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How Parliament treats treaties

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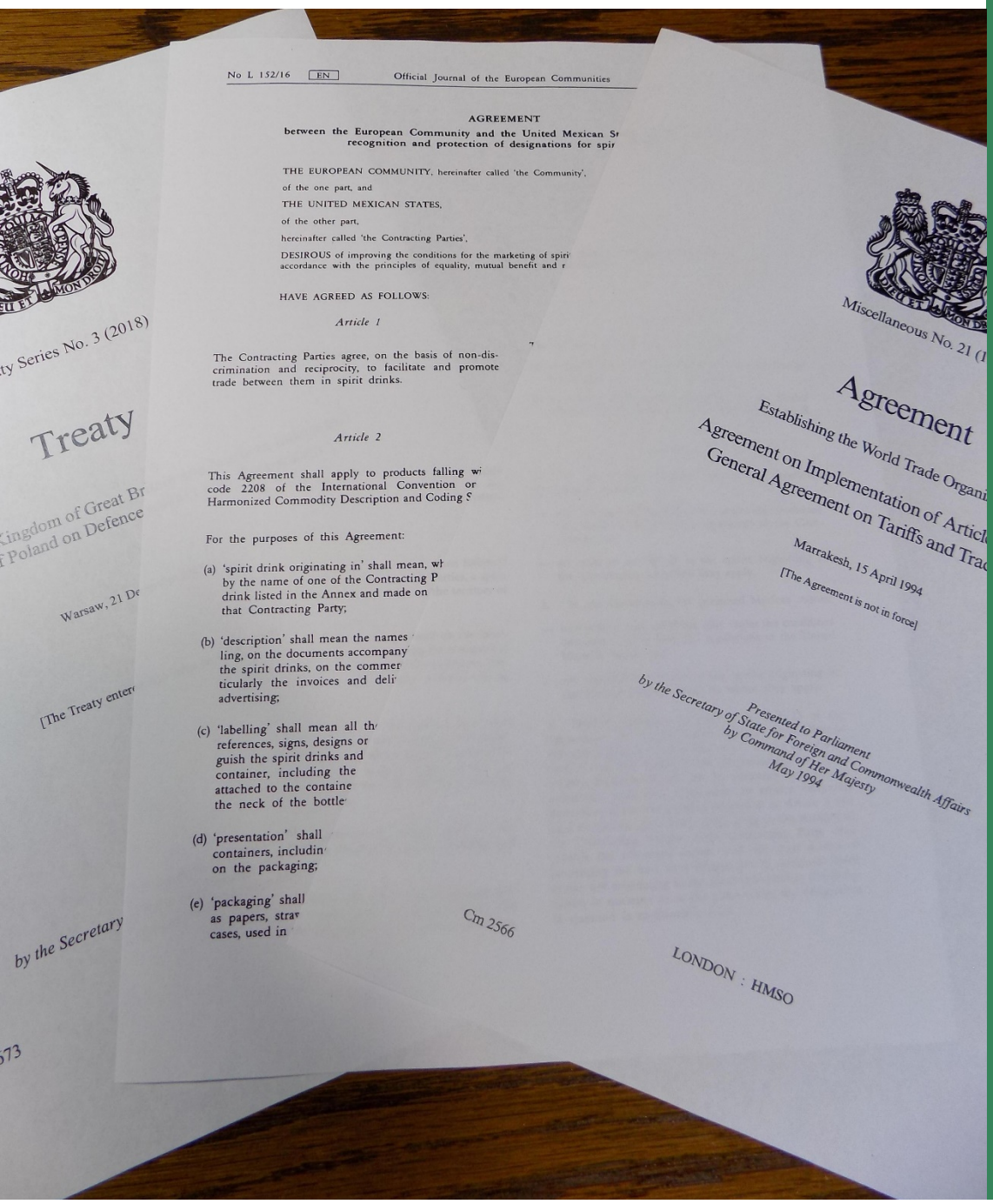

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Overview

International treaties matter to everyone. They can be as important as domestic legislation – sometimes more so – and are an increasing part of UK Government activity, particularly in areas previously handled for the UK by the EU such as trade and fisheries.

In response, Parliament has increased committees' treaty scrutiny, and the Government has made some commitments to support scrutiny of trade treaties. However, treaty scrutiny generally remains under-developed and under-resourced even compared to scrutiny of delegated legislation, and Parliament's formal involvement is still limited.

Proponents of change argue that giving Parliament a bigger role could help the government make better treaties and would increase the democratic legitimacy of this area of government law-making. The Government argues that such changes would interfere with its treaty making powers and its responsibility for conducting foreign policy.

The government makes treaties…

The starting point is that governments make treaties. The UK Government is responsible for negotiating, signing, ratifying, amending and withdrawing from all international treaties involving the UK, under its prerogative powers, and it is the UK Government that is bound by them under international law.

It is also responsible for providing information about treaties. It has made some commitments to increased provisions here, but has rejected proposals for a presumption of transparency.

…but Parliament has some roles

Parliament does have several treaty roles. But since the UK vote to leave the EU, there has been an increased focus on the perceived limitations of Parliament's role in relation to international treaties.

Legislation may be needed

The main formal limits on the Government's treaty powers are that: (1) treaties cannot automatically change domestic law or rights in the UK; and (2) they cannot make major changes to the UK's constitutional arrangements without Parliamentary authority.

Parliament (and/or the devolved legislatures) is therefore involved if domestic law needs to be changed in order to implement a treaty. But implementing legislation is not always necessary. Where legislation is needed, its provisions will be predetermined by the contents of the treaty. And increasingly this legislation will be only secondary (government-made) rather than primary (parliament-made).

The Commons could delay ratification

Separately from legislating for treaties, since 2010 the Commons has had a statutory opportunity to delay the Government's ratification of treaties. But to do so it must find an opportunity to vote against ratifying a signed treaty, during a short statutory period.

Under Part 2 of the Constitutional Reform and Governance Act 2010 (CRAG), the government cannot ratify a treaty unless it has first laid the signed treaty before Parliament (along with an Explanatory Memorandum), for 21 sitting days. This gave statutory form to part of a 1920s constitutional convention on treaties, known as the Ponsonby Rule.

The CRAG Act also for the first time gave the House of Commons a new power: if during that statutory pause it passes a resolution that a treaty should not be ratified, another 21-sitting-day delay to ratification is triggered – and this process may be repeated. A Lords resolution against ratification does not have this effect.

Neither House has yet passed a resolution against ratification of a treaty under these provisions.

Enhanced arrangements for free trade agreements

The Government has agreed some enhanced arrangements for scrutiny and debate of free trade agreements (FTAs), following the UK's departure from the EU. These include consultation before negotiations begin, publishing the outline negotiating mandate, regular updates on the negotiations, and extra time for committee scrutiny of the finalised agreements.

But it has shown no sign of extending these to non-trade treaties, or to any post-Brexit treaties with the EU, and has repeatedly rejected proposals to require parliamentary consent for any treaties.

Exceptionally, Parliament may need to authorise treaty actions in advance

In its 2017 *Miller* judgment, the UK Supreme Court ruled that Parliament needed to legislate to authorise treaty actions in advance in two very specific and exceptional circumstances: where invoking a provision of the treaty amounted to a major change to UK constitutional arrangements, or where it would sever an existing source of domestic law and rights. It is unlikely that these circumstances will arise again outside the Brexit context.

Committee scrutiny

Committees in both the Commons and the Lords have significantly increased their treaty scrutiny work recently. The House of Lords has established a new, dedicated International Agreements Committee to consider all treaties, before, during and after ratification. The Commons International Trade Committee has also scrutinised Brexit-related trade agreements, such as the 2020 UK–Japan Comprehensive Economic Partnership Agreement.

The Joint Committee on Human Rights continues to sift and scrutinise human rights treaties and those with human rights considerations. Along with many other committees, it has made numerous recommendations about how to improve parliamentary scrutiny of treaties.

Some other committees are also beginning to be involved, for instance the Commons Environment, Food and Rural Affairs Committee, whose chair used the new 'guesting provisions' to join the International Trade Committee for several meetings.

However, there are still significant challenges for committees in getting the information they need, and in reporting on treaties in the time available.

Limits and exceptions to Parliament's role

Although CRAG gave Parliament a statutory role on treaties, it is limited in both depth and breadth, and has resulted in little practical difference.

Limited depth

CRAG does not require Parliamentary approval of treaties. Nor does it require scrutiny, debates or votes on treaties, or even create any triggers or mechanisms for them. Opportunities for debate on the floor of the House of Commons depend, to a significant

extent, on the willingness of the Government to facilitate them because it controls most of that time.

Parliament has no formal input while the Government is negotiating treaties, which is the stage when changes could be made. In some other countries like Norway, for example, major foreign policy decisions are discussed confidentially with parliamentary committees in advance. Under the CRAG Act, Parliament can only oppose (or tacitly accept) a concluded treaty in full, as signed treaties cannot be unilaterally amended.

Furthermore, the CRAG period is too short for a typical committee inquiry, and there is no link between scrutiny of treaties and of their implementing legislation.

Limited breadth

The CRAG Act covers only some treaties, and no other international arrangements such as Memorandums of Understanding, which do not even have to be listed let alone published.

Nor does it cover most treaty amendments, or any treaty withdrawal, derogations or decisions made under a treaty.

Furthermore, the Government may exempt a treaty from the CRAG provisions in 'exceptional cases', or avoid them altogether through a treaty's implementing legislation.

Brexit negotiations and agreements

The negotiations for the UK's withdrawal from the EU exposed the long-standing challenges of parliamentary treaty scrutiny.

Many parliamentarians and committees wanted Parliament to be able to play a constructive part in helping the Government secure the best outcome for the UK. Recurring challenges included getting information from the Government, securing regular ministerial appearances, the quality of government responses, committee coordination and overlaps.

Withdrawal Agreement

Amid much controversy, the EU (Withdrawal) Act 2018 was amended against the Government's wishes to include a 'meaningful vote' provision. This required parliamentary consent for the Government to ratify the Withdrawal Agreement with the EU. But after the December 2019 election this provision was repealed by the EU (Withdrawal Agreement) Act 2020, which also disapplied the CRAG treaty provisions for the Withdrawal Agreement.

Trade and Cooperation Agreement

Then in December 2020, the Government agreed the Trade and Cooperation Agreement (TCA) with the EU without the House of Commons having had a formal debate on the substance of the UK's negotiating position. The implementing Bill was passed in one day, providing Parliament with very little time to scrutinise either the treaty or its implementing legislation.

'Rollover' agreements

Parliamentary committees published dozens of reports on Brexit-related matters, and also scrutinised the Brexit-related treaties with around 60 other countries. These 'rollover' agreements were intended largely to reproduce the effects of existing treaties between those countries and the EU that no longer applied to the UK after Brexit. They covered a wide range of topics in addition to Brexit.

Future scrutiny

Many committees have argued that the UK Parliament will still need to scrutinise the implementation of the Brexit treaties and any future negotiations with the EU, but no new structures or mechanisms have yet been introduced.

Devolved executives and legislatures

Treaty-making remains the exclusive responsibility of the UK Government. The devolved executives and legislatures therefore have little involvement in treaties, even though they are bound by them and may be responsible for applying them.

The UK Government has agreed to cooperate with the devolved executives on treaty negotiation and implementation, and is in the process of updating this agreement (concordat). There are no equivalent structures for coordination between the devolved legislatures and Westminster.

Note: this briefing paper replaces Commons Library Briefing Paper 5855, Parliament's Role in Ratifying Treaties, 17 February 2017.

1. Why do treaties matter?

1.1 Increased number and scope

Treaties – written agreements between two or more states and/or international organisations that are binding under international law – are an increasingly important part of government activity.

Globalisation and the growing need for international solutions to international problems mean that there are now more treaties covering more areas than ever. States and international organisations make hundreds of treaties worldwide every year. They are no longer just about war and peace, territory and trade, but instead affect many areas of daily life, from food standards to aviation safety, police cooperation to taxation, environmental targets to domestic violence.

Emily Jones and Anna Sands, of the University of Oxford illustrate the recent change in scope of trade treaties, for example:

> Until the late 1980s, trade deals focused on removing tariffs and other border measures, attracted little public attention, and were subject to very little debate or scrutiny in national parliaments. Recent trade deals touch on a vast array of economic and social policy areas. Rather than just remove border taxes, contemporary trade agreements seek to align regulation between countries, so they have substantial implications for the way that different areas of the economy are regulated – from farming and food standards, to manufacturing, financial services and accounting, to the regulation of the digital economy, and healthcare.[1]

In the UK this trend is intensified by regaining responsibility for areas of international cooperation previously handled by the EU, such as trade, fisheries and data regulation.

As Holger Hestermeyer, Professor of International and EU Law at King's College, London, put it in March 2019, "There has hardly been a day in the last two years in which treaties have not taken centre stage in the public debate".[2]

1.2 Creating obligations, rights and duties

Treaties not only create obligations between states, but also set standards and create rights and duties for individuals and businesses. Many also establish new bodies that can amend the treaty, and/or binding mechanisms for resolving disputes under it.

The UK has chosen to be bound by the 1969 Vienna Convention on the Law of Treaties, which codifies the international law on treaties. This is how it defines a treaty:

> "Treaty" means an international agreement concluded between States in written form and governed by international law, whether

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

2 Holger Hestermeyer,' Parliament and treaty-making: from CRAG to a meaningful vote?', Constitution Unit blog, 14 March 2019

> embodied in a single instrument or in two or more related instruments and whatever its particular designation.

It does not matter what they are called: treaty, convention, agreement, protocol, or anything else. An exchange of instruments in any form, often through diplomatic notes or letters, can be a treaty covered by this definition.

The central provision, sometimes referred to as 'pacta sunt servanda' is set out in Article 26 of the Vienna Convention, which reflects universally-binding customary international law:

> Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

However, the Vienna Convention says little about the relationship between treaty law and domestic law, beyond Article 27 which states:

> A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

This relationship is not always well understood. For example, in 2020 the UK Government proposed controversial domestic legislation – part 5 of the UK Internal Market Bill – that would have empowered Ministers to breach a treaty that it had recently ratified. Although parliamentary sovereignty means that any such provisions are lawful domestically, breaching a treaty is breaching the UK's obligations under international law. The clauses were later dropped.

1.3 A democratic deficit?

The growth in numbers and scope of treaty-making has not been matched by increased oversight in the UK, raising concerns of a democratic deficit.

The UK Government has "an unfettered power to make treaties which do not change domestic law".[3] This is because treaty powers are an exercise of the royal prerogative, rather than being granted by law.

Parliament may be involved where primary or secondary legislation is needed to bring elements of a treaty into UK domestic law. But if the government is to abide by its international legal obligations under the treaty, the terms of that legislation and potentially also of future legislation will be constrained.

And although the UK Parliament now has a statutory power to object to treaties being ratified, it has never used it. So the main methods of parliamentary accountability remain the general, non-binding ones of parliamentary questions, general debates and committee scrutiny.

David Anderson (Lord Anderson QC) has argued that the Government should be accountable for international treaties just as it is for domestic laws:

> Bagehot, the great [constitutional] theorist… in 1872 said that ministers ought to be obliged to explain clearly their foreign

[3] *R(Miller) v Secretary of State for Exiting the European Union*, [2017] UKSC 5, para 58

> contracts before they were valid, just as they have to explain their domestic proposals before they become law.[4]

Emily Jones and Anna Sands, in setting out how much trade agreements have changed even over the last 40 years, suggest that this argument is even stronger now than it was 150 years ago:

> As contemporary trade agreements involve policy decisions that are increasingly akin to domestic policy in terms of their impact on the everyday lives of citizens, there are strong arguments for subjecting them to equivalent democratic scrutiny.[5]

The devolved legislatures have no direct methods of scrutiny and oversight of UK government treaty activities although they must implement treaties in their areas of competence, and may have to legislate to do so.

Nor do the courts in the UK exercise oversight over treaty powers, even though treaties increasingly penetrate into domestic law. Treaty powers are rarely ruled justiciable, even though other exercises of the government's prerogative power increasingly are.[6] The courts will also allow the Government a wide margin of appreciation in settling foreign affairs matters through treaties. The courts will nevertheless have regard even to unincorporated treaties made under those powers in a wide range of circumstances. For example, they will try to interpret domestic law and policy so that it complies with treaty requirements, without any requirement for democratic scrutiny of the treaty.[7]

It has been noted that academics in the UK have largely ignored treaty-making. Foreign relations law is rarely studied or taught as a subject in its own right in the UK. Treaty-making and other topics therefore tend to fall between international law, constitutional law, international relations and politics, with no branch taking a particular interest. Mario Mendez of Queen Mary University of London suggests that this both influences and is influenced by the level of interest in Parliament:

> a mutually reinforcing dynamic between scholarly and parliamentary neglect of the treaty-making power has taken hold, the general lack of engagement with the treaty-making power by each constituency helping to explain and reinforce neglect by the other. The primary driver for this neglect flows from the perception that dualism and parliamentary sovereignty combine to shield the UK legal order from treaties, with Parliament as the legitimate gatekeeper offering the route that treaties must take to impact on the UK.[8]

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4 Alex Dean, 'Interview: David Anderson—parliament on the international plane', Prospect, 3 February 2021

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

6 "the general rule is that the power to make or unmake treaties is exercisable without legislative authority and that the exercise of that power is not reviewable by the courts" – *R(Miller) v Secretary of State for Exiting the European Union*, [2017] UKSC 5, para 55

7 Joint Committee on Human Rights, Protocol No. 14 to the European Convention on Human Rights, HL Paper 8, HC 106, 8 December 2004, para 6

8 Mario Mendez, 'Neglecting the treaty-making power in the UK: the case for change', Law Quarterly Review 2020, 136 (Oct), 630-657

Treaties can therefore have significant impacts on peoples' lives and business, and are recognised by the courts. However there is little accountability, scrutiny and review of government treaty activity.

2. Government responsibilities

2.1 Making and unmaking treaties

Making, amending and unmaking treaties is a matter for governments worldwide. This has been described as "an executive power par excellence".[9] This is part of the long-standing tradition under which foreign relations have a different set of rules from the domestic affairs of a state.[10] It also reflects a view that the "unanimity, strength and despatch"[11] of giving governments sole responsibility for treaties is more important than other factors such as consensus, scrutiny and accountability in treaty-making.

In the UK, the Government negotiates, signs and ratifies treaties under the royal prerogative.[12] This means its powers are inherent, rather than granted (and limited) by statute.

Before Brexit, the UK would typically conclude around 30 treaties a year, but this number is increasing. Box 1 below outlines a typical process, although as explained in section 3.4 below, free trade agreements also now have some additional steps.

Box 1: Typical treaty-making in the UK

- The Government **negotiates** a treaty, which for multilateral treaties is often a lengthy process. Occasionally there will be a public consultation first. The Government sets negotiating objectives and 'red lines', and then sends civil service negotiators to a series of intergovernmental negotiating 'rounds'.
- The Government **signs** the finalised treaty. Signing shows that the State agrees with the text and puts it under an obligation to refrain from acts that would defeat the object and purpose of the treaty. The UK does not usually sign a treaty unless it has a reasonably firm intention of ratifying it. (NB some treaties state that they enter into force on signature alone.)
- The Government introduces or makes any necessary **domestic legislative changes**.
- The Government **lays the signed treaty before Parliament**, along with an Explanatory Memorandum. It may not ratify the treaty during the following 21 sitting days.
- The Lords International Agreements Committee will report on the treaty. Parliament does not have to do anything else, but if either House **resolves against ratification** during that period, the Government must explain why it wants to ratify anyway. The House of Commons can effectively block ratification by passing repeated resolutions that each trigger another 21-sitting-day delay.
- If there are no outstanding Commons resolutions, the Government can **ratify** the treaty. Ratifying is when a State confirms that it is bound by a treaty that it had already signed. It may also be able to make **reservations** and interpretative declarations at this point.
- The treaty **enters into force** for the UK according to the provisions in the treaty – for example six months after ratification, or once the treaty has been ratified by a set number of States.

9 Mario Mendez, 'Constitutional Review of Treaties: Lessons for Comparative Constitutional Design and Practice', Jean Monnet Working Paper 8/16, 2016

10 Helmut Philipp Aust, 'Foreign Affairs', *Max Planck Encyclopedia of Comparative Constitutional Law*, August 2017, para 1

11 W Blackstone, *Commentaries on the Laws of England 1765-69* Book 1 (OUP 2016) p162. See Ewan Smith, Eirik Bjorge and Arabella Lang, 'Treaties, Parliament and the Constitution', *Public Law* July 2020 508 at 518-520.

12 Prerogative powers were once exercised by the reigning monarch but are now exercised largely by the Government on the monarch's behalf, without any parliamentary authority. For background information see Library Briefing Paper 3861, The Royal Prerogative, 17 August 2017

There is guidance on how the UK Government makes, signs and ratifies treaties on the gov.uk website.[13]

Other treaty actions, such as amending, derogating from or leaving a treaty, are also matters for the Government but usually do not require Parliament's involvement, and attract less attention.

Another Commons Library briefing paper, *Principles of International Law: a brief guide*, explains more about treaties in the UK.[14]

2.2 Treaty information and transparency

The Government is responsible for providing information about treaties affecting the UK. But the treaty information it provides is limited, and it has repeatedly rejected a presumption of transparency.

Treaty texts

Each treaty subject to ratification (or the similar processes of accession, approval or acceptance) must be laid before Parliament by the deposit of a Command Paper. These are published in one of three series on the Foreign, Commonwealth and Development Office (FCDO) website: the Country Series (for bilateral treaties), the European Union Series (for treaties between Member States of the European Union and for which the UK was party to prior to the end of the Brexit transition period in December 2020), and the Miscellaneous Series (for multilateral treaties). After entry into force, all treaties binding the UK are then published in the Treaty Series even if they had previously been published in one of the other series.

The FCDO's public UK treaties online database shows when treaties are signed and ratified, and when they enter into force.

Explanatory memorandums

Following an intervention by the Joint Committee on Human Rights,[15] the Government must also publish an Explanatory Memorandum (EM) for every treaty it lays before Parliament. It had been doing so as a matter of practice since 1997.

EMs are prepared by the Government Department taking the lead on the treaty, and the quality and quantity of information they provide has been viewed as patchy.[16] However, partly in response to pressure from the Lords European Union Committee and International Agreements Committee,[17] improvements have been noted. FCDO treaty guidance now contains an EM template with headings including:

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13 Foreign, Commonwealth and Development Office, Treaties and MOUs: Guidance on Practice and Procedures, 19 March 2013 (updated 2020)

14 Patrick Butchard, Principles of International Law: a brief guide, Commons Library Briefing Paper 9010, 21 September 2020

15 Joint Committee on Human Rights, *Legislative Scrutiny: Constitutional Reform and Governance Bill; Video Recordings Bill*, HL Paper 249, HC 249, 12 January 2010, para 1.41

16 Jill Barrett, written evidence to House of Lords International Agreements sub-Committee, TWP0014 (June 2020)

17 See for example House of Lords International Agreements Sub-committee, *Treaty scrutiny: working practices*, 2020 para 71

- the subject matter and policy objectives of the treaty
- why the Government is entering into the treaty
- how the new treaty interacts with any other related agreements
- the substance of the Treaty and the benefits and burdens of UK participation
- any arrangements for governance, dispute resolution, amendments and withdrawal
- any relevant existing UK domestic legislation, and any new implementing legislation or other measures needed
- the territorial application of the treaty
- any direct financial costs and implications of implementing the treaty
- any significant human rights implications
- any UK reservations or declarations
- consultation with stakeholders including the devolved administrations
- explanation of any proposed provisional application
- which Government Minister(s) is/are responsible for the treaty.[18]

In other countries, the Government must provide more detailed and more wide-ranging information about the impact of treaties. For example, in New Zealand a parliamentary Standing Order[19] sets out the requirements for National Interest Analyses for treaties, including an assessment of the costs as well as the benefits of ratification. Parliamentary committees such as the Australian parliament's Joint Standing Committee on Treaties (JSCOT) often hold the government to account on the content of this information.

Treaty negotiations

With some recent exceptions for Free Trade Agreements, the Government rarely publishes any information about treaty negotiations, such as:

- which negotiations it is considering
- what its negotiating objectives are
- when it starts negotiations
- progress with negotiations

It has rejected several committee proposals for a general presumption of transparency, arguing that transparency needs to be balanced against other considerations in each case:

> The consideration of whether and what type of information it will be in the public interest to release in the context of ongoing negotiations will involve weighing the need for transparency and

18 Foreign, Commonwealth and Development Office, Treaties and MOUs: Guidance on Practice and Procedures, 19 March 2013 (updated 2020)
19 SO 406

> openness against a range of other factors including the risk of undermining the UK's negotiating position, any prejudice to the UK's relationship with other States and any expectation of confidentiality on the part of those States.[20]

As Holger Hestermeyer has pointed out, "negotiations in particular would not be effective if conducted in the glare of publicity", and most treaties "are of a technical nature that does not raise particular interest in parliament".[21]

The main counter-arguments are that secrecy makes it hard for anyone to scrutinise treaties at the time when they can be changed, that transparency is essential for accountability, and that sharing information makes for better results. As the chair of the new Lords International Agreements Committee has put it, "greater scrutiny makes for better policies and may help uncover issues at an early stage".[22]

Other countries' governments provide more treaty information. For example, in the Netherlands, legislation requires the Government to 'periodically submit' to Parliament a list of draft treaties it is negotiating. The list must contain specified elements, although information may be excluded in the national interest. In practice the information is provided every three months. The Australian Government also publishes a list of all multilateral treaties under negotiation or review, and tables it in Parliament twice a year.[23]

Updated treaty information

Nor does the UK Government keep public treaty information updated, for example with:

- legislation and policies that implement treaties
- decisions made by treaty bodies
- disputes under treaties
- how treaties are amended
- active derogations
- withdrawal or denunciation

This makes it difficult to determine exactly what the UK's current treaty obligations are as well as which elements can be relied on by individuals and businesses and enforced by the courts.

Parliamentary treaty tracker

The UK Parliament has a new treaty tracker to show what happens in Parliament to all the treaties that are laid there, for example when committee reports are published and if there are any debates. But this is

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20 See for example Government response to Lords Constitution Committee report on Parliamentary Scrutiny of Treaties, July 2019, pp7-8

21 Holger Hestermeyer,'Parliament and treaty-making: from CRAG to a meaningful vote?', Constitution Unit blog, 14 March 2019

22 Peter Goldsmith, 'International agreements affect us all. They deserve to be scrutinised', Prospect, 12 February 2021

23 Jill Barrett, written evidence to House of Lords International Agreements sub-Committee, TWP0014 (June 2020)

not linked to the FCDO treaties database and again has only limited coverage and scope.

3. Parliament has some roles

3.1 Introduction

As international and domestic affairs become increasingly intertwined, treaties are penetrating deep into domestic legal orders, and domestic constitutional principles such as democracy and the rule of law are becoming increasingly relevant to treaties.[24]

As a result, treaty-making is increasingly seen as a responsibility to be shared between government and parliament. Most countries have developed some domestic mechanisms for reviewing government treaty-making. The balance lies in different places in different countries, but often parliament's consent is required for at least some treaties.[25]

In the UK, Parliament's consent is not needed for the government to conclude treaties. This is usually justified by the fact that international agreements that have not been transformed into domestic law have no direct legal effect. But Parliament does have some limited roles:

- it may need to pass treaty-implementing legislation
- the Commons theoretically has a statutory opportunity to delay ratification
- Free Trade Agreements (FTAs) have enhanced scrutiny measures
- exceptionally, Parliament may need to authorise treaty actions in advance
- committees conduct treaty scrutiny

UK parliamentary scrutiny and oversight of treaties has increased, at least for scrutiny of FTAs where the Government has agreed to share more information and at an earlier stage, and to hold debates where possible. And there is now a dedicated treaty scrutiny committee in the House of Lords: the International Agreements Committee. There is more information on both developments in sections 3.4 and 3.6 below.

But treaty scrutiny still attracts less attention and resource than scrutiny of other forms of government law-making. And the Government has not indicated a willingness to extend the arrangements for scrutinising FTAs to other types of treaty, or to introduce a requirement for parliamentary consent.[26]

Proponents of change such as Lord Anderson argue that parliament could help the government make better treaties and would increase the democratic legitimacy of this area of law-making:

> [Greater treaty scrutiny] improves policy, since "the need to explain what it is doing to parliament requires the government to produce evidence and analysis." There is also a democratic case:

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24 Helmut Philipp Aust, 'Foreign Affairs', Max Planck Encyclopedia of Comparative Constitutional Law, August 2017, para 4

25 See Helmut Philipp Aust, 'Foreign Affairs', *Max Planck Encyclopedia of Comparative Constitutional Law*, August 2017, paras 13-16

26 See for example Government response to Lords Constitution Committee report on Parliamentary Scrutiny of Treaties, July 2019, p10

> "If you're looking at an agreement which may have great political significance… if parliament has been involved in the process, then trust in the democratic legitimacy of treaty-making is improved."
>
> A stronger role for parliament can even strengthen a government's negotiating hand "by enabling it to say: 'we'd love to give you this, but there's no way we'd get it through," arguing it needs concessions to sell the deal back home.[27]

3.2 Legislation may be needed

The UK is a 'dualist' state, in which treaties create formal rights and duties only for the Government under international law and cannot automatically change UK domestic law.[28]

Legislation might therefore be needed to give domestic effect to new treaty-based rights and duties that the Government has agreed to. For example, a treaty might require the states that have ratified it to create new criminal offences (Genocide Convention, 1951, Article V). Or it may require them to uphold new individual rights, for instance the right to a periodic review for children in residential care (UN Convention on the Rights of the Child, 1989, Article 25).

The practice of successive Governments is to make sure that domestic law is in line with its proposed new treaty obligations before ratifying. But this is not the same as giving Parliament a say over the treaty itself, for several reasons:

- Not all treaties need any new legislation.
- Some treaties are 'provisionally applied' before ratification.[29]
- Even when legislation is needed, its provisions will largely be predetermined by the contents of the treaty.
- Although a treaty will occasionally be implemented by a stand-alone Bill, perhaps with the treaty text reproduced in a Schedule, more often it will be only a few clauses in a wider Bill, and there might not even be a reference to the treaty in the Bill (see the example in Box 2 below).
- Treaty provisions are often implemented through secondary rather than primary legislation, with little if any parliamentary involvement. For example, the Private International Law (Implementation of Agreements) Act 2020 allows any private international law provisions in treaties to be implemented through secondary legislation for five years, and the Trade Act 2021 allows implementation of some trade treaties by secondary legislation, subject to a number of conditions. In practice, implementing regulations may be a mixture of old and new regulations under a

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27 Alex Dean, 'Interview: David Anderson—parliament on the international plane', Prospect, 3 February 2021

28 See 'International law and parliamentary sovereignty in the UK', part 3.1 of Patrick Butchard, Principles of International Law: a brief guide, Commons Library Briefing Paper 9010, 21 September 2020

29 See Department for International Trade, Provisional application and bridging mechanisms: Information note (undated, 2019)

variety of parent Acts, as for the 2020 UK-Japan trade agreement.[30]

Box 2: UN Convention on the Rights of the Child

The UK has signed and ratified the 1989 UN Convention on the Rights of the Child (UNCRC) – the most widely ratified human rights treaty in the world. However, it has not incorporated the whole convention into domestic law. Some provisions – notably the 'best interests of the child' principle – appear scattered across several pieces of domestic legislation and policy, including for example the *Children Act 1989*. Outside those contexts, the courts in England and Wales cannot directly apply Convention.

However, the Scottish Parliament has now passed a Bill to incorporate the UNCRC into Scots law: the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill which:

- makes the entire UNCRC and its first two optional protocols part of Scots law
- makes it unlawful for a public authority to act (or fail to act) in a way which is incompatible with the UNCRC requirements
- specifies that legal challenges may be brought for alleged breaches of these requirements, both by individuals and by the Commissioner for Children and Young People and the Scottish Commission for Human Rights
- requires Scottish Ministers to produce a Children's Rights Scheme, and prepare and publish a child rights and wellbeing impact assessment for new legislation and some other decisions
- requires public authorities and the Scottish Parliament to publish regular reports on compliance with the UNCRC
- requires a statement of compatibility with the UNCRC for Scottish Parliament Bills
- requires Scottish legislation to be read and given effect in a way which is compatible with the UNCRC requirements
- allows a court to make a "strike down declarator" if a provision of Scottish legislation is incompatible with the UNCRC requirements, which makes that provision cease to be law to the extent of the incompatibility

The UK Government is challenging this legislation in the Supreme Court, arguing that parts of it are outwith the Scottish Parliament's competence.[31]

Emily Jones and Anna Sands of Oxford University highlight food standards as an example of a controversial treaty issue which would have little legislative scrutiny: "If the Government agrees in a trade treaty to change food standards, Parliament is unlikely to have a say, as Ministers are empowered to make direct changes to relevant legislation".[32]

If there is a Bill relating to a treaty, Parliament could of course seek to amend or even reject it. As long as this did not hinder the Government from fulfilling its obligations under the treaty, it would not affect ratification. For example Parliament might insist that the Government report regularly on the implementation of the treaty, even if there is no such requirement in the treaty itself. Amending a Bill about a treaty does not amend the treaty itself.

The majority of treaty provisions are not incorporated into domestic law, but may nevertheless have indirect domestic legal effect. For example, where legislation is capable of two interpretations, one consistent with

30 Department for International Trade, Explanatory memorandum: UK/Japan: Agreement for a Comprehensive Economic Partnership (undated, October 2020?), part 5

31 'Holyrood bills to be challenged by UK government', BBC news online, 12 April 2021

32 Emily Jones and Anna Sands, 'Parliamentary Scrutiny of Trade Deals: How does the UK Measure Up?', UK Trade Policy Observatory blog, 30 September 2020

a treaty obligation and one inconsistent, then the courts will presume that Parliament intended to legislate in conformity with the treaty and not in conflict with it.[33]

The contrast here is with 'monist' states (such as the Netherlands, for example) where at least some treaties automatically become part of domestic law. In these states international law is domestic law – or may even take precedence over it – and treaties may be enforceable in the national courts as soon as they are ratified. This system usually involves the legislature in the ratification of treaties.

3.3 Statutory information requirements and delay power

Part 2 of the Constitutional Reform and Governance Act 2010 (CRAG) gave Parliament a statutory role on treaties that includes a new power – at least in theory – for the Commons to delay ratification. Maddy Thimont Jack and Hannah White of the Institute for Government commented in the 2020 report Parliament and Brexit that CRAG relegates Parliament to "a weak form of sign off at the end of the process".[34]

Treaties and Explanatory Memorandums must be laid before Parliament

Under CRAG, the Government is required to lay before Parliament most signed treaties that are subject to ratification or its equivalent. It cannot then ratify for 21 sitting days.[35] This put one aspect of the 1920s Ponsonby Rule[36] on a statutory footing.

The Minister can extend the 21-sitting-day period by up to 21 further sitting days, by laying a statement about the extension before Parliament during the original 21-sitting-day period.[37] This has rarely happened.

In "exceptional cases" (undefined), the Government can ratify a treaty without laying it before Parliament.[38] Then it must give Parliament a statement explaining why it did that, and lay and publish the treaty as soon as it can. This provision has never been used.

Under CRAG the Government must also include an Explanatory Memorandum (EM) on the treaty when it is laid. Although CRAG provides little detail on what the EM should contain,[39] government guidance now includes an EM template with standard headings (see

33 Lord Bingham of Cornhill, in his maiden speech in the House of Lords, set out this and five further ways in which treaties can have indirect effect in the UK: HL Deb 3 July 1996 c1465 ff

34 Maddy Thimont Jack and Hannah White, 'New parliamentary structures', in UK in a Changing Europe, Parliament and Brexit, March 2020, p32

35 s20

36 HC Deb 171, 1 April 1924, cc2000-2005. See Parliamentary Scrutiny of Treaties: up to 2010, Commons Library Standard Note SN/IA/4693, 25 September 2009

37 s21

38 s22

39 s24 says the EM must explain the provisions of the treaty, the reasons for the Government seeking ratification, and "such other matters as the Minister considers appropriate"

section 2.2 above). The Lords European Union Committee and International Agreements Committee have both made detailed recommendations on EMs.

The delay power

The 2010 Act also gave Parliamentary disapproval of treaties new statutory effect. The Commons now has the theoretical power to delay ratification repeatedly.

The process is this:

- The Government may not ratify a treaty until 21 sitting days after it was laid before Parliament.[40]
- If the 21 sitting days end without a resolution from either House that states that the treaty should not be ratified (invariably the practice so far), then the Government may proceed to ratify.
- If during the 21 sitting days the Commons resolves against ratification, but the Government still wants to continue, it would have to lay before Parliament a statement setting out its reasons. This would trigger another 21 sitting days during which it could not ratify. If the Commons again resolved against ratification during this second 21-sitting-day period, the process could be repeated. This could continue indefinitely, in effect giving the Commons the theoretical power to block ratification.
- If only the Lords and not the Commons resolves against ratification, the Government may simply proceed to ratify, after laying its statement of reasons.

Neither House has yet resolved against ratification under CRAG. There are many possible reasons for this, including for example:

- The challenge of finding time for substantive debate on the floor of the House of Commons when most of that time is controlled by the Government.
- The 'all-or-nothing' nature of such a vote.
- A reluctance to intervene in the Government's exercise of prerogative powers.
- Lack of awareness or interest.
- Other priorities.

3.4 Enhanced arrangements for free trade agreements

Now that powers over international trade have returned to the UK from the EU, the UK is making a large number of trade agreements with other countries for the first time in decades. The Government has introduced some measures to help scrutiny, but these still fall short of the European Parliament's powers.

The new measures apply only to trade treaties (although trade is not the only important competence that has returned from the EU to the UK),

[40] A 'sitting day' means a day on which both Houses of Parliament sit: CRAG s20(9)

and they do not require Parliament's consent for any stage of the process.

Before Brexit

Before Brexit, trade and many other treaties were negotiated on the UK's behalf by the EU, and scrutinised in detail by the European Parliament (EP) and its committees. The European Commission must keep the EP "immediately and fully informed" during treaty negotiations,[41] which includes access to negotiating directives, observation rights for MEPs and often access to confidential negotiating information.[42] The EP can use this information to influence negotiations because its consent is needed at the end of the process to conclude treaties.[43]

The UK Parliament's own EU scrutiny committees also vetted treaty-related decisions by UK Ministers in the EU under their formal scrutiny reserve mechanism.

New arrangements

Following sustained pressure from both Houses of Parliament, as well as from the Commons International Trade Committee and elsewhere, the Government has agreed to some increased transparency, consultation and scrutiny for free trade agreements (FTAs).

The Department for International Trade set out its commitments for scrutiny of new FTAs in a number of documents. For example, scrutiny arrangements for FTA negotiations with Australia, New Zealand, the US and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership[44] were outlined in a Written Ministerial Statement on 7 December 2020.[45]

Scrutiny arrangements for FTAs have also been the subject of recent correspondence between the Commons International Trade Committee (ITC) and the Lords International Agreements Committee (see, for example, letter from the Secretary of State to the ITC on 16 March 2021).

Summary of Government commitments on Parliamentary scrutiny of treaties:

Before negotiations	Hold public consultation or call for input
	Publish negotiating objectives, initial scoping assessment and Government response to the consultation/call for input

41 Treaty on the Functioning of the European Union (TFEU) Art 218(10)
42 Framework Agreement on relations between the European Parliament and the Commission [2010] OJ L304/47
43 TFEU Art 218. See Ewan Smith, Eirik Bjorge and Arabella Lang, 'Treaties, Parliament and the Constitution', *Public Law* July 2020 508 at 524
44 The Comprehensive and Progressive Agreement for Trans-Pacific Partnership – a trade agreement between 11 countries in the Pacific Rim.
45 House of Commons written ministerial statement, UIN HCWS623, Transparency and Scrutiny Arrangements for New Free Trade Agreements, 7 December 2020

	Seek to accommodate a debate if the Commons ITC recommends one in a report on the objectives.
During negotiations	Regular updates, usually after each negotiating round
	Oral and written evidence for parliamentary committees, in public and private
At the end of negotiations	Government impact assessment that is independently scrutinised
	Facilitate time for committees to produce a report on the agreement, including by allowing committees sight of the agreement before it is laid before Parliament under CRAG.
	Seek to accommodate a debate (subject to available parliamentary time)

During the passage of the Trade Bill, the Trade Minister Lord Grimstone also made two commitments on FTA debates (subject to parliamentary time being available), which have been dubbed the 'Grimstone Rule':

- The Government will facilitate a Lords debate on any FTA negotiating objectives, if the Lords IAC has reported on them and recommends a debate
- Lord Grimstone "cannot envisage a new FTA proceeding to ratification without a debate first having taken place on it, should one have been requested in a timely fashion by the committee.[46]

However, Parliament has not been given a veto power over FTAs, nor does it have observation rights during negotiations, as the EP has. Liz Truss, Secretary of State for International Trade, said in October 2020 that:

> These arrangements are appropriate to the UK's constitutional makeup and separation of powers. Ultimately if Parliament is not content with a trade deal, it can raise concerns by resolving against ratification and delay any implementing legislation indefinitely.[47]

The House of Lords International Agreements Committee published evidence on why free trade agreements (FTAs) benefit from enhanced scrutiny:

- FTAs can cover a wide range of issues, including environment, intellectual property, customs, labour relations, technical standards and food safety.

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46 HL Debate 23 February 2021 c724

47 House of Commons written ministerial statement UIN HCWS499, 'Transparency and Scrutiny Arrangements with the International Trade Committee and the International Agreements Sub-Committee for the UK-Japan Comprehensive Economic Partnership Agreement', 12 October 2020

- FTAs are generally substantial agreements, whose contents will need to be interpreted over time.
- Disclosing negotiating objectives would be an opportunity to test where key objections may lie.
- FTAs can compel changes in domestic law and also compel the UK not to change its current law, regulation or practice in the future.[48]

This is supported by many commentators, for example Emily Jones and Anna Sands of the Blavatnik School of Government, University of Oxford:

> Effective scrutiny would improve the quality of decision-making, provide leverage in negotiations, and reassure negotiating partners any treaty they negotiate with the UK will be ratified and implemented.[49]

First example: UK-Japan trade agreement

The first treaty to test out the new enhanced procedures was the UK-Japan Comprehensive Economic Partnership Agreement (CEPA) in 2020. This was a comparatively straightforward treaty that largely replaced the Japan-EU Economic Partnership Agreement (JEEPA) for the UK.

Inquiries

Both the Commons International Trade Committee (ITC) and the Lords International Agreements sub-Committee (IAC) took evidence on it during and after the negotiations, received slightly early copies of the signed agreement in confidence, published reports and successfully recommended debates, as set out in the table below:

Parliamentary scrutiny of UK-Japan CEPA, 2019-20	
20 September 2019	Government consultation on a future FTA with Japan
13 May 2020	UK Government outline negotiating objectives, response to consultation and initial impact assessment published
June-August 2020	Negotiations
8 July 2020	Two Commons ITC oral evidence sessions with experts
23 July 2020	Lords IAC oral evidence session with Secretary of State for International Trade
11 September 2020	Agreement in principle
14 September 2020	Lords IAC oral evidence session with experts

48 House of Lords International Agreements Sub-committee, *Treaty scrutiny: working practices*, 2020 paras 73-76

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

23 September 2020	Lords IAC oral evidence session with experts
12 October 2020	Agreement and supporting documents shared confidentially with ITC and IAC
23 October 2020	Agreement signed and laid before Parliament under CRAG, with supporting documents
4 November 2020	Lords IAC oral evidence session with Trade Minister
	Commons ITC oral evidence session with Secretary of State for International Trade
11 November 2020	Two Commons ITC oral evidence sessions with experts
19 November 2020	Commons ITC report published
20 November 2020	Lords IAC report published
25 November 2020	House of Commons debate
26 November 2020	House of Lords debate
7 December 2020	CRAG period ended

Both committees also held private briefings with Ministers and officials including the UK's Chief Negotiator for CEPA, DIT's Chief Economist and members of the Regulatory Policy Committee (RPC). They received dozens of written evidence submissions and obtained more information in correspondence with the Government.

Reports

In their respective reports, both committees welcomed CEPA as it provided certainty and continuity. But they also both challenged the Government's presentation of it as having extensive differences from JEEPA, and regretted that the Government did not provide an assessment of the benefits it provided for the UK above and beyond those in JEEPA.[50]

The Lords IAC also wanted more information from the Government about the environmental impact of trade deals in future, a detailed table of planned implementing legislation, detailed monitoring and evaluation reviews to assess the economic and other impacts of CEPA post-implementation, and notification to Parliament of amendments to CEPA

[50] See House of Lords International Agreements sub-Committee, Scrutiny of international agreements: UK-Japan Comprehensive Economic Partnership Agreement, HL Paper 175, 20 November 2020; House of Commons International Trade Committee, UK-Japan Comprehensive Economic Partnership Agreement, HC 914, 19 November 2020

even when they fall below the threshold for activating the CRAG scrutiny process.[51]

Debates

Each committee recommended a debate on the Agreement in their respective Houses, as it was the first major deal that the UK had struck as an independent trading nation. These were both held before the CRAG period expired,[52] but were general debates rather than on a CRAG motion so did not include votes on ratifying the treaty.

Lessons learned

The Commons ITC noted that time and resources constrained their ability to scrutinise even this comparatively straightforward treaty. As future agreements would be much less of a known quantity than CEPA, and significantly more controversial, it argued that it would need more time and more access to expertise.[53]

One of the challenges was that when the signed CEPA was shared with the committees, it was confidential, meaning that they could not seek evidence from witnesses other than in private from Ministers and officials during that time. The Department for International Trade is negotiating with parliamentary authorities about how to provide FTA texts earlier, without triggering the CRAG process by formally laying them before Parliament.

Another challenge was that no primary legislation was needed to implement the treaty, and the secondary legislation mentioned by the Government was a mixture of existing and new regulations using powers under a range of Acts.[54]

More powers for Parliament?

There were repeated attempts to give Parliament greater powers in relation to trade treaties in debates on the Trade Bill in the 2017-19 session of Parliament (which never passed into law), and the Agriculture and Trade Bills in the 2019-21 session. These would for example have required Parliamentary approval of FTA negotiating objectives and concluded treaties, consultation with the devolved authorities on negotiating objectives, and sustainability impact assessments to accompany treaties. Other amendments sought to prevent UK trade agreements with countries that committed genocide or other serious human rights abuses.

The Government strongly resisted most of these amendments, reversing in the Commons those that the Lords had agreed.

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51 House of Lords International Agreements sub-Committee, Scrutiny of international agreements: UK-Japan Comprehensive Economic Partnership Agreement, HL Paper 175, 20 November 2020, chapters 9 and 10

52 HC Deb 25 November 2020 cc891-933, HL Deb 26 November 2020

53 House of Commons International Trade Committee, UK-Japan Comprehensive Economic Partnership Agreement, HC 914, 19 November 2020

54 Department for International Trade, Explanatory memorandum: UK/Japan: Agreement for a Comprehensive Economic Partnership (undated, October 2020?), part 5

However, it did accept a requirement (now s42 of the Agriculture Act 2020) to produce reports on how agriculture provisions in FTAs meet UK standards for protecting human, animal or plant life or health, animal welfare and the environment. The Trade Act 2021 amended the Agriculture Act 2020 so that the Government would have to seek the advice of the Trade and Agriculture Commission (TAC), which would be re-established as a statutory body, when preparing these reports. These reports and any advice from the TAC would have to be published before the signed FTA was laid before Parliament under CRAG.[55]

Trade advisory groups

In addition to the Trade and Agriculture Commission, the Department for International Trade (DIT) has also established several other groups for advice and consultation. After a reorganisation in 2020, these include:

- 11 business-led Trade Advisory Groups (TAGs) covering sectors including agri-food, chemicals, creative industries and financial services
- a Strategic Trade Advisory Group (STAG)
- a Trade Union Advisory Group
- several thematic working groups (TWGs) including sustainability, SMEs and intellectual property
- the Board of Trade
- an inter-governmental Ministerial Forum on trade.

However, there has been some criticism of DIT for including only business representatives in the new TAGs, which are reportedly the only groups to see the text of drafts FTAs.[56] Some of the previous advisory groups were mixed, including both business and non-business representation such as NGOs, academics and trade unions.

Separately, DIT and the devolved governments have been working on a new political agreement (concordat) to formalise their working arrangements for international trade negotiations (see section 6.1 below).

3.5 Exceptionally Parliament may need to authorise treaty actions

In January 2017, the UK Supreme Court ruled in the first Miller case that the UK Government needed the prior authority of Parliament in order to trigger the UK's notification of withdrawal from the EU Treaties.

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55 See 'Trade and Agriculture Commission put on statutory footing', DIT and DEFRA press release, 1 November 2020

56 See 'Frustration as UK boosts business say on trade deals', Politico, 16 December 2020

The ruling recognised that "ministers generally enjoy a power freely to enter into and to terminate treaties without recourse to Parliament".[57] But it found two exceptions:

- the Government cannot make or withdraw from a treaty that amounts to a "major change to UK constitutional arrangements" without an Act of Parliament.[58]
- the Government could withdraw from the EU Treaties only if Parliament "positively created" the power for ministers to do so, because the EU Treaties were a source of domestic law and domestic rights.[59]

The government departments that responded to the 2020-21 review of administrative law saw this decision as "an unorthodox extension of the law into the treaty-making prerogative", according to the government summary of responses. The summary added that "In the case of the conduct of foreign affairs the dynamism and flexibility afforded by the use of prerogative powers, without the need for extensive legislative approval, is essential to good administration".[60]

The highly unusual circumstances of this judgment mean it will rarely if ever be a precedent.

3.6 Committees

Introduction

It has often been suggested that Parliamentary committees could play a greater role in scrutinising treaties, but until recently this has rarely been a priority for them.

However, the House of Lords now has a dedicated treaty scrutiny committee – the International Agreements Committee (IAC). The Commons does not have such a committee, instead relying on existing committees such as the International Trade Committee (ITC) to scrutinise negotiations and treaties in their subject areas. The Joint Committee on Human Rights (JCHR) continues its screening of human rights issues in treaties.

Perhaps the biggest achievement so far of this increase in treaty scrutiny is to have improved the quantity and quality of information on treaties (see section 2.2 above). It has also opened up new channels of communication: officials from the Foreign, Commonwealth and Development Office (FCDO) and the Department for International Trade (DIT) now hold regular meetings with the IAC and ITC secretariats.[61]

However further improvements have been mooted. The Commons Public Administration and Constitutional Affairs Committee (PACAC) is

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57 R (on the application of Miller and another) v Secretary of State for Exiting the European Union [2017] UKSC 5, 24 January 2017, para 5
58 para 82
59 para 86
60 Summary of Government Submissions to the Independent Review of Administrative Law (undated, published 6 April 2021), paras 15-17
61 Alexander Horne, 'Treaty Scrutiny in the House of Lords', UK In a Changing Europe blog, 15 April 2021

conducting an inquiry into treaty scrutiny, particularly in the Commons where there have been fewer developments. The Lords IAC's former legal adviser, Alexander Horne, has suggested three areas for it to concentrate on:

> Perhaps the biggest challenge for the new PACAC inquiry will be to determine how the Commons might build upon, rather than duplicate, the work of the Lords.
>
> The IAC now has significant expertise and I would advise departmental select committees in the Commons to mainstream and utilise its reports to ensure that treaty scrutiny is conducted in a complementary fashion between the two Houses.
>
> It is also important to link the work of the IAC with the scrutiny of the legislation used to implement agreements so that parliamentarians get the full picture.
>
> Otherwise, the risk remains that the Commons will routinely examine only FTAs, and that other important treaty scrutiny will be conducted in uncoordinated silos between the two Houses.[62]

Lords International Agreements Committee

The new Lords International Agreements Committee is the UK's first dedicated treaty scrutiny committee. It was established as a full committee in January 2021, after its genesis in the Lords European Union Committee from 2019.

Before 2019

Until 2019, the UK Parliament's only systematic scrutiny of non-EU treaties was conducted by the House of Lords Secondary Legislation Scrutiny Committee (SLSC). The SLSC began to scrutinise treaties in the 2014-15 session, when it realised that those laid under CRAG were covered by its terms of reference. It reported some treaties for information, but only ever one for the special attention of the House.[63]

2019: Lords EU Committee scrutiny of Brexit-related treaties

With Brexit, as the UK sought to conclude dozens of 'continuity' or 'rollover' treaties that sought to replicate EU trade and other agreements with other countries (see section 5.3 below), it became clear that the SLSC could not scrutinise them all. So in 2019, the Lords European Union Committee – which had for many years scrutinised EU treaties with third countries on behalf of the UK – took over scrutiny of all the Brexit-related agreements.

The EU Committee produced 22 treaty reports covering over 50 treaties,[64] although the only agreement on which there was time for it to take evidence was the UK-South Korea treaty.[65]

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62 Alexander Horne, 'Treaty Scrutiny in the House of Lords', UK In a Changing Europe blog, 15 April 2021

63 House of Lords Secondary Legislation Scrutiny Committee, Written evidence to House of Lords Constitution Committee on parliamentary scrutiny of treaties, PST0015, 2019

64 Dominique Gracia and Alexander Horne, 'Treaty scrutiny -A brave new frontier for Parliament', UKCLA blog, 18 March 2020

65 HL Deb 7 September 2020 c110GC

In March 2019 its report on agreements with the Eastern and Southern African states, Chile and the Faroe Islands[66] prompted the first ever parliamentary debate on a CRAG motion.[67] Although this was a debate on extending the scrutiny period for the agreement rather than on whether or not it should be ratified, it had concrete results. For example, the then Minister apologised for not sharing draft agreements with the devolved administrations and committed to changing procedures, and clarified areas of concern that the EU Committee had raised in its report.

Meanwhile, the House of Lords Constitution Committee published the report of its inquiry on Parliamentary Scrutiny of Treaties in April 2019. It called for:

- greater transparency
- a role for Parliament much earlier in the process of negotiating treaties
- a dedicated treaty committee – whether joint or appointed by either or both Houses
- a proper role for the devolved institutions

It also doubted whether it was possible to conduct meaningful parliamentary scrutiny in the CRAG timetable.[68]

Then in June 2019 the Lords EU Committee published a report entitled 'Scrutiny of international agreements: lessons learned'.[69] It concluded that CRAG was poorly designed to facilitate parliamentary scrutiny, and suggested improvements in information sharing and transparency to enable Parliament to do a better job.

2020: Temporary Sub-Committee on International Agreements

This led to the European Union Committee establishing a new temporary sub-committee on International Agreements in April 2020, with Lord (Peter) Goldsmith QC as chair. Its broad remit was to consider "matters relating to the negotiation and conclusion of international agreements". The sub-committee used these criteria 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;

66 House of Lords European Union Committee, Scrutiny of international agreements: Treaties considered on 26 February 2019, HL Paper 300, 27 February 2019
67 HL Deb 13 March 2019 c1107 ff
68 Constitution Committee, Parliamentary Scrutiny of Treaties, HL Paper 345, 30 April 2019, para 62
69 HL Paper 387, 27 June 2019

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

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.

It published a report on its proposed working practices in July 2020.[70] This report noted that the UK lags far behind many countries in parliamentary scrutiny of international commitments. It called for more information earlier in the process, more time for treaty scrutiny, and a sifting mechanism for deciding which treaty amendments and non-treaty agreements are subjected to scrutiny.

The report was debated in the House of Lords on 7 September 2020 alongside the treaty scrutiny reports from the Constitution Committee and the Lords EU Committee[71] - just as it emerged that the Government was proposing to breach international law in the Internal Market Bill (see section 1.2 above). The overwhelming view of participants in the debate was that CRAG did not provide for effective scrutiny, and that the Government needed to provide more information and at an earlier stage. A former chair of the Lords EU Internal Markets Sub-Committee, which had conducted treaty scrutiny under CRAG, argued that this scrutiny did not confer parliamentary legitimacy on the outcome.[72]

In response, the Government made some limited commitments on transparency and accountability, for example to extend the information provided in its Explanatory Memorandums on treaties (see section 2.2 above) so that it now includes:

- the consultation that has taken place (particularly with the devolved administrations)
- the way in which new treaties interact with any related agreements, and
- whether a treaty has any significant human rights implications that should be drawn to the attention of the Joint Committee on Human Rights.[73]

2021: International Agreements Committee fully established

Finally, following the House of Lords Liaison Committee's Review of investigative and scrutiny committees, the sub-committee was established in its own right as the International Agreements Committee on 28 January 2021.

Its terms of reference are "To consider matters relating to the negotiation, conclusion and implementation of international

70 House of Lords European Union Committee, Treaty scrutiny: working practices, HL Paper 97, 10 July 2020

71 HL Deb 7 September 2020 c104GC ff. See Lords Library In Focus: Parliamentary scrutiny of treaties: Debate on committee reports, 19 August, 2020

72 HL Deb 7 September 2020 c119GC

73 See Alexander Horne, 'Treaty Scrutiny in the House of Lords', UK In a Changing Europe blog, 15 April 2021

agreements, and to report on treaties laid before Parliament in accordance with Part 2 of the Constitutional Reform and Governance Act 2010." This covers all treaties and other international agreements: not just those laid under CRAG, and not just those on trade but also on the environment, security, private international law and other matters.

Indeed, its first evidence session, on 1 February 2021, was on a treaty that the UK signed in 2012 but has not yet ratified: the Council of Europe's 'Istanbul Convention' seeking to end violence against women and girls.

The challenges for the IAC were set out in an April 2020 blog post by Dominique Gracia and Alexander Horne:

- finding ways to influence negotiations, rather than simply being informed of a 'done deal'
- engaging with those who might be affected by new agreements, including industry and NGOs
- building relationships with the devolved administrations and legislatures
- working collaboratively with departments across government to develop new working practices that both respect prerogative powers and ensure that parliamentarians can follow negotiations and take an informed position on any final agreement
- building new and productive relationships with departments across Whitehall as it develops expertise across the full range of possible agreements, including on security, the environment, and other areas of public interest.[74]

Its chair, Lord Goldsmith, summarised its overarching goals in a February 2021 article:

> We continue to emphasise to the government the benefits of parliamentary scrutiny and press for stronger scrutiny commitments. Until such commitments can be put on a statutory footing, however, the International Agreements Committee is working hard to ensure that the treaties that are being negotiated on our behalf reflect the best possible outcome.[75]

Commons International Trade Committee

The House of Commons created an International Trade Committee (ITC) in 2016 to scrutinise the new Department for International Trade, long before the UK could begin to negotiate trade treaties. Treaty scrutiny is however now a central part of its remit.

In 2018, to prepare for the return of trade treaty negotiating powers to the UK, the ITC held an inquiry into UK Trade Policy Transparency and Scrutiny. The central argument of its December 2018 report[76] was that a presumption of transparency, and full engagement with Parliament,

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74 Dominique Gracia and Alexander Horne, 'Treaty scrutiny: a new challenge for Parliament', UK in a Changing Europe blog, 20 April 2020

75 Peter Goldsmith, 'International agreements affect us all. They deserve to be scrutinised', Prospect, 12 February 2021

76 House of Commons International Trade Committee, UK trade policy: transparency and scrutiny, HC 1043, 28 December 2018

would help the Government make better trade agreements. Its recommendations included:

- parliamentary votes, both before negotiating objectives are set and before ratification
- updates throughout negotiations
- sharing all negotiating documents, from mandate to final text, with the relevant committee
- private briefings to committees
- statutory engagement with devolved executives
- statutory consultation with business, civil society, and the public, on the mandate for, and scope of, trade agreements

Only two of these recommendations were accepted and implemented by the Government: regular updates throughout trade treaty negotiations, and private briefings to committees. However, the ITC and IAC have both continued pushing for more and earlier information.

The ITC monitored the 'trade continuity' agreements that replaced many EU trade agreements for the UK (see section 5.3 below). Although it did not publish any reports on these treaties,[77] it did correspond with Ministers about them.[78]

The UK-Japan trade agreement was a fuller test of the ITC's treaty scrutiny (see section 3.4 above). Although it had taken evidence during the negotiations, and received a copy of the concluded treaty shortly before it was formally laid before Parliament under CRAG, it was still limited in the scrutiny it could provide:

> This has been a comparatively straightforward case, since CEPA differs from JEEPA in only a few areas. Nevertheless, the Agreement is still a large and complex technical document, and our ability to scrutinise it has been constrained by the limits of both time and resources. We have focused our scrutiny on where CEPA differs from JEEPA due to the nature of this Agreement[79]

One innovation was that the chair of the Commons Environment, Food and Rural Affairs Committee, Neil Parish, joined ITC as a guest for some of its scrutiny of this treaty.[80] He asked questions in evidence sessions relating to his committee's area of interest, and participated (without voting) in the approval of the draft report on the treaty.

Joint Committee on Human Rights

In 2004 the Joint Committee on Human Rights (JCHR) decided to screen all proposed human rights treaties, and any others with human rights

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77 Except an initial report on the principles: Continuing application of EU trade agreements after Brexit, HC 520, 7 March 2018

78 See for example Lack of progress leaves roll over of EU trade agreements at "code red", ITC press release, 15 March 2019; Chair concerned at lack of progress on roll-over of EU trade agreements, ITC press release, 21 May 2019; Secretary of State updates Committee on 'roll-over' of EU FTAs, ITC press release, 2 July 2019

79 House of Commons International Trade Committee, UK-Japan Comprehensive Economic Partnership Agreement, HC 914, 19 November 2020, para 9

80 Under the provisions of paragraph (1)(e) of House of Commons Standing Order No 137A (Select committees: power to work with other committees).

implications, and report on any concerns to enable parliamentarians to decide whether to call for a debate.[81]

Since then it has published many treaty reports and called for debates.[82] It has also called for systematic improvements in treaties and treaty scrutiny. For example, its March 2019 report on Human Rights Protections in International Agreements recommended that the Government should:

- provide more information on treaties, and earlier
- identify agreements it intends to negotiate, and indicate any human rights issues that might be relevant to the negotiation as well as any human rights protections that might need to be sought
- include standard human rights protections, exemptions clauses and suspension clauses in all agreements
- provide a human rights memorandum for proposed international agreements once there is a draft text, unless the Minister has certified that no human rights issues could be engaged by the agreement.
- report regularly to Parliament on the implementation of international agreements containing human rights protections, to allow the JCHR to monitor compliance with human rights standards.

Following this report, the Government changed its guidance on treaty-making so that the template for treaty Explanatory Memorandums now includes a standard heading on human rights.[83]

Other committees

Since 2000, the Government has sent a copy of each treaty laid before Parliament to the relevant departmental Select Committee in the Commons, but they rarely scrutinise them.

However, there are some signs of this beginning to change. For example, the Commons Environment, Food and Rural Affairs (EFRA) Committee has taken an active interest in several treaties. As noted above, its chair attended ITC meetings on the UK-Japan trade agreement as a guest, asking questions to witnesses and contributing to discussions on the draft report. The EFRA Committee also looked at the 2020 UK-Norway Framework Fisheries Agreement, gathering written evidence and writing to the Minister with specific questions on it during the CRAG period.

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81 Joint Committee on Human Rights, Protocol No. 14 to the European Convention on Human Rights, HL Paper 8, HC 106, 8 December 2004, paras 5-7

82 See for example Joint Committee on Human Rights, Prisoner Transfer Treaty with Libya, HL Paper 71, HC 398, April 2009; Protocol 15 to the European Convention on Human Rights, HL Paper 71, HC 837, 2 December 2014

83 Foreign, Commonwealth and Development Office, Treaties and MOUs: Guidance on Practice and Procedures, 19 March 2013 (updated 2020) – see section 2.2 above

4. Limits and exceptions to Parliament's role

Although the aim of the governance of Britain proposals that led to CRAG was 'to hold power more accountable', CRAG's treaty provisions are limited in both depth and breadth, and do little to help Parliament scrutinise treaties effectively at a time when they could influence their content.

4.1 Depth

No consent requirement

CRAG provides the opportunity for Parliament to object to a treaty being ratified, but it does not require Parliament's active consent.

At one stage it had seemed as if CRAG would include an 'affirmative resolution' procedure for at least some categories of treaty, meaning that the Government could not ratify until it had a resolution from both Houses.[84] This stronger procedure tends to produce more debates and votes, and gives more influence to committees scrutinising treaties. But in the end the 'negative' procedure was chosen.

By contrast, when the UK was in the EU, an Act of Parliament was required before the UK Government could ratify treaties that amended the main EU Treaties; and if they increased the competences of the EU they had to be approved in a referendum.[85]

Many other countries – whether 'monist' or 'dualist' – require parliamentary consent before the Government agrees to (at least major) new international treaty obligations.[86] Emily Jones and Anna Sands of the University of Oxford argue that this provides the incentive for Government to properly inform and consult Parliament, including on the negotiating objectives.[87]

No formal involvement before signature

There is no general requirement or mechanism for parliamentary scrutiny of treaty negotiations before they are finalised. So Parliament is not usually involved or even informed at the stage when changes could still be made to the text of a treaty.

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84 Jack Straw introducing the draft Constitutional Renewal Bill, HC Deb 25 March 2008 c32

85 Part 1 of the European Union Act 2011. See also European Assembly Elections Act 1978 s6, re-enacted as s12 of the European Parliamentary Elections Act 2002

86 See for example Pierre-Hugues Verdier and Mila Versteeg, 'Separation of Powers, Treaty-Making, and Treaty Withdrawal', in Curtis A. Bradley (ed), *Oxford Handbook of Comparative Foreign Relations Law*, 2019, p135 at 137; Holger Hestermeyer,' Parliament and treaty-making: from CRAG to a meaningful vote?', Constitution Unit blog, 14 March 2019; Emily Jones and Anna Sands, 'Ripe for reform: UK scrutiny of international trade agreements', GEG Working Paper 144, September 2020

87 Emily Jones and Anna Sands, 'Parliamentary Scrutiny of Trade Deals: How does the UK Measure Up?', UK Trade Policy Observatory blog, 30 September 2020

Ministers said in 2008 that they will commonly "communicate with the relevant select committee" before signing a treaty,[88] but the content and effect of this are not clear. And as noted above, the Government has now promised to provide more information on FTAs before, during and after negotiations, including providing public and private briefings for parliamentary committees, and will try to make time for debates. It is also "supportive of improving the information provision and engagement with Parliament at the commencement of negotiations, where it deems appropriate" and to keeping any scrutiny committee "updated in broad terms of treaties under negotiation, when the Government judges that useful."[89]

But most of this is entirely at the Government's discretion, and is not set out in a Government-Parliament concordat or in Standing Orders or statute.

No changes to a concluded treaty

Multilateral treaties are usually negotiated and finalised by inter-governmental conferences. Once they have been concluded and opened for signature and ratification, no individual governments and certainly no parliament can amend the agreed legal text.

A government can however submit declarations and/or reservations to treaties when it signs or ratifies them, stating for example its understanding of particular treaty provisions or that it does not consider itself bound by a certain provision. Also treaties can usually be amended by a subsequent treaty or protocol.

In the US, treaties are sometimes renegotiated or have a protocol added to respond to amendments proposed by the legislature (see Box 3 below). But in general parliaments are not usually directly involved in shaping the treaty text.[90]

Box 3: The US example

In the US, the Senate Committee on Foreign Relations can propose amendments to a treaty. The President and the other countries involved must then decide whether to accept the conditions and renegotiate the treaty or to abandon it.

According to a 2001 US Congressional Research Service report,[91] it is rare for a treaty to be renegotiated after Senate consideration, and in the case of multilateral treaties renegotiation is 'usually considered infeasible because of the number of countries involved'.

But the report does identify some treaties, particularly bilateral treaties, that have been renegotiated, or negotiated further and amended by protocol, as a result of Senate consideration. One example is a UK-US tax treaty which had a protocol added to deal with reservations raised by the Committee on Foreign Relations.

Other treaties never entered into force because the Committee's reservations or amendments were not acceptable, either to the President or to the other country or countries that were party to the treaty.

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88 HL Deb 31 January 2008 c796

89 Government response to Lords Constitution Committee report on Parliamentary scrutiny of treaties, p8

90 Mario Mendez, 'Constitutional Review of Treaties: Lessons for Comparative Constitutional Design and Practice', Jean Monnet Working Paper 8/16, 2016, pp12-13

91 US Congressional Research Service, 'Treaties and Other International Agreements: The Role of the United States Senate', January 2001, 112

Short scrutiny period

CRAG's 21-sitting-day scrutiny period

CRAG specifies that the Government cannot ratify most treaties unless they have been laid before Parliament for 21 sitting days. This usually amounts to about four or five weeks, unless it coincides with a significant Parliamentary recess.

This is not enough time for a 'normal' committee inquiry, and even les so for holding a debate on a report. Committees do not usually meet more than once a week, meaning that the standard process of agreeing and publishing terms of reference, allowing enough time for experts and interested parties to write and submit written evidence, holding oral evidence sessions and drafting and agreeing a report usually takes around three months at least.

When the House of Lords EU Committee was scrutinising the Brexit-related 'rollover' treaties (see section 5.3 below), it found the deadlines challenging even though it had a large staff complement of 26 (including two legal advisers), a part-time specialist adviser, an existing sub-committee structure, and a culture of document-based scrutiny:

> …the fact that we were able to report on these agreements within 21 sitting days should not be seen as a vindication of the CRAG Act. Quite the contrary: we were only able to scrutinise these agreements within that timetable because we were able to take many of their underlying principles and objectives as a given. Even so, the CRAG Act timetable was a significant impediment, precluding meaningful consultation of stakeholders and limiting the opportunity for committee Members to engage in informed consideration and discussion. [92]

Similarly, when the Commons International Trade Committee scrutinised the UK-Japan trade treaty in the autumn of 2020, it had to limit the scope of its scrutiny even though it saw the treaty in confidence ten days before it was laid in Parliament under CRAG (see section 3.4 above).

Extending the CRAG period

Although CRAG allows the Government to extend the CRAG period repeatedly by up to another 21 sitting days at a time, it rarely does so. For example the Joint Committee on Human Rights asked for an extension to allow it to consider the 2008 Prisoner Transfer Agreement with Libya. The Government gave it only a few extra days, despite the controversy over the release of the man convicted of the Lockerbie bombing, Abdelbaset al-Megrahi, and so it could not publish a substantive report. [93]

The House of Lords has held a debate on a motion to extend the CRAG period, but this motion was only a vehicle for the debate and so it was

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92 House of Lords EU Committee, Scrutiny of international agreements: lessons learned, HL Paper 387, 27 June 2019, para 25

93 See Joint Committee on Human Rights, *Legislative Scrutiny: Constitutional Reform and Governance Bill; Video Recordings Bill*, HL Paper 249, HC 249, 12 January 2010 para 1.45

withdrawn.[94] The Lords International Agreements Committee also asked the Government to extend the CRAG period for a treaty with Kenya, to allow the Government to publish a supplementary Explanatory Memorandum addressing points raised by the Committee and time for a debate.[95] The Government did not extend the CRAG period, but did publish a Written Ministerial Statement[96] in response to the IAC's report, and held off ratification until after the debate.[97]

No link to implementing legislation

The long-standing practice of successive UK Governments is not to ratify a treaty unless and until it is in a position to implement that treaty in domestic law. Any implementing legislation – whether primary or secondary – that is needed to bring UK domestic law into line with the proposed new international obligations will therefore be introduced or made before ratification. However, there is no direct link in CRAG or elsewhere between treaty scrutiny and implementing legislation.

The Government can introduce or make implementing legislation at any point, before, during or after the CRAG period, and irrespective of any committee scrutiny of the treaty. Any debates on the treaty are not linked to debates on implementing legislation (primary or secondary).

By contrast, in New Zealand, treaty scrutiny and implementing legislation are part of an integrated process. Legislation is not introduced until at least 15 sitting days after the treaty has been presented to Parliament, to allow time for a committee to report. Then the first substantive debate on any implementing primary legislation will be replaced by a debate on the committee report.[98]

Similarly in Canada, implementing legislation is not introduced until 21 sitting days after a treaty is laid before Parliament.[99]

No debates required

CRAG does not require debates to be held on treaties, or provide for time to be made for treaty debates. This considerably reduces the effectiveness of the delay powers it provides for Parliament, because in the Commons the Government controls most of the time on the floor of the House.

For the Commons to resolve that a treaty should not be ratified, it would need to agree a motion in those terms on the floor of the House during the statutory 21-sitting-day period. The Labour Government in

94 HL Deb 13 March 2019 c1107ff

95 House of Lords International Agreements Committee, Scrutiny of international agreements: Economic Partnership Agreement with Kenya, Trade in Goods Agreement with Norway and Iceland, and Free Trade Agreement with Vietnam, HL Paper 221, 3 February 2021, para 15

96 Trade Minister Lord Grimstone, United Kingdom-Kenya Economic Partnership Agreement, Written Ministerial Statement UIN HLWS772, 10 February 2021

97 Trade Minister Lord Grimstone, HL Deb 2 March 2021 c1136

98 New Zealand House of Representatives Standing Orders 250(2)(a) and 285(4)(c),

99 Government of Canada, Policy on Tabling of Treaties in Parliament (undated; last updated November 2020), para 6.2b

2008 said that making time for this would be left to the 'usual channels' (in other words the party whips) and for 'people to make a noise'.[100]

A few treaties were debated under the Government's undertaking in the Ponsonby Rule to submit 'important Treaties' to the House for discussion within the 21 sitting days for which they are laid.

The Government also undertook in 2000 to provide the opportunity for the debate of any treaty involving major political, military or diplomatic issues, if the relevant select committee and the Liaison Committee so request. But by 2007 it had not received any requests for a debate under this procedure.[101]

In the House of Lords, a convention has emerged that where the European Union Committee or the International Agreements Committee draws an agreement to the special attention of the House, and a motion for debate has been tabled (even if it does not use the form of words specified in CRAG), the usual channels will assist in finding time for a debate.[102] This has now happened several times, including the first ever debate on a CRAG motion in March 2019[103] (see section 3.6 above).

The Government has also agreed to hold debates where possible in both the Lords and the Commons on free trade agreements, and this duly happened for the UK-Japan treaty in November 2020 (see section 3.4 above).

Other ways of holding a debate in the Commons include:

- an opposition day debate, if one happened to be scheduled during the 21-sitting-day CRAG period.
- a Delegated Legislation Committee debate, followed by either the Government or the Opposition providing time for a decision (and if necessary a vote) on the floor of the House.

It is unlikely that a CRAG motion could be debated in Backbench Business Committee time, because Standing Order No 14(6) says that the Committee cannot provide time to debate 'proceedings under any Act of Parliament'.

Other mechanisms for securing a debate in the Commons, such as adjournment debates, Westminster Hall debates, topical questions, EDMs and ten-minute rule bills, would not allow for a resolution against ratification.

Until 2019 there were very few Parliamentary debates on non-EU treaties that did not require implementing legislation. Box 4 below provides one example.

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100 Jack Straw, Evidence to the Joint Committee on the Draft Constitutional Renewal Bill, 1 July 2008 (Q750)

101 *The Governance of Britain - War Powers and Treaties: Limiting Executive Powers*, CM 7239, 25 October 2007, para 138

102 House of Lords International Agreements Sub-committee, *Treaty scrutiny: working practices*, 2020 para 40

103 HL Deb 13 March 2019 c1107 ff

Box 4: Case study – 2014 debate on the US-UK Mutual Defence Agreement

A rare example of a Commons debate on a non-EU treaty was the Westminster Hall debate on the 2014 revision and renewal of the US-UK Mutual Defence Agreement, in Backbench Business Committee time.[104]

The revised Agreement extended the existing design cooperation to the nuclear reactors powering the UK's new Trident submarines, leading some to question whether the UK remained sufficiently independent of the US.[105]

The debate was secured by Jeremy Corbyn (then a backbench Labour MP) who opposes nuclear weapons and Dr Julian Lewis (a backbench Conservative MP) who supports the UK's nuclear deterrent. Despite their opposing views on the substance, the two Members were united in their desire for more debate and were disappointed by the 'struggle' to get more Members to participate.[106]

This debate had no legal significance as it was on a motion to adjourn.

An Early Day Motion that called for the amended Agreement not to be ratified was signed by 57 MPs,[107] but no resolution against ratification materialised during the 21-sitting-day period, and there was no debate or vote on the floor of the House. The Government therefore ratified the Agreement.

4.2 Breadth

Only some treaties covered

Only treaties and treaty amendments that require ratification (or equivalent) are covered by the CRAG Act.[108] So those that come into force on signature alone are not laid before Parliament.

This is narrower than in other dualist states. In Canada, for example, all treaties are laid before Parliament,[109] and in New Zealand the Minister of Foreign Affairs and Trade has set out criteria for determining which bilateral treaties (which do not usually require ratification) should be submitted to Parliament.[110]

Treaty amendments pose a particular problem. Although sometimes new treaties are drawn up to amend previous treaties, it is much more common for a treaty to include its own procedures for making amendments - even allowing legally-binding amendments to be made by intergovernmental bodies set up under the treaty, such as the Arctic Council. In either case, if the treaty does not specify that these amendments need ratification, they will not be subject to the CRAG requirements, even if the changes are substantial. In September 2020 the Government committed to publishing all treaty amendments, not just those that require ratification and thereby trigger CRAG,[111] but this has not yet been implemented.

The CRAG definition of a treaty also expressly excludes instruments made under treaties that do not amend the parent treaty. Typically these are adopted by States at meetings of treaty parties, and are

104 HC Deb 6 November 2014, c291WH ff
105 J Doward, 'Trident Treaty May Be Renewed without Parliamentary Scrutiny', Observer, 25 October 2014
106 Dr Julian Lewis MP, HC Deb 6 November 2014 c300WH
107 EDM 459 2014-15, tabled 3 November 2014
108 CRAG s25(1)
109 Government of Canada, Policy on Tabling of Treaties in Parliament (undated; last updated November 2020)
110 See New Zealand Parliament, Parliamentary Practice in New Zealand, Chapter 42: International Relations, 4th edition, 2017
111 Lord Ahmad of Wimbledon, HL Deb 7 September 2020 c141GC

binding if the parent treaty so provides – for example Channel Tunnel regulations made under the UK-France Canterbury Treaty. In international law, they may or may not be considered a 'treaty' depending on the context.

Non-treaty international arrangements not covered

Other international arrangements are not covered by the 2010 Act. These may sometimes be as important in their effects as treaties (or more so), and include:

- agreements with entities that the UK Government does not recognise as a State (eg the Palestinian Authority)[112]
- UN Security Council resolutions
- exchanges of letters between governments
- political agreements such as Memorandums of Understanding (MOUs) between States, for example on deporting people to their country of origin without the risk of torture.[113]

Confidentiality and convenience are probably the main reasons for the Government to use political agreements in preference to treaties.[114] They generally do not need to be published or presented to Parliament, although according to Antony Aust, the Foreign Office Treaty Section has kept a copy of MOUs concluded by the UK since 1997.[115]

The Ponsonby Rule included a commitment to inform the House of Commons of all non-treaty "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 and sealed document may exist". This was to allow the Commons to "exercise supervision" over these arrangements. But despite recommendations from the Joint Committee on the Draft Constitutional Renewal Bill (which became CRAG), this part of Ponsonby was not reproduced in CRAG and its current status is unclear. The Lords European Union Committee and International Agreements Committee have both pressed for more public information on Memorandums and Understanding and other non-treaty arrangements.[116]

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112 One such agreement would have been brought to the special attention of the House if it had been a CRAG treaty: European Union Committee, Scrutiny of international agreements: Treaties considered on 19 March 2019, HL Paper 321, 30 March 2019, ch3

113 See Arabella Lang, 'Parliament and International Treaties', in A Horne and A Le Seuer (eds), *Parliament: Legislation and Accountability* (2016) p258

114 Dr Mario Mendez, Written evidence to the House of Lords International Agreements Sub-committee (TWP0013), 2020

115 A. Aust, Modern Treaty Law and Practice (3rd ed, 2013)

116 See for example House of Lords European Union Committee, Treaty scrutiny: working practices, HL Paper 97, 10 July 2020 paras 97-106

Spain, by contrast, has recently introduced a requirement for the government to publish political agreements in an official public registry.[117]

Does not cover treaty withdrawal

CRAG does not mention withdrawal from treaties, nor is there any convention or rule requiring parliamentary involvement in treaty withdrawal.

Although the majority of countries are like the UK in that leaving a treaty does not have the same rules as entering one, more and more countries now mandate parliamentary involvement in treaty withdrawal.[118] In New Zealand, for example, the Government must present to Parliament any multilateral treaties that the Government wishes to withdraw from or to denounce.[119]

Government can avoid statutory requirements

In 'exceptional cases' the Government can ratify treaties without laying them before Parliament, as long as it later publishes the treaty and its reasons for not following the normal rules.[120] This is most likely in urgent cases but is not restricted to that: CRAG does not define or even indicate what 'exceptional cases' might include.

Alternatively, CRAG can be disapplied altogether for a particular treaty through its implementing Act, as happened with the EU Withdrawal Agreement and a year later the Trade and Cooperation Agreement (see section 5 below).

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117 Carlos Esposito, 'Spanish Foreign Relations Law and the Process for Making Treaties and Other International Agreements' in Curtis A. Bradley (ed), Oxford Handbook of Comparative Foreign Relations Law (2019), pp213-21

118 Pierre-Hugues Verdier and Mila Versteeg, 'Separation of Powers, Treaty-Making, and Treaty Withdrawal', in Curtis A. Bradley (ed), *Oxford Handbook of Comparative Foreign Relations Law*, 2019, p135 at 149

119 New Zealand House of Representatives Standing Order 397(1)(c)

120 CRAG s22

5. Brexit negotiations and agreements

Brexit exposed many of Parliament's long-standing challenges in trying to engage with treaty negotiation, agreement and implementation. The continuing debates over Parliament's role suggest that the issues have yet to be fully resolved.

5.1 Withdrawal Agreement

The debate on how the UK would leave the EU became entangled in constitutional questions, such as the role of Parliament and its ability to scrutinise or influence the Government's position during the withdrawal negotiations. In two instances, this resulted in major constitutional court cases going to the Supreme Court.[121]

Answering such questions, as the negotiations progressed, at the same time as the Article 50 clock was ticking, was difficult. Parliament wanted to be more involved, but the Government resisted, maintaining that disclosing its negotiating position during the Brexit negotiations would be damaging, and that parliamentarians should not 'micromanage' the process of leaving the EU.

Several parliamentary committees made recommendations at an early stage about how the UK Parliament should be involved during the negotiations, including:

- House of Lords Constitution Committee, The invoking of Article 50, 13 September 2016
- House of Lords European Union Committee, Brexit: parliamentary scrutiny, 20 October 2016
- House of Commons Exiting the European Union Committee, The process for exiting the European Union and the Government's negotiating objectives, 14 January 2017

Overall, they wanted Parliament to be able to play a constructive part in helping the Government secure the best outcome for the UK. In their view, parliamentary engagement would strengthen the Government's negotiating position and increase the likelihood that the final agreement would enjoy parliamentary and public support.[122]

At least 66 Commons committee reports in 2017-19 concerned Brexit-related issues.[123] Some recurring challenges were:

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121 *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; *R (Miller) v The Prime Minister / Cherry and others v Advocate General for Scotland* [2019] UKSC 41

122 See for example House of Lords European Union Committee, Brexit: parliamentary scrutiny, 20 October 2016, paras 16-19

123 Philip Lynch and Richard Whitaker, 'Select Committees and Brexit: Parliamentary Influence in a Divisive Policy Area', Parliamentary Affairs, Volume 72, Issue 4, October 2019, pp923–944

- getting information from the Government (for instance the long battle to see the Government's impact assessments)
- securing regular ministerial appearances
- the quality of government responses
- coordination and overlaps.

The first Secretary of State for Exiting the EU, David Davis, had agreed that Members of Parliament should be kept at least as well informed as the European Parliament as negotiations progress, but this commitment was never clarified or monitored.

In an attempt to increase accountability, the EU (Withdrawal) Act 2018 (introduced during the Theresa May Government), was amended against the Government's wishes to include a 'meaningful vote' provision.[124] This required the Government to secure a Commons vote in favour of the Withdrawal Agreement before the Government could ratify it.

The Withdrawal Agreement finalised between the EU and the Boris Johnson Government was published in October 2019, and the Government introduced the long-awaited EU (Withdrawal Agreement) Bill to ratify and implement the agreement. The Commons objected to the speed at which the Government proposed to take the Bill through the House of Commons, and the Bill fell when Parliament was dissolved for the December 2019 General Election.

The Government then secured a working majority in that General Election. This allowed it to introduce a revised version of the EU (Withdrawal Agreement) Bill in the House of Commons in December 2019 – two months after the Agreement had been finalised. This version of the Bill repealed the 'meaningful vote' provision of the EU (Withdrawal) Act 2018 and also disapplied the CRAG treaty provisions for the Withdrawal Agreement.

Furthermore, although the pre-election version of the EU (Withdrawal Agreement) Bill had contained a clause that would have required parliamentary approval of the UK's objectives for the future relationship negotiations with the EU, regular Government reports to Parliament on progress in the negotiations, and parliamentary approval by resolution of a future relationship treaty, this provision did not appear in the post-election version of the Bill.[125]

The Commons debated the EU (Withdrawal Agreement) Bill in four days over a three-week period, leaving three weeks for Lords consideration and Royal Assent before the treaty was due to enter into force.

In a 2020 blog post on treaty scrutiny, Dominique Gracia and Alexander Horne concluded that "the difficult precedent of agreeing a Withdrawal

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[124] s13. See A User's Guide to the Meaningful Vote, Commons Library Research Briefing 8424, 25 October 2018

[125] See Commons Library Briefing, The New Withdrawal Agreement Bill, CBP8776, 6 January 2020, p11

Agreement with the European Union demonstrates that we should not underestimate the challenges ahead".[126]

5.2 Trade and Cooperation Agreement

The timing around the Trade and Cooperation Agreement (TCA) with the EU was even tighter.

The TCA was finalised on 24 December 2020. On 30 December Parliament passed the EU (Future Relationship) Act in one day, to implement the TCA in UK law. The TCA was due to apply less than 48 hours after the debates.

The Act disapplied the CRAG treaty provisions, arguably providing a kind of parliamentary consent for the TCA through the votes on the Bill. However, the timing meant that any objection would result in the UK leaving the transition period without an agreement on the future relationship with the EU, which would have had serious consequences. As it was, Parliament accepted the TCA and its implementing legislation without any real chance to scrutinise either of them. The Act enabled UK ratification of the TCA, although this came later, ahead of the full application of the TCA on 1 May 2021. [127]

Brigid Fowler, senior researcher at the Hansard Society, described Parliament's role around the end of the Brexit transition and conclusion of the TCA as "a constitutional failure to properly scrutinise the executive and the law".[128] She noted that the Prime Minister agreed the future relationship treaty without the House of Commons ever having held a formal debate on the substance of the UK's negotiating position.

5.3 'Rollover' agreements

Alongside the negotiations with the EU, the UK also had to negotiate 'rollover' or 'continuity' treaties with around 70 other countries. These largely replicated the effect of existing EU agreements that ceased to apply to the UK at the end of the Transition Period. Many of the treaties were on trade, but others concerned social security, transport and government procurement, for example.[129]

To make comparison with the predecessor EU agreements easier, the Government voluntarily published 'parliamentary reports' alongside all rollover agreements, which were intended to explain the differences.

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126 Dominique Gracia and Alexander Horne, 'Treaty scrutiny -A brave new frontier for Parliament', UKCLA blog, 18 March 2020

127 The TCA was provisionally applied from 1 January 2021 ahead of full ratification because the European Parliament's consent was needed for the EU to complete its ratification process. The TCA originally provided for provisional application until 28 February, but the UK and EU then agreed to extend provisional application until 30 April to give more time for legal-linguistic revision and translations of the TCA text. The European Parliament gave its consent to the TCA in a vote on 27 April.

128 Brigid Fowler, 'Parliament's role in scrutinising the UK-EU Trade and Cooperation Agreement is a farce', Hansard Society blog, 29 December 2020

129 See Commons Library briefing paper 8370, UK replacement of the EU's external agreements after Brexit, 19 September 2019.

The Lords European Union Committee, and subsequently the Lords International Agreements Committee, took responsibility for systematic scrutiny of these rollover agreements, publishing many reports and prompting several debates. In the Commons, both the International Trade Committee and the Exiting the EU Committee also monitored them and corresponded with Ministers.

The Lords scrutiny involved regular engagement between Government officials and staff of the Committees. This informal contact "allowed the Government to address questions on the policy and technical approach to transitioning agreements, and helped the Government adapt and improve some processes based on Committee feedback".[130]

5.4 Future scrutiny

The final report of the Commons Committee on the Future Relationship with the EU argued that the UK Parliament would still need to scrutinise the implementation of the Brexit treaties and any future negotiations.[131] Its draft proposals for a new European Affairs Committee were voted down in the committee.[132] Instead it recommended that the Government propose reforms of the current system for select committee scrutiny of European affairs by the end of April 2021 at the latest. These had not materialised at the time of writing.

In the meantime, the European Scrutiny Committee and some departmental select committees such as the Northern Ireland Affairs Committee are scrutinising the implementation and amendment of the Withdrawal Agreement and TCA. They have some additional support from Commons staff in a new European Affairs Unit and from lawyers in the Office of Speaker's Counsel.

Meanwhile, the former Chair of the Future Relationship Committee, Hilary Benn, is now co-convenor of a new UK Trade and Business Commission to scrutinise the UK's trade deals with Europe and the rest of the world. It includes MPs from all major UK parties and all four nations, as well as business leaders and economists. It will hold evidence sessions and make recommendations to the Government.[133]

The House of Lords has rearranged its committees, following a comprehensive inquiry by the Lords Liaison Committee.[134] The large European Union Committee and its sub-committees have been disbanded, and in their place are a new European Affairs Committee and an additional time-limited sub-committee on the Protocol on Ireland

130 Government response to Lords Constitution Committee report on Parliamentary Scrutiny of Treaties, July 2019, p4

131 House of Commons Committee on the Future Relationship with the European Union, 'The shape of future parliamentary scrutiny of UK-EU relations', HC 977, 21 January 2021

132 See the formal minutes of the inquiry: House of Commons Committee on the Future Relationship with the European Union, 'The shape of future parliamentary scrutiny of UK-EU relations', HC 977, 21 January 2021p36 ff

133 UK Trade and Business Commission, MPs and business leaders launch cross-party commission on trade with Europe and the world, 12 April 2021

134 See House of Lords Liaison Committee, Review of investigative and scrutiny committees: strengthening the thematic structure through the appointment of new committees, HL Paper 193, 15 December 2020

/ Northern Ireland. The European Affairs Committee will scrutinise UK-EU relations generally, and more specifically the implementation and governance structures of the Withdrawal Agreement, TCA and any other UK-EU agreements.

Like many other treaties, the TCA provides for parliamentary cooperation between the parties.[135] It states that the UK and European Parliaments "may establish" a Parliamentary Partnership Assembly consisting of Members of the two parliaments. The Assembly may seek information from the UK-EU Partnership Council that supervises the operation of the TCA at a political level, and make recommendations on the implementation of the TCA and any supplementing agreement. However, this Assembly has not yet been set up and there are no firm proposals as yet on how this would be handled on the UK side.

The TCA also provides for civil society engagement, referring to consultation with domestic advisory groups and a civil society forum.[136]

135 Commons Library Research Briefing 9139, The UK-EU Trade and Cooperation Agreement: governance and dispute settlement, 19 February 2021, section 3.3

136 Commons Library Research Briefing 9139, The UK-EU Trade and Cooperation Agreement: governance and dispute settlement, 19 February 2021, section 3.4

6. Limited role for the devolved authorities

Under the UK's devolution arrangements, international relations including treaty-making are reserved to the UK Government.

However, the devolved countries' interests may be different from or even opposed to those of the UK Government, and their legislatures are responsible for passing any implementing legislation needed in their areas of competence.

Despite this, there is no legal requirement for the UK Government to consult the devolved administrations or legislatures on treaties. Their ability to scrutinise treaties depends on both the extent to which the UK Government involves the devolved administrations, and the extent to which the UK Parliament considers the devolved legislatures' positions.

6.1 Executives

The UK Government has made a political commitment to cooperate with the devolved administrations on negotiating and implementing treaties with implications for devolved areas of responsibility.

This is set out in an inter-governmental Concordat on International Relations, which is one of five concordats supporting an MOU.[137] The Concordat promises cooperation on exchanging information, formulating UK foreign policy, negotiating treaties and implementing treaty obligations. It also provides for ministers and officials from the devolved administrations to form part of UK treaty-negotiating teams, for apportioning any quantitative treaty obligations, and for penalties should the devolved bodies default on any agreed liability.

Nevertheless, as Joanna Harrington has pointed out:

> It is both implicit and explicit in the nature of the devolved arrangements that Westminster retains the ability to override the actions of any devolved body and it could do so to ensure the State's compliance with its international commitments.[138]

This was particularly evident in the EU withdrawal negotiations.

6.2 Legislatures

There is no direct way for devolved legislatures to scrutinise UK government treaty actions, even though they may need to pass treaty-implementing legislation.

They have however sought to monitor and influence treaty developments, for example through the Scottish Parliament's Culture, Tourism, Europe and External Affairs Committee, and the Senedd's

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

138 J Harrington, 'Scrutiny and Approval: The Role for Westminster-Style Parliaments in Treaty-Making', 55 International and Comparative Law Quarterly 121 (2006), p150

External Affairs and Additional Legislation Committee. In December 2019 the latter set out a proposed five-phase process for the Senedd to engage with any future treaty negotiations, agreement, implementation, and ongoing monitoring of implementation.[139]

Scotland has even acted before Westminster in enacting legislation relating to a treaty. For instance, when ratifying the 2000 Hague Convention on the International Protection of Adults, the UK Government made a formal declaration that the Convention applied to Scotland alone until implementing legislation was passed for the rest of the UK. And in March 2021 the Scottish Parliament passed a Bill making the entire UN Convention on the Rights of Child part of Scots law (see Box 2 above). The same month the Scottish Government announced that it would seek to incorporate four more UN human rights conventions into Scots law.[140]

The informal Interparliamentary Forum on Brexit (IPF), which brings together chairs and convenors of Brexit-related committees from across the UK's legislatures, discussed parliamentary scrutiny of treaty negotiations in September 2019. It agreed that parliamentary scrutiny of international treaties is a matter for all of the legislatures of the UK, and called for the UK Government to share information regularly on its negotiating mandates.[141] However, it is not clear how the IPF's work might be carried forward. There have been many calls for the IPF to be developed into a more formal structure with a clearly recognised role, a transparent and accountable way of working, and proper reporting mechanisms,[142] but these reforms have not yet materialised.

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139 National Assembly for Wales External Affairs and Additional Legislation Committee, *UK international agreements after Brexit: A role for the Assembly [Senedd]*, (undated, December 2019)

140 'New Human Rights Bill', Scottish Government press release 12 March 2021

141 'Interparliamentary Forum on Brexit holds eighth meeting', House of Lords European Union Committee press release, 10 September 2019

142 See for example 'An inter-parliamentary body for the UK Union?', Hansard Society blog, 3 February 2021

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