

HOUSE OF LORDS

Select Committee on the Constitution

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20th Report of Session 2017–19

# Parliamentary Scrutiny of Treaties

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Evidence is published online at <https://www.parliament.uk/parliamentary-scrutiny-of-treaties-inquiry> and available for inspection at the Parliamentary Archives (020 7219 3074).

Q in footnotes refers to a question in oral evidence.

## SUMMARY

Treaty-making is a significant responsibility of the Government. Treaties determine the shape of policy in a wide range of areas and commit the UK to membership of international organisations. The UK is party to over 14,000 treaties and normally negotiates around 30 new treaties each year.

Treaties are binding in international law and form the basis for domestic legislation to comply with their provisions. It is therefore imperative that Parliament scrutinises the Government's treaty actions—through the mandate, negotiation and ratification phases—that precede implementing legislation.

Parliament's scrutiny of treaties is based on the Ponsonby rule, established nearly 100 years ago and subsequently set out in the Constitutional Reform and Governance Act 2010 (CRAG). These provisions limit Parliament's scrutiny to a 21 sitting day period after the Government lays a completed, signed treaty before both Houses. No systematic scrutiny of treaties currently takes place prior to signature.

Treaties are subject to a negative resolution procedure, meaning that no debate or vote is required before they are ratified. During that period, the House of Commons has the power to delay ratification for a further 21 days—repeatedly, if desired—but only if the Government makes time for debates and votes to take place. The House of Lords may vote against a treaty's ratification, however the Government can nonetheless ratify the treaty by making a statement setting out why the treaty should still be ratified. This is the limit of Parliament's involvement in, and scrutiny of, treaties. Since the passage of the 2010 Act, no debates have taken place in the House of Commons under its provisions. While we accept that treaty-making is a function of the Government under the Royal Prerogative, the powers available to Parliament to scrutinise ministers' actions are anachronistic and inadequate.

Evaluating the current system of parliamentary scrutiny is timely, given the UK's impending departure from the European Union. During the period of the UK's membership of the EU, the nature of treaties changed fundamentally—broadening from areas largely associated with international affairs—peace settlements and security alliances—to wide-ranging economic and trade agreements, encompassing diverse public policy issues. Parliament's existing scrutiny mechanisms developed when treaty-making was profoundly different to its current state, and while many treaties were negotiated and concluded at EU-level.

To address the shortcomings in Parliament's scrutiny of treaties, we recommend that a new treaty scrutiny select committee be established. This committee should sift all treaties, to identify which require further scrutiny and draw them to the attention of both Houses. The committee would have the option to undertake scrutiny of those treaties itself or engage the policy expertise of other select committees as appropriate. For significant treaties, the committee should be able to recommend that the Government extend the 21 sitting day period under CRAG, providing the committee with sufficient time to report to Parliament. The treaty committee should also be able to secure a debate on treaties it deems significant. We recommend that if the committee recommends a debate on a treaty, the Government should commit to providing time for it within the 21-day period.

We recommend that there should be a general principle, rather than a legal requirement, in favour of transparency throughout the treaty process. While it should remain the Government's responsibility to decide what information should be shared with Parliament, and there will be circumstances where the national interest requires a measure of secrecy, we recommend that disclosure should be the norm rather than the exception. The treaty committee should be informed when negotiations begin and be told which parties are involved and the subject areas that are expected to be discussed. We also recommend that the quality of explanatory memorandums accompanying treaties laid before Parliament should be improved to allow the treaty committee to conduct effective scrutiny.

The treaty committee and the Government should build an effective working relationship and, over time, the trust to share confidential documents relating to treaty negotiations. We welcome the Government's commitment to provide select committees with sensitive information about free trade agreements on a confidential basis and we recommend that, where appropriate, this be extended to negotiations relating to other forms of treaty.

The expanded remits of the devolved institutions and the challenges of shared and overlapping competences emerging as a consequence of Brexit are brought to the fore by issues around treaty-making. We reaffirm our previous recommendations for strengthened intergovernmental mechanisms to address these issues. We recommend that the UK Government engages effectively with the devolved institutions throughout the treaty process including, where appropriate, involving representatives from the devolved executives as part of the UK Government's negotiating team. We do not see the need for the devolved legislatures to provide explicit consent to treaties, but the UK Government must take their views into account to ensure that the devolved competences are respected and in recognition that the necessary domestic legislation will be implemented by the devolved legislatures.

Treaty-making has always been a significant function of the Government, and the expanding scope of treaties in recent decades has heightened their importance. Parliament's scrutiny processes have not kept up. The increasing volume of treaties expected after Brexit only strengthens the case for reform. The establishment of a treaty committee and greater information-sharing by the Government will provide the basis for the significant improvements in Parliament's scrutiny that we believe are essential.



# Parliamentary Scrutiny of Treaties

## CHAPTER 1: INTRODUCTION

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1. Treaty-making is a core function of the UK Government. The UK is party to over 14,000 treaties and a further 35 were negotiated by the Government in 2018.<sup>1</sup> Membership of organisations, including the United Nations, the European Union and NATO, is a consequence of the UK signing and ratifying treaties with other countries. Policies, such as the prohibitions of torture and the death penalty, and the rules on possession of nuclear weapons, have been furthered by the UK's participation in certain treaties. Treaties thus determine many of the UK's international obligations and are the basis for domestic legislation to comply with those requirements.
2. Despite their importance, Parliament's scrutiny of treaties has historically been limited, with little attention paid to the treaty-making process. Where Parliament has engaged with treaties it has been through scrutiny of the Government bills required for their implementation.
3. The impending departure of the UK from the European Union has raised questions about the current system of treaty scrutiny, as Brexit will fundamentally change the context for treaty-making in the UK. Many treaties to which the UK is subject have been negotiated and agreed under the auspices of the EU, and so were subject to the European Parliament's scrutiny mechanisms. After Brexit, for the first time in over 45 years, the UK will have much greater competence to negotiate treaties in a wide range of politically salient areas, particularly through new trade treaties. Indeed, the UK's ability to operate an "independent trade policy", making treaties "to sign and implement ambitious free trade agreements",<sup>2</sup> has been a pillar of the Government's prospectus for Brexit. The UK's preparations for departure from the EU have already resulted in an increased volume of treaty-making, as the Government seeks to rollover or replicate trade arrangements that will otherwise cease to apply after Brexit.
4. In this report we explore how Parliament currently scrutinises treaties; the use of the Royal Prerogative; the nature and volume of treaties; ideas for reforming treaty-making; and the interaction between treaty-making and devolution.
5. While our inquiry was prompted by Brexit, we have not focused on the atypical negotiation and scrutiny of the Withdrawal Agreement (itself a treaty), but the wider consequences of Brexit for treaty-making. We agree with the former Foreign and Commonwealth Office (FCO) legal adviser, Sir Michael Wood, who said: "If improvements to scrutiny arrangements are to be considered, these should not be unduly influenced by Brexit issues or introduced in accordance with an artificial timetable related to Brexit. Changes need to address the future more generally."<sup>3</sup>
6. In this inquiry we heard from 17 witnesses and received 27 written submissions. We are grateful to everyone who submitted written material or gave evidence to us in person.

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1 [Q 89](#) (Sir Alan Duncan MP)

2 Prime Minister's Office, 10 Downing Street, *PM G20 press statement*, (1 December 2018): <https://www.gov.uk/government/speeches/pm-g20-press-statement-1-december-2018> [accessed 6 March 2019]

3 Written evidence from Sir Michael Wood ([PST0012](#))

## CHAPTER 2: TREATY-MAKING AND SCRUTINY

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### Introduction

7. Treaties are international agreements between states that have legal effect. In international law, the 1969 Vienna Convention on the Law of Treaties defines a treaty as:

“an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”<sup>4</sup>

8. Other forms of international agreements to which the UK is a party exist, such as memorandums of understanding. These are different from treaties in that they are not binding under international law. While there may be political consequences for states failing to adhere to international agreements, only treaty obligations may lead to legal ramifications for signatories that do not comply with them. While some international agreements may be worthy of scrutiny, as they are not subject to statutory parliamentary scrutiny processes and in most cases do not have legal effect, we do not consider them further in this report.

### Treaty-making in the UK

9. The UK is party to over 14,000 treaties, some negotiated by the UK Government through bilateral or multilateral processes, others under the auspices of supranational institutions of which the UK is a member.<sup>5</sup> On average, the UK negotiates, signs and ratifies around 30 treaties a year.<sup>6</sup>
10. The significance of treaties varies considerably. Sir Michael Wood, said “Some are of central importance in international and national affairs, while others are of strictly limited interest.”<sup>7</sup> Having assessed the monthly Foreign and Commonwealth Office treaty action bulletins for 2018, former Foreign Secretary Rt Hon Jack Straw concluded that while recent treaties had dealt with important matters, they were “not likely to stir up controversy”, and many of them were “pretty prosaic”.<sup>8</sup>
11. Distinguishing between significant treaties, that may be worthy of close parliamentary scrutiny, and more “prosaic” treaties is not necessarily straightforward. Professor Michael Bowman, Director of the University of Nottingham’s Treaty Centre, explained:

“treaties are unhelpfully resistant to neat and orderly classification into predetermined categories—there is, in other words, no simple, widely

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4 Vienna Convention on the law of treaties. Concluded at Vienna on 23 May 1969: <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf> [accessed 6 March 2019]. Agreements between states and international organisation, or between international organisations themselves are governed by 1986 Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations: [http://legal.un.org/ilc/texts/instruments/english/conventions/1\\_2\\_1986.pdf](http://legal.un.org/ilc/texts/instruments/english/conventions/1_2_1986.pdf) [accessed 6 March 2019]

5 Foreign and Commonwealth Office, *UK Treaties: Guidance to the work of the Foreign and Commonwealth Office* (2 July 2013): <https://www.gov.uk/guidance/uk-treaties#uk-treaties-online> [accessed 6 March 2019]

6 House of Commons Library, *Parliament’s role in ratifying treaties*, [Briefing Paper Number 5855](#), 17 February 2017. See also, [Q 89](#) (Sir Alan Duncan MP)

7 Written evidence from Sir Michael Wood ([PST0012](#))

8 [Q 69](#) (Jack Straw)

agreed, all-purpose taxonomy of such instruments ... Although it seems most natural and convenient to classify them as instruments in the fields of ‘human rights’, ‘trade’, ‘education’, ‘environment’ etc—not least because that tends to map most easily onto existing institutional structures and reservoirs of expertise—such an approach (at least if applied in isolation) might very well prove inappropriate or counter-productive in practice. For one thing, the precise boundaries of such categories are by no means conceptually clear or incontestable; for another, many treaties quite deliberately straddle two or more such subject areas.”<sup>9</sup>

### Treaties and the Royal Prerogative

12. The negotiation and signature of treaties have historically been seen solely as the preserve of the Government, acting under the Royal Prerogative.
13. While the Supreme Court’s judgment in *R (Miller) v The Secretary of State for Exiting the European Union*<sup>10</sup> raised questions about the interaction between the treaty-making prerogative and statute law in the context of EU withdrawal,<sup>11</sup> the Government confirmed,<sup>12</sup> and many of our witnesses agreed,<sup>13</sup> that the principle that treaty-making is undertaken by the Government under prerogative power remains unchanged.
14. **We recognise that treaty-making—specifically the negotiation and signature of treaties—is a function of the Government, exercised through the Royal Prerogative.**

### Parliament’s scrutiny of treaties

15. Parliamentary interest and involvement in the treaty-making process has, for the most part, been limited. Its scrutiny has primarily been of the Government legislation required to implement treaty obligations.
16. Until 2010 Parliament’s involvement in treaties operated under a convention known as the Ponsonby rule, established in 1924, which stipulated that treaties must be laid before Parliament for 21 sitting days prior to ratification.<sup>14</sup> In 2007 the then Lord Chancellor Jack Straw proposed putting the Ponsonby rule on a statutory footing.<sup>15</sup> This led to the process for ratifying treaties set out in sections 20–25 of the Constitutional Reform and Governance Act

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9 Written evidence from the University of Nottingham Treaty Centre ([PST0017](#))

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

11 See, for example, written evidence from the Trade Justice Movement ([PST0010](#))

12 Written evidence from the Foreign and Commonwealth Office ([PST0023](#))

13 See, for example, [Q 41](#) (Sir Franklin Berman QC) and written evidence from Jill Barrett, Queen Mary, University of London, Eirik Bjorge, Bristol University, Ewan Smith, University of Oxford, and Arabella Lang, House of Commons Library ([PST0020](#))

14 According to the Governance of Britain green paper in 2007, “the Ponsonby Rule provides that treaties which do not come into force on signature, but which instead come into force later when governments express their consent to be bound through a formal act such as ratification, must be laid before both Houses of Parliament as a Command Paper for a minimum period of 21 sitting days ... Explanatory Memoranda are provided with each treaty laid before Parliament to keep it informed about the UK’s treaty intentions. Parliamentary debates are, however, rare. There is no binding mechanism for Parliament to force a debate or which dictates the form of any debate.” The Secretary of State for Justice and Lord Chancellor, *The Governance of Britain*, Cm 7170, July 2007, p 19: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/228834/7170.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228834/7170.pdf) [accessed 6 March 2019]

15 The Secretary of State for Justice and Lord Chancellor, *The Governance of Britain*, Cm 7170, July 2007, p 19: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/228834/7170.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228834/7170.pdf) [accessed 6 March 2019]

2010 (CRAG).<sup>16</sup> These provisions, which encompass but are broader than the Ponsonby rule, state that:

- A treaty may be ratified only if a Minister has laid before Parliament a copy of the treaty and within 21 sitting days<sup>17</sup> neither House has resolved to reject it. A treaty must be accompanied by an explanatory memorandum setting out the provisions of the treaty and the Government’s reasons for seeking its ratification.
  - If the House of Commons resolves against ratification—irrespective of the view of the House of Lords—a further 21 sitting day period is triggered during which the Government may lay a statement explaining why the treaty should nevertheless be ratified. The Government cannot ratify the treaty until that further 21-day period has elapsed, during which time the Commons may resolve against ratification again. This process may be repeated, so giving the Commons power to block a treaty’s ratification indefinitely.
  - If the House of Lords resolves against ratification but the Commons does not, the Government may lay a statement before Parliament setting out its reasons why the treaty should nonetheless be ratified and then may proceed to ratify it. The power of the Lords over treaties is therefore limited, in practice amounting to a brief delay to ratification.
- In “exceptional cases” a minister may ratify a treaty without going through the process set out above.<sup>18</sup> Subsequently, a copy of the treaty must be laid before Parliament and an explanation given for ratifying the treaty without the normal process. The legislation provides no guidance on what might constitute an “exceptional case”, and as such it is at the discretion of ministers to decide.

17. Since the process was established in 2010 neither House has resolved against ratification. As the evidence from Jill Barrett, Queen Mary, University of London, Professor Eirik Bjorge, Bristol University, Dr Ewan Smith, University of Oxford, and Arabella Lang, House of Commons Library, noted, “No qualifying resolution has ever been tabled under the CRAG Act, and as far as we are aware no meaningful debate or vote on a treaty has ever taken place during the s. 20 period.”<sup>19</sup>

### **Efficacy of the CRAG process**

18. Sir Franklin Berman QC, a former legal adviser in the Foreign and Commonwealth Office, suggested that there was “nothing inherently wrong with the current arrangements [the CRAG process], which scrupulously respect the different prerogatives of the Executive and of Parliament.”<sup>20</sup>

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16 Witnesses to this inquiry used various acronyms for the Constitutional Reform and Governance Act 2010, such as CRAGA and CRaG. For the purposes of consistency in this report, we use CRAG throughout.

17 A minister may extend the 21 sitting day period by up to 21 further sitting days by laying a statement before Parliament before the period expires. This may be done repeatedly.

18 Constitutional Reform and Governance Act 2010, [section 22](#)

19 Written evidence from Jill Barrett, Queen Mary, University of London, Eirik Bjorge, Bristol University, Ewan Smith, University of Oxford, and Arabella Lang, House of Commons Library ([PST0020](#)). Shortly before the publication of this report the House of Lords debated extending the 21 sitting day scrutiny period under section 21 of CRAG for three treaties. HL Deb 13 March 2019 [cols 1107–1122](#).

20 Written evidence from Sir Franklin Berman QC ([PST0002](#))

19. However, most of our other witnesses disagreed. The current system was described as “not sufficient”,<sup>21</sup> “not fit for purpose”,<sup>22</sup> “ineffective”,<sup>23</sup> “outdated”,<sup>24</sup> “unsatisfactory”,<sup>25</sup> “inadequate for major international agreements”,<sup>26</sup> and not providing a “constructive balance between Parliament and government.”<sup>27</sup> Professor David Howarth, University of Cambridge, observed:

“From the Whitehall point of view, everything is perfect. The whole process is under the control of Ministers. Parliament does not really get a look-in until after signature and, even after signature, the CRAG processes are very difficult for anyone to operate, especially in the Commons where the Government controls the agenda. So it is marvellous from their point of view. From the Westminster point of view, obviously the opposite is the case.”<sup>28</sup>

20. Rt Hon Sir Alan Duncan MP, Minister of State for Europe and the Americas, said that the provisions in CRAG were appropriate, but “ultimately, anything to do with parliamentary scrutiny is a matter for Parliament” rather than the Government.<sup>29</sup>

21. A number of shortcomings with the current system were raised. The Trade Justice Movement pointed to the lack of parliamentary involvement in treaties prior to ratification:

“Under the current system, negotiating objectives are not laid before Parliament, there is no debate and no vote before the government begins negotiations ... Since Parliament is not consulted prior to negotiations, this means that there is no formal process to ensure that the views of MPs and their constituents are taken into account in shaping trade deals ... This severely impacts the ability of Parliament to hold the government to account for its actions.”<sup>30</sup>

22. War on Want described the current system as presenting Parliament with a *fait accompli*.<sup>31</sup> Sir Michael Wood suggested: “it might be considered desirable for there to be more scrutiny of treaties before ratification. That is, that Parliament should have more of a say leading up to the decision whether or not to ratify a treaty.”<sup>32</sup>

23. A further concern was that the CRAG provisions did not cover all types of treaty, as not all treaties provide for a ratification stage. Sir Michael Wood explained:

“Treaties do not always provide for a ratification stage; they may enter into force upon signature or come into force upon an exchange of notes.

21 Written evidence from Global Justice Now ([PST0001](#))

22 Written evidence from ClientEarth, Woodland Trust and Friends of the Earth England, Wales & Northern Ireland ([PST0005](#)) and Dr Sam Fowles ([PST0013](#))

23 Written evidence from Christian Concern ([PST0014](#)) and Dr Sam Fowles ([PST0013](#))

24 Written evidence from Lord Boswell of Aynho, on behalf of the European Union Select Committee ([PST0026](#)) and Dr Sam Fowles ([PST0013](#))

25 Written evidence from ClientEarth, Woodland Trust and Friends of the Earth England, Wales & Northern Ireland ([PST0005](#)) and Susan Hedley ([PST0007](#))

26 Written evidence from David Henig ([PST0004](#))

27 Written evidence from War on Want ([PST0009](#))

28 [Q 1](#) (Professor David Howarth)

29 [Q 88](#) (Sir Alan Duncan MP)

30 Written evidence from the Trade Justice Movement ([PST0010](#))

31 Written evidence from War on Want ([PST0009](#))

32 Written evidence from Sir Michael Wood ([PST0012](#))

These are usually (but not always) the less significant treaties (though this is of course a subjective matter), or those not requiring implementing legislation.”<sup>33</sup>

24. Other forms of international agreement, such as UN Security Council Resolutions, are not covered by the CRAG processes. Jack Straw highlighted the significant impact some Security Council Resolutions can have on member states:

“UN Security Council resolutions are made under a treaty and they have the effect of treaties, often going further than that. They can be mandatory on all Governments, for example on sanctions, all the post 9/11 decisions made by the Security Council on terrorism and plenty elsewhere. For those, there is no process for signature or ratification. Once they have been determined in the Security Council, that is that. We are one of only five member states that can say no at the point of decision. Everybody else just has to put up with it.”<sup>34</sup>

25. Witnesses also observed that there is no guarantee that time will be made available in the House of Commons for a debate or a vote on a treaty if one is sought.<sup>35</sup> This is similar to the concerns raised about statutory instruments subject to the negative procedure, which we highlighted in our recent report on delegated legislation.<sup>36</sup> The Trade Justice Movement said:

“the government has little incentive to give time to debate controversial treaties as they risk losing a vote on ratification. Whilst the Opposition might force a debate on an Opposition Day, only 20 days per session are allocated for such debates, meaning that an Opposition Day debate may not be scheduled during the 21 sitting days.”<sup>37</sup>

26. Global Justice Now observed that “Parliament didn’t even have a debate on the Canadian–EU trade deal known as CETA until the British government had already authorised conclusion of the deal, despite parliamentarians requesting such a debate for over 12 months.”<sup>38</sup>

27. One counter-argument to the suggestion that meaningful debate on treaties is lacking was that Parliament would have an opportunity to scrutinise their contents when considering the legislation to implement them. However, as former Foreign and Commonwealth legal counsellor Jill Barrett said:

“This may be inadequate because the legislation commonly implements only part of the treaty, and because it will not reveal the obligations undertaken by other States parties to the treaty. For example, the obligations in the UK–USA Extradition Agreement 2003 are asymmetric, but this is not apparent from the UK’s implementing legislation.”<sup>39</sup>

28. ClientEarth, the Woodland Trust and Friends of the Earth were among a number of witnesses who argued that the 21 sitting day period was both

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33 *Ibid.*

34 [Q 70](#) (Jack Straw)

35 Written evidence from Jill Barrett ([PST0021](#))

36 Constitution Committee, *The Legislative Process: The Delegation of Powers* (16th Report, Session 2017–19, HL Paper 225)

37 Written evidence from the Trade Justice Movement ([PST0010](#))

38 Written evidence from Global Justice Now ([PST0001](#))

39 Written evidence from Jill Barrett ([PST0021](#))

“too short and at too late a stage to secure thorough and effective scrutiny of international treaties.”<sup>40</sup>

29. Concerns were also raised about the circumstances in which the “exceptional cases” provision in section 22 of CRAG might be invoked by the Government.<sup>41</sup> Professor Michael Bowman said:

“it seems reasonable to suppose that by far the most likely scenario in which ill-judged or over-hasty governmental decisions might be made in this field would be one involving a situation of perceived ‘emergency’ (whether real, exaggerated or largely imagined), when public feelings might be running high and the flames of political intemperance might most easily be fanned. Yet these are precisely the circumstances in which Parliamentary scrutiny is most likely to be excluded ... [the Act] permits ratification of treaties without prior reference to Parliament under the rubric of ‘exceptional cases’, a category which remains totally undefined in the Statute but is widely supposed to have emergency situations in mind.”<sup>42</sup>

30. Connected to the lack of parliamentary involvement in treaty processes were concerns about the lack of transparency and information about treaties and negotiations.<sup>43</sup> Jill Barrett and others said that “The Government has no obligation to inform Parliament or the public about proposed, ongoing or abortive treaty negotiations.”<sup>44</sup> Global Justice Now said: “Members of Parliament do not have the right to see or vote on government negotiating objectives, to see the negotiating papers, which would allow them to scrutinise government positions, to read impact assessments or consultations or to amend or stop a trade deal once negotiated and before it is signed.”<sup>45</sup>
31. The only information that the Government is required to provide at any point in the treaty-making process is the explanatory memorandum (EM) that accompanies a signed treaty when it is laid before Parliament. In the view of Jill Barrett, many explanatory memorandums were “very short and uninformative. This is in notable contrast to the EMs submitted with Statutory Instruments. The House of Lords Secondary Legislation Scrutiny Committee has provided detailed guidance to Government on the contents it expects to see in an EM and it comments on the quality of EMs tabled.”<sup>46</sup>
32. Lord Boswell of Aynho, on behalf of the European Union Select Committee, concluded:

“Perhaps the only reason successive Governments have been able to get away with limiting Parliament’s role in [the scrutiny of treaties] is because the treaties that matter most—particularly trade agreements—have been negotiated on our behalf by the EU. Operating in accordance with EU law, the European Commission has conducted negotiations, while

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40 Written evidence from ClientEarth, Woodland Trust and Friends of the Earth England, Wales & Northern Ireland ([PST0005](#)). See also written evidence from the Trade Justice Movement ([PST0010](#))

41 Written evidence from the Trade Justice Movement ([PST0010](#)) and ClientEarth, Woodland Trust and Friends of the Earth England, Wales & Northern Ireland ([PST0005](#))

42 Written evidence from the University of Nottingham Treaty Centre ([PST0017](#))

43 Written evidence from Global Justice Now ([PST0001](#)) and the Trade Justice Movement ([PST0010](#))

44 Written evidence from Jill Barrett, Queen Mary, University of London, Eirik Bjorge, Bristol University, Ewan Smith, University of Oxford, and Arabella Lang, House of Commons Library ([PST0020](#))

45 Written evidence from Global Justice Now ([PST0001](#))

46 Written evidence from Jill Barrett ([PST0021](#))

the European Parliament has provided increasingly effective democratic oversight. Meanwhile, our domestic procedures for scrutinising treaties have languished.”<sup>47</sup>

33. **The current mechanisms available to Parliament to scrutinise treaties through CRAG are limited and flawed. Reform is required to enable Parliament to conduct effective scrutiny of the Government’s treaty actions, irrespective of the consequences of Brexit.** We consider the options for reform in Chapter 4.

### Committee scrutiny of treaties

34. Aside from the CRAG process, the only systematic scrutiny of treaties has been conducted by the House of Lords Secondary Legislation Scrutiny Committee (SLSC) since 2014–15. Treaties fall within the SLSC’s remit to scrutinise “every instrument (whether or not a statutory instrument) ... upon which proceedings may be, or might have been, taken in either House of Parliament under an Act of Parliament.” This is “with a view to determining whether or not the special attention of the House should be drawn to it.” In its evidence, the SLSC said it had considered 69 treaties since 2014–15; it had reported on 18 of them for information and had not drawn any to the special attention of the House.<sup>48</sup>
35. Since at least 2000, the Foreign and Commonwealth Office has sent every signed treaty to the relevant departmental select committee;<sup>49</sup> however few of these have been reported on.
36. During our inquiry the House of Lords European Union Committee undertook a temporary function to scrutinise the treaties that the Government was seeking to ‘replicate’ or ‘roll-over’ at the point the UK leaves the European Union.<sup>50</sup> The workings of this process may provide valuable lessons on the practicalities of treaty scrutiny.
37. The SLSC concluded: “There are opportunities and compelling arguments for more effective parliamentary scrutiny of treaties ... Given the role of the SLSC—essentially, policy scrutiny of secondary legislation—the SLSC, in our view, would not be the natural home for this ‘upstream’ treaty scrutiny function.”<sup>51</sup> We share the SLSC’s view and consider its implications in more detail later in this report.

### Treaty scrutiny by the European Parliament

38. While a member of the EU, competence over some policy areas, such as trade, has resided in Brussels rather than Westminster. Witnesses told us that the European Parliament has conducted effective scrutiny, particularly on wide-ranging trade agreements such as the Comprehensive Economic and Trade Agreement (CETA) with Canada.
39. Jude Kirton-Darling MEP, a member of the European Parliament’s International Trade Committee, explained that since 2010, after the Lisbon

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47 Written evidence from Lord Boswell of Aynho, on behalf of the European Union Select Committee ([PST0026](#))

48 Written evidence from the Secondary Legislation Scrutiny Committee ([PST0015](#))

49 House of Commons Procedure Committee, *Second Special Report* (Session 1999–2000, HC 990)

50 European Union Committee, *Scrutiny of international agreements* (27th Report, Session 2017–19, HL Paper 282)

51 Written evidence from the Secondary Legislation Scrutiny Committee ([PST0015](#))

Treaty came into effect, the European Parliament had gradually evolved its narrow powers on treaties, resulting in the opening of formal inquiries and creation of “other informal powers.” This had been possible because the European Commission was required under the Lisbon Treaty “to keep the European Parliament informed in a timely and effective manner.”<sup>52</sup> This led the Commission to provide the European Parliament with information from the point of “the draft mandate for negotiation, through the negotiation process ... then out towards the ratification.” Ms Kirton-Darling also noted that, after ratification, the European Parliament’s International Trade Committee sought to “hold the negotiators to the commitments they made in agreements.”<sup>53</sup>

40. Jack Straw pointed out that the European Parliament is a markedly different institution to the UK Parliament:

“I do not believe there is a parallel between a Parliament of a unitary state, which is what we still are, and a supranational Parliament, which is what the European Parliament is ... You are being led down a rabbit hole if you think there is much to learn from the practice of the European Parliament. It is a very different institution for a very different purpose.”<sup>54</sup>

41. The differences between the UK Parliament and the European Parliament are significant. In the UK, the Government draws its membership and legitimacy from Parliament, with members of the executive also remaining members of the legislature. In comparison, there is clear separation between the functions and responsibilities of the European Parliament and European Commission.

42. While the context may be different, there may be lessons of good practice that the UK could adopt after Brexit. Witnesses referred to the greater emphasis on transparency and information provision on treaties in the European Parliament. Professor Elaine Fahey, Professor of Law, City Law School, University of London, thought this dichotomy was particularly stark during the Brexit negotiations:

“The UK Parliament looks very much behind the curve. You do not look like you are getting all the information here and now. It is out there on the internet, on Twitter and on the PowerPoint slides of the EU 27. There is the dynamic of engagement with information. We live in a world where everything is leaked. You have a lot to learn about how to bring on board the provisions of the rules of procedure of the European Parliament.”<sup>55</sup>

43. The Trade Justice Movement explained that, after the talks between the EU and the USA on the Transatlantic Trade and Investment Partnership (TTIP) collapsed, the EU Commission committed to:

- “Making more negotiation objectives public
- Providing all MEPs with access to additional restricted documents, including negotiating texts, in a secure reading room

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52 [Q 11](#) (Jude Kirton-Darling MEP)

53 *Ibid.*

54 [Q 71](#) (Jack Straw)

55 [Q 5](#) (Professor Elaine Fahey)

- Reducing the number of restricted documents so that MEPs have access to more information outside the secure reading room
  - Publishing a list of the documents shared with the European Parliament and the Commission as well as information about who is being consulted in relation to trade negotiations
  - Disclosing negotiating mandates immediately after their adoption
  - Publishing final trade agreement texts in advance of the legal revision being completed.”<sup>56</sup>
44. While some of these measures were taken only in relation to the TTIP negotiations, Jude Kirton-Darling said they were “Quite a step forward”.<sup>57</sup>
45. Lord Boswell of Aynho, Chairman of the Lords EU Committee, said: “the mechanisms for treaty scrutiny that have evolved during the period of UK membership of the EU should be regarded as part and parcel of the UK’s constitutional settlement. Failure to replicate comparable arrangements domestically post-Brexit would be a retrograde step, reducing transparency and democratic accountability.”<sup>58</sup>
46. **The powers that the European Parliament has developed over recent years suggest that effective scrutiny of international agreements can occur where there is sufficient political interest, information provision and powers.**
47. **While we do not recommend directly replicating the European Parliament’s treaty scrutiny mechanisms at Westminster, lessons may be learned from it, particularly in relation to information provision.** We consider what reforms are required in more detail in Chapter 4.

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56 Written evidence from the Trade Justice Movement ([PST0010](#))

57 [Q 14](#) (Jude Kirton-Darling MEP)

58 Written evidence from Lord Boswell of Aynho, on behalf of the European Union Select Committee ([PST0026](#))

## CHAPTER 3: NATURE AND VOLUME OF TREATIES

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### Introduction

48. The UK's departure from the European Union exposes and exacerbates many of the shortcomings in Parliament's treaty scrutiny system. This is not simply because the UK will leave the system of EU-level negotiation and scrutiny of treaties, as set out in the previous chapter, but also because the context in which treaties are negotiated has changed profoundly during the period of EU membership. Treaties, particularly trade treaties, can cover much broader areas of public policy than in the past, and in much greater detail. Preparations for Brexit have already led to an increase in the number of treaties being laid before Parliament.

### Breadth of treaties

49. The content of treaties has expanded and changed over time, particularly in recent decades. Former Foreign Secretary Rt Hon Sir Malcolm Rifkind said "Traditionally, treaties were relations between states—war and peace, exchange of territory and matters of that kind; not entirely, but to a very substantial degree. Now the bulk of treaties are on trade or issues that have domestic implications."<sup>59</sup>
50. Dr Mario Mendez, Reader in Law at Queen Mary University of London, said that "there has been a radical transformation in the remit of treaty-making. Treaties are doing very different things today from what they were doing in, for example, 1924. They reach into all aspects of our daily lives in a way that they did not in 1924."<sup>60</sup> David Lawrence, Senior Political Adviser at the Trade Justice Movement, explained:

"trade agreements have substantially changed ... They now cover huge areas of public policy. They have an impact on rights that ordinarily would derive from primary legislation ... Things such as consumer rights, workers' rights, environmental legislation and health standards are all affected."<sup>61</sup>

### Volume of treaties

51. Witnesses highlighted the greater freedom the UK would have to negotiate new treaties after Brexit. Rt Hon David Lidington MP, Chancellor of the Duchy of Lancaster, said that "in a post-EU future, we are probably looking at a significant increase in the number of treaties that the United Kingdom will seek to negotiate and implement, and they will be quite disparate in character."<sup>62</sup>
52. Sir Franklin Berman QC said "There will be a huge burden of treaty-making, as we know from our daily press, to make up for the fact that we are no longer within the trading arrangements of the EU and the EU's network of broader international arrangements."<sup>63</sup> Dr Dermot Hodson and Professor Imelda Maher suggested that "By one measure, the Government will need to negotiate at least 750 treaties with 168 states if it wishes to recover the

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59 [Q 79](#) (Sir Malcolm Rifkind)

60 [Q 1](#) (Dr Mario Mendez)

61 [Q 62](#) (David Lawrence)

62 [Q 93](#) (David Lidington MP)

63 [Q 37](#) (Sir Franklin Berman QC)

agreements on trade, regulatory, nuclear and other issues that it will forego by leaving the EU.”<sup>64</sup>

53. The Secondary Legislation Scrutiny Committee emphasised the strain this would put on Parliament: “Arguably, any increase in numbers will serve only to compromise further, to a greater or lesser extent, an already largely ineffective scrutiny mechanism.”<sup>65</sup>
54. **The UK’s departure from the European Union will result in the Government negotiating and signing more treaties than has been common in recent years. These will include complex trade treaties, which have hitherto been negotiated at EU-level and scrutinised by the European Parliament. Parliament’s scrutiny of treaties will need to adapt to these changes, as the provisions of the Constitutional Reform and Governance Act 2010 were enacted in a time where leaving the EU had not been seriously contemplated, and thus not designed to support detailed scrutiny of the volume and breadth of treaties that will be required in future.**

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64 Written evidence from Dr Dermot Hodson, Birkbeck College, and Professor Imelda Maher, University College Dublin ([PST0025](#))

65 Written evidence from the Secondary Legislation Scrutiny Committee ([PST0015](#))

## CHAPTER 4: REFORMING TREATY SCRUTINY

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55. The shortcomings in the current system of treaty scrutiny, and the pressures that leaving the EU will place on those processes, necessitate fresh consideration of how Parliament deals with treaties. In this chapter we consider options for improving treaty scrutiny and make recommendations for reform.

### A treaty scrutiny committee

56. As part of our scrutiny of the Constitutional Reform and Governance Bill, which became CRAG in 2010, we recommended that the House of Lords consider establishing a committee to scrutinise treaties.<sup>66</sup> Many of our witnesses to this inquiry similarly suggested that Parliament required a select committee dedicated to treaty scrutiny. For example, Professor Joanna Harrington, University of Alberta, said that a treaty committee would be a “home” within Parliament for treaties and that this would have several benefits. She said it:

“Provides a visible location to where the texts of all proposed treaty actions can be sent, and kept, along with their explanatory memoranda ... Serves to publicise the Executive’s reasons for wanting to ratify a treaty, with committee members able to use the committee’s processes to seek further explanations or clarifications, to propose reservations and understandings, and were an inquiry to be warranted, to receive submissions and hear testimony from witnesses.”<sup>67</sup>

57. David Lawrence from the Trade Justice Movement said:

“Committees are the obvious place where issues can be explored in more depth than just on the Floor of the House, if you get allotted time for a debate. The other good thing about parliamentary committees is that they have a level of independence from Government, which means that if they hold inquiries into trade agreements it is a better process throughout.”<sup>68</sup>

58. As a home for treaties, a treaty committee would attract more attention from parliamentarians and the public to treaties before Parliament. Jill Barrett said that at present “The only information on Parliament’s website about treaties laid before Parliament under the CRAG Act is listed under ‘Statutory Instruments’. It is very difficult to find it, even if you know it is there. There is nothing there to attract the public’s interest in Parliament’s work on treaties.”<sup>69</sup>
59. The Government suggested that it was open-minded on Parliament establishing a new treaty scrutiny committee. Sir Alan Duncan said that “anything to do with parliamentary scrutiny is a matter for Parliament”,<sup>70</sup> but the Government was “ready to engage in discussions and consider arrangements to strengthen parliamentary scrutiny of treaties”.<sup>71</sup> While not

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66 Constitution Committee, *Constitutional Reform and Governance Bill* (11th Report, Session 2009–10, HL Paper 98), para 16

67 Written evidence from Professor Joanna Harrington ([PST0018](#))

68 [Q 63](#) (David Lawrence)

69 Written evidence from Jill Barrett ([PST0021](#))

70 [Q 88](#) (Sir Alan Duncan MP)

71 Written evidence from the Foreign and Commonwealth Office ([PST0023](#))

contradicting this view, David Lidington MP set out potential challenges a treaty committee might face:

“Would a single treaty scrutiny committee actually have within it the capacity and expertise to deal with things that might be as different as a fisheries treaty with Iceland, an FTA [free trade agreement] with Mexico, a political co-operation agreement with Kyrgyzstan or a military assistance treaty with Kuwait? It would surely be necessary, in each of those hypothetical examples, for whichever committee or committees were looking at them to take account of the views of experts on the areas of policy that were the subject matter of the treaty.”<sup>72</sup>

60. There are examples of committees focusing on treaties in other countries’ parliaments. Many witnesses identified the Joint Standing Committee on Treaties (JSCOT) in Australia as an effective model for treaty scrutiny. JSCOT reviews all treaty actions proposed by the Australian government. Before a treaty can be ratified, the Australian government sends the proposed treaty and accompanying documents to JSCOT, which can conduct an inquiry and reports on the issues. Once the report is complete, it is presented to the Commonwealth Parliament with a recommendation as to whether the treaty should be ratified.<sup>73</sup>
61. Alexander Downer, the former Australian Foreign Minister who was accountable to JSCOT for the first decade after its establishment, told us that it was a committee of “substantial prestige” as: “Treaties cover everything now, because of globalisation ... Treaties have become a much more important issue than ever before ... this committee has taken on quite a significant role.”<sup>74</sup>
62. **We believe a dedicated treaty committee is required to provide effective parliamentary scrutiny of treaties. Such a committee would create a natural home and possible clearing house within Parliament for all treaty-related activity, building expertise amongst members and staff and providing better scrutiny of the Government’s actions.** In the rest of this chapter we explore how such a committee might be constituted and how it might operate.
63. A number of witness suggested that a joint committee of both Houses would be best placed to undertake treaty scrutiny.<sup>75</sup> For example, Dr Mario Mendez, referring to the recommendation made by the Joint Committee on the Draft Constitutional Renewal Bill in 2008, said that a joint committee would be preferable, as it would combine the “expertise that can be found in the House of Lords with the added legitimacy that flows from having elected members.”<sup>76</sup>
64. Dr Brigid Fowler, Senior Researcher at the Hansard Society, thought that there were good arguments in favour of joint committees, but the Society’s experience had been that members of both Houses had not always been

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72 [Q 93](#) (David Lidington MP)

73 Parliament of Australia, Joint Standing Committee on Treaties, ‘Role of the Committee’: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Treaties/Role\\_of\\_the\\_Committee](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/Role_of_the_Committee) [accessed 6 March 2019]

74 [Q 43](#) (Alexander Downer)

75 Written evidence from ClientEarth, Woodland Trust and Friends of the Earth England, Wales & Northern Ireland ([PST0005](#))

76 Written evidence from Dr Mario Mendez, Queen Mary University of London ([PST0022](#))

keen. The success of joint committees had been a “bit hit-and-miss”, perhaps because “there are quite different cultures in the two Houses.”<sup>77</sup>

65. The House of Commons International Trade Committee recently reported on the need for parliamentary scrutiny of trade agreements. The committee concluded that “A parliamentary committee should be charged with the detailed scrutiny that will be required for future trade negotiations. At present, the most suitable committee to take this responsibility is ours.”<sup>78</sup> As there are lots of treaties on subjects other than trade, this would not obviate the need for a separate committee to undertake treaty scrutiny.
66. At present, the Liaison Committees in both the House of Commons and the House of Lords are reviewing the structure and work of the select committees in their respective Houses.<sup>79</sup> We hope this report will be helpful in their deliberations.
67. **There is a choice to be made between establishing a treaty committee in either or both Houses, or establishing a joint committee. We recognise that there are advantages and disadvantages to any model and ultimately that it will be for the Liaison Committees in both Houses to consider whether a joint committee would be desirable. If a joint committee is not the preferred option, it would be appropriate for the House of Lords to appoint its own treaty scrutiny committee.**

### The stages of treaty scrutiny

68. There are three points in the treaty-making process where more effective scrutiny might take place: mandates, negotiations and ratification. At each stage we explore what scrutiny Parliament might conduct and what information it requires to undertake that work.

### Mandating treaty negotiations

69. Currently there is no requirement for the Government to alert Parliament nor to seek its consent to open treaty negotiations. There is also no real practice of Parliament being proactive in mandating the opening of negotiations for new treaties.
70. Some of the non-governmental organisations (NGOs) who submitted evidence argued that Parliament should take a much more active role at the mandating stage.<sup>80</sup> For example, the Trade Justice Movement advocated a debate and vote on “proposals to enter into formal trade negotiations, and use this to set out and approve the Government’s negotiating mandate. This will ensure that there is some degree of democratic consensus prior to a deal being negotiated”.<sup>81</sup>
71. Other witnesses thought that there should be greater involvement for Parliament, without the need for it to approve a formal mandate for opening

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77 [Q 56](#) (Dr Brigid Fowler)

78 International Trade Committee, [UK trade policy transparency and scrutiny](#) (Sixth Report, Session 2017–19, HC 1043)

79 House of Commons Liaison Committee, [‘Select Committee system effectiveness and influence inquiry launched’](#), 18 January 2019; House of Lords Liaison Committee, [‘Select Committee review in the House of Lords launched’](#), 18 January 2018.

80 Written evidence from War on Want ([PST0009](#)), ClientEarth, Woodland Trust and Friends of the Earth England, Wales & Northern Ireland ([PST0005](#)), and Global Justice Now ([PST0001](#))

81 Written evidence from the Trade Justice Movement ([PST0010](#))

negotiations. David Henig, Director of the UK Trade Policy Project at the European Centre for the International Political Economy, said:

“Given that Parliament and devolved administrations will need to vote to approve a Free Trade Agreement there are those who argue that they should also have to approve a mandate for talks. I do not agree that this is necessary. Government should publish their aims for talks, and MPs, Peers and devolved assemblies should have a chance to debate this, and emphasise important points, but ultimately the government should be the ones setting out what they aim to achieve, to be voted on by MPs at the end of the process.”<sup>82</sup>

72. Witnesses with experience of negotiating treaties were sceptical about this level of engagement and transparency. For example, former Foreign Secretary Sir Malcolm Rifkind did not “believe that the concept of a mandate from Parliament or from any element within Parliament would be in the public interest.”<sup>83</sup> He said:

“[A] Government who are known to require, in advance, the approval of Parliament speak with less authority during these negotiations. It reduces the authority of the Government in the negotiations ... It also implies that if you have been given a mandate and you wish to depart from the mandate, in the middle of the negotiation you have to go back and forward to your Parliament to say, ‘Can we please change the mandate that you have given us?’ It is often at the very least inconvenient, to put it mildly, and sometimes entirely impractical ... The nature of any negotiation involves both sides knowing that, at some stage, they will have to offer compromises. You do not announce these compromises in advance; you keep them in reserve for when and if they are required.”<sup>84</sup>

73. Alexander Downer agreed:

“I am not sure that it would help with the Government’s capacity to negotiate. The Government’s basic view, and certainly my view, would be that the Executive, the relevant Minister and his or her department should be able to conduct the negotiations in an unfettered way ... let us take into account the resources that would be involved ... it would create chaos, in the amount of time that was involved.”<sup>85</sup>

74. Sir Franklin Berman QC noted that it was not always evident at the point that discussions begin that a treaty would be the outcome:

“[T]he process of entering into contact with the other side is not necessarily under the label of setting out to negotiate a treaty. It is a process of contact that might ultimately turn into a closer discussion, in the course of which the parties are not even clear at that stage whether the ultimate objective will be a treaty in the formal sense, or some other kind of understanding or less formal arrangement between them.”<sup>86</sup>

75. Setting out the Government’s position, Sir Alan Duncan MP said that it was “Parliament’s role to hold ministers to account, and ministers negotiating

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82 Written evidence from David Henig ([PST0004](#))

83 [Q 81](#) (Sir Malcolm Rifkind)

84 *Ibid.*

85 [Q 45](#) (Alexander Downer)

86 [Q 34](#) (Sir Franklin Berman QC)

treaties will always need to have in their mind an understanding of which issues in those treaties are relevant to Parliament and are seen to be significant for Parliament.”<sup>87</sup> However, he thought it would be “wrong” to “be mandated to do only certain things ... Some treaties involve delicate negotiations; as soon as you throw them open to the public gaze, you destroy the strength of your negotiating hand.”<sup>88</sup>

76. **We do not believe that Parliament should be required to endorse the Government’s mandate prior to commencing treaty negotiations. This would impinge inappropriately on the Government’s prerogative power and limit the Government’s flexibility in the negotiations. However, for significant or controversial treaties, the Government will want to ensure that it has the support of Parliament at the outset of negotiations in order to secure ratification to the final text of the agreement. While this may not be a formal resolution to approve a mandate or the commencement of negotiations, the Government should consider the merits of a debate or other forms of engagement at an early stage, so that Parliament is involved in the process.**

*Information provision at the opening of negotiations*

77. At present the Government is not required to inform Parliament that treaty negotiations have begun. The only information provided about the Government’s treaty actions is a list of the treaties that the UK signed in the previous month on the Foreign and Commonwealth Office’s section of the gov.uk website.
78. The Joint Committee on Human Rights, in its recent report on human rights protections in international agreements, said the current arrangements were not adequate and recommended that “the Government must inform Parliament of all international agreements that it intends to negotiate—at a minimum identifying the other party to the agreement and the subject matter and broad aims of the agreement.”<sup>89</sup>
79. Shortly before the end of our inquiry, the Department for International Trade set out its proposals for Parliament’s involvement in free trade agreements after the UK has left the EU.<sup>90</sup> In its paper the Government committed that, for future free trade agreements, it would publish an “Outline Approach” which would:
- “include our negotiating objectives and be accompanied by a scoping assessment which will be informed by economic modelling, setting out the potential economic impacts of any agreement. We will ensure that Parliament has a role in scrutinising these documents so that we can take its views into account before commencing negotiations.”<sup>91</sup>
80. **We recommend that the Government should inform any treaty committee when treaty negotiations begin and provide background**

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87 Q 90 (Sir Alan Duncan MP)

88 *Ibid.*

89 Joint Committee on Human Rights, *Human Rights Protections in International Agreements* (17th Report, Session 2017–19, HC 1833 HL Paper 310), paras 65–66. See also Appendix 3.

90 Department for International Trade, *Processes for making free trade agreements after the United Kingdom has left the European Union*, CP 63, February 2019: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/782176/command-paper-scrutiny-transparency-27012019.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/782176/command-paper-scrutiny-transparency-27012019.pdf) [accessed 6 March 2019]

91 *Ibid.*

**information about the parties to the negotiations and the broad subject areas that are expected to be discussed. This will improve the information available to Parliament and allow a treaty committee to plan its scrutiny work effectively. There may be circumstances where a treaty was not the outcome initially envisaged by the Government; in such cases, the Government should alert the committee as soon as formal negotiations begin. In many cases, especially in relation to trade negotiations, such information will be in the public domain and it will not compromise the Government’s position to keep Parliament informed. We therefore welcome the Government’s commitment to provide more information to Parliament at the beginning of the process for making free trade agreements and suggest this approach be considered for all treaties.**

81. **We recognise that there are rare instances where the fact that negotiations are taking place is sensitive and information could not reasonably be provided to a treaty committee. On these occasions, nothing that compromises the Government’s ability to negotiate freely should be disclosed. We recommend that in such circumstances the Government informs any treaty committee at the earliest appropriate opportunity and explains why confidentiality was needed earlier in the process.**

#### ***During treaty negotiations***

82. Parliament’s role during the negotiations, reflecting the Government’s prerogative on treaties, is one of scrutiny. We found little support for any formal involvement of Parliament in conducting negotiations; rather, the primary concern during this phase of treaty-making was the information provided to Parliament about negotiations and the balance between transparency and confidentiality.
83. **We believe that if Parliament is kept appropriately informed about the existence of ongoing treaty negotiations (subject to the qualification about exceptional circumstances in paragraph 81), existing parliamentary mechanisms, supplemented by the work of the proposed treaty committee, should be sufficient to provide effective scrutiny.**

#### ***Information provision and transparency during treaty negotiations***

84. Many witnesses criticised the lack of information available to Parliament during individual treaty negotiations. Global Justice Now said current disclosure of information represented a “democratic deficit” and argued that parliamentarians should have “proper rights to information, and powers to scrutinise, set guidelines, amend, and stop trade deals”.<sup>92</sup> War on Want similarly argued:

“Transparency should be the norm during trade negotiations, so that the presumption is that material can be made public unless there is a specific and convincing reason against. In particular the UK should release its text proposals ahead of each negotiating round, and the consolidated text, showing the current state of agreement between the parties, should be released after each negotiating round. This reflects

the trend for increasing transparency in EU and WTO negotiations, as well as common practice in other areas of international negotiations such as on climate change.”<sup>93</sup>

85. We heard that the UK’s treaty actions appeared to be less transparent than those of other countries.<sup>94</sup> Michael Clancy, Director of Law Reform at the Law Society of Scotland, said that, in practice, an opaque approach by the UK Government could be futile as “other jurisdictions may have more transparency than we are prepared to give ... nowadays it is very easy to sit and peruse the agendas of committees the world over. What appears to be hidden in one jurisdiction is quite open in another.”<sup>95</sup>
86. Jack Straw was more sceptical about transparency during treaty negotiations:
- “There should be transparency at the beginning and the end of the process, but ... in the middle of the process it should be for the negotiators to decide how much privacy and confidentiality there should be, and certainly not others ... Everybody is in favour of transparency. It is motherhood and apple pie. You cannot not be, but a lot of negotiations have to take place in confidence. You are literally trying to build up confidence with the party on the other side, and if what you are doing is going to be leaked, life becomes impossible.”<sup>96</sup>
87. Mr Straw referred to negotiations with the government of Spain in 2001 on the provisions of the 1713 Treaty of Utrecht that affected Gibraltar. Sir Malcolm Rifkind made a similar point in relation to negotiations he had as Foreign Secretary during the 1990s with Argentina about the Falkland Islands:
- “Sadly, as in Mr Straw’s example, it did not lead to a breakthrough, but it made significant progress in improving the bilateral relationship between our two Governments. None of that leaked or was in the public domain, and it would have been very foolish for it to be in the public domain, because any chance we might have had of seeing some even more substantial progress would have been jeopardised.”<sup>97</sup>
88. Nick Dearden, Director of Global Justice Now, said that he would like to see “a presumption of transparency” during treaty negotiations, and that if the Government wanted to keep something secret, there had to be an “explanation” and “committees should be able to argue back against that if they thought it was not justified.”<sup>98</sup> Sir Malcom Rifkind said he did not “have any problem with the concept of a presumption of openness, as long as it is the Government who ultimately determine how far they can go.”<sup>99</sup>
89. Sir Alan Duncan MP thought that a presumption of transparency, even with the caveats suggested by Sir Malcolm Rifkind, would be an “error”:
- “It would make negotiations very difficult. As we have seen already in public debate, it reduces the exchange of opinion, with the ramping up of

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93 Written evidence from War on Want ([PST0009](#))

94 See, for example, [Q 5](#) (Professor Elaine Fahey)

95 [Q 60](#) (Michael Clancy)

96 [Q 77](#) (Jack Straw)

97 [Q 85](#) (Sir Malcolm Rifkind)

98 [Q 66](#) (Nick Dearden)

99 [Q 86](#) (Sir Malcolm Rifkind)

opinion to that of simplistic slogans, which are very good for an NGO's profile but not very good for the quality of public debate. Parliament is the place to scrutinise, and the forum of social media exchange would not be fruitful for negotiating treaties. Of course, transparency is ultimately important, but at the right stage, in the right way and at the appropriate level."<sup>100</sup>

He did, however, recognise that the level of transparency should depend on the treaty under negotiation:

"We adjusted the level of engagement to match the appropriateness of the treaty that was being negotiated, which is probably something we would always do. We have had the Canada treaty, with lots of NGOs firing off their views. If we were to negotiate with the United States on a free trade agreement, I am sure there would be massive public interest in what was happening and what was going to be included and discussed. But if it was some kind of nuclear de-proliferation or reduction treaty, we would be in a completely different world, where a presumption of transparency would be likely to ask us to reveal lots of things that it would not be appropriate to reveal. What then would the presumption of transparency have meant? It has to be calibrated."<sup>101</sup>

90. **The level of information that can reasonably be provided to Parliament during negotiations will vary considerably, but we believe there should be a general principle (rather than a legal requirement) in favour of transparency during treaty negotiations. We would not expect such information to include negotiating strategies, 'red lines' or potential areas of compromise; rather the Government might provide an assessment of progress, information on any areas on which agreement had been reached, and any changes to the list of subjects under discussion.**
91. **The Government must remain in control of what information it considers is appropriate to disclose about negotiations. There will be instances when it is not in the UK's national interest for information to be shared with Parliament. We expect such occasions to be the exception rather than the norm.**

*Information-sharing and trust*

92. The reforms we propose in this report will be most effective if a treaty committee and the Government build a relationship of trust, with information sharing embedded as part of the process. Lord Boswell of Aynho said that, from his experience of chairing the EU Committee and interacting with the Government, "effective parliamentary scrutiny of treaty negotiations requires trust—a willingness to engage in frank discussion, to give access to documents, and to share and respect confidence."<sup>102</sup>

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100 [Q 92](#) (Sir Alan Duncan MP)

101 *Ibid.*

102 Written evidence from Lord Boswell of Aynho, on behalf of the European Union Select Committee ([PST0026](#)), and Dr Sam Fowles ([PST0013](#))

93. Jude Kirton-Darling MEP told us that there was an effective working relationship between members of the European Parliament’s International Trade Committee and the EU’s trade negotiators:

“[As] members of the International Trade Committee we are sent confidential documents circulated among members of the Trade Policy Committee—with the exception of the most sensitive. If you are a rapporteur or shadow rapporteur on a file, you get an extra level of access to the negotiations that you are covering ... On TTIP, we all enjoyed much greater transparency because we had the readouts from the negotiating teams after the negotiating rounds, which are probably the most useful thing I have ever had access to. The negotiators wrote their reports back to their headquarters in Brussels, saying, ‘This is where we have got to in this round. This is where the US is. This is the key issue’. You could see exactly what was going on in the negotiations.”<sup>103</sup>

94. She added that confidential documents had been made available in reading rooms to all MEPs during the TTIP negotiations.<sup>104</sup> Other witnesses commented on the value of access to confidential documents during treaty negotiations.<sup>105</sup>

95. Professor David Howarth expressed scepticism about sharing confidential materials during treaty negotiations:

“In an ideal world, Ministers would trust the chairs of Select Committees not to give away secrets—which is, in effect, the system in the United States when it is working properly ... The problem with Britain is that Whitehall does not trust Parliament. It does not trust anybody. It does not trust the lawyers. There is an inherent distrust by Whitehall of Westminster.”<sup>106</sup>

96. We note that during the negotiation of the UK’s withdrawal from the European Union the House of Commons compelled the Government to provide confidential sectoral analyses on Brexit to the Exiting the European Union Committee. These analyses were also given to the Lords EU Committee. Both committees held the documents in confidence while negotiations continued as to what parts of them could be made public.

97. In its recent paper, *Processes for making free trade agreements after the United Kingdom has left the European Union*, the Government proposed providing select committees with sensitive information during free trade agreement negotiations:

“we propose that the committee(s) could have access to sensitive information that is not suitable for wider publication and could receive private briefings from negotiating teams. This would need to be on an understanding of confidentiality, and we envisage that the committee would need to take a mixture of public and private evidence from Ministers and negotiators on the progress of negotiations. This would ensure that the committee(s) was able to follow negotiations closely,

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103 [Q 14](#) (Jude Kirton-Darling MEP)

104 *Ibid.*

105 See, for example written evidence from ClientEarth, Woodland Trust and Friends of the Earth England, Wales & Northern Ireland ([PST0005](#)) and Professor Elaine Fahey ([PST0006](#))

106 [Q 6](#) (Professor David Howarth)

provide views throughout the process and take a comprehensive and informed position on the final agreement.”<sup>107</sup>

98. **While an effective working relationship between any treaty committee and the Government should be established from the committee’s inception, trust regarding the sharing of confidential documents can develop only gradually over time. We welcome the Government’s commitment to provide select committees with sensitive information about free trade agreements on a confidential basis and we recommend that, where appropriate, this be extended to negotiations relating to other forms of treaty.**

### Ratifying treaties

99. As we set out in Chapter 2, the CRAG provisions allow for a “take it or leave it” vote on the final treaty text after the Government has signed the agreement but before it has been ratified. Section 20 of CRAG stipulates that treaty approval is subject only to negative resolution, with neither House guaranteed a vote on the agreement. Jill Barrett, a former FCO legal counsellor who led the Government’s work on the treaty provisions in CRAG, said that CRAG “gives legal effect to a negative vote, but does not provide any mechanism to ensure that if a debate and vote is requested by a sufficient number of members, that it will take place.”<sup>108</sup>
100. The inadequacy of the negative resolution procedure for treaty approval was foreseen by Jack Straw at the time he provided evidence to the Joint Committee on the Draft Constitutional Renewal Bill as Lord Chancellor in 2008. He told that committee “that the best solution might be to make provision in the Standing Orders of each House, that if X number said they wanted a debate and vote, there would have to be a debate and vote, and possibly also that the appropriate subject Select Committee should produce a report on it.”<sup>109</sup>
101. Many witnesses suggested that there should be a mechanism to ensure that parliamentarians are guaranteed the opportunity to debate and vote on treaties.<sup>110</sup> Others argued that, as the scope of treaties had fundamentally changed over recent decades, more significant reform was required to make Parliament’s role commensurate with treaties’ domestic effect. For example, Dr Mario Mendez said that an affirmative resolution procedure should apply to at least certain types of treaties. This might include treaties “modifying domestic law, military treaties, treaties on joining international organisations, treaties affecting domestic spending, trade treaties and treaties affecting the rights and obligations of citizens.”<sup>111</sup>

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107 Department for International Trade, *Processes for making free trade agreements after the United Kingdom has left the European Union*, CP 63, February 2019: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/782176/command-paper-scrutiny-transparency-27012019.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/782176/command-paper-scrutiny-transparency-27012019.pdf) [accessed 6 March 2019]

108 Written evidence from Jill Barrett (PST0021)

109 Written evidence from Jill Barrett (PST0021) and Joint Committee on the Draft Constitutional Renewal Bill, *Minutes of Evidence*, 1 July 2008

110 See written evidence from Global Justice Now (PST0001), ClientEarth, Woodland Trust and Friends of the Earth England, Wales & Northern Ireland (PST0005) and Dr Sam Fowles (PST0013)

111 Written evidence from Dr Mario Mendez, Queen Mary University of London (PST0022)

102. Sir Alan Duncan MP drew attention to the challenges of providing an affirmative resolution on all treaties:

“[P]arliamentary time is already very much at a premium, and will be all the more so, certainly in the short term, in the aftermath of our leaving the EU. Finding time for the Commons and the Lords to grant express approval for all treaties negotiated in any one year would be very challenging; I think there were 35 last year.”<sup>112</sup>

103. **A treaty committee must be able to secure a debate on treaties it deems significant. We do not believe that many treaties each session would warrant a substantive debate and so the impact on parliamentary time would be limited.**
104. **While the Constitutional Reform and Governance Act 2010 could be amended to provide for an affirmative resolution, we suggest altering the application of the procedures would be more straightforward. A treaty committee should be empowered to recommend a debate on a treaty and the Government should commit to providing time for it within the 21-day period. If there is opposition to the treaty, the debate would take place on a motion under section 20 of CRAG that the treaty should not be ratified. If the treaty is significant and worthy of debate, but faces no opposition, the debate could be on a neutral motion.**

*Functions of a treaty scrutiny committee during ratification*

105. Given the number and variety of treaties that will be under negotiation and laid before Parliament, a treaty committee will need to consider how to arrange its work effectively. Many witnesses suggested that a committee should sift the treaties laid by the Government at the beginning of the 21-day period and identify which ones were worthy of further scrutiny. Sir Franklin Berman QC saw the advantages of a committee having this role:

“a sifting system that would take treaties that are of particular interest and importance, notably those that are more likely to have an effect inside the United Kingdom, and separate them from others that are purely on the foreign policy level or that might be so technical that they are of no general interest to Parliament at all. It would use that as the fork in the road to determine those that would have a more detailed examination, by whatever process is most appropriate, leaving the others aside.”<sup>113</sup>

106. Dr Brigid Fowler also referred to a committee sifting treaties:

“The range of instruments that you might be dealing with is one thing that argues for a flexible system, which suggests that you might want to be looking at some sort of sift somewhere. We would not want to oblige parliamentarians and parliamentary staff to spend time on treaties that nobody has a problem with and do not warrant it.”<sup>114</sup>

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112 [Q 89](#) (Sir Alan Duncan MP)

113 [Q 37](#) (Sir Franklin Berman QC)

114 [Q 54](#) (Dr Brigid Fowler)

107. The Joint Standing Committee on Treaties (JSCOT) in Australia operates such a sifting mechanism.<sup>115</sup> The Australian government designates whether a treaty is ‘major’, ‘minor’ or ‘technical’; however JSCOT can re-categorise them if it disagrees with the government’s assessment. JSCOT undertakes an inquiry and reports on those treaties deemed to be more significant. As part of its initial work, the proposed treaty committee may wish to consider whether this model would be appropriate for the UK Parliament. The committee might also wish to consider whether all treaties categorised as ‘major’ should be subject to a debate, as we set out earlier in the chapter.
108. We heard a range of views on whether a treaty committee should sift and scrutinise treaties, or whether it should sift treaties and refer them to other select committees for scrutiny. Jill Barrett and others suggested:
- “a hybrid model, in which a treaty committee sifts treaties and sends as many as possible to specialist committees, but handles some treaties itself, such as those with cross-cutting effects and those without a clearly responsible committee. The hybrid model seems to us the most appropriate and effective.”<sup>116</sup>
109. A hybrid model would allow a treaty committee to work closely with other committees in either or both Houses to use their policy knowledge, while building its own expertise on cross-cutting agreements that touch on a range of policy areas. Another option would be for the treaty scrutiny committee to sift treaties and identify which it wishes to report on. If a treaty committee in the Lords was tasked with this, it might be empowered to appoint sub-committees to scrutinise individual treaties, on to which it could co-opt members of the House with experience relevant to the treaty in question. **We suggest that any treaty committee seeks to draw on the expertise of other committees and members to assist its scrutiny through whatever process it considers appropriate.**
110. **We recommend that the proposed treaty committee undertake a sifting function to identify which treaties are of greatest significance and to draw those to the attention of Parliament.**
111. **We recommend that the Government keeps the proposed treaty committee informed in broad terms about the treaties that are under negotiation, in order that the committee can anticipate which treaties will need to be sifted for greater scrutiny and prepare accordingly.**

*Time available for scrutiny*

112. Under the CRAG provisions, the 21 sitting day period required before ratification begins once a treaty has been laid before Parliament. We heard concerns, set out in Chapter 2, that this period was too short to conduct meaningful scrutiny.
113. In comparison, JSCOT has a similar amount of time to consider the Australian government’s proposed treaties. The most significant treaties, Category 1, are reported on within 20 sitting days, while Category 2 treaties

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115 For more information on JSCOT, see Parliament of Australia, Joint Standing Committee on Treaties, ‘Role of the Committee’: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Treaties/Role\\_of\\_the\\_Committee](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/Role_of_the_Committee) [accessed 6 March 2019]

116 Written evidence from Jill Barrett, Queen Mary, University of London, Eirik Bjorge, Bristol University, Ewan Smith, University of Oxford, and Arabella Lang, House of Commons Library ([PST0020](#))

are reported on within 15 days. Alexander Downer suggested that this “does not sound very long”, but this has “not been a particular problem ... and the committee can always ask for an extension.”<sup>117</sup>

114. In its paper on Parliament’s scrutiny of free trade agreements, the Government recognised the challenges for a treaty committee of reporting with the 21 sitting day period and committed to ensuring “there was sufficient time between finalising a new FTA [free trade agreement] and laying it before Parliament under the CRAG procedure so that the committee(s) could make such a report.”<sup>118</sup>
115. **We welcome the Government’s commitment to provide the text of trade agreements to a committee prior to laying them before Parliament for the purposes of the Constitutional Reform and Governance Act 2010. We recommend that this process is followed for all types of treaty.**
116. **In addition, section 21 of the Constitutional Reform and Governance Act 2010 allows for the 21 sitting day period to be extended at the discretion of ministers. A treaty committee should not be constrained in its scrutiny by the 21 sitting day provision in the CRAG. We recommend that the Government commits to extending the treaty consideration period if requested by the proposed treaty committee to allow for the completion of scrutiny, unless there are exceptional reasons not to do so.**

*Information provided with signed treaties*

117. Every signed treaty laid before Parliament is accompanied by an explanatory memorandum (EM) produced by the Government. The laying of an EM developed as a convention from 1997 and was formalised in section 24 of CRAG in 2010.
118. Jill Barrett said that the information provided in EMs was limited: many were “very short and uninformative” and they compared poorly to those accompanying secondary legislation.<sup>119</sup> She added:

“These deficiencies are illustrated by a recently laid treaty: Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse. The UK signed it on 5 May 2008; it was laid before Parliament with an EM on 12 April 2018 (a delay of 10 years); and ratified on 20 June 2018. The EM consists of 2 pages with scant information beyond a summary of the aims of the Convention. For example, on implementation, it merely states: ‘In order to ratify the Convention the UK has taken the necessary legislative and administrative steps to implement the Convention in UK law (including the devolved administrations).’<sup>120</sup>

119. This view was echoed by the House of Lords European Union Committee in a recent report. In relation to two treaties, the Committee concluded that the

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117 Q 42 (Alexander Downer)

118 Department for International Trade, *Processes for making free trade agreements after the United Kingdom has left the European Union*, CP 63, February 2019: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/782176/command-paper-scrutiny-transparency-27012019.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/782176/command-paper-scrutiny-transparency-27012019.pdf) [accessed 6 March 2019]

119 Written evidence from Jill Barrett (PST0021)

120 *Ibid.*

supporting explanatory material provided “insufficient information on their policy objectives and on how they will be implemented.”<sup>121</sup>

120. In comparison, witnesses told us that other countries’ parliaments receive more substantive explanatory materials, with particular reference made to the parliaments of Australia and New Zealand. In Australia, a National Interest Analysis accompanies each proposed Category 1 and Category 2 treaty, setting out the government’s view on:

- “the economic, environmental, social and cultural effects of the proposed treaty;
- the obligations imposed by the treaty;
- how the treaty will be implemented domestically;
- the financial costs associated with implementing and complying with the terms of the treaty; and
- the consultation that has occurred with State and Territory Governments, industry and community groups and other interested parties.”<sup>122</sup>

121. Michael Clancy told us that he was “particularly attracted by the requirement” of the National Interest Analysis in Australia, adding:

“That strikes me as a very worthwhile addition to the material one might give to Members who have to look at treaty provisions. It will have to be different from Explanatory Memoranda. An Explanatory Memorandum can sometimes be little more than the reworking of the words on the page. I say that as someone who has written an Explanatory Memorandum or two in my time. It is sometimes difficult to explain other than simply by reworking the words on the page.”<sup>123</sup>

122. **The quality of explanatory memorandums accompanying treaties will need to improve to allow Parliament to conduct effective scrutiny.**

123. **The proposed treaty committee could set guidelines for the Government on the expected contents of explanatory memorandums and other materials such as impact assessments, similar to those developed for statutory instruments by the Secondary Legislation Scrutiny Committee.**

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121 European Union Committee, *Scrutiny of International Agreements: Treaties considered on 26 February* (31st Report, Session 2017–19, HL Paper 300), Summary

122 Parliament of Australia, Joint Standing Committee on Treaties, ‘Role of the Committee’: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Treaties/Role\\_of\\_the\\_Committee](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/Role_of_the_Committee) [accessed 6 March 2019]

123 [Q 56](#) (Michael Clancy)

## CHAPTER 5: DEVOLUTION AND TREATY-MAKING

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### Introduction

124. Over the past two decades devolution of powers to Scotland, Wales and Northern Ireland has been implemented and extended, providing the devolved legislatures with competence over a range of policy areas. Future trade deals negotiated by the UK Government are likely to cover issues that are within devolved competence, such as agriculture and fisheries. However, as treaty-making is reserved, only the UK Government can negotiate and ratify such treaties.<sup>124</sup>
125. Many witnesses argued that the devolved governments should be involved in the negotiation of treaties in areas falling within their competence, and the devolved legislatures should be able to scrutinise them effectively. Jill Barrett and others observed that “The UK’s long-established treaty procedures were ... devised before the devolution settlements. The devolved administrations and legislatures are currently demanding a more formal and substantive role in shaping international agreements that affect them.”<sup>125</sup>

### Treaty-making and the devolved executives

126. The 2013 Memorandum of Understanding (MOU) between the UK Government and the executives of Scotland, Wales and Northern Ireland sets out the principles that apply to different areas of inter-governmental relations, including on international relations.<sup>126</sup> Concordat D, on international relations, states:
- “Under the devolution settlement, the United Kingdom Government is responsible for international relations. The Secretary of State for Foreign and Commonwealth Affairs is responsible for the foreign policy of the United Kingdom, and has overall responsibility for concluding treaties and other international agreements on behalf of the United Kingdom.”<sup>127</sup>
127. Jill Barrett and others explained that “devolved executives and legislatures currently have very limited direct involvement in the negotiation of international treaties, even when the duty to implement those treaties is devolved and when devolved interests might diverge from or even conflict with UK interests.”<sup>128</sup> The Scottish Government said that it already faced

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124 Our inquiry concerned the role of the UK Parliament and devolved institutions, and we have therefore not examined in detail, or drawn conclusions about, the roles of the legislatures and governments of either the Overseas Territories or Crown Dependencies in the scrutiny of treaties which affect those territories, whether they are negotiated by the UK Government or negotiated by the territories concerned under entrustment arrangements. We are, however, grateful for the evidence from HM Government of Gibraltar and welcome their report of meaningful and productive consultation with the UK Government on treaty-making (PST0027).

125 Written evidence from Jill Barrett, Queen Mary, University of London, Eirik Bjorge, Bristol University, Ewan Smith, University of Oxford, and Arabella Lang, House of Commons Library (PST0020)

126 Cabinet Office, *Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, the Scottish Ministers, The Welsh Ministers, and the Northern Ireland Executive Committee*, (1 October 2012), p 43: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/316157/MoU\\_between\\_the\\_UK\\_and\\_the\\_Devolved\\_Administrations.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/316157/MoU_between_the_UK_and_the_Devolved_Administrations.pdf) [accessed 6 March 2019]

127 *Ibid.*

128 Written evidence from Jill Barrett, Queen Mary, University of London, Eirik Bjorge, Bristol University, Ewan Smith, University of Oxford, and Arabella Lang, House of Commons Library (PST0020)

“difficulties ... in playing a full and equal role in influencing major foreign policy decisions where Scotland has a legitimate interest.”<sup>129</sup>

128. While treaty-making will continue to be a power available only to the UK Government, devolution has resulted in the institutions in Edinburgh, Cardiff and Belfast becoming responsible for a range of policy areas. Repatriation of powers from the EU gives rise to new areas in which UK (e.g. trade negotiations) and devolved (e.g. agriculture) competence overlap. Global Justice Now said:

“many areas of policy that trade deals may impact on are devolved, including: agriculture, education, human rights, procurement, local government and healthcare. Modern trade deals can have a serious impact on these areas of devolved policy and more broadly on the powers of the Scottish parliament and Welsh and [Northern Ireland] assemblies.”

129. Disputes over competence may arise after Brexit if the devolved institutions refuse to implement treaty measures that they oppose, but which the UK Government has already ratified.

130. Bruce Crawford MSP, Convenor of the Scottish Parliament’s Finance and Constitution Committee, said that overlapping competences in relation to treaties meant that the devolved institutions should be involved throughout the treaty-making process:

“Whilst recognising that international trade is a reserved competence, the [Finance and Constitution] Committee was equally cognisant that trade agreements will include a wide range of issues which fall within devolved areas, meaning that any future trade agreements may well limit the legislative competence of the devolved institutions. In the Committee’s view, it is therefore essential that the devolved institutions are involved at all stages of the trade negotiation process particularly because, as stated by the House of Commons Select Committee on International Trade, ‘each of the four nations of the UK may differ in their priorities for trade deals.’”<sup>130</sup>

131. The Scottish Government said that they should have a “formal role in establishing the UK’s priorities, policies and positions on international agreements relating to reserved matters that affect Scottish interests” where the issue is a reserved competence of the UK Government, such as security. It also argued that treaties with both reserved and devolved areas should have “prior consent from the Scottish Government on the negotiation priorities, and subsequent consent by the Scottish Government and Parliament prior to ratification.”<sup>131</sup>

132. Mick Antoniw AM, Chair of the Welsh Assembly’s Constitutional and Legislative Affairs Committee, argued that treaty-making should cease being a reserved matter for the UK Government:

“I would like there to be a specific role that required the devolved institutions to give approval to areas. I suspect that that is a step too far

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129 Written evidence from the Scottish Government ([PST00011](#))

130 Written evidence from Bruce Crawford MSP on behalf of the Finance and Constitution Committee of the Scottish Parliament ([PST0019](#))

131 Written evidence from the Scottish Government ([PST0011](#))

within the current politics in Parliament. The way to deal with it is to say that if we are genuinely recognising devolved responsibilities, and for them to be carried out by the devolved Governments effectively, when treaties are negotiated, there has to be a specific role of engagement and participation for the devolved institutions.”<sup>132</sup>

133. The Law Society of Scotland suggested a number of possible levels of involvement for the devolved institutions:

- (a) “requiring the consent of the devolved administrations to any UK negotiated trade position;
- (b) normally requiring the consent of the devolved administrations, but the UK Government not being bound to obtain such consent;
- (c) having a procedural structure for the devolved administrations’ involvement similar to that in the European Union (Withdrawal) Act 2018 for “common frameworks” (i.e. formal consent by the devolved administrations would not be required but a procedure would be set out to ensure involvement in the process);
- (d) as a minimum, and without requiring the consent of the devolved legislatures, allowing the devolved legislatures and administrations access to documents, policies etc. and allowing them to have a scrutiny and comment role.”<sup>133</sup>

134. We also heard examples of how other countries balance the interests and involvement of sub-state legislatures and executives in treaty-making. Dr Sylvia de Mars, Senior Lecturer in Law at the University of Newcastle, explained that in Germany:

“The German federal parliaments have input into German trade policy but only via the central parliament. They handle their federalism in a way that is highly compatible with how the EU has ordinarily dealt with member states’ own affairs. In effect, the central parliament has said, ‘We will take care of this. We will negotiate with our federal parliaments as the central parliament. We will take their opinions on board and reflect them in the German overall position’. That is probably an easier comparator for how the UK might wish to engage in trade negotiations in future in the light of devolved government than, say, Wallonia. That would be a rather big change from the amount of power which the devolved regions have had to date.”<sup>134</sup>

135. The Trade Justice Movement said that in Canada the federal government “has the full power to conclude trade agreements”,<sup>135</sup> but it cannot oblige the provincial authorities to implement treaties. Nick Dearden explained:

“it makes complete sense for the federal Government to keep the provinces on side throughout. In the recent CETA negotiations, Canada included devolved provinces in its negotiating team at every point so

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132 [Q 24](#) (Mick Antoniw AM)

133 Written evidence from the Law Society of Scotland ([PST0024](#))

134 [Q 17](#) (Dr Sylvia de Mars)

135 Written evidence from the Trade Justice Movement ([PST0010](#))

they could be pretty sure, when it came back, that they had a reasonable chance of getting it through.”<sup>136</sup>

As there is often a need for the provinces to implement the treaties ratified by the federal government, this has led the Province of Quebec to develop a process that requires treaties that touch upon their competence to be ratified in the National Assembly of Quebec.<sup>137</sup> Whether this is appropriate has been subject to dispute. The federal government has not accepted these claims, and other countries do not recognise “any competence on the part of Canada’s provinces to conclude treaties.”<sup>138</sup>

136. Dr Jacques Hartmann, Reader in the School of Law, University of Dundee, gave the example of the constitutional relationship between Denmark and the Faroe Islands. As is the case in the UK, devolution in the Faroe Islands is based on a reserved powers model. However, unlike in the UK—bar areas that are exempt, including issues relating to the Danish constitution and foreign policy—“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.”<sup>139</sup> This has allowed the Faroes to negotiate “several international agreements, including a special economic treaty with Iceland (the Hoyvík agreement) which established a single economic area between the parties.”<sup>140</sup>
137. David Lidington MP acknowledged that the UK Government would need to consult the appropriate devolved minister before treaty negotiations could begin:
- “It is right that the UK lead Minister should give devolved Ministers an opportunity to seek to influence the UK negotiating position. That is not the same thing as saying that there has to be a veto or that we should have some sort of qualified majority voting system to establish it. I do not think that would be right.”<sup>141</sup>
138. As well as involvement in setting the UK’s negotiating position, witnesses discussed whether representatives from the devolved governments should form part of the UK Government’s negotiating team. Jack Straw said “Yes, they should. In practice, when I was Lord Chancellor, there were certainly justice and home affairs negotiations within the EU where the Justice Minister from Scotland sat alongside me. I thought that was entirely right.”<sup>142</sup>

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136 [Q 65](#) (Nick Dearden)

137 Government of Quebec, ‘Agreements and Conventions: Participation by Quebec in international agreements’: [http://www.mrif.gouv.qc.ca/en/relations-du-quebec/organisations-et-forums/organisations-internationales/accords-et-traites](http://www.mrif.gouv.qc.ca/en/rerelations-du-quebec/organisations-et-forums/organisations-internationales/accords-et-traites) [accessed 6 March 2019]

138 Professor Joanna Harrington, ‘Scrutiny and Approval: The Role for Westminster-style Parliaments in Treaty-Making,’ *International & Comparative Law Quarterly*, vol 55, issue 1 (2006) pp121–160: <https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/scrutiny-and-approval-the-role-for-westminsterstyle-parliaments-in-treatymaking/CD668AF0A385D6E2477A4716DC298FB5> [accessed 6 March 2019]

139 Written evidence from Dr Jacques Hartmann, University of Dundee ([PST0008](#))

140 *Ibid.*

141 [Q 94](#) (David Lidington MP)

142 [Q 76](#) (Jack Straw)

139. David Lidington MP said that this was also his experience while Europe Minister:

“I remember going over to Brussels on ministerial business of my own and overlapping with the big annual fisheries meeting in December; about 30 people were crowded into the UK delegation room in the Justus Lipsius building, because all the devolveds were there in force. It depends on how many seats are available in the ministerial room, but at times devolved Ministers and officials have been in the room, if not formally at the table with the UK nameplate, and they have been able to talk to the Minister in the chair or to pass notes and see what is going on there.”<sup>143</sup>

140. **As part of its treaty-making after the UK leaves the European Union, the UK Government must engage effectively with the devolved institutions on treaties that involve areas of devolved competence.**
141. **The UK Government will need to consult the devolved governments about their interests when opening negotiations, not just to respect the competences of those governments but also in acknowledgement of the important role devolved administrations may play in the implementation of new international obligations. It is also likely that other countries participating in negotiations will seek to ensure that any new treaty will be implemented fully throughout the UK. The same logic applies to representatives from the devolved governments forming part of the UK Government’s team in relevant negotiations.**

#### **Inter-governmental relations**

142. The involvement of the devolved governments in treaty-making will rely on effective inter-governmental structures, processes and relationships. We raised concerns about the efficacy of inter-governmental mechanisms in our reports on *Inter-governmental relations in the United Kingdom* and *The Union and devolution*.<sup>144</sup>
143. As part of this inquiry, we again heard concerns that the Joint Ministerial Committee (JMC) and its sub-committees were not functioning adequately. Mick Antoniw AM said that both the structure of the JMC and a lack of support from the UK Government were causing difficulties, particularly in the context of Brexit:

“The structure is prone to not working properly. It is not designed to cope with the constitutional requirements that exist at the government level. It is also very much the case that all the promises that were made that there would be engagement and consultation have not been delivered. For example, the First Ministers of Wales and Scotland got to see the draft Brexit agreement only the night before it was published. The engagement before that was limited. There has been a real issue within the UK Government in understanding the importance of that engagement process. To date, there is considerable dissatisfaction on the

143 Q 94 (David Lidington MP)

144 Constitution Committee, *Inter-governmental relations in the United Kingdom* (11th Report, Session 2014–15, HL Paper 146); Constitution Committee, *The Union and devolution* (10th Report, Session 2015–16, HL Paper 149)

Welsh side that that has ever been complied with in spirit, let alone in practice.”<sup>145</sup>

144. The Scottish Government also said that the inter-governmental mechanisms were not working:

“For some considerable time, it has been clear that the MoU [memorandum of understanding] and Concordats are not fit for purpose. Before the June 2016 referendum, discussions had taken place between the administrations on how to update the MoU and the structures for inter-governmental consultation and co-operation. Ultimately, Ministers from the different governments and executives could not reach agreement on the best way to update the arrangements, however it remains clear that significant reform is required. Indeed the consensus from academics, think tanks, independent Commissions and Parliamentary Committees is that the current intergovernmental system is not working and there is an urgent need for reform.”<sup>146</sup>

145. David Lidington MP pointed to the ongoing review of inter-governmental relations and said that “it is going constructively. Like a lot else in government, the sheer administrative as well as legislative workload involved in Brexit means that it is probably going more slowly than one might otherwise wish.”<sup>147</sup> Mr Lidington also acknowledged that there had been tension between the UK and devolved governments:

“There is no hiding the fact that there have been some differences and disagreements. I am not here to make party-political points, but the difference has been sharpest with the Scottish Government. In part, that reflects a political difference between a unionist Government in London and a nationalist Government in Holyrood, with different strategic and constitutional objectives.”<sup>148</sup>

146. One specific concern was the lack of an effective dispute resolution mechanism for when disagreements arose between the UK and devolved governments, particularly in relation to Brexit. Mick Antoniw AM said that there was “no mechanism within the withdrawal agreement for the involvement of devolved institutions in dispute resolution. The process is dependent on the good will of the UK Government. Unfortunately, that good will cannot be relied on effectively.”<sup>149</sup>

147. David Lidington MP told us that the Government is “looking at dispute resolution mechanisms as part of the inter-governmental review”, because of the particular issues that arise out of the repatriation of competences and the need to develop UK-wide common frameworks. In the interim, Mr Lidington said: “The default position is that you have to go back to what the devolution Acts say about where competence and the right to decide ultimately lie, but you buttress that legal underpinning with conventions, memorandums of understanding and habits of good practice.”<sup>150</sup>

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145 [Q 21](#) (Mick Antoniw AM)

146 Written evidence from the Scottish Government ([PST00011](#))

147 [Q 94](#) (David Lidington MP)

148 *Ibid.*

149 [Q 26](#) (Mick Antoniw AM)

150 [Q 94](#) (David Lidington MP)

148. In its recent paper on the *Process for making free trade agreements after the United Kingdom has left the European Union*, the Government said it would seek to form a new Ministerial Forum for international trade:

“This will ensure there is a regular and formal structure to support discussion and engagement between the UK Government and the devolved administrations on trade agreements. The operational arrangements for the frequency and terms of reference for this forum are subject to ongoing discussion with the devolved administrations. Our clear intention is that the Forum will be a flexible mechanism to enable Ministerial discussion at the key points during trade negotiations ... Together, these processes will ensure that the priorities and expertise of the devolved administrations can shape and inform the development of the UK Government’s international trade policy and negotiating positions.”<sup>151</sup>

149. **Inter-governmental relations have been under stress in recent years. This reflects in part the different political composition of the governments in Westminster, Edinburgh and Cardiff, and the significant additional strain of Brexit. As we have observed in our legislative scrutiny, this has manifested itself in a number of ways including disputes over legislative consent.**
150. **It is disappointing that the recommendations of our previous reports to address the shortcomings of inter-governmental relations have not been acted on. While some tension is inevitable where competences overlap, particularly in the politically-charged context of Brexit, if problems with the inter-governmental machinery had been addressed at an earlier stage, some of them might have been ameliorated.**
151. **We welcome the review of the Memorandum of Understanding on inter-governmental relations and the operation of Joint Ministerial Committee structures. It is essential that agreement can be reached on its future operation, including its dispute resolution mechanism, in order to strengthen working relationships and provide a basis for cross-government working, including the negotiation and implementation of treaties. To this end, we also welcome the announcement of a new Ministerial Forum for international trade.**

### **Treaties and the devolved legislatures**

152. In Chapter 4 we recommended that the UK Parliament should scrutinise the Government’s treaty actions rather than participate in treaty-negotiations. It will be up to the devolved legislatures to consider what scrutiny they wish to undertake in relation to treaties, though if ministers of the devolved governments are participating in negotiations there will be an opportunity for parliamentarians to scrutinise their actions through existing mechanisms.
153. Some of our witnesses suggested that consent of the devolved legislatures to treaties that affect devolved issues should be sought prior to ratification. Dr Sam Fowles suggested an active role for the devolved legislatures, arguing that “where the treaty impacts on areas of devolved competence the draft

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151 Department for International Trade, *Processes for making free trade agreements after the United Kingdom has left the European Union*, CP 63, February 2019: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/782176/command-paper-scrutiny-transparency-27012019.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/782176/command-paper-scrutiny-transparency-27012019.pdf) [accessed 6 March 2019]

must be laid before the devolved legislatures and cannot be ratified unless those legislatures give consent according to their own procedures.”<sup>152</sup> Such a prescriptive innovation would go considerably further than the Sewel convention, whereby Parliament will not normally legislate with regard to devolved matters without the consent of the devolved legislatures.

154. Requiring the consent of the devolved legislatures would be similar to Belgium’s federal model, where the consent of its sub-state parliaments is required prior to ratification. Dr Dermot Hodson, Birkbeck College, and Professor Imelda Maher, University College Dublin, observed: “Belgium’s federal approach sometimes impedes treaty making, as occurred in October 2016 when the Parliament of the Walloon Region withheld its consent for the EU–Canada Comprehensive Economic and Trade Agreement (CETA) shortly before this agreement was due to be signed.”<sup>153</sup>

155. David Lidington MP did not consider it appropriate to require the consent of the devolved legislatures to treaties:

“I do not see how you can apply [the] Sewel [convention] to treaties. The devolution Acts are clear that international relations are the responsibility of the UK Government and Parliament, and the Sewel convention applies to legislation but not to the negotiation of treaties. Obviously, when a treaty requires implementing legislation that touches on a devolved competence, [the] Sewel [convention] kicks in and, in those circumstances, we would need to seek a legislative consent motion in the usual way. Ultimately, it is a matter for the UK Parliament to decide what should happen. That is probably the best mechanism to rely on. At the moment, I am not tempted to try to invent some new system for treaties.”<sup>154</sup>

156. **It is essential that the devolved governments are effectively involved in treaty negotiations. This should ensure that devolved competences are respected and that the devolved legislatures are able to undertake meaningful scrutiny of the treaty actions that will affect them, as the impact in some policy areas could be significant.**

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152 Written evidence from Dr Sam Fowles ([PST0013](#))

153 Written evidence from Dr Dermot Hodson, Birkbeck College, and Professor Imelda Maher, University College Dublin ([PST0025](#))

154 [Q 95](#) (David Lidington MP)

## **SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS**

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1. We recognise that treaty-making—specifically the negotiation and signature of treaties—is a function of the Government, exercised through the Royal Prerogative. (Paragraph 14)
2. The current mechanisms available to Parliament to scrutinise treaties through CRAG are limited and flawed. Reform is required to enable Parliament to conduct effective scrutiny of the Government’s treaty actions, irrespective of the consequences of Brexit. (Paragraph 33)
3. The powers that the European Parliament has developed over recent years suggest that effective scrutiny of international agreements can occur where there is sufficient political interest, information provision and powers. (Paragraph 46)
4. While we do not recommend directly replicating the European Parliament’s treaty scrutiny mechanisms at Westminster, lessons may be learned from it, particularly in relation to information provision. (Paragraph 47)
5. The UK’s departure from the European Union will result in the Government negotiating and signing more treaties than has been common in recent years. These will include complex trade treaties, which have hitherto been negotiated at EU-level and scrutinised by the European Parliament. Parliament’s scrutiny of treaties will need to adapt to these changes, as the provisions of the Constitutional Reform and Governance Act 2010 were enacted in a time where leaving the EU had not been seriously contemplated, and thus not designed to support detailed scrutiny of the volume and breadth of treaties that will be required in future. (Paragraph 54)
6. We believe a dedicated treaty committee is required to provide effective parliamentary scrutiny of treaties. Such a committee would create a natural home and possible clearing house within Parliament for all treaty-related activity, building expertise amongst members and staff and providing better scrutiny of the Government’s actions. (Paragraph 62)
7. There is a choice to be made between establishing a treaty committee in either or both Houses, or establishing a joint committee. We recognise that there are advantages and disadvantages to any model and ultimately that it will be for the Liaison Committees in both Houses to consider whether a joint committee would be desirable. If a joint committee is not the preferred option, it would be appropriate for the House of Lords to appoint its own treaty scrutiny committee. (Paragraph 67)
8. We do not believe that Parliament should be required to endorse the Government’s mandate prior to commencing treaty negotiations. This would impinge inappropriately on the Government’s prerogative power and limit the Government’s flexibility in the negotiations. However, for significant or controversial treaties, the Government will want to ensure that it has the support of Parliament at the outset of negotiations in order to secure ratification to the final text of the agreement. While this may not be a formal resolution to approve a mandate or the commencement of negotiations, the Government should consider the merits of a debate or other forms of engagement at an early stage, so that Parliament is involved in the process. (Paragraph 76)

9. We recommend that the Government should inform any treaty committee when treaty negotiations begin and provide background information about the parties to the negotiations and the broad subject areas that are expected to be discussed. This will improve the information available to Parliament and allow a treaty committee to plan its scrutiny work effectively. There may be circumstances where a treaty was not the outcome initially envisaged by the Government; in such cases, the Government should alert the committee as soon as formal negotiations begin. In many cases, especially in relation to trade negotiations, such information will be in the public domain and it will not compromise the Government's position to keep Parliament informed. We therefore welcome the Government's commitment to provide more information to Parliament at the beginning of the process for making free trade agreements and suggest this approach be considered for all treaties. (Paragraph 80)
10. We recognise that there are rare instances where the fact that negotiations are taking place is sensitive and information could not reasonably be provided to a treaty committee. On these occasions, nothing that compromises the Government's ability to negotiate freely should be disclosed. We recommend that in such circumstances the Government informs any treaty committee at the earliest appropriate opportunity and explains why confidentiality was needed earlier in the process. (Paragraph 81)
11. We believe that if Parliament is kept appropriately informed about the existence of ongoing treaty negotiations (subject to the qualification about exceptional circumstances in paragraph 81), existing parliamentary mechanisms, supplemented by the work of the proposed treaty committee, should be sufficient to provide effective scrutiny. (Paragraph 83)
12. The level of information that can reasonably be provided to Parliament during negotiations will vary considerably, but we believe there should be a general principle (rather than a legal requirement) in favour of transparency during treaty negotiations. We would not expect such information to include negotiating strategies, 'red lines' or potential areas of compromise; rather the Government might provide an assessment of progress, information on any areas on which agreement had been reached, and any changes to the list of subjects under discussion. (Paragraph 90)
13. The Government must remain in control of what information it considers is appropriate to disclose about negotiations. There will be instances when it is not in the UK's national interest for information to be shared with Parliament. We expect such occasions to be the exception rather than the norm. (Paragraph 91)
14. While an effective working relationship between any treaty committee and the Government should be established from the committee's inception, trust regarding the sharing of confidential documents can develop only gradually over time. We welcome the Government's commitment to provide select committees with sensitive information about free trade agreements on a confidential basis and we recommend that, where appropriate, this be extended to negotiations relating to other forms of treaty. (Paragraph 98)
15. A treaty committee must be able to secure a debate on treaties it deems significant. We do not believe that many treaties each session would warrant a substantive debate and so the impact on parliamentary time would be limited. (Paragraph 103)

16. While the Constitutional Reform and Governance Act 2010 could be amended to provide for an affirmative resolution, we suggest altering the application of the procedures would be more straightforward. A treaty committee should be empowered to recommend a debate on a treaty and the Government should commit to providing time for it within the 21-day period. If there is opposition to the treaty, the debate would take place on a motion under section 20 of CRAG that the treaty should not be ratified. If the treaty is significant and worthy of debate, but faces no opposition, the debate could be on a neutral motion. (Paragraph 104)
17. We suggest that any treaty committee seeks to draw on the expertise of other committees and members to assist its scrutiny through whatever process it considers appropriate. (Paragraph 109)
18. We recommend that the proposed treaty committee undertake a sifting function to identify which treaties are of greatest significance and to draw those to the attention of Parliament. (Paragraph 110)
19. We recommend that the Government keeps the proposed treaty committee informed in broad terms about the treaties that are under negotiation, in order that the committee can anticipate which treaties will need to be sifted for greater scrutiny and prepare accordingly. (Paragraph 111)
20. We welcome the Government's commitment to provide the text of trade agreements to a committee prior to laying them before Parliament for the purposes of the Constitutional Reform and Governance Act 2010. We recommend that this process is followed for all types of treaty. (Paragraph 115)
21. In addition, section 21 of the Constitutional Reform and Governance Act 2010 allows for the 21 sitting day period to be extended at the discretion of ministers. A treaty committee should not be constrained in its scrutiny by the 21 sitting day provision in the CRAG. We recommend that the Government commits to extending the treaty consideration period if requested by the proposed treaty committee to allow for the completion of scrutiny, unless there are exceptional reasons not to do so. (Paragraph 116)
22. The quality of explanatory memorandums accompanying treaties will need to improve to allow Parliament to conduct effective scrutiny. (Paragraph 122)
23. The proposed treaty committee could set guidelines for the Government on the expected contents of explanatory memorandums and other materials such as impact assessments, similar to those developed for statutory instruments by the Secondary Legislation Scrutiny Committee. (Paragraph 123)
24. As part of its treaty-making after the UK leaves the European Union, the UK Government must engage effectively with the devolved institutions on treaties that involve areas of devolved competence. (Paragraph 140)
25. The UK Government will need to consult the devolved governments about their interests when opening negotiations, not just to respect the competences of those governments but also in acknowledgement of the important role devolved administrations may play in the implementation of new international obligations. It is also likely that other countries participating in negotiations will seek to ensure that any new treaty will be implemented fully throughout the UK. The same logic applies to representatives from

the devolved governments forming part of the UK Government's team in relevant negotiations. (Paragraph 141)

26. Inter-governmental relations have been under stress in recent years. This reflects in part the different political composition of the governments in Westminster, Edinburgh and Cardiff, and the significant additional strain of Brexit. As we have observed in our legislative scrutiny, this has manifested itself in a number of ways including disputes over legislative consent. (Paragraph 149)
27. It is disappointing that the recommendations of our previous reports to address the shortcomings of inter-governmental relations have not been acted on. While some tension is inevitable where competences overlap, particularly in the politically-charged context of Brexit, if problems with the inter-governmental machinery had been addressed at an earlier stage, some of them might have been ameliorated. (Paragraph 150)
28. We welcome the review of the Memorandum of Understanding on inter-governmental relations and the operation of Joint Ministerial Committee structures. It is essential that agreement can be reached on its future operation, including its dispute resolution mechanism, in order to strengthen working relationships and provide a basis for cross-government working, including the negotiation and implementation of treaties. To this end, we also welcome the announcement of a new Ministerial Forum for international trade. (Paragraph 151)
29. It is essential that the devolved governments are effectively involved in treaty negotiations. This should ensure that devolved competences are respected and that the devolved legislatures are able to undertake meaningful scrutiny of the treaty actions that will affect them, as the impact in some policy areas could be significant. (Paragraph 156)

## APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

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### Members

Lord Beith  
 Baroness Corston  
 Baroness Drake  
 Lord Dunlop  
 Lord Hunt of Wirral  
 Lord Judge  
 Lord MacGregor of Pulham Market  
 Lord Morgan  
 Lord Norton of Louth  
 Lord Pannick  
 Baroness Taylor of Bolton (Chairman)  
 Lord Wallace of Tankerness

### Declarations of interest

Lord Beith  
*Honorary Bencher of the Middle Temple*

Baroness Corston  
*No relevant interests*

Baroness Drake  
*No relevant interests*

Lord Dunlop  
*No relevant interests*

Lord Hunt of Wirral  
*Partner DAC Beachcroft LLP*  
*Co-Chair, All-Party Parliamentary Group on Legal and Constitutional Affairs*  
*Honorary Bencher of the Middle Temple*

Lord Judge  
*Former Lord Chief Justice of England and Wales (2008–2013)*

Lord MacGregor of Pulham Market  
*No relevant interests*

Lord Morgan  
*No relevant interests*

Lord Norton of Louth  
*No relevant interests*

Lord Pannick  
*Represented the lead claimant, Ms Gina Miller, in R (Miller) v Secretary of State for Exiting the European Union [2017]*

Baroness Taylor of Bolton (Chairman)  
*No relevant interests*

Lord Wallace of Tankerness  
*No relevant interests*

A full list of members' interests can be found in the Register of Lords' Interests:

<http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests/>

Professor Mark Elliott, Professor of Public Law at the University of Cambridge, and Professor Stephen Tierney, Professor of Constitutional Theory at the University of Edinburgh, acted as specialist advisers for the inquiry. They both declared no relevant interests.

## APPENDIX 2: LIST OF WITNESSES

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Evidence is published online at <https://www.parliament.uk/parliamentary-scrutiny-of-treaties-inquiry> and available for inspection at the Parliamentary Archives (020 7219 3074).

Evidence received by the Committee is listed below in chronological order of oral evidence session and in alphabetical order. Those witnesses marked with \* gave both oral evidence and written evidence. Those witnesses marked \*\* gave oral evidence and did not submit any written evidence. All other witnesses submitted written evidence only.

### Oral evidence in chronological order

- |    |  |                                 |
|----|--|---------------------------------|
| *  | Professor Elaine Fahey, Professor of Law & Associate Dean (International), City Law School, University of London             | <a href="#"><u>QQ 1–9</u></a>   |
| ** | Professor David Howarth, Professor of Law and Public Policy, University of Cambridge   |                                 |
| *  | Dr Mario Mendez, Reader in Law, Queen Mary University of London  |                                 |
| ** | Jude Kirton-Darling MEP  | <a href="#"><u>QQ 10–20</u></a> |
| ** | Dr Sylvia de Mars, Senior Lecturer in Law, University of Newcastle   |                                 |
| ** | Mick Antoniw AM, Chair, Constitutional and Legislative Affairs Committee, National Assembly of Wales                         | <a href="#"><u>QQ 21–32</u></a> |
| *  | Sir Franklin Berman QC, Barrister with Essex Court Chambers and former Legal Adviser to the Foreign and Commonwealth Office. | <a href="#"><u>QQ 33–41</u></a> |
| ** | Alexander Downer, Former Australian Minister for Foreign Affairs and High Commissioner to the UK                             | <a href="#"><u>QQ 42–50</u></a> |
| ** | Dr Brigid Fowler, Senior Researcher, Hansard Society   | <a href="#"><u>QQ 51–61</u></a> |
| *  | Michael Clancy OBE, Director of Law Reform, Law Society of Scotland  |                                 |
| *  | Nick Dearden, Director, Global Justice Now   | <a href="#"><u>QQ 62–68</u></a> |
| *  | David Lawrence, Senior Political Adviser, Trade Justice Movement   |                                 |
| ** | Rt Hon Jack Straw, former Foreign Secretary and former Lord Chancellor   | <a href="#"><u>QQ 69–78</u></a> |
| ** | Rt Hon Sir Malcolm Rifkind, former Foreign Secretary   | <a href="#"><u>QQ 79–87</u></a> |
| ** | Rt Hon Sir Alan Duncan, Minister of State for Europe and the Americas  | <a href="#"><u>QQ 88–97</u></a> |
| ** | Rt Hon David Lidington MP, Chancellor of the Duchy of Lancaster  |                                 |

- \*\* Julia Crouch, Deputy Director for International Agreements, Foreign and Commonwealth Office

### Alphabetical list of all witnesses

- \*\* Mick Antoniw AW, Chairman, Constitutional and Legislative Affairs Committee, National Assembly of Wales ([QQ 21–32](#))
- Jill Barrett, Queen Mary University of London [PST0021](#)  
[PST0020](#)
- \* Sir Franklin Berman QC, Barrister with Essex Court Chambers and former Legal Adviser to the Foreign and Commonwealth Office. ([QQ 33–41](#)) [PST0002](#)
- Eirik Bjorge, Bristol University [PST0020](#)
- \* Michael Clancy OBE, Director of Law Reform, Law Society of Scotland ([QQ 51–61](#)) [PST0024](#)
- Christian Concern [PST0014](#)
- Bruce Crawford MSP, Convenor, Finance and Constitution Committee, Scottish Parliament [PST0019](#)
- \*\* Julia Crouch, Deputy Director for International Agreements, Foreign and Commonwealth Office ([QQ 88–97](#))
- \*\* Nick Dearden, Director, Global Justice Now ([QQ 62–68](#))
- \*\* Rt Hon Sir Alan Duncan MP, Minister of State for Europe and the Americas ([QQ 88–97](#))
- Equality and Human Rights Commission [PST0016](#)
- \*\* Jude Kirton-Darling MEP ([QQ 10–20](#))
- \*\* Alexander Downer, Former Australian Minister for Foreign Affairs and High Commissioner to the UK ([QQ 42–50](#))
- \* Professor Elaine Fahey, Professor of Law & Associate Dean (International), City Law School, University of London [PST0006](#)
- \*\* Dr Brigid Fowler, Senior Researcher, Hansard Society ([QQ 51–61](#))
- Dr Sam Fowles [PST0013](#)
- Friends of the Earth England, Wales & Northern Ireland [PST0005](#)
- Foreign and Commonwealth Office [PST0023](#)
- Global Justice Now [PST0001](#)
- Professor Joanna Harrington, Faculty of Law, University of Alberta [PST0018](#)

|    |  |                                |
|----|--|--------------------------------|
|    | Dr Jacques Hartmann, Reader in Law and Director of the LLM in International Law & Security, University of Dundee             | <a href="#"><u>PST0008</u></a> |
|    | Susan Hedley   | <a href="#"><u>PST0007</u></a> |
|    | David Henig, Director of the UK Trade Policy Project, European Centre for International Political Economy                    | <a href="#"><u>PST0004</u></a> |
|    | HM Government of Gibraltar   | <a href="#"><u>PST0027</u></a> |
|    | Dr Dermot Hodson, Reader in Political Economy, Birkbeck, University of London  | <a href="#"><u>PST0025</u></a> |
| ** | David Lawrence, Senior Political Adviser, Trade Justice Movement ( <a href="#"><u>QQ 62–68</u></a> )                         |                                |
|    | Lord Boswell of Aynho, Chairman of the European Union Select Committee   | <a href="#"><u>PST0026</u></a> |
|    | Professor Imelda Maher, Dean of Law and Sutherland Professor of European Law, University College Dublin                      | <a href="#"><u>PST0025</u></a> |
|    | Arabella Lang, House of Commons Library  | <a href="#"><u>PST0020</u></a> |
| ** | Rt Hon David Lidington MP, Chancellor of the Duchy of Lancaster ( <a href="#"><u>QQ 88–97</u></a> )                          |                                |
| ** | Dr Sylvia de Mars, Senior Lecturer in Law at the University of Newcastle ( <a href="#"><u>QQ 10–20</u></a> )                 |                                |
| *  | Dr Mario Mendez, Reader in Law, Queen Mary University of London ( <a href="#"><u>QQ 1–9</u></a> )                            | <a href="#"><u>PST0022</u></a> |
|    | National Assembly of Zambia  | <a href="#"><u>PST0003</u></a> |
| ** | Rt Hon Sir Malcolm Rifkind, former Foreign Secretary ( <a href="#"><u>QQ 79–87</u></a> )                                     |                                |
|    | Secondary Legislation Scrutiny Committee   | <a href="#"><u>PST0015</u></a> |
|    | The Scottish Government  | <a href="#"><u>PST0011</u></a> |
|    | Ewan Smith, Shaw Foundation Junior Research Fellow at Jesus College, Oxford  | <a href="#"><u>PST0020</u></a> |
| ** | Rt Hon Jack Straw, former Foreign Secretary and former Lord Chancellor ( <a href="#"><u>QQ 69–78</u></a> )                   |                                |
|    | Trade Justice Movement   | <a href="#"><u>PST0010</u></a> |
|    | University of Nottingham Treaty Centre   | <a href="#"><u>PST0017</u></a> |
|    | War on Want  | <a href="#"><u>PST0009</u></a> |
|    | Sir Michael Wood, member of the International Law Commission and former legal adviser to the Foreign and Commonwealth Office | <a href="#"><u>PST0012</u></a> |

**APPENDIX 3: LETTER FROM THE CHAIR OF THE JOINT  
COMMITTEE ON HUMAN RIGHTS TO THE CHAIRMAN, 20  
FEBRUARY 2019**

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Dear Ann,

Thank you for your letter of 29 November 2018 relating to the House of Lords Constitution Committee inquiry into parliamentary scrutiny of treaties. As you note, this is an important topic, especially in light of Brexit.

The JCHR has undertaken a short inquiry into human rights protections in international agreements. We hope to agree the report following that inquiry shortly and it will, I hope, be of interest to your Committee and complement your work.

The Committee has already discussed the broad approach, and our view in general terms is likely to be that the Government should do more to ensure that human rights considerations should be taken into account as and when international agreements are negotiated.

It is clear that, as other Committees have said, Parliament should be given more and better information about the agreements Government intends to negotiate, and their aims. From our point of view, such information should indicate any human rights issues that might be relevant to the negotiation as well as any human rights protections that might need to be sought. We would like human rights memoranda to be given to Parliament (and to JCHR) as a matter of course, with suitable levels of analysis.

The Committee is also likely to consider whether there is enough information given to Parliament on the implementation of international agreements containing human rights protections.

We look forward to colleagues' views, including those of the House of Lords Constitutional Committee, on how best to construct and resource a parliamentary process to sift all international agreements and highlight those which require further consideration to the appropriate Committee.

Yours sincerely

Rt Hon Harriet Harman MP

Chair, Joint Committee on Human Rights

## APPENDIX 4: CALL FOR EVIDENCE

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The Constitution Committee has launched an inquiry into the parliamentary scrutiny of treaties and invites individuals and organisations to submit evidence.

When the UK leaves the European Union, the Government will seek to rollover and replicate some existing international treaties and begin negotiation on new treaties. These will be both with the EU and with other countries, and on a wide range of topics including aviation, fisheries and nuclear safety, as well as trade.

Parliament currently has few procedures or mechanisms for scrutinising the government's treaty actions, and its role needs to be re-examined to ensure that it is sufficiently robust to deal with potentially many more treaties.

Parliament's treaty role was put on a statutory basis by the Constitutional Reform and Governance Act 2010. The Act formalised some of the Ponsonby Rule, placing a requirement on the Government to lay before Parliament most treaties that it wishes to ratify, along with an Explanatory Memorandum. For the first time, the Act also gave parliamentary disapproval of treaties statutory effect, and gave the House of Commons a power to block ratification. In addition, since 2014 the Secondary Legislation Scrutiny Committee has scrutinised treaties laid before Parliament at the point of ratification, and some select committees also look at some treaty actions in their areas. Further, parts of some treaties need implementing legislation in the UK, allowing Parliament to consider how those elements will be implemented in the UK. But unlike in some other countries, Parliament does not have to approve most treaties, or debate or vote on them, and has no formal opportunity to influence their terms.

Parliamentary scrutiny of treaties at the EU-level is more substantial. The EU Parliament is required to authorise the opening and conclusion of treaty negotiations and the EU's negotiator is required to keep the relevant parliamentary committee fully updated throughout the process. This system of parliamentary oversight of negotiations and treaty agreements will cease to apply after Brexit, resulting in a reduction in the scrutiny of treaties that affect the UK.

For this inquiry, the Committee is interested in: the effectiveness of Parliament's current treaty role; how other countries' parliaments and the EU Parliament conduct treaty scrutiny; and, how and when Parliament should scrutinise government's negotiating of and agreement to treaties after Brexit.

The Committee welcomes written submissions on any aspect of this topic, and particularly on the issues and questions set out below. Submissions need not address all the questions. We welcome contributions from all interested individuals and organisations.

### Questions

1. How effective is Parliament's current scrutiny of treaties in both holding the Government to account and helping it get the best agreements possible? How useful are the processes and powers under the Constitutional Reform and Governance Act 2010 and do they strike the right balance between Parliament and government?
2. What challenges does Brexit pose for Parliament's consideration of treaties?

3. What role should Parliament have in the future in scrutinising treaties, from potentially requiring approval for the negotiating mandate through negotiations themselves to treaty agreement, as well as in subsequent treaty actions like amendments, derogations, enforcement and withdrawal? How should this link to Parliament's consideration of treaty-implementing legislation?
4. To what extent, if at all, does the judgment of the Supreme Court in the Miller case on triggering Article 50 have implications for the government's future treaty actions?
5. Should different types of treaties be subject to different levels of scrutiny? If so, how should these be differentiated?
6. Is a parliamentary treaties scrutiny committee required to examine government treaty actions post-Brexit? If so, how should it be composed and supported, and what powers should it have? Or would another model be appropriate?
7. What information should the government provide to Parliament on its treaty actions? Should there be a regular reporting requirement during negotiations?
8. How might the government and/or Parliament best engage other stakeholders and members of the public during treaty negotiation and scrutiny?
9. What models of treaty scrutiny in other countries are most effective and what might the UK Parliament learn from them?
10. What role should the devolved institutions have in negotiating and agreeing treaties?