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European Union Committee

11th Report of Session 2019-21

Treaty scrutiny: working practices

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The European Union Committee

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SUMMARY

The International Agreements Sub-Committee was established in April 2020 as a Sub-Committee of the European Union Committee. Its responsibility is to consider "matters relating to the negotiation and conclusion of international agreements". This includes, but is not limited to, all treaties laid under the Constitutional Reform and Governance Act 2010 (the CRAG Act) and those trade agreements the Government is negotiating post-Brexit. This report, on working practices, follows on from a short inquiry, which we commenced on 11 May 2020.

The establishment of the new Committee presents the House with an opportunity to address some of the deficiencies of Parliament's current treaty scrutiny processes.

In this report we consider how the Sub-Committee can conduct practical and effective scrutiny of international agreements, within the current statutory framework. We note concerns that have previously been expressed about the CRAG Act around the provision of information prior to signature of agreements and the amount of time available for scrutiny. Time and experience will show whether it is possible to conduct effective scrutiny within the short 21-sitting-day timetable provided for under the CRAG Act.

Experience may show that it is not possible to ensure adequate scrutiny of international agreements without legislative change. As immediate legislative change is unlikely, we have used our report to set out a series of pragmatic recommendations to facilitate parliamentary treaty scrutiny without the need for amendments to the CRAG Act.

Our report also highlights the importance of engagement: with the devolved administrations and legislatures, other Committees within the UK Parliament, and stakeholders.

International agreements can have a significant impact on the constituent parts of the UK and can impinge on devolved interests and competencies. In addition to encouraging real and meaningful consultation to ensure that international agreements reflect the interests of Scotland, Wales and Northern Ireland, we will also need to find a way to support interparliamentary dialogue.

We will need to work together with many other committees of the UK Parliament, each of which will have a shared interest in international agreements. Cooperation will be essential to ensure that our work is mainstreamed across Parliament, and that the Government can be held to account across the very wide range of policy areas that can be covered by international agreements.

Effective scrutiny requires that those who are affected by international agreements as well as experts have the chance to comment on the consequences of any agreement. We will therefore issue public calls for evidence on all agreements which are potentially legally, politically, or economically important, and encourage all interested stakeholders to contribute.

Most of our recommendations to Government relate to the provision of information. If the CRAG Act is not to be amended, then it is essential that the Government provides detailed and comprehensive information at each stage of the treaty-making process. Accordingly, we welcome the commitments on

parliamentary scrutiny made to us by the Department for International Trade. In particular, its commitment to allow Committees time to make detailed reports on any new trade agreement that has been reached, prior to laying the agreement under the CRAG Act, is essential to allow for proper analysis of agreements.

We encourage other Whitehall departments to follow the lead of the Department for International Trade and make similar commitments to ensure that other important agreements, for example in respect of the environment, security and private international law, are scrutinised just as effectively as trade agreements.

We also urge the Foreign and Commonwealth Office to engage positively in a discussion on how the Sub-Committee can scrutinise other relevant material, including amendments to international agreements, and 'treaty-like agreements', such as memoranda of understanding, in a proportionate and pragmatic way.

Treaty scrutiny: working practices

CHAPTER 1: INTRODUCTION

The establishment of the International Agreements Sub-Committee

1. The International Agreements Sub-Committee was established in April 2020 as a sub-committee of the European Union Committee. This followed the decision of the House of Lords to endorse a recommendation by the Procedure Committee to revise the terms of reference of the European Union Committee by including a duty "to consider matters relating to the negotiation and conclusion of international agreements".[1]

2. Although it is currently a Sub-Committee of the European Union Committee, the International Agreements Sub-Committee has been asked to consider the Government's conduct of negotiations of international agreements with states and other international parties. This could encompass a wide range of agreements, described in detail below. The Sub-Committee is also specifically tasked to scrutinise *all* treaties that are laid before Parliament under the Constitutional Reform and Governance Act 2010 (the CRAG Act).

This inquiry

3. At its first meeting, the Sub-Committee agreed to conduct a short inquiry into working practices. The inquiry opened on 11 May 2020 and two private round-table meetings were held with experts on international agreements.[2] We also received 15 written submissions. We would like to thank everyone who contributed helpful evidence to our inquiry.

4. This report examines some of the challenges to effective scrutiny of treaties under the UK constitutional settlement and how the Sub-Committee intends to operate within the current legislative framework. It also sets out some requests to the Government to ensure that its treaty scrutiny work is both effective and of practical assistance to interested stakeholders and the Government itself.

5. **We make this report to the House for debate.**

Background: some historical context

6. The UK Government signs and ratifies international agreements (or treaties—we use the terms interchangeably) under the royal prerogative. Historically, Parliament's involvement has been limited, but as the UK is what is known as a dualist state,[3] Parliament is often required to legislate to bring domestic law into line with proposed treaty obligations. This does not have to be by

1 HL Deb, 17 March 2020, col 1389

2 At these two events we heard from Arabella Lang, House of Commons Library; Dr Holger Hestermeyer, Kings College London; Jill Barrett, Queen Mary (University of London) and 6 Pump Court Chambers; Alexander Downer, former Australian Minister for Foreign Affairs (1996–2007) and High Commissioner to the UK (2014–18); Jason Langrish, former Canadian trade negotiator and Executive Director of Canada Europe Roundtable for Business; and Jude Kirton-Darling, former MEP and member of the European Parliament's International Trade Committee.

3 Unless the relevant powers already exist in domestic law, Parliament needs to legislate for treaty provisions to have direct domestic legal effect.

way of primary legislation: for example, the Institute for Government (IfG) has noted that Parliament has already given the Government many of the powers it would need to implement Free Trade Agreements (FTAs), since tariff reduction can be implemented by negative statutory instrument under section 9 of the Taxation (Cross-border Trade) Act 2018.[4] Some treaties may therefore come into force without any parliamentary debate having taken place.

7. Parliament is also notified of international agreements that the Government intends to ratify. But it has no role in the negotiation of agreements and has no effective veto power under the CRAG Act (discussed below) to prevent the Government from ratifying agreements that Parliament does not feel are in the national interest.

8. Concerns about this state of affairs were expressed as far back as the nineteenth century. In the introduction to the Second Edition of his seminal work, *The English Constitution*, Walter Bagehot observed:

> "Treaties are quite as important as most laws, and to require the elaborate assent of representative assemblies to every word of the law, and not to consult them even as to the essence of the treaty, is prima facie ludicrous. In older forms of the English Constitution, this may have been quite right; the power was then really lodged in the Crown and because Parliament met very seldom, and for other reasons, it was then necessary that, on a multitude of points, the Crown should have much more power than is amply sufficient for the present."[5]

9. Bagehot identified that, under the system as it then stood, "the Government which negotiates a treaty can hardly be said to be accountable to any one", even though (in some cases) once the treaty has been made by the Government it cannot be undone in the same way as domestic legislation.[6] He argued that it would be advantageous to "require that in some form the assent of Parliament" should be given to treaties, and that "we should have a real discussion prior to the making of such treaties." Bagehot noted that, were this done, "We should have the reason for the treaty plainly stated, and also the reasons against it."[7]

The Ponsonby Rule

10. Despite the arguments made in favour of parliamentary involvement in the agreement of treaties, reform was slow. In 1924 the Foreign Affairs Minister, Arthur Ponsonby, gave a multi-part undertaking to Parliament during the Commons Second Reading debate on the Treaty of Peace (Turkey) Bill. He affirmed that:

> "It is the intention of His Majesty's Government to lay on the table of both Houses of Parliament every treaty, when signed, for a period of 21 days, after which the treaty will be ratified …
>
> In the case of important treaties, the Government will, of course, take an opportunity of submitting them to the House for discussion within this period. But, as the Government cannot take upon itself to decide

4 Written evidence from the Institute for Government (TWP0008), para 23
5 Walter Bagehot, *The English Constitution*, 2nd Edition (Brighton: Sussex Academic Press, 1997), p. 176
6 *Ibid.*, p. 178
7 *Ibid.* p. 179

> what may be considered important or unimportant, if there is a formal demand for discussion forwarded through the usual channels from the Opposition or any other party, time will be found for the discussion of the treaty in question."[8]

11. The third limb of the commitment was that the Government desired that Parliament should:

> "also exercise supervision over agreements, commitments and undertaking by which the nation may be bound in certain circumstances and which may involve international obligations of a serious character, although no signed and sealed document may exist."[9]

12. Over time the requirement for a treaty to lie on the table for 21 calendar days has hardened into a requirement for all treaties to be laid for at least 21 *sitting* days before ratification. This commitment has come to be referred to as the Ponsonby Rule.[10]

13. Notwithstanding the Ponsonby Rule, in 1998 Professor Robert Blackburn observed that Westminster was "the only Parliament in the European Union that lacks a formal mechanism for securing parliamentary scrutiny and approval of treaties".[11]

The Constitutional Reform and Governance Act 2010

14. Two significant changes have occurred in recent years. The first was a commitment by the Government in 1996, in response to the publication of the Treaties (Parliamentary Approval) Bill, a private member's bill, to produce Explanatory Memoranda (EM) alongside treaties. The second was the passage of the CRAG Act, which codified some aspects of the Ponsonby Rule into statute. The CRAG Act was passed following the Governance of Britain review, conducted from 2008 until 2010. The changes relating to treaties were first suggested as part of the Draft Constitutional Renewal Bill.

15. Part 2 of the CRAG Act requires that a treaty be laid before Parliament for 21 sitting days prior to ratification, accompanied by an EM "explaining the provisions of the treaty, the reasons for Her Majesty's Government seeking ratification of the treaty, and such other matters as the Minister considers appropriate."

16. The CRAG Act did little new to facilitate scrutiny of agreements (since it merely codified an existing convention) and did not provide Parliament with a power to prevent the ratification of an agreement. Moreover, the obligations on the Government only arise once the agreement has been signed, which is too late in the process to influence the content of the agreement. The Act does provide the House of Commons with a power to delay the ratification of an agreement, potentially indefinitely, but this has never been used and can be sidestepped entirely in undefined "exceptional circumstances".[12] On the question of post-signature review of bi-lateral agreements, Professor

8 HC Deb, 1 April 1924, vol 171, cols 2000–05
9 *Ibid.*
10 For more background on the operation of the Ponsonby Rule, prior to the passage of the CRAG Act, see: House of Commons Procedure Committee, *Parliamentary Scrutiny of Treaties* (Second Special Report, Session 1999–2000, HC 210).
11 Robert Blackburn, 'Parliament and Human Rights' in Dawn Oliver and Gavin Drewry (eds), *The Law and Parliament* (London: Butterworths, 1998), p. 188–9
12 Constitutional Reform and Governance Act 2010, section 22

Campbell McLachlan QC (Professor of International Law at Victoria University of Wellington) has observed that:

> "Post-signature review suffers from the defect that it presents Parliament with an all-or-nothing choice. It can either accept the treaty in the form in which it has been negotiated, or reject it in its entirety. This greatly limits the substantive contribution that Parliament can make."[13]

17. By 2016, Arabella Lang, the (then) specialist on international law at the House of Commons Library had concluded that:

> "The CRAG [Act] 2010 does nothing new to help Parliament actually scrutinise treaties. In other words, there is nothing to ensure that Parliament looks at treaties in a systematic way, decides which are significant or controversial and presents its democratic opinions on them to Government at a point where it could make a difference. This is perhaps surprising given that the aim of the Governance of Britain proposals was 'to hold power more accountable'."[14]

18. In the most recent edition of Modern Treaty Law and Practice, former Foreign Office Deputy Legal Adviser, Anthony Aust, described Part 2 of the CRAG as an "unnecessary" and "cumbersome" procedure.[15] In response to our call for evidence, Stephen Adams (senior counsel at Global Counsel) argued that the UK's current structures for parliamentary oversight of treaties represent the "rudimentary minimum" to fulfil important accountability functions.[16]

Brexit: A new interest in treaty scrutiny

19. One reason that there may have been limited interest in domestic scrutiny of treaties is that, while the UK was an EU Member State, much of the work negotiating agreements was done by the EU on the UK's behalf. Agreements within EU competence were scrutinised in detail by the European Parliament, including UK MEPs, and the European Parliament has veto powers in respect of certain agreements under Article 218 of the Treaty on the Functioning of the European Union. On the domestic front, the European Union Committee in the House of Lords and the European Scrutiny Committee in the House of Commons scrutinised the decisions made by UK Ministers at the main EU decision-making body, the Council. These mechanisms have now come to an end following the UK's exit from the European Union on 31 January 2020.

20. In the 2017–19 session, there was increased interest in the future of treaty scrutiny. Until 2019, the only regular committee-based scrutiny of agreements was conducted by the House of Lords Secondary Legislation Scrutiny Committee (SLSC), which began to scrutinise treaties in the 2014–15 session. In 2019, much of this work was taken over by the European Union Committee, which scrutinised all Brexit-related agreements, while the SLSC continued to scrutinise agreements unrelated to Brexit. The EU Committee produced over 20 reports, looking at more than 50 agreements, most of them continuity trade agreements which sought to replicate or 'rollover' trade

13 Written evidence from Prof Campbell McLachlan QC (TWP0003), para 26
14 Arabella Lang, 'Parliament and International Treaties' in Alexander Horne and Andrew Le Sueur (eds), *Parliament: Legislation and Accountability* (Oxford: Hart, 2016), p. 251
15 Anthony Aust, *Modern Treaty Law and Practice*, 3rd Edition (Cambridge: Cambridge University Press, 2013), p. 168
16 Written evidence from Stephen Adams (TWP0012), para 1

agreements that the EU had with third countries. Following a report of the Committee, 2019 also saw the first debate following a motion under CRAG.[17]

21. In June 2019 the European Union Committee published a report entitled *Scrutiny of international agreements: lessons learned*. It concluded that the CRAG Act was "poorly designed to facilitate parliamentary scrutiny" and highlighted potential improvements in information sharing and transparency which could enable Parliament to do a better job.[18]

22. The House of Lords Constitution Committee also showed interest in international agreements, publishing its report *Parliamentary Scrutiny of Treaties* in April 2019.[19] The House of Commons International Trade Committee published a report entitled *UK trade policy and transparency* in December 2018.[20]

23. These reports were all published recently, and we do not rehearse their recommendations in detail. Nonetheless, we seek to build on their conclusions. We note that all three reports called for greater transparency; a role for Parliament much earlier in the process of negotiating international agreements; and a proper role for the devolved institutions. Significant concerns were also expressed as to whether it was possible to conduct meaningful parliamentary scrutiny within the timetable permitted under the CRAG Act.

24. The Constitution Committee recommended that a new treaty scrutiny committee should be established, which could identify treaties which required further scrutiny and draw them to the special attention of the House. It stated that:

> "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."[21]

25. The International Trade Committee also highlighted the need for sufficient time to be found between a final text of a treaty being agreed and it being presented to Parliament, in order that it is feasible for a report to be made. In addition, it highlighted the importance of involving business and civil society in the formulation and oversight of trade policy.[22]

26. The scrutiny of trade deals was the subject of much debate during consideration of the Trade Bill in the 2017–19 session. During the Commons Bill stages, Caroline Lucas MP proposed a new clause that would have

17 HL Deb, 13 March 2019, cols 1107 *et seq*
18 European Union Committee, *Scrutiny of international agreements: lessons learned* (42nd Report, Session 2017–19, HL Paper 387)
19 Constitution Committee, *Parliamentary Scrutiny of Treaties* (20th Report, Session 2017–19, HL Paper 345)
20 International Trade Committee, *UK trade policy transparency and scrutiny* (Sixth Report, Session 2017–19, HC 1043)
21 *Parliamentary scrutiny of treaties*, summary
22 *UK trade policy*

required the Government to engage with Parliament in some detail and obtain its approval prior to the ratification of any trade agreement.

27. During the Bill's Lords Stages, there were multiple amendments relating to Parliament's role in trade agreements. At the beginning of Committee stage, Baroness Smith of Basildon moved a motion, agreed on division, that the Report stage should not proceed until the Government had set out its proposals for a process for making new trade agreements, "including roles for Parliament and the devolved legislatures and administrations in relation to both a negotiating mandate and a final agreement".[23] This requirement was eventually met by the publication, in February 2019, of a Command Paper entitled *Processes for making free trade agreements after the United Kingdom has left the European Union*.[24]

28. The Lords also agreed an amendment relating to parliamentary scrutiny of trade agreements. This would have, among other things, required the Government to gain consent from Parliament to its draft negotiating mandate; required the Government to consult with the devolved administrations on the content of the draft negotiating mandate; and amended the CRAG Act to require the Government to seek approval from Parliament before ratifying any new trade agreement.[25]

29. The Trade Bill fell at the end of the last Parliament.

30. **The establishment of an International Agreements Sub-Committee in the House of Lords presents a fresh opportunity to address some of the deficiencies of the UK Parliament's treaty scrutiny processes.**

31. **It is evident from the Government responses to select committee reports in the last Parliament that it is reluctant to amend the legislative framework and review the timetable for scrutiny under the CRAG Act. We have therefore used this report to set out what we believe are a series of pragmatic and proportionate recommendations to facilitate effective Parliamentary treaty scrutiny, without the need for legislative change.**

32. **Time and experience will tell whether it is possible to conduct meaningful scrutiny within the current timescales. Much will depend on how far the Government is willing to share information in advance of laying an agreement under the CRAG Act. Accordingly, we anticipate reviewing our work within a year and making further recommendations. If we cannot make treaty scrutiny work within the current framework, legislative change may prove the only means to ensure adequate scrutiny of international agreements.**

23 HL Deb, 21 January 2019, col 506

24 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 [accessed 3 July 2020]

25 The text of this amendment is included at Appendix 4 of this report.

CHAPTER 2: PROCESSES AND REQUIREMENTS FOR EFFECTIVE SCRUTINY

Workstreams and scrutiny

33. We anticipate that the new Sub-Committee's three main workstreams are likely to be:

- scrutiny of agreements subject to ratification under the CRAG Act;
- inquiries on proposed FTAs; and
- inquiries on international agreements or proposed agreements that are unrelated to trade.

34. In respect of the first of these, we are tasked with scrutinising *all* international agreements subject to ratification under the CRAG Act. This means that, in addition to FTAs, we will scrutinise a wide range of other agreements relating to the environment, security, private international law and other matters. We will draw those that are most important to the special attention of the House of Lords.

35. Questions also arise over the scrutiny of amendments to international agreements, and 'treaty-like documents' which are not covered by the CRAG Act. These include agreements with entities that the UK Government does not recognise as a State (e.g. the Palestinian Authority) and Memoranda of Understanding (political agreements between States which are not binding in international law, but which may prompt interest and debate) (MoUs).[26] These issues are considered in more detail in Chapter 3.

Criteria for whether to draw a treaty to the special attention of the House

36. The Sub-Committee will use the following criteria, originally adopted by the European Union Committee and subject to only one minor amendment,[27] in deciding whether to draw a treaty to the special attention of the House:

(a) that it is politically or legally important, or gives rise to issues of public policy that the House may wish to debate prior to ratification;

(b) in the case of any agreement that is intended to 'roll over' an agreement by which the UK was previously bound, as an EU Member State, that it differs significantly from the precursor agreement, or that it is inappropriate, in view of changed circumstances since the precursor agreement was concluded by the EU;

(c) that it contains major defects, that may hinder the achievement of key policy objectives;

26 For example, Arabella Lang notes that former Governments have signed controversial memoranda of understanding with countries on deportation with assurance, to try to guarantee that people could be returned to their country of origin without the risk of torture. See Arabella Lang, 'Parliament and International Treaties', p. 258.

27 The original criteria (b) and (c) used by the European Union Committee have been merged and updated to take account of the fact that the UK is no longer a member of the European Union.

(d) that the explanatory material laid in support provides insufficient information on the agreement's policy objective and on how it will be implemented;

(e) that further consultation would be appropriate, including with the devolved administrations.

37. These criteria were originally developed with the continuity agreements in mind, and do not focus on the merits of individual agreements, but rather whether they accurately replicated the existing EU agreement. The criteria are, nonetheless, flexible and can be usefully retained, in their modified form, during the implementation period, during which there may be further rollover agreements. However, it is important to stress that in respect of all new agreements an assessment will be made of the merits of the underlying agreements, and that the scrutiny criteria will not act as a constraint on this.

38. **For the remainder of this Parliamentary session, the criteria for scrutinising international agreements will be as set out in paragraph 36.**

39. **However, there will be a significant change in practice. In 2019, the application of the scrutiny criteria was focused on a consideration of whether trade continuity agreements successfully rolled over existing trade agreements. Going forward, the Committee will assess all new agreements on their merits and will consider whether they are politically, economically or legally important, or give rise to issues of public policy that the House may wish to debate prior to ratification, as well as how effectively the Government has secured its stated aims and negotiating objectives.**

Parliamentary debates

40. Under Part Two of the CRAG Act, it is open to the House of Lords to resolve that a treaty should not be ratified. No such motion for resolution has been tabled, and even if it were to be tabled and agreed by the House its effect would be merely advisory: if the Government decides to proceed with ratification notwithstanding, the Act requires that the Minister of the Crown ratifying the agreement lay before Parliament a "statement indicating that the Minister is of the opinion that the treaty should nevertheless be ratified and explaining why".[28] By convention, where the European Union Committee has drawn an agreement to the special attention of the House, and a motion for debate has been tabled (even if it does not use the form of words specified in the CRAG Act), the usual channels have assisted in finding time for a debate to be held.

41. **We are grateful for the support of the usual channels in finding time to debate motions relating to international agreements to which special attention has been drawn. This reflects the earlier recommendation by the House of Lords Constitution Committee. We look forward to the continuation of this support.**

42. **In circumstances where it is not practicable to hold a debate within the CRAG timetable, we would expect that the 21-sitting-day period**

28 Constitutional Reform and Governance Act 2010, section 20

be extended, unless there are exceptional circumstances to justify the ratification of the agreement without a debate.

Relations with other parliamentary committees

43. Several other Select Committees have an interest in treaties, FTAs and international relations generally. Notably, in the House of Commons, there may be an overlap with the International Trade Committee on the scrutiny of trade agreements. Parliament's Joint Committee on Human Rights will take an interest in those agreements that have an impact on human rights frameworks, directly or indirectly. And in the House of Lords the International Relations and Defence Committee is responsible for considering policy issues relating to international relations. Other committees in both Houses may wish to scrutinise agreements which cover particular subjects, such as extradition, defence, or the environment.

44. The number of Committees with shared interests means that we will have to work together cooperatively to ensure that Parliament holds the Government to account across the range of areas related to international agreements. This can be facilitated in several ways, including at official level; through Chair-to-Chair meetings; and, potentially, via joint Committee meetings. We welcome the Commons International Trade Committee's willingness to work together to ensure the two Committees' scrutiny of international trade matters is carried out in a complementary way.[29]

Relations with the devolved executives and legislatures

45. One of the most significant issues identified during the EU Committee's scrutiny of Brexit-related agreements was the level of engagement with the devolved administrations in Scotland, Wales and Northern Ireland. Initially there were concerns that the devolved administrations were not consulted until very late in the process, sometimes when agreements had already been signed. Following proactive engagement with the Government, it was agreed that the devolved administrations would be provided with copies of agreements when they were 'stable'—namely, when they were initialled.

46. In its lessons learned report, the Committee noted that in future, when new treaties are being negotiated, rather than 'rollover' agreements, "proactive engagement will be critical". It also suggested that "existing, informal channels of communications between the UK's legislatures may also need to be developed and, if necessary, strengthened, to help reduce scrutiny gaps and duplication".[30]

47. New agreements may well engage devolved competencies and interests, and appropriate consultation will be vital. As the IfG has observed, new international agreements may well require legislation to be passed by the devolved legislatures. This "will not just be relevant to FTAs, but also, for example, to environmental and fisheries agreements".[31] Colin Murray and Dr Clare Rice argued that Brexit "has exposed the degree to which the

29 In a letter to the Secretary of State for Trade, the Chair, Angus Brendan MacNeil MP, said that the Committee would "follow the work" of the International Agreements Sub-Committee and "seek to ensure that where possible, our scrutiny is complementary". International Trade Committee, Letter to Secretary of State for International Trade (18 June 2020): https://committees.parliament.uk/publications/1531/documents/14132/default [accessed 3 July 2020]

30 European Union Committee, *Lessons learned*, para 44

31 Written evidence from the Institute for Government (TWP0008), para 31

UK's governance order is not as unitary as the doctrine of parliamentary sovereignty suggests". They contended it "overlooks the engagement of devolved institutions in Northern Ireland, Scotland and Wales with other countries and international bodies" and concluded that, as the "devolved administrations are free to diverge on policy within their areas of competence to reflect localised necessity," "Westminster is thus not the centre of legislative authority in the UK; it is one of several".[32]

48. The IfG identified the need for strong interparliamentary relationships, and reserved particular praise for the Interparliamentary Forum on Brexit, which first met under the chairmanship of the Senior Deputy Speaker in October 2017, following a recommendation by the European Union Committee in its report *Brexit: devolution*:[33]

> "The Interparliamentary Forum on Brexit was a positive step in building relations both between members of the different legislatures but also officials. Creating a space for informal discussions about international agreements which affect the whole of the UK would be a positive step."[34]

49. The External Affairs and Additional Legislation Committee of the Senedd (Welsh Parliament) has proposed a five-phase process through which it would seek to engage with the UK Government on new international agreements.[35] However, in its written submission to our inquiry, it also proposed that any proposals for a revised process of UK Parliamentary scrutiny should incorporate "the need to consider the views of the Senedd before the conclusion of its scrutiny process." It added:

> "An interparliamentary dialogue on international trade, perhaps under the aegis of the Interparliamentary Forum on Brexit, would be welcome from our perspective."[36]

50. **International agreements may impinge on devolved competencies and interests. While there are representatives within the UK Parliament from the constituent parts of the UK, this does not necessarily mean that Wales, Scotland and Northern Ireland will automatically be fully involved in the UK Parliament's treaty scrutiny processes.**

51. **While it will be for the devolved administrations and Parliaments to negotiate their precise arrangements between themselves and with the UK Government, we would encourage the creation of a real and meaningful consultation process to ensure that agreements reflect the interests of the constituent parts of the UK.**

52. **On the interparliamentary front, it is vital that Westminster committees engage closely with the Welsh and Scottish Parliaments and the Northern Ireland Assembly in scrutinising the negotiation and agreement of future treaties. As a first step, we invite the Interparliamentary Forum on Brexit to consider the options for developing processes to support such engagement.**

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32 Written evidence from Colin Murray and Dr Clare Rice (TWP0010), para 9
33 European Union Committee, *Brexit: devolution* (4th Report, Session 2017–19, HL Paper 9)
34 Written evidence from the Institute for Government (TWP0008), para 32
35 Written evidence from the External Affairs and Additional Legislation Committee of the Welsh Parliament (TWP0005), para 2.
36 *Ibid.*, para 32

Relations with the Crown Dependencies and Overseas Territories

53. International agreements can also have an impact on the Crown Dependencies (Jersey, Guernsey and the Isle of Man) and Overseas Territories.[37] This is because the UK can negotiate to extend the application of treaties to the Crown Dependencies and Overseas Territories, either at the time of ratification, or at some later date. This means that it is important to ensure that they are fully consulted at the earliest stage, to allow them time to consider the implications of having any treaty extended to them. We would encourage both the Crown Dependencies and Overseas Territories to commence a dialogue with us, particularly where they feel that their concerns have not been taken into account at the negotiating stage, or where they wish to be included within the scope of an agreement.

Volume of work, working practices and prioritisation

54. It is currently unclear how many international agreements will be laid before Parliament in the post-Brexit environment.[38] In 2016, it was estimated that perhaps 30–40 treaties a year might be signed and ratified by the FCO.[39] The number of new trade agreements that may be concluded after the end of the transition period is also unclear, although the Government clearly has ambitions to sign deals with the United States, Japan, Australia and New Zealand in the near future. All of this makes it difficult to anticipate the precise workload that may fall on the International Agreements Sub-Committee.

55. Arabella Lang suggested that our "initial working methods and objectives" should be "flexible and adaptable", and that "we should conduct "periodic reviews" of our working methods and effectiveness. She also recommended that the Committee might wish to reach a "framework agreement" with the Government which could set out, *inter alia*, what information will be provided and when.[40]

56. In order to prioritise work, it is evident that the Committee will need to be given reasonable notice of the laying of treaties. It will also need a clear assessment from the Government as to their content and nature, which should be contained in the EM accompanying the agreement. However, there may also be merit in categorising agreements, by importance, when they are laid.

57. Jill Barrett, a barrister and former Foreign Office lawyer, suggested that one way to manage workload was through a "sifting" process:

> "The Committee should devise a working method for 'sifting' all treaties, immediately they are laid. The Committee first needs to develop criteria for prioritising treaties to identify the level of attention each requires from Parliament. These criteria should be applied rapidly to each treaty, to determine whether it requires scrutiny, and if so what level and by

37 Anguilla; Bermuda; British Antarctic Territory; British Indian Ocean Territory; British Virgin Islands; Cayman Islands; Falkland Islands; Gibraltar; Montserrat; Pitcairn, Henderson, Ducie and Oeno Islands (commonly known as the Pitcairn islands); St Helena, Ascension and Tristan da Cunha; South Georgia and South Sandwich Islands; Turks and Caicos Islands; and Sovereign Base Areas in Cyprus

38 The Parliament website provides information about every treaty that has been laid under the CRAG Act. Parliament's treaty tracker can be found at: https://treaties.parliament.uk/.

39 Lang, 'Parliament and International Treaties', p. 242

40 Written evidence from Arabella Lang (TWP0006), paras 1 and 29

which committee, and whether there is any issue to call to the attention of other committees and/or both Houses."[41]

58. She noted, in particular, that the Australian Parliament's Joint Standing Committee on Treaties (JSCOT) operates a sifting mechanism. Treaties and treaty actions are categorised as 'major', 'minor' or 'technical'. While the Government proposes the category, JSCOT can re-categorise if it disagrees. Major and minor treaties are referred for inquiry and report. But JSCOT normally accepts 'technical' treaty actions without an inquiry, although it has discretion to hold one.[42] The IfG also highlighted the work of JSCOT, stating that "this model may prove useful for the UK Parliament, accepting that some international agreements will not be as important as others."[43] A sifting mechanism was also proposed by Professor Joanna Harrington, of the University of Alberta, who argued that a mechanism should be "established so as to determine which new treaty actions require study and inquiry by the committee, and which do not, and in keeping with the goal of strengthening accountability, such a mechanism should be established by the Sub-Committee itself rather than by a Minister or Foreign Office official".[44]

59. Once the precise volume of treaties becomes clearer, we anticipate following the precedent set by JSCOT, and will seek to reach an agreement with the Government on the categorisation of treaties and other documents, such as amendments and MoUs, that we wish to scrutinise.

60. **After the end of the transition period we will conduct a further review to ensure that our working methods and objectives remain appropriate. Subject to that further review, we see merit in the proposal that we establish a framework agreement with the Government to set out what information will be provided to Parliament and the Sub-Committee.**

61. **In the interim, we will open a discussion with the Government on the potential for reaching agreement on how to categorise treaties and other documents in such a way as to facilitate proportionate scrutiny. The Australian Joint Standing Committee on Treaties may offer a useful precedent.**

Engagement with stakeholders

62. One of the main ways that Parliament can improve its scrutiny of international agreements is to engage with stakeholders and groups which will be directly affected by those agreements. The European Union Committee's scrutiny of the rolled over South Korea trade agreement benefited from such engagement.[45]

63. As the IfG has observed, the "most obvious way that parliament can engage with relevant stakeholders around international agreements is through holding evidence sessions." Yet this can be time consuming and, given the constrained timetable under the CRAG Act, the IfG argued that we should look to "best practice" on public engagement from other select committees

41 Written evidence from Jill Barrett (TWP0014), para 7
42 *Ibid.*, para 9
43 Written evidence from the Institute for Government (TWP0008), para 27
44 Written evidence from Prof Joanna Harrington (TWP0001), para 16
45 European Union Committee, *Scrutiny of international agreements: Treaties considered on 21 October 2019* (1st Report, Session 2019, HL Paper 6)

in Parliament.[46] One example they highlighted was the European Statutory Instruments Committee in the House of Commons, which launched an "engagement tool" that allowed anyone to submit comments on the statutory instruments the committee was scrutinising at that time. The IfG suggested:

> "A similar tool may be useful for the scrutiny of relevant international agreements, as any member of the public would be able to express their views—or highlight concerns. This could also inform any decisions around which witnesses should be invited to give evidence on particularly sensitive international agreements."[47]

64. **One of our initial aims, this year, is to build relations with stakeholder groups. It is clear that parliamentary scrutiny is more effective when experts and those who are affected by international agreements have the opportunity to advise on the meaning and consequences of an agreement.**

65. **Given the limited time that Parliament has to engage with agreements under the CRAG Act, effective and efficient engagement will be key. While public evidence sessions will remain an important way to highlight particularly sensitive or contentious agreements, we will also be issuing public calls for evidence on all agreements which are potentially legally or politically important and would encourage all interested stakeholders to submit written evidence.**

46 Written evidence from the Institute for Government (TWP0008), paras 28–30
47 *Ibid.*

CHAPTER 3: INFORMATION PROVISION BY THE GOVERNMENT

66. As we have noted, if we are to conduct meaningful scrutiny of international agreements, it is essential that the Government provides detailed and comprehensive information at each stage of the treaty-making process. The traditional approach has been to publish information after an agreement has been signed. This has included EMs and, in respect of recent rollover FTAs, more detailed Parliamentary Reports. However, in a number of recent reports, the Department for International Trade (DIT) has recognised the need to engage with Parliament at earlier stages in the process.

67. This chapter considers the information that is currently provided to Parliament about treaties and 'treaty-like' agreements by the FCO and DIT, and identifies the minimum level of information provision that will be necessary for the Sub-Committee to conduct effective scrutiny. It also considers some of the commitments already made to Parliament by the FCO and DIT.

Explanatory Memoranda

68. As noted in paragraph 15 above, section 24 of the CRAG Act contains a statutory requirement on the Government to lay an EM with each treaty laid before Parliament.[48] But CRAG does not set out any detailed requirements about the contents of such EMs. This provision was a late amendment to the Act and was not debated at the time.[49]

69. Jill Barrett therefore proposed that the Committee may wish to "issue guidance on the expected contents of treaty Explanatory Memoranda" and "review the adequacy of each EM as it is tabled". She noted that the Secondary Legislation Scrutiny Committee has provided detailed guidance on what it expects to see in EMs and that it comments publicly on the adequacy of EMs. She argued that although recent dialogue at official level between House of Lords staff and the FCO had resulted in "improvements", a public process would be more effective.[50] A similar point was made by Arabella Lang, who noted that JSCOT often held the Australian Government to account on the content of EMs.[51]

70. Arabella Lang also suggested that EMs could be renamed "'National Interest Analysis', or similar, to better reflect their purpose". This terminology reflects the usage in other Parliaments. Professor Campbell McLachlan QC noted that the content of the National Interest Analysis documents supplied to the New Zealand Parliament is specified in a Standing Order (SO 397), which requires "an assessment of the costs as well as the benefits of ratification". Professor McLachlan argued that this approach was "much more rigorous than the current form of Explanatory Memorandum used in the UK".[52]

48 Constitutional Reform and Governance Act 2010, section 24
49 Jill Barrett records that this provision was proposed by way of an amendment, tabled by Lord Norton of Louth, in the fnal stage of the Bill's passage through Parliament, and accepted by the Government during the pre-General Election 'wash-up'. See 'The United Kingdom and Parliamentary Scrutiny of Treaties: Recent Reforms', *International Comparative Law Quarterly*, 60 (2011), pp. 231–2.
50 Written evidence from Jill Barrett (TWP0014), para 3
51 Written evidence from Arabella Lang (TWP0006), paras 8 and 9
52 Written evidence from Prof Campbell McLachlan QC (TWP0003), para 21

71. The Sub-Committee will keep the content and quality of EMs under review. Our proposed scrutiny criteria refer to the quality of explanatory material at subparagraph (d), and the EU Committee provided some guidance in its lessons learned report on the subjects that ought to be addressed in an EM. In response, the FCO recently supplied the Committee with an updated EM template, taking account of many of its suggestions. We hope that this final template may be made public shortly and that the quality of published EMs will continue to improve.

72. **We welcome the FCO's efforts to update its Explanatory Memorandum template and to expand the nature and range of the information that it makes available to Parliament. The quality of EMs provided to Parliament is currently one of our published scrutiny criteria. We will keep the new EMs under review and provide further feedback when appropriate. We encourage the FCO to publish its updated EM template at the earliest opportunity.**

Free Trade Agreements

73. Scrutiny of FTAs is likely to pose a particular challenge. In his written evidence, David Henig, Director of the UK Trade Policy Project at the specialist trade policy think-tank the European Centre for International Political Economy, noted the wide range of issues which might be covered in such agreements:

> "FTAs are lengthy treaties setting out the rules for preferential trade over and above World Trade Organization (WTO) levels of access taking place between two or more customs territories. Other agreements such as Mutual Recognition Agreements (MRAs) focus on regulations, and are not considered preferential in WTO terms, but still set rules for trade. Rules can come in many areas including environment, intellectual property, customs, labour relations, technical standards, food safety and many more."[53]

74. Mr Henig highlighted the fact that FTAs are likely to be "substantial" agreements, whose contents will "need to be interpreted over time". This meant that it was important that the process of scrutiny should be commenced "well ahead of the completion of negotiation", or alternatively that the Government should allow "considerable time at that point for ratification."[54]

75. The idea of frontloading scrutiny was also addressed by the IfG. They suggested that, to enhance the role of Parliament at the start of the process, the Government should "lay a command paper before Parliament detailing its negotiating objectives for each FTA to allow a debate". The IfG argued that this would be "beneficial to increase transparency and enhance scrutiny by parliamentarians" and would also be "an opportunity to test where key objections may lie".[55]

76. Stephen Adams of Global Counsel also stressed the importance of parliamentary scrutiny, stating that the effect of FTAs is important not only because they can "compel changes in domestic law", but also because they can "compel the UK not to change its current law, regulation or practice in the future", which could have "quasi-constitutional" importance in the UK

53 Written evidence from David Henig (TWP0009)
54 *Ibid.*
55 Written evidence from the Institute for Government (TWP0008), para 10

system, where parliamentarians should be "cognisant of their obligations to successor Parliaments".[56]

77. As we noted in Chapter 1, the Government has not shown any willingness to extend the statutory timetable under the CRAG Act. However, other options for parliamentary scrutiny exist. These include:

- the publication of comprehensive consultation documents at the outset of a negotiation, which set out, *inter alia*, the Government's objectives and initial analysis of a potential deal;
- public announcements, via ministerial statements, after negotiating rounds;
- private briefings by Ministers and officials;
- the publication of Parliamentary Reports and impact assessments; and
- providing parliamentary committees with time to make detailed reports on any agreement that has been reach prior to laying the agreement under CRAG.

78. Each of these options was the subject of commitments by the Government in the previous Parliament.[57] In recent months, the DIT has published detailed policy papers on its strategic approach to agreeing an FTA with Japan[58] and on its objectives in trade negotiations with the United States of America.[59] These documents set out public negotiating objectives and preliminary assessments of the impacts of the proposed FTAs. On 17 June 2020 a further set of papers was published in respect of proposed trade deals with Australia and New Zealand.[60]

79. On 18 May 2020, the Minister for Investment at the Department for International Trade, Lord Grimstone of Boscobel, wrote to the Sub-Committee with an update on negotiations with the United States. He indicated that the UK and US had conducted the first round of negotiations between 5 May and 15 May, that this was a was "a full discussion covering all aspects of negotiations towards an FTA including creating opportunities for SMEs, services, telecoms and customs arrangements", and that he would be making a Written Ministerial Statement to Parliament on the same day.

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56 Written evidence from Stephen Adams (TWP0012), para 2

57 See, for example, the commitments made in the Department for International Trade's *Processes for making free trade agreements* at pp 6–7.

58 Department for International Trade, *UK-Japan Free Trade Agreement: The UK's Strategic Approach* (18 May 2020): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/885176/UK_Japan_trade_agreement_negotiations_approach.pdf: [accessed 3 July 2020]

59 Department for International Trade, *UK-US Free Trade Agreement* (2 March 2020): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/869592/UK_US_FTA_negotiations.pdf [accessed 3 July 2020]

60 See Department for International Trade, *UK-Australia Free Trade Agreement: The UK's Strategic Approach* (17 June 2020): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/892747/UK_strategy_for_UK-Australia_free_trade_agreement.pdf [accessed 3 July 2020] and Department for International Trade, *UK-New Zealand Free Trade Agreement: The UK's Strategic Approach* (17 June 2020): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/892830/UK_strategy_for_UK_NZ_free_trade_agreement.pdf [accessed 3 July 2020].

He also offered the Sub-Committee a briefing on "outcomes from the first round of US-UK negotiations".[61]

80. We were encouraged that, at that private briefing, Lord Grimstone indicated that the Government intended to stand by many of the commitments made by the DIT in its February 2019 Command Paper. The text of the subsequent letters between Lord Goldsmith and Lord Grimstone, published in Appendix 3 of this report, underlines this assurance. We note in particular the commitment by the Government to make available sufficient time for the Sub-Committee to report on new agreements prior to them being laid before Parliament under the CRAG Act.

81. One practical way in which committees could be provided with time to make detailed reports, prior to laying an agreement under the CRAG Act, would be to provide them with a copy of the agreement at the time that it is initialled, by which point the text is stable. We have already noted that this is done as part of the consultation process with the devolved administrations. There is no reason why this information could not be shared with parliamentary committees at the same time. At this stage, the negotiations are effectively over, and while the text might still be subject to legal scrubbing, or very minor amendment, there is no reason why it should not be subjected to scrutiny, even if the document has to be provided on a confidential basis.

82. **We are grateful that the Department for International Trade has confirmed that the commitments made in its Command Paper, *Processes for making free trade agreements*, published in February 2019, continue to apply. In particular, we believe that the commitment to allow committees time to make detailed reports on any agreement that has been reached, prior to laying the agreement under the CRAG Act, will prove essential to allow for proper scrutiny. We encourage other departments across Whitehall to now follow the Department for International Trade's lead.**

Lessons from other Parliamentary systems

83. Welcome though they are, none of the commitments made by the DIT go as far as the scrutiny systems in some other jurisdictions. Dr Mario Mendez, Reader in Law at Queen Mary, University of London, stated:

> "If we are aspiring to 'best practices' in terms of parliamentary scrutiny, these proposals do not go as far as the emerging practice in the EU where the European Parliament has been able to use its treaty enshrined information rights and veto power to shape negotiating mandates and also the treaty text. Nor in relation to trade does it go anywhere near as far as the US where the fasttrack trade promotion authority lays out substantive conditions for trade negotiations, time constraints, Congressional veto powers and ensures a prominent role for

61 Letter from Lord Grimstone of Boscobel, Kt, to the Rt Hon Lord Goldsmith QC, dated 18 May 2020: https://committees.parliament.uk/publications/1130/documents/9716/default/ [accessed 3 July 2020]

congressional committees and advisory groups composed of members of congress in the pre-negotiation stage and during negotiations."[62]

84. At a private round table event where we discussed treaty scrutiny in other jurisdictions with Alexander Downer, Jason Langrish, and Jude Kirton-Darling, it was clear that, at the European Parliament, the combination of an effective International Trade Committee, information rights and a veto power, meant that far more influence could be brought to bear.

85. The IfG contended that comparing the US and EU experience to that of a Westminster-style democracy was problematic. It noted that the models were not entirely applicable to the UK's constitutional arrangements and political structure, since both the European Commission and the US presidency "are independent executives operating in systems with a strong separation of powers". By contrast, the IfG noted that "the UK's constitutional system is based, in contrast, on a fusion of powers and requires the executive to maintain the continuous confidence of the House of Commons".[63]

86. Nonetheless, there is much to be learnt from the operation of treaty scrutiny in other Parliaments,[64] and the experience of the Australian JSCOT (described briefly in Chapter 2) may provide some helpful precedents. JSCOT is empowered to consider matters arising from treaties and proposed treaty actions, as well as any international agreement—whether or not negotiated to completion—that is referred to it by either House or a Minister. This covers bilateral and multilateral agreements, including amendments to agreements and withdrawal from treaties.[65]

87. The treaty scrutiny process requires that all actions proposed by the Government be tabled for at least 15 sitting days before action is taken that will bind Australia under international law to the terms of the treaty. In the Australian parliamentary calendar, this might run for between four and six calendar weeks. JSCOT routinely invites written submissions on treaties under scrutiny and holds hearings, where appropriate. While it may not have the same powers as the European Parliament, or Congress, we believe that JSCOT is a broadly effective model.

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62 Written evidence from Dr Mario Mendez (TWP0013), para 3. Professor Philippe Lagassé, Associate Professor and Barton Chair at Carleton University, has argued that the Canadian approach to parliamentary treaty scrutiny: "resembles the situation in the United Kingdom prior to the enactment of the Constitutional Reform and Governance Act 2010. Parliamentary scrutiny of treaties is governed by an executive policy that resembles the Ponsonby Rule that applied in the United Kingdom prior to the passage of this 2010 act. Hence, the British Parliament has little to learn from its Canadian counterpart in this area" (TWP0004). Meanwhile, Clerk Assistant at the Canadian House of Commons, Eric Janse, notes that "the tabling of treaties in the House of Commons remains a courtesy on the part of the executive, which retains full authority to decide whether to ratify the treaty after the parliamentary review" (TWP0011).

63 Written evidence from the Institute for Government (TWP0008), para 7

64 We received a number of helpful written submissions on this subject, including from Prof Campbell McLachlan QC and David Wilson on arrangements in New Zealand (TWP0003 and TWP0015 respectively); Prof Philippe Lagassé and Eric Janse on arrangements in Canada (TWP0004 and TWP0011 respectively); and the International Department of the Storting on scrutiny in the Norwegian Parliament (TWP007). We also received two helpful comparative pieces from Prof Joanna Harrington (TWP0001) and from four academics involved in the International Treaty Ratification Votes Database Project (TWP0002).

65 Australian Joint Standing Committee on Treaties, 'Role of the Committee': https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/Role_of_the_Committee [accessed 3 July 2020]

The approach of the Department for International Trade

The provision of confidential information and briefings

88. One of the ways the DIT, in its 2019 Command Paper, proposed to engage with Parliament was through the provision of confidential information and private briefing to select committees.

89. On 10 June 2020 we held a private meeting with Lord Grimstone of Boscobel. Officials from the DIT were also in attendance. As well as asking about working practices, we discussed the proposed UK-US trade deal. We understand that this was the first time a Committee of the UK Parliament had received such a confidential briefing about a proposed trade deal.

90. There is clearly a tension between a Committee receiving confidential information from the Government and the general principles that the Committee is answerable to the House, and that Parliament as a whole seeks to conduct scrutiny openly and transparently. Nonetheless, we commend the DIT for its willingness to engage in what is a new and challenging process. We welcome the constructive way in which Lord Grimstone and his officials engaged with us and we were impressed with their commitment to return and update us on the negotiations on a regular basis.

91. **We welcome the constructive engagement that we have received from the Department for International Trade as we begin our work. The public-facing documents on the proposed UK-US and UK-Japan Free Trade Agreements have been helpful in initiating our scrutiny work.**

92. **It is important that the Government sets out, at an early stage in the process, clear negotiating aims and objectives, so that the public can understand why the Government is seeking these FTAs, and Parliament can evaluate how effectively the Government has met its objectives.**

93. **We also recognise the Government's argument that some matters are too sensitive to make public during negotiations. Accordingly, while noting that the provision of confidential information to Committees makes it more difficult to engage with stakeholders, the public, and Parliament, we nonetheless welcome the willingness of Ministers and officials to provide private briefings to the Committee during the course of trade negotiations. We believe that regular briefings will prove essential to our work. The challenge for us will be to use them to inform our public-facing work in an appropriate manner, including by providing context to the final texts that are agreed between the parties.**

Information on non-trade agreements

94. The commitments made by the DIT only relate to FTAs, but much of the diet of the Sub-Committee will be made up of agreements which do not relate to trade. Some of these, for example those that relate to the environment, security, or extradition, may prove equally contentious.

95. On 17 June 2020 the Sub-Committee met Lord Ahmad of Wimbledon, the Minister of State at the FCO responsible for treaty policy and practice. Due to the COVID-19 crisis, this meeting took place in private. We are grateful to Lord Ahmad for engaging with us on the question of working practices. As

with the meeting with Lord Grimstone, referenced at paragraph 80 above, correspondence setting out what was discussed at this meeting is included in Appendix 3 of this report.

96. **We raised with the FCO, in our meeting with Lord Ahmad, a number of issues (which we a subsequently set out in our letter of 22 June). Many of these had been raised previously by the EU Select Committee over the course of the past year. At the time of writing this report we have not yet had a response with the commitments we hope to see. We hope that the Department will engage with our recommendations in a positive and expeditious fashion. The rationale for our desire to scrutinise treaty-like documents, such as memoranda of understanding and amendments to international agreements is set out in further detail below.**

Memoranda of understanding

97. Certain 'treaty-like' documents, including MoUs, are commonly distinguished from formal international agreements, on the basis that they are political agreements between States and are not designed to be governed by international law.

98. This distinction has legal precedent. Article 2 of the 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".[66]

99. Section 25 of the CRAG Act similarly defines a treaty as "a written agreement—(a) between States or between States and international organisations, and (b) binding under international law".[67]

100. Arabella Lang has noted that, in 2008, the issue of MoUs was given some attention by the Joint Committee on the Draft Constitutional Renewal Bill (which became the CRAG Act), when the then Lord Chancellor, Jack Straw, conceded that some MoUs could be examined by a select committee on an ad hoc basis in future, in confidence if needs be.[68]

101. The Joint Committee on the Draft Constitutional Renewal Bill recommended that the scrutiny of such documents should be enhanced. And it noted comments from the Foreign Affairs Select Committee that "many 'treaty-like' documents (such as memoranda of understanding, exchanges of letters between governments, EU common positions and UN Security Council resolutions) may be more important in their effects than most treaties".[69]

102. Dr Mendez cited "confidentiality and convenience" as the main reasons for use of MoUs in preference to treaties, noting that they "generally do not need to be published and are generally not subject to any constitutional procedures".[70] He highlighted the new public register of political agreements in Spain as a model that Parliament might wish to ask the Government to follow.

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66 United Nations, Vienna Convention on the law of treaties: https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf [accessed 3 July 2020]

67 Constitutional Reform and Governance Act 2010, section 25

68 Lang, 'Parliament and International Treaties', p. 258

69 Joint Committee on the Draft Constitutional Renewal Bill, *Draft Constitutional Renewal Bill* (Report, Session 2007–8, HL 166-I, HC 551-I), para 232

70 Written evidence from Dr Mario Mendez (TWP0013), para 7

103. MoUs have the potential to encompass issues of legal and political importance, for example diplomatic agreements on the treatment of terror suspects who are returned to their country of origin. At the high point of the trade continuity programme in 2019, the DIT also proposed using MoUs to provisionally apply legally binding international agreements, thus blurring the distinction between the two categories of agreements.

104. While it is unlikely that we would have the capacity to subject all MoUs to detailed parliamentary scrutiny, it is important that we are kept aware of the existence of these agreements, so that we can address the perception that important political commitments are being agreed in private and are not subject to any oversight. Concerns were also expressed by Arabella Lang that such arrangements may be used as "workarounds" to enable scrutiny to be evaded where "parliamentary demands become too onerous".[71]

105. **We note the commitment contained within the third limb of the Ponsonby Rule that the Government of the day will draw to the attention of Parliament "other agreements, commitments and understandings which may in any way bind the nation to specific action in certain circumstances and which may involve international obligations of a serious character, although no signed sealed document may exist". This commitment was not codified in statute as part of the Constitutional Reform and Governance Act 2010.**

106. **We invite the Government to enter into a discussion about the extent to which this commitment covers politically important Memoranda of Understanding, and about how these can be drawn to the attention of Parliament going forward.**

Amendments and the provision of other information

107. In its lessons learned report, the European Union Committee noted that it is currently "not clear when amendments will engage the provisions of the CRAG Act, particularly when they are agreed by Joint Committees without the need for ratification". The report warned that where such amendments did not need to be implemented in domestic legislation, this could lead to a scrutiny gap, "unless relevant amendments are notified to Parliament and potential issues are outlined clearly in the initial EM accompanying the agreement".[72]

108. This conclusion was echoed in the evidence from Jill Barrett:

> "An issue on which there is an urgent need for clearer information in EMs is treaty amendment mechanisms. Parliament should require treaty EMs to identify any provision in a new treaty for future amendments. It should make clear whether amendments will have treaty status and be subject to CRaG scrutiny, or whether the Government considers CRaG not to apply, eg because amendments will bind the UK through an automatic or tacit approval procedure … **This is especially important in relation to trade agreements**."[73]

71 Written evidence from Arabella Lang (TWP0006), para 30
72 European Union Committee, *Lessons learned*, para 63
73 Written evidence from Jill Barrett (TWP0014), para 5. See also written evidence from Prof Joanna Harrington (TWP0001), para 6.

109. There has been official dialogue between committee staff and officials at the FCO for some months on this issue, but there has been little concrete progress on how the Government proposes to notify Parliament about proposed amendments to agreements.

110. There is a precedent for providing EMs on proposed amendments to treaties: the European scrutiny committees of both Houses already receive EMs in respect of amendments to agreements negotiated by the European Union, which have to be agreed by the Council of the European Union. This precedent could be adapted, to accommodate the provision of EMs on changes proposed to bi-lateral and multi-lateral agreements which are binding on the UK.

111. **We urge the FCO to engage with the committees to devise a system for drawing amendments to international agreements to the attention of Parliament. At present, the absence of any method of highlighting changes to treaties causes a significant scrutiny gap, which means that it is impossible to have an up to date picture of the UK's international obligations.**

112. **While the International Agreements Sub-Committee is unlikely to report on each proposed amendment to an agreement, important amendments could be sifted by the Sub-Committee and important changes to international agreements could be drawn to the special attention of the House in the same way as new treaties.**

Derogations, withdrawal from agreements and dispute resolution

113. We received a number of other suggestions about additional information that should be provided to the Committee, including information on derogations and withdrawal from agreements.[74] In addition, the European Union Committee has already indicated that the Government should report regularly on the implementation of agreements, and that this should include governance arrangements, decisions made by Joint Committees operating under the agreements, and any issues and decisions arising under dispute resolution provisions.[75]

114. The precise volume of such information is still far from clear. But, as the EU Committee observed in its lessons learned report, it may be that some form of sifting mechanism will be required to ensure that this task can be conducted in a proportionate way.

115. **We invite the Government to engage with committees to determine the most effective way of supplying additional information on international agreements, including decisions on derogations, withdrawal from agreements, and decisions arising under dispute resolution provisions. We acknowledge that these should be scrutinised in a proportionate way: a sifting mechanism, perhaps similar to that of JSCOT, could offer a way forward.**

74 Written evidence from Arabella Lang (TWP0006), para 30
75 European Union Committee, *Lessons learned*, para 62

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

Introduction

1. The establishment of an International Agreements Sub-Committee in the House of Lords presents a fresh opportunity to address some of the deficiencies of the UK Parliament's treaty scrutiny processes. (Paragraph 30)

2. It is evident from the Government responses to select committee reports in the last Parliament that it is reluctant to amend the legislative framework and review the timetable for scrutiny under the CRAG Act. We have therefore used this report to set out what we believe are a series of pragmatic and proportionate recommendations to facilitate effective Parliamentary treaty scrutiny, without the need for legislative change. (Paragraph 31)

3. Time and experience will tell whether it is possible to conduct meaningful scrutiny within the current timescales. Much will depend on how far the Government is willing to share information in advance of laying an agreement under the CRAG Act. Accordingly, we anticipate reviewing our work within a year and making further recommendations. If we cannot make treaty scrutiny work within the current framework, legislative change may prove the only means to ensure adequate scrutiny of international agreements. (Paragraph 32)

Processes and requirements for effective scrutiny

4. For the remainder of this Parliamentary session, the criteria for scrutinising international agreements will be as set out in paragraph 36 of this report. (Paragraph 38)

5. However, there will be a significant change in practice. In 2019, the application of the scrutiny criteria was focused on a consideration of whether trade continuity agreements successfully rolled over existing trade agreements. Going forward, the Committee will assess all new agreements on their merits and will consider whether they are politically, economically or legally important, or give rise to issues of public policy that the House may wish to debate prior to ratification, as well as how effectively the Government has secured its stated aims and negotiating objectives. (Paragraph 39)

6. We are grateful for the support of the usual channels in finding time to debate motions relating to international agreements to which special attention has been drawn. This reflects the earlier recommendation by the House of Lords Constitution Committee. We look forward to the continuation of this support. (Paragraph 41)

7. In circumstances where it is not practicable to hold a debate within the CRAG timetable, we would expect that the 21-sitting-day period be extended, unless there are exceptional circumstances to justify the ratification of the agreement without a debate. (Paragraph 42)

8. International agreements may impinge on devolved competencies and interests. While there are representatives within the UK Parliament from the constituent parts of the UK, this does not necessarily mean that Wales, Scotland and Northern Ireland will automatically be fully involved in the UK Parliament's treaty scrutiny processes. (Paragraph 50)

9. While it will be for the devolved administrations and Parliaments to negotiate their precise arrangements between themselves and with the UK Government, we would encourage the creation of a real and meaningful consultation process to ensure that agreements reflect the interests of the constituent parts of the UK. (Paragraph 51)

10. On the interparliamentary front, it is vital that Westminster committees engage closely with the Welsh and Scottish Parliaments and the Northern Ireland Assembly in scrutinising the negotiation and agreement of future treaties. As a first step, we invite the Interparliamentary Forum on Brexit to consider the options for developing processes to support such engagement. (Paragraph 52)

11. After the end of the transition period we will conduct a further review to ensure that our working methods and objectives remain appropriate. Subject to that further review, we see merit in the proposal that we establish a framework agreement with the Government to set out what information will be provided to Parliament and the Sub-Committee. (Paragraph 60)

12. In the interim, we will open a discussion with the Government on the potential for reaching agreement on how to categorise treaties and other documents in such a way as to facilitate proportionate scrutiny. The Australian Joint Standing Committee on Treaties may offer a useful precedent. (Paragraph 61)

13. One of our initial aims, this year, is to build relations with stakeholder groups. It is clear that parliamentary scrutiny is more effective when experts and those who are affected by international agreements have the opportunity to advise on the meaning and consequences of an agreement. (Paragraph 64)

14. Given the limited time that Parliament has to engage with agreements under the CRAG Act, effective and efficient engagement will be key. While public evidence sessions will remain an important way to highlight particularly sensitive or contentious agreements, we will also be issuing public calls for evidence on all agreements which are potentially legally or politically important and would encourage all interested stakeholders to submit written evidence. (Paragraph 65)

Information provision by the Government

15. We welcome the FCO's efforts to update its Explanatory Memorandum template and to expand the nature and range of the information that it makes available to Parliament. The quality of EMs provided to Parliament is currently one of our published scrutiny criteria. We will keep the new EMs under review and provide further feedback when appropriate. We encourage the FCO to publish its updated EM template at the earliest opportunity. (Paragraph 72)

16. We are grateful that the Department for International Trade has confirmed that the commitments made in its Command Paper, *Processes for making free trade agreements*, published in February 2019, continue to apply. In particular, we believe that the commitment to allow committees time to make detailed reports on any agreement that has been reached, prior to laying the agreement under the CRAG Act, will prove essential to allow for proper scrutiny. We encourage other departments across Whitehall to now follow the Department for International Trade's lead. (Paragraph 82)

17. We welcome the constructive engagement that we have received from the Department for International Trade as we begin our work. The public-facing documents on the proposed UK-US and UK-Japan Free Trade Agreements have been helpful in initiating our scrutiny work. (Paragraph 91)

18. It is important that the Government sets out, at an early stage in the process, clear negotiating aims and objectives, so that the public can understand why the Government is seeking these FTAs, and Parliament can evaluate how effectively the Government has met its objectives. (Paragraph 92)

19. We also recognise the Government's argument that some matters are too sensitive to make public during negotiations. Accordingly, while noting that the provision of confidential information to Committees makes it more difficult to engage with stakeholders, the public, and Parliament, we nonetheless welcome the willingness of Ministers and officials to provide private briefings to the Committee during the course of trade negotiations. We believe that regular briefings will prove essential to our work. The challenge for us will be to use them to inform our public-facing work in an appropriate manner, including by providing context to the final texts that are agreed between the parties. (Paragraph 93)

20. We raised with the FCO, in our meeting with Lord Ahmad, a number of issues (which we a subsequently set out in our letter of 22 June). Many of these had been raised previously by the EU Select Committee over the course of the past year. At the time of writing this report we have not yet had a response with the commitments we hope to see. We hope that the Department will engage with our recommendations in a positive and expeditious fashion. The rationale for our desire to scrutinise treaty-like documents, such as memoranda of understanding and amendments to international agreements is set out in further detail below. (Paragraph 96)

21. We note the commitment contained within the third limb of the Ponsonby Rule that the Government of the day will draw to the attention of Parliament "other agreements, commitments and understandings which may in any way bind the nation to specific action in certain circumstances and which may involve international obligations of a serious character, although no signed sealed document may exist". This commitment was not codified in statute as part of the Constitutional Reform and Governance Act 2010. (Paragraph 105)

22. We invite the Government to enter into a discussion about the extent to which this commitment covers politically important Memoranda of Understanding, and about how these can be drawn to the attention of Parliament going forward. (Paragraph 106)

23. We urge the FCO to engage with the committees to devise a system for drawing amendments to international agreements to the attention of Parliament. At present, the absence of any method of highlighting changes to treaties causes a significant scrutiny gap, which means that it is impossible to have an up to date picture of the UK's international obligations. (Paragraph 111)

24. While the International Agreements Sub-Committee is unlikely to report on each proposed amendment to an agreement, important amendments could be sifted by the Sub-Committee and important changes to international agreements could be drawn to the special attention of the House in the same way as new treaties. (Paragraph 112)

25. We invite the Government to engage with committees to determine the most effective way of supplying additional information on international agreements, including decisions on derogations, withdrawal from agreements, and decisions arising under dispute resolution provisions. We acknowledge that these should be scrutinised in a proportionate way: a sifting mechanism, perhaps similar to that of JSCOT, could offer a way forward. (Paragraph 115)

APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

Members

Lord Alderdice (until 11 June 2020)
Lord Foster of Bath
Lord Fraser of Corriegrath
Lord Gold
Lord Goldsmith (Chair)
Lord Kerr of Kinlochard
Lord Lansley
Baroness Liddell of Coatdyke
Lord Morris of Aberavon
Lord Oates
Lord Robathan
Earl of Sandwich
Lord Watts

Declarations of interests

Lord Alderdice
No relevant interests
Lord Foster of Bath
No relevant interests
Lord Fraser of Corriegrath
No relevant interests
Lord Gold
No relevant interests
Lord Goldsmith (Chair)
Partner, Debevoise & Plimpton LLP
Lord Kerr of Kinlochard
Chairman, Centre for European Reform
Deputy Chairman, Scottish Power plc
Member, Scottish Government's Standing Council on Europe
Lord Lansley
Director, LOW Associates Ltd
Chair, UK Japan 21st Century Group
Trustee, Radix
Baroness Liddell of Coatdyke
Adviser, PricewaterhouseCoopers
Association Member, Bupa
Chair, Annington Ltd
Honorary Chair, Britain-Australia Society Education Trust
Trustee, Northcote Educational Trust
Lord Morris of Aberavon
No relevant interests
Lord Oates
Chair, Advisory Committee, Weber Shandwick UK
Director, Centre for Countering Digital Hate
Lord Robathan
No relevant interests

Earl of Sandwich
No relevant interests
Lord Watts
No relevant interests

The following Members of the European Union Select Committee attended the meeting at which the report was approved:

Baroness Brown of Cambridge
Lord Cavendish of Furness
Baroness Couttie
Baroness Donaghy
Lord Faulkner of Worcester
Lord Goldsmith
Baroness Hamwee
Lord Kerr of Kinlochard
Earl of Kinnoull
Baroness Neville-Rolfe
Lord Oates
Baroness Primarolo
Lord Ricketts
Lord Sharkey
Lord Thomas of Cwmgiedd
Baroness Verma
Lord Wood of Anfield

During consideration of the report the following members declared an interest:

Lord Faulkner
Chairman, Alderney Gambling Control Commission
Her Majesty's Government's Trade Envoy to Taiwan
Lord Lamont
Advisor to Meinhardt Engineering, Singapore
Adviser to Stanhope Capital
Director, European Opportunities Trust
Director, Chelverton Dividen Trust
Adviser, Halkin Investments

A full list of Members' interests can be found in the Register of Lords' Interests: https://www.parliament.uk/mps-lords-and-offices/standards-and-financial-interests/house-of-lords-commissioner-for-standards-/register-of-lords-interests/

APPENDIX 2: LIST OF WITNESSES

Evidence is published online at https://committees.parliament.uk/work/297/treaty-scrutiny-working-practices/publications/ and available for inspection at the Parliamentary Archives (020 7219 3074).

Evidence received by the Committee is listed below in chronological order. Only written evidence was taken during the course of this inquiry.

Alphabetical list of all witnesses

Stephen Adams	TWP0012
Jill Barrett	TWP0014
External Affairs and Additional Legislation Committee of the Welsh Parliament	TWP0005
Professor Joanna Harrington	TWP0001
David Henig	TWP0009
Institute for Government	TWP0008
International Department of the Storting	TWP0007
Eric Janse	TWP0011
Juliet Kaarbo	TWP0002
Professor Philippe Lagassé	TWP0004
Arabella Lang	TWP0006
Benjamin Martill	TWP0002
Professor Campbell McLachlan QC	TWP0003
Dr Mario Mendez	TWP0013
Colin Murray	TWP0010
Falk Ostermann	TWP0002
Dr Clare Rice	TWP0010
Wolfgang Wagner	TWP0002
David Wilson	TWP0015

APPENDIX 3: CORRESPONDENCE BETWEEN THE SUB-COMMITTEE AND THE DEPARTMENT FOR INTERNATIONAL TRADE AND FOREIGN AND COMMONWEALTH OFFICE

Letter from Lord Goldsmith QC to Lord Grimstone on working practices, 16 June 2020

Thank you for speaking to the International Agreements Committee on 10 June about our Working Practices inquiry, which provided a useful and constructive discussion. The Committee were pleased to note your statement that the Department was committed to transparency. They noted the example you gave of the publication of the detailed documents relating to the Government's approach and objectives for the US and Japan negotiations together with written statements and open briefings for parliamentarians. You told us that you expected this approach to continue with the Australian and NZ negotiations; likely to commence in the next few weeks. We also noted the Written Statement that had been made reporting on the first round of negotiations, and we were pleased to note that you expected that sort of reporting to continue.

We also discussed the provision of updates to scrutiny committees and parliamentarians more widely, including when concluded trade agreements were laid before Parliament under the Constitutional Reform and Governance Act 2010. We were grateful for your confirmation that the Department was committed to providing such updates regularly, as well as an Explanatory Memorandum and an impact assessment when agreements were concluded.

You also noted that Parliamentary Reports had been produced for all the continuity trade agreements, and that this would continue to be the case. There was not time to discuss this in more detail during the meeting, but we would be grateful to know whether the Department also intends to produce Parliamentary Reports for newly negotiated agreements, as well as continuity agreements.

You told the Committee that holding debates on the Government's objectives for trade negotiations was not part of the Department's plans as it was considered that debates on negotiating objectives could be counterproductive, as they would provide intelligence to the other negotiating party/parties. However, we were pleased to note your statement that the sorts of documents that DIT published prior to starting negotiations with the US were indicative of the information that it intended to make available publicly to Parliament for other future negotiations.

The Committee were grateful for your acknowledgement of the challenge of carrying out detailed work within a 21-sitting-day period and you suggested that private briefings, from ministers or officials, might be a way forward to help inform committees and allow them to begin their work before an agreement was laid formally. You suggested that practice and experience over the coming months might be the best guide for how to achieve this balance of confidentiality and information provision, and we would be happy to take forward with you discussions on how best to do that. Would it be helpful if you and I had a discussion about that to seek to reach a more detailed proposal?

The Committee further noted the statement that the Command Paper setting out the Department's approach to trade agreements (Processes for making free trade agreements, published in February 2019) still applied, which had amongst other things committed the Department to making time to allow a select committee to report on an agreement after negotiations had ended but before the treaty text had

been laid, although it was noted that this did not specify precisely how much time would be made available.

The Committee believes that this approach could be helpful to HMG, as experience from other countries showed that it could be useful for negotiators to be able to say that, through confidential discussions with their parliament, they knew that a certain concession a negotiating partner was suggesting would be impossible to get through the legislature.

Members also asked about how the Government would work with the devolved administrations, and how it would ensure that its economic cost-benefit analyses were robust, in particular where they might indicate impacts on particular regions or nations in the UK. They welcomed your statement that you were very conscious of duties to the whole of the UK and noted that Greg Hands, the Minister for Trade Policy, held constructive and collaborative meetings with counterparts in Wales, Scotland and Northern Ireland through the Ministerial Forum for Trade, and that opinions and advice from the devolved nations were acted upon.

The economic modelling done by DIT was discussed, and it was noted that the Department's approaches and methods were in line with those used in the wider literature, but that such modelling, particularly of dynamic effects, could be difficult. You noted that it was not always possible to conduct modelling at a granular level that would show, for example, the effects on all regions of the UK with good levels of certainty. However, the Department was trying hard to draw out the likely impact on different parts of the UK. What had currently been published were scoping assessments, and with any final agreement a more detailed impact assessment could be produced.

You did in this context note that particular suggestions or questions about the methodology used would be welcome, and that officials would be happy to provide more detail about how economic analyses were produced. We do not have any such questions at this time, but hope to receive evidence on this point and may wish to discuss this in more detail in the future.

Finally, members asked about what more could be done by both the Government and Parliament to ensure that the public were aware of what was being negotiated and agreed, and why.

You told us that the Government was seeking to strike deals because they were in the public interest, and we agreed with you that there was a need to help everyone understand and take advantage of them. In particular, we discussed the debate on the Agriculture Bill regarding standards, which indicated the very significant interest people had in the deals that the Government was seeking to strike, as well as the significant number of contributions to public consultations, with 160,000 responses to the public consultation on the US deal.

As you know, we are working towards concluding our inquiry and will be publishing a full report in the coming weeks. In that respect, it would be very useful if we could include in our report an annex recording some of the discussion that we have had with you, so that other members and the public are aware of the exchange we have had in person, as well as by correspondence.

With that in mind, I would be grateful for your, and your officials', views about whether this letter, along with any response from you, might be put into the public domain as part of our final report.

I would be grateful for a response to this letter by 30 June.

Letter from Lord Grimstone to Lord Goldsmith QC on working Practices, 29 June 2020

Thank you for your letter dated 16 June, following our meeting on 10 June. I am committed to working closely with your Committee and continuing a constructive working relationship as we take forward the UK's independent Trade Policy.

I was pleased to be able to reassure your Committee that we are committed to transparency, using the comprehensive information we have published on our approach to US and Japan negotiations as an example. We will, of course, continue to keep Parliament updated on the progress of negotiations via regular updates.

You asked whether we intend to publish Parliamentary Reports for new FTAs as well as our continuity agreements. The purpose of our Parliamentary Reports for continuity agreements is to draw the attention of the House to any significant changes that have been made to the original text of the deal that the EU had with the country in question. As we discussed, my department will continue to produce Parliamentary Reports for all remaining continuity agreements.

This does not apply to new FTAs and, given we will be producing full impact assessments and explanatory memoranda and engaging in ongoing dialogue with your Committee on new FTAs, we do not believe it is necessary to produce similar Parliamentary Reports for such agreements. I would be happy to discuss this further to ensure that we understand the information that you would like to see and can consider that as we develop the suite of information that will accompany final agreements.

Regarding private briefings, at an appearance before the International Trade Committee (ITC) on 24 June the International Trade Secretary confirmed that we will hold private briefings where appropriate to discuss the progress of negotiations and any areas of interest with relevant Select Committees. I know that our respective officials are already discussing this as part of their regular dialogue and I would of course be happy to have a further discussion with you.

In terms of the Command Paper entitled "Processes for making free trade agreements once the UK has left the EU", this paper was authored and published by a previous administration prior to the election and thus in a very different context. This Government is committed to the key principles of transparency and effective scrutiny of our trade policy and has made, and delivered, its own commitments in this regard. This includes delivering many of the commitments from the previous paper, for example publishing objectives and initial economic assessments for our negotiations with the US, Japan, Australia and New Zealand.

As confirmed by the International Trade Secretary to the ITC on 24 June, it is our intention to ensure:

> "that there is sufficient time for the relevant scrutiny committee to produce a report, should it wish to do so, before the final text of a trade agreement is laid before Parliament."

I have noted your ongoing inquiry and look forward to reading your report. I am content for your letter of 16 June and this response to be published as part of that report. If you wish to publish further information from our previous meetings I would appreciate a discussion beforehand.

Letter from Lord Goldsmith QC to Lord Ahmad of Wimbledon on working Practices, 22 June 2020

Thank you for speaking to the International Agreements Committee on 17 June about our Working Practices inquiry, which provided a useful and constructive discussion.

The Committee was pleased to note your commitment to working cooperatively to find ways to support parliamentary scrutiny of international agreements, including those that do not currently engage CRAG, such as Memoranda of Understanding. We welcome your commitment to helping to address some of the challenges posed by the short timetable under CRAG, including ensuring that sufficient time can be found to allow our Committee to report on an agreement after it is finalised but before it is laid formally under CRAG.

It was also useful to discuss the 'umbrella' role you and the Foreign and Commonwealth Office play across Government when it comes to the negotiation and conclusion of international agreements and submitting them for scrutiny under CRAG. We agree with you that there ought to be a consistent approach to supporting parliamentary scrutiny across Departments and hope that you and your officials might work in Government to help ensure that this is the case.

In our discussion, you highlighted that it will be difficult to establish a single, one-size-fits-all framework for either the provision of early information or the laying of political agreements like MOUs for scrutiny. We appreciate that international agreements vary widely and agree with you that experience will be a good guide of the sorts of working practices that will be most effective for different types of agreements.

Nevertheless, we hope our officials can start to discuss now the types of agreements where, in principle, information could be provided early to the Committee prior to a final agreement being laid for scrutiny under CRAG, as well as those categories of agreements that would not be subject to CRAG but we might agree should be notified to the Committee and offered for scrutiny. It would be useful to make some progress on this issue by the September, to allow the Committee and you to consider some recommendations about a flexible framework that would give more clarity to Departments across Government about what the Committee will need from them in order to conduct parliamentary scrutiny effectively.

During the meeting we also discussed the sorts of information included in Explanatory Memoranda, and in particular the role the FCO could play in ensuring that all Departments were able to provide informative assessments of the human rights impacts of international agreements. We are grateful for the work that FCO officials have done so far in reviewing the EM template to help ensure that EMs provide the Committee with the information it needs and hope that this guidance will prove effective.

Finally, we discussed the role of the devolveds in international agreements. We welcome your open and collaborative approach to working with the devolved administrations and hope that this is shared by your colleagues across Whitehall, as we know it is shared by Lord Grimstone at the Department for International Trade. You noted that sharing initialled agreements with the UK Parliament at the same time as sharing them with the devolved administrations would need to be considered on a case-by-case basis. While we appreciate it is hard to define in the abstract precisely when an agreement might be suitable for sharing, we again

hope that our officials might have productive discussions in the next few months about how to develop a flexible framework for doing this.

As you know, we are working towards concluding our inquiry and will be publishing a full report in the coming weeks. In that respect, it would be very useful if we could include in our report an annex recording some of the discussion that we have had with you, so that other members and the public are aware of the exchange we have had in person, as well as by correspondence. I hope that you might agree that this letter, along with any response from you, can be put into the public domain as part of our final report.

I would be grateful for a response to this letter by 30 June, if possible, to allow us to finalise our report as swiftly as possible in early July.

Letter from Lord Ahmad of Wimbledon to Lord Goldsmith QC on working Practices, 3 July 2020

Thank you for providing me the opportunity to brief your Committee on 17 June, and your subsequent letter of 22 June underlining our shared commitment to working cooperatively to support parliamentary scrutiny of international agreements. I'm glad both you and the Committee found the discussion useful and constructive, and I look forward to further conversations in future. Following the UK's exit from the EU, the International Agreements Sub-Committee has an important scrutiny role to play in relation to international agreements.

As you are aware, the Foreign and Commonwealth Office is leading a process of reviewing the procedures around the Constitutional Reform and Governance Act (CRaG), which lays out the provisions for parliamentary scrutiny of international agreements. We will need to consult colleagues across Government before responding to your inquiry report in full, including the issues raised in your letter of 22 June.

At this point, I would like to reiterate my comments made before your Committee, namely that this Government welcomes and respects Parliament's role in scrutinising international agreements. Timely, robust scrutiny undoubtedly leads to better treaty making.

I wish you all the best with with your report and, as highlighted above, look forward to the further discussions in due course.

APPENDIX 4: AMENDMENT 12 TO THE TRADE BILL 2017–19 (PARLIAMENTARY APPROVAL OF TRADE AGREEMENTS) AS AGREED BY THE HOUSE

(1) Negotiations towards a free trade agreement may not commence until the Secretary of State has laid a draft negotiating mandate before the appropriately constituted Committee and it has been approved by—

(a) resolution of that Committee, and

(b) a resolution of both Houses of Parliament.

(2) Prior to the draft negotiating mandate being laid, the Secretary of State must have consulted with each devolved administration on the content of the draft negotiating mandate.

(3) Prior to considering a resolution approving a mandate relating to the negotiation of a free trade agreement, the Committee must produce a sustainability impact assessment.

(4) Before either House of Parliament may approve by resolution the text of a proposed free trade agreement, the Secretary of State must lay the text of the proposed agreement before the Committee and that text must be approved by a resolution of that Committee.

(5) Prior to the laying of the text of the proposed agreement, the Secretary of State must have consulted with each devolved administration on the text of the proposed agreement.

(6) Prior to considering a resolution approving the text of a free trade agreement under subsection (4), the Committee must produce a report setting out a recommendation in relation to the ratification of the agreement.

(7) The Secretary of State must lay the report produced under subsection (6) before both Houses of Parliament.

(8) Schedule (Committee on Trade Agreements) contains further provision about the reports under subsection (6).

(9) A free trade agreement may not be ratified unless the agreement has been laid before, and approved by an amendable resolution of, both Houses of Parliament.

(10) The Constitutional Reform and Governance Act 2010 is amended as follows.

(11) At the end of section 25(2) insert ", or a treaty containing a free trade agreement as defined in section (Parliamentary approval of trade agreements) of the Trade Act 2019."

(12) In this section, "free trade agreement" refers to any agreement between the United Kingdom and one or more partners that includes components that facilitate the trade of goods, services or intellectual property including but not limited to—

(a) Free Trade Agreements (FTA) as defined by section 8;

(b) Interim Association Agreements, Association Agreements (AA);

(c) Economic Partnership Agreements (EPA);
(d) Interim Partnership Agreements;
(e) Stabilisation and Association Agreements (SAA);
(f) Global Agreements (GA);
(g) Economic Area Agreements (EAA);
(h) Cooperation Agreements (CA);
(i) Comprehensive Economic and Trade Agreements (CETA);
(j) Association Agreements with strong trade component;
(k) Transatlantic Trade and Investment Partnerships (TTIP);
(l) Investment Protection Agreements.