny of implementing legislation in the UK.

43. It is the long-standing practice of successive UK governments not to ratify a treaty until domestic law is in line with their new international obligations. But there are no rules on coordinating the introduction of any new legislation with laying the treaty under CRAG – it could be done before, during or after that. Nor will a committee that is scrutinising a treaty, or even individual members of that committee, necessarily be involved in scrutinising any implementing legislation. There is no requirement on the government to wait for a committee to report on a treaty before introducing implementing legislation.

44. The Government's Explanatory Memorandums on treaties now indicate the legislation that the government intends to use to implement the treaty. But Parliament in practice has little say in determining which treaty provisions need legislation, or what type of legislation is appropriate. Nor is there any subsequent connection to show any legislation that is actually in force to implement treaty provisions. The greatest clarity comes from those few treaties implemented by a dedicated Act of Parliament that reproduces the treaty provisions it is implementing. Second best is legislation that at least makes some reference to the treaty. But more frequently treaty provisions requiring implementing legislation will be implemented piecemeal through multiple provisions in multiple measures, whether primary or secondary, and there may not be any reference to the treaty in the legislation. As the government does not link this implementing legislation to its treaty database, it can be almost impossible to determine what treaty provisions have been implemented in domestic law, let alone how that may change over time.

45. There should be clear connections between treaty scrutiny and scrutiny of any implementing legislation. One option is to delay introducing any implementing legislation for a set period after the treaty is published to allow any committee reports to be

published (in Canada implementing legislation is not introduced until 21 sitting days after a treaty is laid before Parliament).[39] Another is to replace the first substantive debate on any implementing legislation by a debate on the committee report on the treaty, as happens in New Zealand.[40] The links could be strengthened further by including committee members who had scrutinised the treaty in the legislative committee scrutinising implementing legislation.

46. It is more complex where legislation is needed in devolved areas of competence. Wherever possible, any implementing legislation required should be made or introduced by devolved Ministers and scrutinised by the devolved legislatures (rather than routing such legislation through Westminster under the legislative consent convention).

47. A particular concern is implementing treaties through statutory instruments (SIs), which are inadequately scrutinised in the United Kingdom. SIs cannot be amended and are virtually never defeated by a vote in parliament. The majority of SIs are subject to the negative resolution procedure which means they are never debated. Those subject to the affirmative procedure tend not to be debated for long enough to fully scrutinise what can be long and complex instruments.[41]

48. It can be difficult to ascertain when SIs are used to implement treaties and trade agreements into UK law. For example, the UK-Japan Comprehensive Economic Partnership Agreement ('CEPA') was agreed in October 2020 but as far as we can tell only six SIs referring to CEPA have been made so far.[42] It is not easy to assess whether this is sufficient to implement the treaty, or even whether it matches what was proposed in the CEPA Explanatory Memorandum.[43]

49. There is a further concern around use of s8 of the EU Withdrawal Agreement Act 2018 ('EUWA') to make SIs implementing new trade agreements negotiated by the UK. During the passage of EUWA, the Government stated that it would not be 'a vehicle for policy changes' and that section 8 gave 'the Government the necessary power to correct or remove the laws that would otherwise not function properly once we have left the EU'. In our view, it would be outside the scope of this stated purpose and the power itself to use it to implement agreements which are plainly substantive not technical changes to UK law and which go beyond correcting laws that will not function once the UK has left the EU. Yet the Government's Explanatory Memorandum for the UK-Japan CEPA states that

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[39] Government of Canada, Policy on Tabling of Treaties in Parliament (last updated November 2020), para 6.2b
[40] New Zealand House of Representatives Standing Orders 250(2)(a) and 285(4)(c)
[41] See for example Alexandra Sinclair and Dr Joe Tomlinson, Plus ça change? Brexit and the flaws of the delegated legislation system, Public Law Project, 13 October 2020
[42] The Public Procurement (International Trade Agreements) (Amendment) Regulations 2021 No. 787; The Customs Tariff (Preferential Trade Arrangements and Tariff Quotas) (Amendment) (EU Exit) Regulations 2020 No. 1657; The Conformity Assessment (Mutual Recognition Agreements) and Weights and Measures (Intoxicating Liquor) (Amendment) Regulations 2021 No. 730; The Customs Tariff (Preferential Trade Arrangements) (EU Exit) Regulations 2020 No. 1457; The Customs Tariff (Preferential Trade Arrangements and Tariff Quotas) (EU Exit) (Amendment) Regulations 2021 No. 382; The Customs Tariff (Preferential Trade Arrangements and Tariff Quotas) (EU Exit) (Amendment) (No. 3) Regulations 2021 No. 693
[43] Department for International Trade, Explanatory Memorandum: UK/Japan: agreement for a Comprehensive Economic Partnership, part 5

"In general, where implementation of the UK-Japan CEPA is required, the Government will implement pursuant to the European Union (Withdrawal) Act 2018".[44]

50. Recommendations:

- **The Government should not introduce any treaty-implementing legislation until the IAC and any relevant Commons committee holding an inquiry on the treaty have published their reports.**
- **The first substantive debate on any implementing legislation should be replaced by a debate on the committee report on the treaty.**
- **Parliamentarians who scrutinised a treaty in committee should be included wherever possible in the committee scrutinising any implementing legislation.**
- **Any implementing legislation needed in devolved areas of competence should wherever possible be made by the devolved institutions rather than the UK ones.**
- **The use of SIs to implement treaties – particularly under the European Withdrawal Agreement Act 2018 – should be subject to clear limits and thoroughly scrutinised by Parliament.**

How effectively is the implementation of international treaties, including the decisions of new decision-making bodies, being scrutinised?

51. Parliament's engagement should not end at ratification but extend into how a treaty is applied, how its governance arrangements are operating, decisions made by bodies set up under the treaty, amendments, disputes and even withdrawal. In South Korea, for example, the National Assembly is supposed to carry out post-conclusion monitoring of the effects of FTAs on domestic industries.[45]

52. The UK Parliament has no specific mechanisms or structures for scrutinising how international treaties are implemented, other than the standard scrutiny procedures for any implementing legislation and the general work of select committees. Both the Joint Committee on Human Rights and the Lords International Agreements Committee have remits that allow them to scrutinise treaties in action. But this work is ad hoc rather than systematic, and dependent on the priorities and workloads of the respective committees.

53. Treaties often set up decision-making bodies that can amend the terms of the treaty or make rules and regulations under it, and/or binding mechanisms for resolving disputes, such as Investor-State Dispute Settlement. Parliament should engage closely with those bodies. Treaties may also delegate various types of power – legislative, adjudicative, regulatory, monitoring and enforcement for example – to international organisations.

54. It would be impossible and unnecessary to systematically monitor and scrutinise how all UK treaties are working in practice, how they are being amended and what decisions are being made under them. However, Parliament could for example choose to introduce specific reporting requirements for the Government on individual treaties where it saw fit,

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[44] Department for International Trade, Explanatory Memorandum: UK/Japan: agreement for a Comprehensive Economic Partnership, para 5.1

[45] See J. Lee, 'Incorporation and implementation of treaties in South Korea', in C . Bradley (ed), Comparative Foreign Relations Law, 2019, 221, at 237

by amending implementing legislation. It could also demand a greater level of transparency for treaty amendments and dispute resolution.

55. Where treaties are amended by bodies set up under the treaty and/or by further agreements between the parties, the amendments should be published. Parliament should be able to scrutinise important amendments in detail, engage before and during negotiations, and consider whether or not to approve them. The Government intends "the majority of important treaty amendments" to be subject to ratification and therefore submitted to Parliament for scrutiny in accordance with CRAG.[46] However, it has not clarified what "important" means in this context, or how it will be decided which treaties meet that criterion.

56. Many multilateral treaties include parliamentary assemblies to allow representatives of national legislatures to debate and assess implementation. Typically these only have powers to seek information and make non-binding recommendations, and awareness of them is low. The NATO parliamentary assembly and Parliamentary Assembly of the Council of Europe are probably the best known in the UK. More could be done to raise the profile of these assemblies, publicise their work and governments' responses to them, and integrate their work with that of domestic parliamentary committees.

57. Perhaps the most sophisticated scrutiny of treaty implementation comes from the various UN human rights treaty monitoring bodies, such as the UN Committee on the Rights of the Child. These typically have fixed cycles of investigation and reporting on each member state, with input from civil society as well as governments. Again the UK Parliament has little systematic engagement with these bodies or with the UN human rights rapporteurs, and could potentially do more to provide evidence to them and to hold the government to account on their findings.

58. The Miller ruling[47] reminded us that CRAG is wholly silent on treaty withdrawal, contrary to the growing practice of according parliaments a role (currently 39 out of 190 written constitutions require Parliamentary involvement in withdrawal).[48] There are strong arguments for Parliament's role in treaty withdrawal to echo that for joining treaties. The criteria for determining its precise role would have to be flexible enough to deal with the varying rules for withdrawal contained in each treaty, from no specific provisions to detailed ones with a time-lag between notification of withdrawal and withdrawal taking effect.

59. Recommendations

- **Where a treaty establishes bodies to monitor implementation, Parliament should engage closely with those processes.**

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[46] Government Response to the House of Lords International Agreements Sub-committee Report: Treaty Scrutiny, Working Practices, p8

[47] *R(Miller) v Secretary of State for Exiting the European Union*, [2017] UKSC 5

[48] L. Helfer, 'Treaty exit and interbranch conflict at the interface of international and domestic law', in C. Bradley (ed), Comparative Foreign Relations Law (2019), 355, at 357-8

- **Parliament should consider introducing specific reporting requirements for the Government on individual treaties, for example by amending implementing legislation to require transparency for treaty amendments and other decisions made under the treaty, and for dispute resolution.**
- **Parliament should engage systematically with UN treaty monitoring bodies, providing evidence to them and holding the Government to account on their findings.**
- **The role and work of parliamentary assemblies established by treaties should be publicised, and their work integrated with that of domestic parliamentary committees**
- **Parliament's role in treaty withdrawal should echo that for joining treaties.**

4) Role of the House of Commons

What role should Parliament, and the House of Commons in particular, have at different stages of the treaty making and implementation process?

60. Parliament should be able to engage with treaty scrutiny throughout the life of a treaty, from initial proposals, through to ratification and implementation, and beyond to amendment and even withdrawal. But there must be flexibility in the system, given the huge range of treaties. For example there would be different considerations for minor treaty amendments, routine 'template' treaties on double taxation or mutual legal assistance, sensitive and urgent bilateral treaties, and wide-ranging multilateral treaties with significant impact on businesses, individuals and the constitution that may take years to negotiate.

61. Committees' treaty roles and capacity should be expanded. For example, there should be a new core task for Commons select committees "to examine treaties within their subject areas". Ad-hoc committees or sub-committees could be created for treaty scrutiny, and/or there could be more use of 'guesting' provisions.

62. Some options for different stages in the process include:

Before negotiations begin

- A treaty scrutiny reserve for starting negotiations / setting negotiating aims (European Parliament Committees can for example recommend that the opening of negotiations not be authorised until they have reported on the mandate)
- An early confidential role for Parliament, as in Norway where the Government can choose to discuss its negotiating position in confidence with the parliament's Extended Standing Committee on Foreign Affairs and Defence.[49] It typically does so on important or sensitive issues, or where the Government needs to know where the majority in Parliament stands (the Norwegian Parliament has a veto power over some treaties).
- A debate on the negotiating mandate

During negotiations

[49] See International Department of the Storting, Written evidence to the Lords International Agreements sub-Committee, TWP0007, 2 June 2020

- Regular updates on negotiations, and confidential briefings for Parliamentarians, on all important treaties (not only FTAs).
- Scrutiny by the devolved legislatures of UK Ministers' engagement with devolved administrations.

Finalised treaties

- Government actions on all (or only important) treaties to stand referred to a committee, as in Australia, New Zealand and South Africa, with a rule that the Government takes no binding treaty action until the report is published
- Enough time allowed for proper scrutiny of finalised treaties before ratification
- A debate in Government time before ratification, where recommended by the relevant committee
- Treaties and implementing legislation should be scrutinised and debated together
- A treaty approval requirement for important treaties
- Advance notification of Parliament when the Government intends to provisionally apply a treaty, in part or in full, with reasons and a timetable for next steps.

After ratification

- Post-ratification treaty scrutiny of how treaties are implemented, including decisions made by treaty bodies such as Joint Committees, and any reservations, declarations and derogations
- Parliamentary processes for withdrawal from treaties should be introduced to mirror those for ratification.

63. The details of the respective roles of Parliament and Government should be set out in a mutually-agreed concordat on treaty powers between Parliament and Government, with input from the devolved legislatures and executives. This would demonstrate a commitment to building awareness, trust and constructive relationships. It could bring clarity, certainty and transparency, without the rigidity of inscribing such matters in legislation, and it would also allow coverage of matters where legislation is inappropriate, such as the internal affairs of Parliament.

64. This treaty concordat could take as its starting point the draft Government-Parliament Framework Agreement on Treaties proposed to the Commons Liaison Committee in 2019.[50] This set out five broad principles for treaty scrutiny:

- recognise the appropriate treaty roles of each institution
- establish a general principle of transparency with limited exceptions
- set out a general principle that the Government supplies all treaty information in good time
- recognise the need for flexibility for different types of treaties
- establish appropriate engagement with the devolved authorities

[50] Parliament and Treaties Hub, House of Commons, *Written evidence for the Commons Liaison Committee's inquiry on The effectiveness and influence of the select committee system*, SCA0083, published 3 Sep 2019

65. The Liaison Committee commended this draft when it recommended the development of a Framework Agreement between Parliament and the Government on providing information on treaty negotiations and conclusion.[51]

66. The IAC has also recommended a (more limited) treaty concordat setting out the Government's commitments relating to transparency and scrutiny of free trade agreements, negotiated between the Government, itself and the Commons International Trade Committee.[52]

67. But better scrutiny is not always enough: "Mere scrutiny, without the power to drive change, can be ineffectual".[53] Giving Parliament more information and time for scrutiny might give the impression of genuine accountability whilst in practice being only a rubber stamp.

68. The key is to require the assent of the House of Commons for the most important treaties. This would bring the UK into line with the vast majority of countries in the world, including other dualist countries such as Norway. It is not a sufficient requirement for scrutiny, but it is arguably a necessary precondition. Giving Parliamentarians a real power to veto treaties would provide a strong incentive for the Government to engage in gaining Parliamentary and public approval throughout the treaty process. For example, the EP issues resolutions at various stages in the treaty process setting out its views and indicating any conditions for giving its approval to the concluded treaty. And in Norway early parliamentary consultation means that most treaties which are put to the Parliament for its consent, are usually not controversial or subject to extensive debate.

69. Although the House of Commons repeatedly voted against a general requirement for parliamentary assent to trade treaties during the passage of the Trade Act 2021, the actual provisions of a concluded treaty have prompted a different response. When the details of the UK-Australia FTA 'agreement in principle' were published, a group of MPs wrote to the Secretary of State calling for it to receive "proper scrutiny and approval by parliament to assuage our concerns and the concerns of the public".[54]

70. Going further, treaty powers could be transferred out of the royal prerogative entirely, and placed under statutory authority, following the trajectory of other prerogative powers.

71. Recommendations:

- **Commons select committees should have a new core task "to examine treaties within their subject areas". Ad-hoc committees or sub-committees could be created for treaty scrutiny, and/or there could be more use of 'guesting' provisions.**

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[51] Liaison Committee, *The effectiveness and influence of the select committee system*, Fourth Report of Session 2017–19, HC 1860, para 89.
[52] House of Lords International Agreements Committee, Working practices: one year on, 7th report of 2021-22, HL Paper 75, 17 September 2021, para 40 and Appendix 2
[53] Alexander Horne, 'The limits of parliamentary scrutiny', *Prospect*, 17 July 2021
[54] See Best for Britain, 'MPs from all four UK nations demand Parliamentary scrutiny of Australia trade deal', 15 June 2021

- **Parliament and the Government should negotiate a public, politically binding concordat setting out their respective roles on treaties.**
- **The Constitutional Reform and Governance Act 2010 should be amended to require the House of Commons' assent to important treaties.**

What role should Parliament, and the House of Commons in particular, have in relation to different types of treaties, and on what basis?

72. At the moment the government allows different degrees of parliamentary involvement with international agreements based on their form rather than their substance.

73. Parliament's current roles, both statutory and non-statutory, for different types of international agreements are summarised in the table below:

Type of international agreement	Text published	Scrutiny period	Systematic committee scrutiny	Debate required	Parliamentary approval required
Non-treaty arrangements	Some under Ponsonby – lapsed	No	No	No	No
Treaties not subject to CRAG	Yes	No	No	No	No
Treaties exempted from CRAG by legislation like WA and TCA	Yes	No	No	No	Only of statutory provision exempting treaty from CRAG
Treaties where 'exceptional circumstances' cited	Yes after ratification	No	No	No	No
General treaties subject to CRAG	Yes	Yes	Yes (IAC)	No	No
FTAs	Yes	Yes	Yes (IAC and ITC)	Yes	No

However, these distinctions do not necessarily reflect the relative importance of the agreements and are determined more by form than by content.

74. Recommendation:

There is a clear need to develop criteria for determining (a) which treaties and amendments require ratification and are therefore submitted to Parliament, (b) which Parliament scrutinises in detail, (c) which it engages with before and during negotiations, and (d) which it needs to approve. These criteria could, for example, concern:

- **political implications**
- **financial implications**
- **implications for particular sectors, regions or devolved nations**
- **implications for domestic law**

- **human rights, equalities and environmental implications**
- **constitutional implications**
- **implications for other international obligations**
- **joining or leaving international institutions**
- **whether or not they can be terminated**

75. Ultimately, however, a significant degree of discretion will be involved, so accountability for how that discretion is exercised will also be essential. In Australia, for example, there is a three-track structure with different procedures for major and minor treaty actions, and although the Government makes the initial choice, Parliament's Joint Standing Committee on Treaties (JSCOT) can ask for an action to be moved to a different track.[55]

Given that international agreements affect people's lives, how can the House of Commons increase the democratic accountability of international agreements?

76. Many of the recommendations in this submission would increase the democratic accountability of international agreements in the UK. There are three further suggestion we would like to raise here.

77. Firstly, the Government must ensure that it gives civil society bodies the same access during treaty negotiations that business representatives have. Currently, for example, business representatives are given access to negotiating documents on free trade agreements through Trade Advisory Groups, whereas trade unions and other civil society representatives are not. It could also consider giving a range of bodies the right to attend negotiations as observers.

78. Secondly, there should be much wider and more consistent consultation on treaties. The Government has started consulting on the broad objectives of new FTAs before setting negotiating objectives, but this should not be confined to FTAs. Consultation is a crucial part of the process and should be designed to gather views on how competing priorities should be balanced against each other. It is hard to assess the effects of complex technical treaties in increasingly interconnected spheres, so external expertise is essential. The Government should also give its reasons for rejecting views expressed during consultations, and conduct further consultation if the objectives change significantly.

79. Thirdly, the Government should be more consistent with its treaty obligations, for example to ensure that (enforceable) trade treaties reinforce rather than conflict with the UK's (often non-enforceable) international obligations on the environment, health, workers' rights and data rights.

80. Recommendations:

- **Civil society representatives should have the same access to treaty discussions as business representatives**
- **The Government should hold meaningful public consultations on all important treaties, not just FTAs**

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[55] See further on JSCOT, Parliament of the Commonwealth of Australia, *A History of the Joint Standing Committee on Treaties: 20 years* (Commonwealth of Australia, 2016), Report 160.

- **Enforceable trade treaty obligations should reinforce rather conflict with non-enforceable obligations on the environment, health, workers' rights and data rights**

5) Information and resourcing requirements

How, and at what stages of the treaty making process, should the Government share information with Parliament?

81. There is no 'one-size-fits-all' answer to this. However, recent developments demonstrate some measures that could be extended to other 'important' treaties. The crucial element is that treaty information must be shared before the treaty is finalised if scrutiny is to be meaningful.

82. The Government has agreed some non-statutory measures to help scrutiny of free trade agreements (FTAs), including better and earlier information, updates and private briefings on negotiations. This shows that there is no principled argument against such disclosure.

83. Recommendation:

- **The Government's commitments on sharing information with Parliament about FTAs should be extended to other important treaties negotiated by other Government Departments. These commitments should be developed in consultation with Parliament, and set out in the Parliament-Government Concordat on treaties.**

Should Parliament have access to confidential information and, if so, what mechanisms might assure the continued confidentiality of that information?

84. Again, the Government has shown that the principle of sharing confidential treaty information with Parliamentarians is acceptable, with its approach to FTAs. This should be extended to other important treaties.

85. **Recommendations**:

- **At a minimum, Parliament should have access to confidential information on all important treaties on the same basis as it currently does with FTAs.**
- **It should also have access to the same confidential information as is given to business groups on FTAs, and at the same time.**
- **The devolved legislatures should have the same rights to treaty information as the UK Parliament, where it relates to devolved competencies and interests.**

As more and more FTAs are negotiated and more confidential information shared, trust may develop – it is in parliamentarians' interests to respect this confidentiality in order for the sharing of information to continue.

What treaty information should be publicly available in respect of the UK's current treaty obligations and to facilitate scrutiny of new treaties?

86. Although the Government has significantly extended how much information it provides on FTAs and when, this could be developed further and applied to other important treaties.

87. A consistent theme in recent committee recommendations is that there should be a presumption of transparency for treaty information. For significant treaties this should include the intention to start negotiations through setting a negotiating mandate, dates of negotiating rounds and summary outcomes, through to signature and ratification. This alone would go an enormous way towards democratising the UK's treaty actions and enabling them to be scrutinised and held to account, whilst still allowing information to be withheld for national security reasons for example.

88. Further, it is not always clear what the UK's current treaty obligations actually are. Combining two of Lord Bingham's rule of law principles suggests that the state's obligations in international law should be accessible and predictable. [56] But not only is it often very unclear what measures have been taken – statutory or non-statutory – to implement a treaty, it can also be complex to determine the actual status of a treaty for the UK, in particular if it has been amended or subject to interpretation.

89. The UK's public treaty information therefore needs a comprehensive overhaul. The three FCDO sources (UK Treaties Online, lists of treaty command papers and the FCDO treaty section's internal database) should be integrated, and linked to the UK Parliament's treaty tracker. A single, searchable, online UK treaties database should include:

- Treaties under consideration or negotiation, as recommended by the JCHR[57] and the Constitution Committee[58]
- Government consultations and responses
- Impact assessments and explanatory memorandums
- Parliamentary inquiries, reports, government responses etc
- Government reports and statements on negotiations
- Status of treaties (date signed, ratified, in force, withdrawn)
- Current implementing legislation
- Reservations, declarations or derogations
- Disputes under the treaty
- Amendments

90. Other countries provide useful examples. For instance, the Australian Treaties Database contains searchable treaties with information on amendments or withdrawal, and links to background material including JSCOT reports and government responses.

91. CRAG requires the Government to publish an Explanatory Memorandum (EM) alongside any treaty laid under CRAG, and FCDO guidance say it should include subject matter, ministerial responsibility, general and financial policy considerations, reservations and

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[56] Principle 1: the law must be accessible and, so far as possible, intelligible, clear and predictable, and principle 8: the state must comply with its obligations in international law as in national law. Tom Bingham, *The Rule of Law* (2011)

[57] Joint Committee on Human Rights, Human Rights Protections in International Agreements (17th Report, Session 2017–19, HC 1833 HL Paper 310), paras 65–66.

[58] House of Lords Constitution Committee, *Parliamentary Scrutiny of Treaties*, 20th report of 2017-19, HL Paper 345, 30 April 2019, para 80

declarations, means of implementation, and consultation outcomes. But this is late in the process and not always sufficient. In other countries including New Zealand, treaty impact assessments must be more detailed and more wide ranging.

92. The JCHR, Lords EU Committee and Commons IAC have secured some improvements to EMs, for example to require a statement of human rights implications, information on treaty amendments, and information on engagement with the devolved authorities, but they could be further developed. For example, they should include standard headings on environmental, health, equalities, regional and devolution impact assessments. They could also be produced at additional points in the process, for example at the beginning of negotiations, and for any major amendments or withdrawal.

93. Crucially there should also be independent treaty impact assessments, or at least independent verification of government reports. There is a new requirement in the Agriculture Act 2020 and Trade Act 2021 for the Government to publish a reports on how agriculture provisions in FTAs meet UK standards on protecting human, animal or plant life or health, animal welfare and the environment, and they must ask the statutory Trade and Agriculture Commission for advice. All important treaties should similarly be assessed against UK domestic standards by independent experts.

94. Recommendations:

- **There should be a rebuttable presumption of transparency for all government treaty actions.**
- **Major improvements to public treaty information are needed, ideally a fully searchable, comprehensive treaty database showing the full range of information about a treaty including how it has been scrutinised, implemented and/or amended.**
- **Treaty explanatory memorandums should include comprehensive impact assessments, with a wide range of information on the impact on rights and equalities. They could also be produced at additional points in the process.**
- **All important treaties should be assessed against UK domestic standards by independent experts.**

What sort of expertise does Parliament need to scrutinise treaties?

95. Parliament needs – or needs access to – two different types of expertise in order to scrutinise treaties effectively:
    - expertise in treaty *processes and procedures*
    - expertise in treaty *subject areas*

96. Expertise in **treaty processes and procedures** covers treaty law and negotiation practice as well as parliamentary treaty rules, practice and coordination. It is needed in order to understand the stages of treaty negotiation, completion and implemention, what is typical or exceptional, and how the CRAG process and related provisions work in practice. It is also important to coordinate treaty scrutiny work across Parliament and the devolved legislatures, to develop and maintain an institutional memory of treaty scrutiny, to

develop and maintain relations with government officials, academics and other experts, and to be a point of contact within Parliament on treaty scrutiny.

97. In the Lords this expertise is developing in the International Agreements Committee and its secretariat, as set out in its recent reports on working practices.[59] However, its staff is small – one clerk, one assistant clerk, one policy analyst and one committee assistant – and it no longer has a legal adviser.

98. In the Commons there are no treaty scrutiny posts. The Commons Library has no specialist on international law or treaties.[60] The International Trade Committee has a staff of nine, including two committee specialists and an academic fellow, but treaty scrutiny is only a part of its remit, and it has no coordinating role. Three of the lawyers from the Office of Speaker's Council may provide advice to any Commons committee on international law, but they have many other duties besides. Neither the Scrutiny Unit nor the new European Affairs Unit (both of which provide support across committees) includes treaty expertise. For a few years there was a Parliament and Treaties Hub in the Commons which provided expert information, advice and coordination across the Commons, between the Commons and the Lords, and with experts and interested groups outside Parliament, but this no longer exists.

99. Each treaty would also require different expertise in **treaty subject areas**. This would help evaluate the treaty in its context, and whether it is likely to have the impacts suggested or any others. Once again, this expertise would be best applied before the relevant treaty action is finalised. In the House of Commons, it might come from committee specialists, Parliamentary Academic Fellows, the scrutiny unit, European Affairs Unit, Speaker's Counsel or the Library research service, even if this is not part of their current work. Specialist advisors to committees may be appointed for scrutinising major treaties, and if an inquiry is launched, expert witnesses can provide written or oral evidence, but there is often no time either to appoint specialist advisers or arrange for evidence from witnesses between signature and ratification.

100. Recommendations:

- **Parliament should appoint experts in treaty processes and procedures in both the Commons and the Lords to provide expert treaty scrutiny information, advice and coordination and to develop and maintain links with government officials and others outside Parliament.**
- **Parliament should develop more flexibility in using subject specialists within Parliament for treaty scrutiny work, and ensure that the international law elements of each subject are well understood internally, as there is not always time to appoint or hear from external specialists.**

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[59] House of Lords European Union Committee, Treaty Scrutiny: Working Practices, 11th report of 2019-21, HL Paper 97; 10 July 2020; International Agreements Committee, Working practices: one year on, 7th report of 2021-22, HL Paper 75, 17 September 2021,

[60] It does however currently have a temporary, part-time academic fellow in international law

- **The Government should provide enough time between finalising a treaty and the end of the CRAG period for parliamentary committees to hear from expert witnesses.**

September 2021