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Treaty Scrutiny: The Role of Parliament in UK Trade Agreements

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Key points

- There is broad agreement that the current process of treaty scrutiny in the UK Parliament, based on the Constitutional Reform and Governance Act 2010 but substantively going back to a scheme established in 1924, is no longer fit for purpose.
- There are two reasons for this: first, in the last century the number, content, scope and mechanisms of treaties have changed substantially. Second, during the UK's membership of the EU some of the most complex modern treaties, namely free trade agreements (FTAs), had been concluded by the EU and effective mechanisms of parliamentary control had developed in this regard. With Brexit, these have fallen away.
- Since then, Parliament has established a formal treaty scrutiny mechanism in the House of Lords and has gained significant experience in handling treaties. We believe that the time has now come to learn from this experience and reform the UK treaty scrutiny system. We have, therefore, proposed a number of reforms to improve the practice of treaty scrutiny.
- These proposals consist of five main elements: (1) systematic scrutiny of treaties in both Houses of Parliament; (2) the introduction of a parliamentary consent vote in the House of Commons for significant treaties, particularly new FTAs; (3) ensuring the early involvement of Parliament starting with the negotiating mandate for FTAs; (4) broadening the list of documents subject to scrutiny; (5) to cope with the increased workload, introducing a sifting mechanism (that would be conducted in a new Sifting Committee in the House of Commons and in the International Agreements Committee (IAC) in the House of Lords) to identify treaties requiring thorough parliamentary engagement.

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Treaty Scrutiny: The Role of Parliament for UK Trade Agreements

Abstract

In the United Kingdom, Parliament's role in treaty-making is limited to scrutinising treaties under the provisions of the Constitutional Reform and Governance Act 2010 (CRAG). The Act partly codifies and to some extent progressively develops the so-called "Ponsonby rule" which dates back to 1924.1 Parliament's limited involvement and, in particular, the absence of a parliamentary vote on treaties is often justified by the UK's dualist approach to treaties, under which treaties cannot be directly invoked in national law, but require implementing legislation, which is passed by Parliament.

Since the introduction of the Ponsonby rule, the scope, depth and mechanics of commitments under international agreements have changed significantly. Trade agreements are emblematic of this change: agreements once focused on tariffs on the trade in goods now encompass detailed regulatory obligations, ranging from intellectual property law to subsidies. They often set up treaty bodies with the power to develop the treaty in some limited manner.

In light of these changes, the former chair of the International Agreements Committee, Baroness Hayter, reached the conclusion that the existing legislation on treaty scrutiny in CRAG was "not fit for purpose".2

The changed landscape of international agreements challenges the UK treaty scrutiny system in two ways. First, it raises questions regarding legitimacy. Parliaments play an important role in the democratic legitimation of international agreements, including free trade agreements. Many jurisdictions require a parliamentary consent vote on some treaties, including trade agreements (often in the form of an up-or-down vote). The current UK system fails to provide that legitimacy. We will show that Parliament's involvement in scrutinising treaties and in passing implementing legislation no longer suffices in the light of the way modern treaties are drafted and implemented.

Second, the complexity of modern treaties imposes pragmatic challenges for treaty scrutiny. Over time, it has become evident that broad modern free trade agreements cannot be examined in a meaningful way under the current system. The need to replace the EU's trade agreements provoked some reform of internal parliamentary procedures in the UK. However, the framework for scrutiny is still inadequate, particularly in the House of Commons. Although the government has made a number of post-Brexit commitments concerning the scrutiny of new free trade agreements, it is doubtful whether these go far enough to provide adequate accountability.

This project sets out to describe the development and current state of affairs of UK treaty scrutiny and, from there, develop realistic proposals for improvement, allowing for a greater involvement of Parliament in treaty-making and thus for a more inclusive trade policy.

About the authors

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[1] Jill Barrett, The United Kingdom and Parliamentary scrutiny of treaties: recent reforms, ICLQ 60 (2011), 225-245.
[2] Interview with Baroness Hayter.

Equalities Committee on international agreements. He is the editor of several books, including Parliament and the Law – now in its third edition.

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Chapter 1: Introduction

This project

This project researches the role of Parliament in treaty-making with a particular emphasis on free trade agreements. It focuses principally on the UK but includes some comparative observations.

The report is in four parts. The first provides a short introduction, explaining the historic context and the impact of Brexit on parliamentary processes and frameworks. The second examines how parliamentary committees in the UK currently scrutinise treaties. Part three highlights a number of concerns and lacuna within the current framework for treaty scrutiny. The final part suggests a number of pragmatic options for change, that build on previous recommendations from various parliamentary select committees, testimony given by Arabella Lang and the report authors to the Public Administration and Constitutional Affairs Committee (PACAC)[9] and a workshop conducted by the Trade and Public Policy Network[10], which we believe would improve parliament's ability to conduct this work.

In order to complete this report, the authors, together with our research assistants, have reviewed all of the post-Brexit parliamentary reports and debates which relate to the scrutiny of free trade agreements. We have also conducted an analysis of recent academic work in this area, which has informed our conclusions.

In addition to a consideration of the scholarly and parliamentary material already available on the issue of parliamentary scrutiny of treaties, the authors also interviewed some of those involved in the process. Finally, the research is informed by our own personal experience working for the House of Lords on the scrutiny of international agreements.

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Background

The purpose of treaty scrutiny

In a world in which problems often cannot be tackled by one state alone and where acting across borders has become routine, treaties serve an increasingly important function.

As treaties involve important decisions for the whole country, in a parliamentary democracy, Parliament should be involved in the making of treaties.[11] In the UK this function is served by parliamentary treaty scrutiny,[12] whose purpose is to ensure transparency,[13] democratic accountability to Parliament,[14] and to prevent ministers from taking important decisions without the authority of Parliament.[15] This process should not be regarded as an entirely adversarial process. Scrutiny helps spot oversights and mistakes.[16]

There is an argument to be made that, given the importance of treaties, treaty scrutiny should be treated the same way with regard to parliamentary involvement as other types of scrutiny such as legislative scrutiny.[17] Particularities of treaty scrutiny are (only) called for to the extent that treaties are different, namely the fact that they are negotiated with a counterparty outside the UK.[18]

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[9] The testimony is available here: committees.parliament.uk/writtenevidence/120379/pdf/

[10] Trade and Public Policy Network, Six Practical Steps to Strengthen Parliamentary Scrutiny of UK Trade Agreements « UK Trade Policy Observatory (sussex.ac.uk), Note of workshop held on 27 May 2022.

[11] Interview with Baroness Hayter (7 July 2023); Interview with Lord Kinnoull (14 June 2023).

[12] Interview with Lord Goldsmith (7 July 2023).

[13] Interview with Arabella Lang (30 June 2023).

[14] Interview with Lord Grimstone (30 June 2023), Interview with Arabella Lang.

[15] Interview with Baroness Hayter.

[16] Interview with Lord Kinnoull.

[17] Interview with Arabella Lang.

[18] Interview with Lord Grimstone.

Within the UK parliamentary system it is the Commons that should have the final word on new treaties, although in practice currently only the House of Lords conducts systematic treaty scrutiny.[19] Concerningly, at present, the Commons does not have a comprehensive treaty scrutiny mechanism in place.

A little history

The UK Government signs and ratifies international agreements (or treaties—we use the terms interchangeably) under the royal prerogative. The general constitutional role of Parliament is essentially unchanged since 1924 when treaties began to be laid before Parliament for 21 days under the so-called "Ponsonby rule".

In April 1924 the Foreign Affairs Minister, Arthur Ponsonby, used the occasion when moving the Second Reading of the Treaty of Peace (Turkey) Bill to make "a brief statement as to the intention of the Government with regard to the important question of the submission of Treaties to Parliament" with the intention to inaugurate a new custom and procedure. He affirmed that:

> "It is the intention of His Majesty's Government to lay on the table of both Houses of Parliament every treaty, when signed, for a period of 21 days, after which the treaty will be ratified and published and circulated in the Treaty Series. In the case of important treaties, the Government will, of course, take an opportunity of submitting them to the House for discussion within this period. But, as the Government cannot take upon itself to decide what may be considered important or unimportant, if there is a formal demand for discussion forwarded through the usual channels from the Opposition or any other party, time will be found for the discussion of the treaty in question."[20]

Ponsonby also made an additional commitment to the effect that the Government desired that Parliament should:

> "also exercise supervision over agreements, commitments and undertaking by which the nation may be bound in certain circumstances and which may involve international obligations of a serious character, although no signed and sealed document may exist."[21]

While the rule was abandoned in December 1924, it was resumed in 1929 and has been generally followed since.[22] Over time, the requirements of the rule and the practice under it developed further. Thus, for example, the 21-day rule became one of 21 sitting days. Since 1997 explanatory memoranda have been laid together with all treaties tabled under the Ponsonby rule and since 1998 the Foreign and Commonwealth Office (FCO), now replaced by the Foreign, Commonwealth and Development Office (FCDO), has also applied the rule to treaties subject only to the mutual notification of the completion of necessary internal procedures.[23]

The main benefits of the Ponsonby rule arguably have been that it acknowledged the importance of parliamentary involvement in treaty-making, that it has achieved greater transparency and that it has successfully combatted the practice of secret treaties.[24] However, under the Ponsonby rule, Parliament had neither a real veto power, nor a right to information prior to the signature of any new agreement.

The absence of the requirement of a consent vote is sometimes justified on the basis that the UK is a dualist state with regard to international treaties. A dualist state treats the spheres of international law and national law as separate. While a treaty the state is a party to binds the state and an international court would apply the treaty, national courts and the administration in a dualist state cannot apply a treaty. They only apply the national law. Accordingly, unless the relevant provisions already exist in domestic law, Parliament needs to legislate for treaty provisions to have domestic legal effect (or it needs to be implemented via secondary legislation). Where implementing legislation is required, FCDO guidance and convention demands that this legislation must be passed before treaty ratification.[25] This, so the theory goes, is sufficient in respect of

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[19] Interview with Baroness Hayter.

[20] HC Deb, 1 April 1924, vol 171, cols 2000–05

[21] Ibid.

[22] E. Lauterpacht, The Contemporary Practice of the United Kingdom in the Field of International Law – Survey and Comment, ICLQ 6 (1957), 506, 528. See also Lang & Mendez, Parliament's Engagement with Treaties, in: Horne et al., Parliament and the Law (Hart, 3rd ed. 2022), 159-187 at 164-167.

[23] House of Commons, Session 1999-2000, Procedure Committee, 2nd Report, Parliamentary Scrutiny of Treaties (HC 210).

[24] James Brown Scott, Ratification of Treaties in Great Britain, American Journal of International Law 18 (1924), 296-298.

[25] Treaties and MOUs: Guidance on Practice and Procedures - GOV.UK (www.gov.uk)

parliamentary involvement, as treaties themselves do not affect domestic law and hence parliamentary involvement for the treaty itself is not required.

We want to note at the outset that this theory is gravely deficient[26] in light of modern treaty practice. It shall suffice, here, to give four reasons for this:

1) Treaties can contain provisions or parts which provide for optional future obligations. The Parliament agreeing to the ratification of the treaty may well be asked to pass implementing legislation which merely grants wide-ranging and ill-defined powers to the Government to make secondary legislation at some future date. This rather undermines the role of Parliament the abovementioned convention is meant to ensure.

2) Modern treaties are living instruments. Their provisions are interpreted in international dispute settlement and they empower treaty bodies to make changes. Both of these mechanisms can mean that an obligation under international law to pass legislation arises even after the entry into force of the treaty, but is subject to no real scrutiny.[27]

3) Even where there already is legislation implementing a treaty, thus making parliamentary action unnecessary, the entry into force of a treaty limits the scope for future parliamentary action. Without the treaty, Parliament is free to abolish the existing legislation; with the treaty it can legally do so (in domestic law), but doing so would put the UK in violation of the agreement and thereby possibly incur state liability.

4) Implementing legislation does not have to be primary legislation, again allowing for treaties to come into force without there having been any debate in Parliament at all.

The Constitutional Reform and Governance Act 2010

The Ponsonby rule was put into statutory form in 2010 as part of the Constitutional Reform and Governance Act (CRAG 2010), which partly codified and progressively developed the pre-existing rule.[28] Notably, CRAG 2010 introduced a provision to allow Parliament, at least in theory, to delay (but not veto) the ratification of any new agreement.

Under Part 2 of CRAG treaties can only be ratified after they have been laid before Parliament along with explanatory memoranda, published, and a period of 21 sitting days has expired after the laying of the treaty. If the House of Lords during this period resolves that the treaty should not be ratified it can nevertheless be ratified if a minister lays a statement before Parliament that the treaty should be ratified and why. If the House of Commons passes a similar resolution a minister can lay the same statement and ratification is possible after a further 21 sitting days if the Commons do not, again, resolve against ratification. The latter process can, in theory, be repeated perpetually.

Many of the weaknesses inherent in CRAG are readily apparent from its wording. Parliament was not provided with a statutory role in setting the negotiating objectives for an agreement, receiving information, monitoring the progress of negotiations, overseeing reservations and scrutinising amendments (unless the latter are so significant that they meet the definition of a treaty subject to ratification). Moreover, the CRAG provisions come into play only after treaties have been signed by the parties (allowing no real opportunity for changes to be made[29]) and the timetable it prescribes is too short to allow proper consultation or engagement by committees with stakeholders. Finally, CRAG does not require a debate in any circumstance, reducing the effectiveness of Parliament's power to vote to delay ratification (and in fact rendering the possibility of delaying ratification perpetually a matter of theory).[30]

A further weakness is that, over time, it became clear that the requirements of CRAG are not always observed. Notably, they were completely disapplied by the legislation implementing both the Withdrawal Agreement and the Trade and Cooperation Agreement with the European Union – possibly the two most important agreements

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[26] A parliamentary vote on implementing legislation is not a vote on the treaty (as is made clear in the following), even though it is sometimes treated as such by some commentators and often the Government.

[27] An example of this is provided by Art. 1(2) of the Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and the Swiss Confederation of 11 February 2019, under which some provisions of previous EU-Swiss Agreements currently shall not apply, but can be made applicable by the Joint Committee.

[28] Jill Barrett, The United Kingdom and Parliamentary scrutiny of treaties: recent reforms, ICLQ 60 (2011), 225-245.

[29] This particularity distinguishes Parliament's role in treaty scrutiny from its role in legislation. Interview with Lord Grimstone.

[30] Arabella Lang, How Parliament Treats Treaties, House of Commons Briefing Paper, 1 June 2021, 38 f.

the UK has ratified in recent years.[31] CRAG itself also explicitly provides for the possibility of a Minister of the Crown disapplying treaty scrutiny "exceptionally". In July 2022, the (then) Secretary of State for Foreign, Commonwealth and Development Affairs, Elizabeth Truss MP, employed this power under section 22 of CRAG 2010 to ratify a treaty relating to the accession of Sweden and Finland to NATO, without the requirements of CRAG having been met.[32] This provision had never previously been used. The decision to do so was justified on the grounds of the "unprecedented international security circumstances" and the fact that there was "broad-cross party support for Sweden and Finland joining NATO."[33] While each of these three examples could theoretically be justified on the grounds of pressure of time, they also highlight the weakness of the arrangements. The requirements of CRAG can be disregarded even in respect of momentous decisions.

Finally, in addition to the abovementioned shortcomings of the legislation, the practical implementation of treaty scrutiny under CRAG 2010 has also fallen short of the aspirations of some in Parliament. Notably, no Commons parliamentary select committee took responsibility for the routine scrutiny of new international agreements following the passage of the Act.

Scrutiny of European Union acts and the impact of Brexit

Besides the Ponsonby rule and the later CRAG system of treaty scrutiny, from the 1970s, a separate system of scrutiny of EU acts, including EU treaties, developed, for which Parliament occupied a much larger role.[34] Indeed, one of the reasons the UK Parliament may not have prioritised the question of treaty scrutiny in the past is because, while the UK was an EU Member State, many of the UK's international agreements were negotiated by the EU. This is particularly true with regard to the negotiation of free trade agreements. These have become increasingly complex, requiring thorough scrutiny, but were negotiated by the EU under its exclusive competence for the common commercial policy.[35]

Agreements within EU competence, including trade agreements, were scrutinised in detail by the European Parliament[36] (including UK MEPs). It has both veto powers in respect of certain types of agreements (including FTAs) due to the requirement of a parliamentary consent vote[37] and the right to be "immediately and fully informed at all stages of the procedure", under Article 218 of the Treaty on the Functioning of the European Union (TFEU).[38] The consent vote has given the European Parliament a tool to force the Commission to better cooperate with them. The European Parliament has tried to build on its formal rights in Art. 218(10) by suggesting that it should also have a say in the formulation of negotiating directives.[39]

In addition, the European Union Committee in the House of Lords and the European Scrutiny Committee in the House of Commons scrutinised the decisions made by UK ministers at the Council of the EU.[40] These parliamentary committees had significant resources and were provided with a large amount of information on

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[31] European Union (Withdrawal Agreement) Act 2020, s32 and European Union (Future Relationship) Act 2020, s36.

[32] Section 22 of CRAG 2010 provides that a Minister may dispense with the requirements set out in the Act where they are of the opinion that, exceptionally, the treaty should be ratified without the requirements having been met.

[33] Written statements - Written questions, answers and statements - UK Parliament, available at https://questions-statements.parliament.uk/written-statements/detail/2022-07-06/hcws188.

[34] Interview with Lord Kinnoull.

[35] Art. 207 TFEU. Note also the exclusive competence for concluding association agreements under Art. 217 TFEU.

[36] Interview with Frank Hoffmeister (3 August 2023).

[37] Note the requirement of the consent vote does not depend on whether the treaty is subject to ratification or becomes binding upon signature. Whenever the EU expresses its consent to being bound by a treaty (which is called "conclusion" in EU law under Article 218(6) TFEU), the Parliament has the right to a parliamentary consent vote for the category of treaties enumerated in Article 218(6)(a) TFEU. Interview with Frank Hoffmeister.

[38] In practice with regard to information on ongoing negotiations for FTAs the INTA Committee forms an ad hoc monitoring committee representative of the composition of Parliament that will be informed regularly in non-public sessions by the Commission's chief negotiator. Confidentiality of these hearings is (legally) required and maintained. Given the consent vote of Parliament it is in the Commission's interest to inform the committee fully to avoid surprises later on. Interview with Frank Hoffmeister.

[39] From this point of view the Commission would send draft negotiating directives to both Council and Parliament and Parliament would give informal input or adopt a formal resolution. In practice this request has at least at times been accommodated. See also para. 29 of the European Parliament resolution of 22 November 2023 on proposals of the European Parliament for the amendment of the Treaties (2022/2051(INL)) proposing "that the European Parliament and the Council, upon a recommendation from the Commission, open trade negotiations".

[40] Interview with Lord Kinnoull.

proposed EU acts. Scrutiny of UK decisions at the Council gave Parliament a decisive tool due to the role of the Council: it is not only one of the two bodies that has to agree to all measures passed by way of the ordinary legislative procedure of the EU; it is also the essential decision-making body when it comes to EU treaty-making. It is the Council that authorises the opening of the negotiations, adopts negotiating directives, authorises the signing of the agreements and concludes them.[41]

Both committees' scrutiny work was underpinned by a "scrutiny reserve resolution", which was agreed by both Houses. Under this resolution, the Government undertook not to agree to any EU proposal until the Committee has completed its consideration, or "cleared it from scrutiny".[42] Thus, the two committees were able to act as an early warning system to the UK Parliament if they had substantial concerns about proposed EU measures. Under its EU scrutiny system Parliament had access to more information and, in practice, more power over treaty-making than it does under the CRAG 2010 procedures with regard to treaties concluded solely by the UK.

Brexit disrupted the UK's EU scrutiny system. On January 31, 2020 the UK left the European Union, and on December 31, 2020 the transition period ended. The UK is now as a whole no longer bound by EU law and does not take part in EU decision-making. Accordingly, the scrutiny of EU acts fell away.

The establishment of new systems of scrutiny

Brexit put additional strain on the existing scrutiny system, as it meant that the UK Government had to replace a large number of treaties. At that moment, Parliament leapt into action swiftly and fairly effectively.

In October 2018 the House of Lords Constitution Committee launched an inquiry into the Parliamentary scrutiny of treaties, producing its report in April 2019. The report highlighted many issues and argued that it is "imperative that Parliament scrutinises the Government's treaty actions—through the mandate, negotiation and ratification phases—that precede implementing legislation."[43]

Meanwhile, the House of Lords Procedure Committee decided on 14 January 2019 that the European Union Select Committee should take on the responsibility for organising, for the first time[44], a visible, regularised and detailed scrutiny process for international agreements.[45] The EU Committee noted the significant impact that treaties could have on daily life, observing:

> "[T]reaties can embody important policy decisions and create legal obligations for the UK, impinging on the role of Parliament. They may also require legislation to be passed by Parliament, and can affect Parliament's future ability to pass legislation that would place the UK in breach of its international law obligations. Even where treaties do not require any immediate changes to domestic law, they can develop dynamically through decision-making by treaty bodies, or following dispute resolution. This may lead to future changes or restrict domestic capacity for law-making over time. For all these reasons, parliamentary scrutiny of treaties matters."[46]

The scrutiny process developed in an organic way over time, alongside the machinery for conducting scrutiny. The scrutiny function at first exercised by the EU Committee was handed over to the International Agreements

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[41] Art. 218 (2) TFEU. Interview with Frank Hoffmeister.

[42] Both resolutions provided for exceptions. See for details Erskine May, Treatise on the Law, Privileges, Proceedings and Usage of Parliament (25th ed. 2019), para. 32.9.

[43] Select Committee on the Constitution, Parliamentary Scrutiny of Treaties

[44] Prior to Brexit, the only regular scrutiny of treaties that had been undertaken was by the House of Lords Secondary Legislation Scrutiny Committee. It commenced scrutinising treaties in the 2014-15 parliamentary session, when it was recognised that treaties laid under CRAG fell within its terms of reference. From the 2015-16 session up to 15 October 2018 the Committee considered 69 treaties. Of these, it reported on 18 treaties for information, but did not draw any to the special attention of the House. In October 2018 the Committee split into two sub-committees to meet the additional workload caused by Brexit. Secondary Legislation Scrutiny Committee – written evidence (PST0015), available at https://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/constitution-committee/parliamentary-scrutiny-of-treaties/written/93423.html.

[45] For a short history of this system, see: Scrutiny of international agreements: lessons learned (parliament.uk). The decision by the Procedure Committee is available at https://www.parliament.uk/globalassets/documents/lords-committees/procedure/Decision-Note-2019-01-14.pdf.

[46] European Union Committee, Scrutiny of international agreements: lessons learned, 27 June 2019.

Committee (IAC) which started life as a sub-committee of the EU Committee in March 2020, but became a full select committee of the House of Lords in January 2021.[47]

The importance of the subject matter can be seen from the first committee's high-powered membership: it contained two former Labour Attorney Generals, a former Conservative Cabinet Minister, a former Permanent Secretary to the Foreign Office and a former British High Commissioner to Australia. That membership also ensured that the Committee was seen as a serious actor by the Government, making the Committee effective in its interaction with Government.[48]

Unlike the House of Lords, the House of Commons has not developed a regular scrutiny system for all relevant international agreements. In 2016 the International Trade Committee was set up, mirroring the creation of the Department for International Trade (DIT) the same year. The ITC scrutinised trade agreements, but not other international agreements. It was dissolved in 2023, following the merger of DIT with the Department for Business, Energy and Industrial Strategy into the Department for Business and Trade. With the dissolution of the ITC and its replacement by a departmental select committee covering all of the activities of the Department of Business and Trade, we expect that there will be less time to cover treaties and accordingly less, rather than more scrutiny. [49]

During the Johnson administration, some efforts were made to enhance Parliament's role in the process of scrutiny during the passage of the Trade Bill. Ultimately, most were unsuccessful. The only significant statutory change that was accepted by the Government was in respect of agricultural aspects of FTAs. An FTA that includes measures applicable to trade in agricultural products is laid to Parliament under CRAG with a report by the Secretary of State drafted with advice by an independent non-parliamentary body, the Trade and Agriculture Commission (TAC), on aspects described in the law. The advice is also laid before Parliament.[50]

The task faced by Parliament if it wishes to go beyond mere analysis of new arrangements and actually hold the Government to account is a large one. In one of its final reports the ITC observed that the provisions for parliamentary scrutiny of treaties set out in CRAG simply "do not reflect the changes made since the UK left the European Union and so are therefore not fit to scrutinise future FTAs."[51]

In March 2021, the Public Administration and Constitutional Affairs Committee (PACAC) took up the challenge of considering how things might be improved, recognising the fact that systems in place in the Commons had returned to arrangements "largely based on the situation 100 years ago when international agreements were very different."[52] It launched an inquiry entitled The Scrutiny of International Treaties and other international agreements in the 21st century. The publication of the Committee's final report is imminent and we hope that the Committee might consider adopting some of our recommendations.

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[47] Alexander Horne, Treaty scrutiny in the House of Lords, UK in a Changing Europe, 15 April 2021.

[48] Interview with Lord Grimstone.

[49] See Business and Trade Committee, Scrutiny of Free Trade Agreements, 13 July 2023. See also paras 68 ff. below.

[50] The TAC was established in September 2021 to advise the Government on whether UK FTAs protect – or at least maintain – UK statutory protections for human, animal or plant life or health, animal welfare and the environment. The obligation imposed on the Secretary of State relating to the report is contained in sec. 42 of the Agriculture Act 2020 as amended by sec. 9 of the Trade Act 2021.

[51] House of Commons International Trade Committee, UK trade negotiations: Parliamentary scrutiny of free trade agreements, 27 October 2022.

[52] Inquiry into post-Brexit scrutiny of international treaties, 26 March 2021.

How does Parliament currently scrutinise treaties?

The object of scrutiny as defined by CRAG

The current Parliamentary scrutiny system is based on CRAG. The international agreements that are scrutinised are those laid before Parliament under section 20 of CRAG, (namely treaties subject to ratification). These are laid before Parliament along with an explanatory memorandum explaining the provisions of the treaty, the reasons for seeking ratification of the treaty, and other matters, as the respective minister sees fit under section 24 of CRAG.

CRAG itself defines the notion of treaties in section 25 in terms similar (though not entirely identical) to Article 2 of the Vienna Convention on the Law of Treaties (VCLT): treaties are "written agreements (a) between States or between States and international organisations" that are "(b) binding under international law." Treaties only have to be laid before Parliament if they are subject to ratification, a notion that section 25(4) enlarges somewhat to encompass both the need for a "deposit or delivery of an instrument of ratification, accession, approval or acceptance" and the "deposit or delivery of a notification of completion of domestic procedures". Treaties that enter into force upon signature are accordingly not within the scope of CRAG.

Section 25(2) of CRAG explicitly excludes from its scope regulations, rules, measures, decisions or similar instruments made under a treaty "(other than one that amends or replaces the treaty (in whole or in part))." This explicitly excludes decisions by treaty bodies from scrutiny. The situation is somewhat less clear for amendments, which – as one commentator wrote "is a treaty for the purposes of the CRAG Act if it meets the other criteria in section 25."[53]

Additional requirements for trade in agriculture

As discussed above, if the agreement that is to be scrutinised is an FTA including measures applicable to trade in agricultural products, the Secretary of State can only lay the agreement before Parliament after laying a report on the consistency of the agreement with the maintenance of UK levels of statutory protection in relation to human, animal or plant life or health, animal welfare and the environment.[54] In preparing the report the Secretary of State must request advice from the independent Trade and Agriculture Commission and lay that advice before Parliament as well.[55]

Scrutiny in the House of Lords

Treaty scrutiny in the House of Lords is, broadly speaking, centralised. The IAC examines all international agreements laid before Parliament under CRAG 2010,[56] except for further agreements with the European Union, which may be considered by the European Affairs Committee.[57]

The Committee has a small secretariat (one clerk, one policy analyst, and an assistant, as well as access to a senior legal adviser and special advisers as necessary).

The IAC set out its methodology in two reports: *Treaty scrutiny: working practices*[58] and *Working practices: one year on*.[59] In short, the Committee examines each agreement against a set of criteria, to determine whether to report an agreement to the special attention of the House. These criteria are:

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[53] Jill Barrett, The United Kingdom and Parliamentary scrutiny of treaties: recent reforms, ICLQ 60 (2011), 225, 234.
[54] Section 42 of the Agriculture Act 2020.
[55] Section 9 of the Trade Act 2021.
[56] Companion to the Standing Orders and Guide to the Proceedings of the House of Lords, para. 11.64.
[57] Companion to the Standing Orders and Guide to the Proceedings of the House of Lords, para. 11.60. Interview with Lord Kinnoull. The EU Committee's competence harks back to the origin of the IAC as a sub-committee of the EU Committee. Interview with Lord Grimstone.
[58] European Union Committee, Treaty scrutiny: working practices, 10 July 2020.
[59] International Agreements Committee, Working practices: one year on 17 September 2021.

> "(a) that the agreement is politically or legally important, or gives rise to issues of public policy that the House may wish to debate prior to ratification; […]
>
> [(b)] that it contains major defects, that may hinder the achievement of key policy objectives;
>
> [(c)] that the explanatory material laid in support provides insufficient information on the agreement's policy objective and on how it will be implemented; […]
>
> [(d)] that further consultation is necessary, including with the devolved administrations."[60]

Once the IAC has ascertained whether any of these criteria apply, it determines whether to draw the agreement to the special attention of the House of Lords. If it decides to do so, it will explicitly state whether the agreement merits a debate on the floor of the House, or whether the Committee is content for His Majesty's Government to provide additional information prior to ratification (while leaving the door open for other Peers to request a debate).[61]

The IAC publishes its analysis in a report. Before May 2023, it considered itself bound to publish a report on every agreement it scrutinised. In May 2023 it proposed to move to a 'sifting' arrangement whereby, while agreements would continue to be analysed by the IAC's secretariat, the most straightforward agreements would only be noted and would not be subject to a formal report.[62] It suggested the following criteria in this regard: (a) novelty, (b) political significance or giving rise to notable matters of public policy, (c) significant human rights implications, (d) significant expenditure.[63] The sifting process is undertaken by the clerk and legal adviser to the Committee, but the Chair of the Committee (inviting the views of other members as necessary) is the final arbiter of the process.[64]

This arrangement was agreed by the House and the terms of reference for the IAC were changed to reflect the arrangement. They now read as follows:

> "to consider, and where appropriate report on, 1) matters relating to the negotiation, conclusion and implementation of international agreements, and 2) treaties laid before Parliament in accordance with Part 2 of the Constitutional Reform and Governance Act 2010".[65]

While the IAC has reported agreements to the attention of the House and has requested (and obtained) debates on agreements in the Lords, the Lords has – at the time of writing – never resolved against ratification of a treaty (which could in any event be overridden by Government under section 20(8) of CRAG). It seems likely to do so only in matters of constitutional importance, namely issues affecting human rights.[66] This might be put to the test over the new UK-Rwanda Agreement on an Asylum Partnership, for which the IAC concluded that the "Government should not ratify the […] Treaty until Parliament is satisfied that the protections it provides have been fully implemented, since Parliament is being asked to make a judgment, based on the Treaty, that Rwanda is safe."[67] The chair of the Committee, Lord Goldsmith, is to move on 22 January 2024 that the House of Lord resolves under section 20 of CRAG 2010 that the Government should not ratify the agreement until its protections have been fully implemented.[68]

Additional commitments relating to trade agreements

Free Trade Agreements are, to some extent, at the forefront of the debate on treaty scrutiny. This is, first of all, the consequence of the scope of such agreements, which commonly encompass several areas of regulation.

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[60] Ibid., paras. 17, 20.
[61] Ibid., para. 19.
[62] Interview with Lord Kinnoull.
[63] Letter to Liaison Committee 17-05-23. The proposal was triggered by a number of substantially identical agreements on driving licenses that were put forward. Interview with Lord Grimstone.
[64] Interview with Lord Grimstone.
[65] Parliament, Companion to the Standing Orders and Guide to the Proceedings of the House of Lords (26th ed. Amended on 28 November 2023), para. 11.64.
[66] Interview with Lord Grimstone.
[67] IAC, Scrutiny of international agreements: UK-Rwanda Agreement on an Asylum Partnership, 17 January 2024, para. 47.
[68] House of Lords order paper for 22 January 2024.

Secondly, trade agreements were of particular importance in the post-Brexit process, as the EU has an exclusive competence in the area and has concluded more trade agreements than any other international actor, requiring a significant effort to maintain trade preferences for British traders. The complexity of FTAs made one of the shortcomings of CRAG painfully clear. The CRAG process starts (and the CRAG clock runs) after the treaty has been fully negotiated. This makes it almost impossible to get a full overview of what has been negotiated and how it affects individuals with regard to such complex agreements.

The Government recognised these shortcomings when it made a number of commitments regarding the scrutiny of trade agreements, including such issues as the publication of negotiating objectives and regular briefings. During the passage of the Trade Act 2021 the then trade minister Lord Grimstone made a two-prong commitment that became known as the "Grimstone rule", committing HMG to (a) facilitating a debate on the negotiating objectives if the International Agreement Committee publishes a report on them and request such a debate; and (b) facilitating a debate on the agreement itself if the committee requests one, subject to the parliamentary time available.[69]

While these commitments constituted improvements, they were still undertaken in a haphazard, unsystematic manner. Accordingly, in its second *Working Practices* report, the IAC pressed the Government to enter into a concordat which would set out a formal framework for scrutiny for Parliament to examine new FTAs.

The Government refused this request, but in May 2022 it did agree to an exchange of letters between the IAC and the (then) Department for International Trade to consolidate the Government's scrutiny commitments for trade agreements[70], which was placed in the libraries of both Houses. This set down an official record of what Parliament should expect from the Government and was negotiated by officials of both the IAC and the Commons ITC.[71] The formal commitments set out in the exchange of letters went beyond the statutory conditions contained in CRAG 2010. The Government indicated that it would meet the following additional requirements:

Pre-negotiations

For new FTA negotiations, the Government will undertake a public consultation or call for input. This further includes a commitment to publish its response to the consultation/call for input. Similarly, the Government will publish its negotiation objectives as well as a scoping assessment before the start of negotiations.

Should the IAC, or the ITC publish a report on those objectives, the Government will gladly consider that report and, should it be requested, facilitate a debate on the objectives, subject to the parliamentary time available.

During negotiations

During new FTA negotiations the Government will publish regular updates – usually after each substantive negotiating round. Where there are no standard negotiating rounds, it will publish updates at regular intervals.

The Government is committed to undertaking close engagement with the relevant Select Committees, including providing oral and written evidence in public and private. The Chief Negotiator will usually provide private and public evidence, and the Government will make relevant Senior level Civil Service experts available to brief the committees on the technical detail of negotiations, where necessary, in private.

Post Signature

In the case of new FTAs, the Government will publish the FTA, alongside explanatory material and an independently scrutinised Impact Assessment which will cover the economic and environmental impacts of the agreement as soon as reasonably practicable following signature.

The Government will also endeavour to share the signed FTA, explanatory material and an independently scrutinised Impact Assessment with the IAC and ITC, in confidence, prior to publication, where time allows.

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[69] HL Deb. 23 February 2021 c724. See: e.g. A. Horne, Treaty scrutiny in the House of Lords UK in a Changing Europe, 15 April 2021 and Treaties matter. But parliament is barely given a say, Prospect Magazine, 8 February 2022.

[70] Letter from Baroness Hayter to Lord Grimstone in response to letter from Lord Grimstone on parliamentary scrutiny of FTAs - formal exchange

[71] Unfortunately, the Commons ITC never formally signed the exchange of letters, which led to some difficulties (discussed below).

Should the IAC or ITC produce a report on a new FTA and as part of this request a debate, the Government will seek to facilitate this subject to available parliamentary time.

The Government will ensure that the relevant select committees have a reasonable amount of time to scrutinise new FTAs and produce any reports on them that they may wish to prior to the start of the CRAG period.

In the case of the Australia, New Zealand and [the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (]CPTPP[)] agreements the Government expects there to be a period of at least 3 months between the publication of the signed FTA and the agreement being laid under Part 2 of the CRAG Act 2010.

Where applicable, the Government will seek independent advice from the Trade and Agriculture Commission (TAC) in line with the requirements of the Agriculture Act 2020 (as amended by the Trade Act 2021). The Government's request for TAC advice, the TAC advice received, and the Government's own report will be laid before Parliament in line with Section 42 of the Agriculture Act 2020 (the TAC process).

The Government does not 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 ITC or IAC, subject to available parliamentary time."[72]

These commitments were an improvement over the previous flexible framework, particularly with regard to the House of Lords.[73] For the FTAs with Australia, New Zealand and the CPTPP the commitments ensured at least three months for the Lords to conduct their scrutiny and there was hope that this standard would be followed in respect of any significant new FTA. Moreover, the 'usual channels' in the Lords (the whips) were supportive in finding time for debates on the IAC's reports.[74]

The UK-Australia FTA is a useful example in this respect.[75] The Government launched a public consultation in July 2018,[76] published its negotiating objectives in June 2020,[77] negotiated the agreement and signed the Agreement on 16 December 2021. The Agreement was published as a command paper on 16 December 2021. The TAC advice was given in April 2022,[78] the Section 42 report dates from June 2022.[79] The IAC opened its inquiry into the FTA in July 2020, and held six evidence sessions on the negotiations, the agreement in principle, and the final agreement.[80] The Government formally laid the agreement before Parliament on 15 June 2022. The IAC ordered its scrutiny report to be printed on 16 June 2022, requesting a debate. That debate on a "take note" motion was held on 11 July 2022.[81] The CRAG period expired on 20 July. As will be shown below, scrutiny in the Commons proceeded far less smoothly.

In spite of these incremental improvements, however, treaty scrutiny in Parliament continues to suffer from a number of fatal flaws. These will be discussed in detail below.

Scrutiny in the House of Commons

While the framework for treaty scrutiny in the House of Lords is both fairly clear and effective, the setup in the House of Commons is both opaque and in flux. Brexit did not lead to a more systematic approach to treaty scrutiny as it did in the Lords under the initial leadership of the EU Select Committee. The European Scrutiny Committee, since 2010 under the leadership of Sir Bill Cash, has never assumed a similar responsibility. Instead, the International Trade Committee stands out with regard to treaty scrutiny. At the time of writing and after the demise of the ITC, the bulk of any scrutiny of FTAs is conducted by the Business and Trade Committee.

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[72] Spelling and numbering adapted to this report.

[73] See, for example: Is parliament finally being given a proper say over government trade deals? (prospectmagazine.co.uk)

[74] In its second *Working Practices* report the IAC noted that of the 46 treaties it had examined between April 2020 and September 2021, seven were reported for the special attention of the House and five of these were also subject to a debate on the floor of the House or in Grand Committee.

[75] Occasions to test the policy have been limited so far because few agreements have progressed to the scrutiny stage.

[76] Public consultation on trade negotiations with Australia: Summary of responses, 18 July 2019.

[77] UK-Australia free trade agreement: the UK's strategic approach, 17 June 2020.

[78] TAC, Advice to the Secretary of State for International Trade on the UK-Australia Free Trade Agreement, April 2022.

[79] Report pursuant to Section 42 of the Agriculture Act 2020: UK-Australia Free Trade Agreement, June 2022.

[80] IAC, Scrutiny of international agreements: UK-Australia free trade agreement, 16 June 2022.

[81] House of Commons Library, Research Briefing: UK-Australia Free Trade Agreement, 12 May 2023.

However, it is open to other departmental and cross-cutting committees to take an interest in any agreements which engage their terms of reference.

Recent engagements with trade agreements include a report by the Environment, Food and Rural Affairs Committee on the implications of the Australia FTA for food and agriculture[82] and an intervention from the Women and Equalities Committee about women's empowerment and human rights clauses in a proposed trade deal with the Gulf Co-operation Council.[83] Outside the area of trade the Home Affairs Committee recommended in January 2024 that the Government provide time for the UK-Rwanda treaty to be debated in the House of Commons to enable the Commons to record its view on ratification before the expiry of the 21 sitting day period under CRAG.[84]

The work of the International Trade Committee

Following the Commons tradition of having a select committee for each Government department, the Commons set up an International Trade Committee in 2016 that scrutinised spending, administration and policy of the Department of International Trade. Until the machinery of Government changes, which saw the end of the Department for International Trade in February 2023, the ITC was responsible for examining new FTAs. However, it did this as part of its broader work of scrutinising the work of the department.

While the approach the IAC took to scrutiny might be described as constructive criticism, the ITC was sometimes more combative. Partly this difference is due to the structures of the committees. The IAC, as a cross-departmental treaty scrutiny committee, focuses more on the structure of a treaty; to what extent it fulfils government objectives; and whether its content has been properly signalled and justified. It is not solely a trade committee and has always stressed this point. The ITC, by contrast, as a departmental committee took more substantive views on the content of FTAs given its subject matter mandate.[85] To some extent, this difference in approach is also a direct consequence of the cultural differences between the more political House of Commons and the House of Lords, which is less so. This difference in style between the Houses has two consequences: suboptimal cooperation between the two Houses and more problematic interactions between the Commons and the Government.

As to the first point, although there was extremely useful cooperation at staff level between the IAC and ITC, including trilateral meetings between Lords, Commons and DIT officials, the Commons committee could be seen to be somewhat standoffish in its approach to Lords counterparts. The main example of this having a negative impact was over the exchange of letters in May 2022 mentioned above, which worked better for the Lords than for the Commons.[86] Some of the blame for this must fall on the former Chair of the ITC who did not sign the final exchange of letters, despite the fact that it made specific governmental commitments in respect of the ITC.

As to the second point, the more politicised process and the more combative style almost by necessity means that the Commons committee will at times be less effective at voluntarily extracting information and concessions from Government. At times, the confrontational approach can become counterproductive. To some extent, however, the combativeness is a consequence of the political nature of the Commons.[87]

Unlike in the House of Lords (where the terms of the exchange of letters appears to have been observed by the Government), in the more political cut and thrust of the House of Commons the Government's commitment to improve treaty scrutiny has not worked successfully. The Australia-UK FTA illustrates this failure: the ITC had asked for a debate on the Agreement, but, unlike the IAC in the House of Lords where a debate was held, it saw its request for a debate in the Commons denied by the Government.[88]

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[82] Environment, Food and Rural Affairs Committee, Australia FTA: Food and Agriculture, 17 June 2022.

[83] Letter from Chair of Women and Equalities Committee to Secretary of State for Business and Trade, 27 September 2023.

[84] House of Commons Home Affairs Committee, UK-Rwanda treaty: provisions of an asylum partnership, 10 January 2024, para. 13. At the time of writing, it was unclear whether such a debate would occur.

[85] Interview with Lord Grimstone.

[86] See para. 54.

[87] Interview with Lord Grimstone.

[88] See House of Commons, Research Briefing: UK-Australia Free Trade Agreement, 12 May 2023. The Government also refused to extend the CRAG scrutiny period to allow the ITC further time to examine the new FTA.The Government's position was that the text of the treaty had been available six months prior to the triggering of the CRAG period, see: Letter from Secretary of State for International Trade to Chair of ITC, 19 July 2022.

During an urgent question on the scrutiny process on the floor of the House of Commons, the (then) Junior Trade Minister, Ranil Jayawardena MP, laid bare the weakness of the commitments in the Commons. The (then) Shadow Trade Minister, Nick Thomas-Symonds MP had argued that the Government's failure to make time available for a debate was "completely unacceptable and a clear breach of promise. Lord Grimstone wrote in May 2020:'The Government does not envisage a new FTA proceeding to ratification without a debate first having taken place on it'." In response, Jayawardena appeared to resile from the commitments entirely:

> "As for what my noble Friend Lord Grimstone said, processes for the other place are a matter for the other place."[89]

In October 2022, the ITC published a report on parliamentary scrutiny of trade agreements where it stated that while it accepted that the Government needed a request for debate on a new FTA to be made in a "timely manner", the "commitment to granting such a request must be firmer than 'subject to parliamentary time' as [the Government] controls parliamentary time."[90] It also argued that if debates in the House of Commons were to have any relevance, they must be allowed to take place on the basis of a substantive motion (rather than simply being general debates)[91], during the period that the Commons retained the power to delay ratification of the agreement.

Following the spat, the Government appeared to row back from Jayawardena's (perhaps spontaneous) rhetoric and, in a written response to the ITC published in January 2023, indicated that it would "seek to ensure that a debate on an FTA is held during the CRAG period" and that where a debate has been requested but cannot be accommodated during the CRAG scrutiny period, it would "consider extending the CRAG period."[92] But in the same response, the Government made clear that it would not be sympathetic to allowing an automatic debate on a substantive motion. Rather, it argued that a general debate would be more suitable, claiming that:

> "A Government commitment to guaranteed substantive debates under CRAG would fundamentally alter the nature of the scrutiny framework, undermine the Royal Prerogative, and remove flexibility."[93]

The Business and Trade Committee

In March 2023, the House of Commons agreed to restructure its select committees to reflect the machinery of government changes following the abolition of the Department of International Trade. These changes took effect in April 2023, when the responsibility for scrutiny of the Government's trade policy (including new FTAs) was transferred to the House of Commons Business and Trade Committee (BTC).

In July 2023, the BTC published a report entitled *Scrutiny of free trade agreements*. The report made clear that the committee was constrained by the fact that it operated "within finite resources" and that it would have to choose its work "with care and with regard to political interest." It went on to indicate that it intended to "adopt a case-by-case approach to scrutiny of prospective free trade agreements in the future."[94]

The BTC highlighted that its future working model would be to adopt a targeted, thematic, model which would seek to examine the Government's negotiating objectives. It noted that:

> "In most cases, we would expect to publish a report setting out our assessment of the implications of a proposed agreement, and to seek a debate on those negotiating objectives. That approach would offer a chance for the Committee—or indeed the House—to influence the content of free trade agreements. We believe that would be more productive than exhaustive textual scrutiny of an agreement that has been finalised and signed, and when no scope for influence or manoeuvre remains."

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[89] Hansard, Australia-UK Free Trade Agreement: Scrutiny, 19 July 2022

[90] International Trade Committee, UK trade negotiations: Parliamentary scrutiny of free trade agreements, 27 October 2022.

[91] The distinction is that a debate on a substantive motion could seek to delay ratification of a new FTA under CRAG, whereas a general debate merely allows MPs to express their views on the proposed new arrangements.

[92] UK trade negotiations: Parliamentary scrutiny of free trade agreements: Government Response to the Committee's Fourth Report, 26 January 2023.

[93] Ibid.

[94] Business and Trade Committee, Scrutiny of Free Trade Agreements, 13 July 2023.

The BTC made clear that it would "not normally expect to conduct detailed textual scrutiny of signed agreements."[95] On the question of whether debates should take place on a substantive motion, the BTC concluded that while, in most cases, it would expect a debate to take place on a neutral motion, in circumstances where the committee identified concerns which were so serious that the agreement should not be ratified it would make that recommendation in a report to the House "and would ask the Government to make time for a debate on a substantive motion during the CRAG period."[96]

It is worth noting that, despite the concerns expressed by the Government, the House of Commons has, thus far, never made use of its powers to delay ratification of a treaty by resolving against ratification under CRAG.

While the BTC is taking a pragmatic approach to scrutiny, which may well make the most of scarce parliamentary resources, it is plain from its report that the ultimate consequence of the machinery of government changes is that it will lead to less scrutiny of new FTAs in Parliament.

[95] Ibid.
[96] Ibid.

Where the Scrutiny System Falls Short

Introduction

The current scrutiny system suffers from a number of problems. We will present them in a structured manner, commencing with the legal basis for scrutiny, the documents that are scrutinised, the process of scrutiny including devolution, and the structures for scrutiny in Parliament. Lastly, we will tackle the issue of powers granted to Parliament.

Legal Basis of Scrutiny

The main legal basis for scrutiny today is CRAG 2010. All of our interviewees voiced explicit discontent with the substantive content of CRAG. It is outdated. It only provides for scrutiny after the finalisation of the treaty text and sets a time period that makes it impossible to get expert views needed to properly evaluate complex treaties.[97]

As we have shown above some of these problems have, to some extent, been mitigated in practice through governmental commitments. These, however, do not resolve the issue: with the exception of the independent agricultural committee, none of the commitments have been put into statutory form, many of them are strictly limited to some areas and can be waived at the government's discretion. This was illustrated by the Government's approach to debate in the Commons in the case of the Australia FTA. The refusal to observe the commitments made by Lord Grimstone was particularly egregious as there was no obvious urgency to ratify the new FTA before Parliament's summer recess and some compromise could easily have been found.

Documents subject to scrutiny

CRAG 2010 significantly limits the documents that are subject to treaty scrutiny. The exclusion of a number of documents creates a significant scrutiny deficit.

Treaties not subject to ratification / notification

Under CRAG 2010 only treaties subject to ratification are subject to scrutiny. Following the developments under the Ponsonby rule, ratification is enlarged to encompass accession, approval or acceptance as well as deposit or delivery of a notification of completion of domestic procedures. However, under the Vienna Convention on the Law of Treaties (VCLT) treaties can, upon consent of the parties, also enter into force in other ways, e.g. by signature only, which would exclude them from CRAG scrutiny. There are no legal rules obliging states to choose the ratification route for significant treaties, providing the Government with an easy way to avoid scrutiny if partners so agree.

Amendments to treaties, Decisions by Treaty Bodies

Most FTAs can be amended by the parties, although the mechanisms by which this can be done can vary. Most commonly, FTAs make provision for amendments to happen through the mutual decision of the parties. This can happen through a variety of mechanisms, including Joint Committees that are set up under the terms of the agreement itself.

The provisions in CRAG relating to amendments are far from clear but, unless the changes require ratification, the Government is under no legal obligation to lay any information before Parliament. Decisions by treaty bodies that do not constitute amendments are clearly not subject to treaty scrutiny.

The Windsor Framework and the structure of the UK-Switzerland Free Trade Agreement illustrate the difficulties posed by amendments and decisions of treaty bodies falling outside the scope of CRAG. The Windsor Framework constituted de facto a significant amendment to the Northern Ireland Protocol contained in the

[97] Interview with Baroness Hayter, Interview with Lord Goldsmith, Interview with Lord Grimstone.

Withdrawal Agreement. Despite its obvious relevance for the constitutional setup of the UK it did not fall under CRAG and was only subject to scrutiny at the discretion of the Government.

The UK-Switzerland free trade agreement[98] incorporates several Switzerland-EU agreements in its Article 1(1), however, it provides in Article 1(2) that a number of their provisions and one of the incorporated agreements in its entirety shall not apply unless otherwise decided by the Joint Committee set up by the agreement. It would seem appropriate to not look at the provisions in Article 1(2) conclusively in the scrutiny process for the agreement (since they might never take effect) and instead scrutinise them properly when a Joint Committee decision to include them is discussed. The current scrutiny system does not allow this.

Issues relating to amendments to trade agreements were highlighted by the House of Lords European Union Committee in its *Lessons Learned* report in June 2019. It stated that:

> "Currently, it is not clear when amendments to agreements will engage the provisions of the CRAG Act, particularly where they are agreed by Joint Committees without the need for ratification. It is also possible that some significant amendments may not need to be implemented in domestic legislation if the original implementing legislation is sufficiently widely drawn. This could lead to a scrutiny gap, unless relevant amendments are notified to Parliament and potential issues are outlined clearly in the initial explanatory memorandum accompanying the agreement."[99]

Unfortunately, the report did not prompt changes in Government practice. By September 2021, the clearly exasperated IAC wrote in its second *Working Practices* report that:

> "We have two, longstanding, requests on the question of amendments to treaties. Both were discussed in our earlier Working Practices report. The first was that the Government engage with us to devise a system for drawing new amendments to international agreements to the attention of Parliament. The second was that the Government should ensure that it maintains a list of amendments so that it is possible for anyone to find an up-to-date version of each international agreement. While the Government has promised to implement both of these requests little has happened in practice."[100]

Eventually, in a letter dated 19 July 2022, the then Secretary of State for International Trade, Anne-Marie Trevelyan MP, stated that she was "happy to commit" that "all significant amendments" would be notified to the then ITC and the IAC in writing; and that officials would be instructed to provide quarterly updates to the committees on decisions made by joint committees under a new FTA.[101]

This is, of course, progress. But it ignores the fact that significant changes can be made to international agreements without full, contemporaneous, scrutiny by Parliament.

Reservations

Reservations are unilateral statements by a state when becoming a party to a treaty that purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that state.[102] The legal rules pertaining to reservations are complex,[103] but roughly speaking reservations are an often permissible tool for a state to modify, in a limited manner, the content of a convention as it applies to that state. In the UK, making reservations is a prerogative power: Parliament has no role.[104] This creates a problem for treaty scrutiny, as reservations modify the treaty subject to scrutiny. The issue is illustrated by the recent ratification of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul

[98] Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and the Swiss Confederation, Switzerland No. 4, 2019.

[99] European Union Committee, Scrutiny of international agreements: lessons learned, 27 June 2019.

[100] International Agreements Committee, Working practices: one year on, 17 September 2021.

[101] Letter from Secretary of State for International Trade to Chair of the International Trade Committee, 19 July 2022.

[102] Article 2(d) Vienna Convention on the Law of Treaties.

[103] See ILC, Guide to Practice on Reservations to Treaties, Yearbook of the ILC 2011, vol. II, Part Two.

[104] International Agreements Committee, Scrutiny of international agreements: Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, 17 June 2022, para. 14.

Convention), to which the Government made reservations that the IAC (and several Commons committees) were concerned about.[105]

The use of political arrangements (MoUs)

Recent years have seen states increasingly resort to legally non-binding agreements. These are often referred to as Memoranda of Understanding (MoUs), though it should be born in mind that the designation of an agreement is not decisive in determining whether it is a legally binding treaty or whether it is not legally binding and hence not a treaty under the VCLT. Non-binding agreements are not subject to treaty scrutiny under CRAG.

MoUs are not just numerous, but also of a perplexing diversity. Many of them are of a more symbolic nature.[106] More recently, however, governments have resorted to MoUs in legally or politically more problematic circumstances. This is true in the area of trade and in other fields.

As to trade law, examples arose during the Brexit process. For example, the then Department for International Trade resorted to using MoUs as a bridging mechanism to ensure that the trade arrangements under EU FTAs remained in place between the end of the transition period, when the UK legally lost the benefit of these FTAs, and the entry into force of the replacement "continuity" FTAs.[107] In a different vein, the Government has generated much noise when signing MoUs with some US states. While these MoUs are more traditional (i.e. clearly non-binding), the way in which they were announced illustrates how important they were for the Government. Moreover, some Air Services Agreements, which had been treaties between the EU and third countries, were converted into MoUs. [108]

As to other fields, the recent, unsuccessful, attempt to remove asylum seekers under the terms of the UK-Rwanda MoU is the most obvious example.[109]

The IAC highlighted a number of issues with the Government's use of MoUs in its report on the *Memorandum of Understanding between the UK and Rwanda for the provision of an asylum partnership arrangement*.[110] It noted that, unlike treaties, MoUs do not have to be laid before Parliament for a 21 day scrutiny period and can enter into force immediately. Many MoUs are never published and there is no central repository for signed MoUs. The IAC also noted that the lack of a comprehensive MoU database "raises serious transparency concerns: public knowledge of the existence of any given MoU depends on whether the government of the day decides to make a statement in Parliament, issue a press notice, or publish it online."

The fact that the UK Government has attempted to 'cure' some of the deficiencies of the Rwanda MoU by entering into a formal treaty with Rwanda on very similar terms[111] highlights the fact that the instrument used to form arrangements with other states can often be a matter of choice and convenience for governments.

The process of scrutiny

Pre-finalization scrutiny

Several participants in the scrutiny process pointed out that scrutiny has to begin more consistently with scrutiny of the negotiation objectives, where applicable. Otherwise, Parliament simply looks at the finished product and

[105] See: e.g. IAC, Scrutiny of international agreements: Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, 17 June 2022.

[106] Interview with Lord Grimstone.

[107] Such MoUs were signed with Cameroon, Kenya, the CARIFORUM states (though for some states provisional application resolved the time gap) and the Pacific states. An overview over FTAs with bridging mechanisms is available at https://www.gov.uk/guidance/uk-trade-agreements-with-non-eu-countries.

[108] European Union Committee, Scrutiny of international agreements: lessons learned, 27 June 2019, paras 70-74

[109] For full details, see the judgment of the Supreme Court in R (on the application of AAA (Syria) and others) v Secretary of State for the Home Department [2023] UKSC 42. After the Rwanda policy was not upheld by the Supreme Court, the Government transformed the MoU into a treaty and proposed additional legislation.

[110] Memorandum of Understanding between the UK and Rwanda for the provision of an asylum partnership arrangement

[111] A. Horne, Spectator, Has Sunak done enough to fix the Rwanda plan? 6 December 2023.

is, de facto, reduced to the question whether it is better to have the treaty or not, which limits the value of scrutiny.[112]

Timetable

All participants have pointed out that the timetable fixed by CRAG can, depending on the treaty, fall far short of what is required to obtain the input needed to properly scrutinise treaties.[113] That input involves taking evidence from outside parties, namely stakeholders and experts. Scrutiny can only be effective with sufficient time for scrutiny.[114]

Governmental commitments and voluntary governmental cooperation particularly with the House of Lords IAC[115] can and have helped mitigate the issue, e.g. by making the treaty available before the CRAG period begins.[116] But such cooperation has not managed to avoid absurd outcomes even in uncontested cases,[117] and cannot be expected to work in contested cases. As a matter of principle, proper parliamentary treaty scrutiny should not be a matter of governmental largesse.

The devolved governments and legislatures

As a unitary state, the UK's arrangements for devolution do not provide the separate nations of Scotland, Northern Ireland and Wales with a formal voice in treaty-making. However, both the separate nations and, indeed, overseas territories take a keen interest in some of the treaties that go through Parliament. Failure to take their interests into account can result in grave consequences.[118]

A practice has developed for the Government to hear from the devolved administrations and overseas territories so that it can understand and take into account their concerns.[119] Despite this input, a feeling of being excluded from the process appears to have gained traction in some of the nations of the UK. Angus Robertson MSP, Cabinet Secretary for the Constitution, External Affairs and Culture for the Scottish Government, told PACAC that:

> "Despite bearing responsibility for implementing devolved aspects of any completed treaty, devolved Governments rarely have any say in the formulation of the negotiating line that determines the content of the treaty. What should be the negotiating line for the UK as a whole is practically merely the UK Government's negotiating line and has not taken on board any of the needs, interests, concerns and expectations of the devolved Governments and the views of the legislatures."[120]

The role of legislatures is also underdeveloped. The Welsh Parliament has highlighted the fact that CRAG "does not provide a formal role for the devolved legislatures, nor does it contain a duty to consult with the devolved legislatures before the UK Parliament forms its conclusions" and has suggested that "UK parliamentary scrutiny could only benefit from the devolved legislatures having a formal role, with our view being recognised and accommodated."[121]

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[112] Interview with Lord Goldsmith.

[113] Interview with Baroness Hayter, Interview with Lord Goldsmith; Interview with Lord Grimstone.

[114] Interview with Lord Grimstone.

[115] We note, for example, the government's acceptance to extend the scrutiny period under sec. 21 of CRAG in the case of the Agreement with Switzerland on the Mutual Recognition of Professional Qualifications. See the House of Lords IAC report on the agreement, 19 September 2023.

[116] Interview with Lord Grimstone.

[117] The Agreement with Switzerland on Mutual Recognition in relation to Conformity Assessment was provisionally applied before the scrutiny period ended. See the respective House of Lords IAC report of 13 January 2023, para. 2.

[118] Some of these interests can concern a single issue, as was the case with Patagonian squid, which the Falklands used to export in great numbers to the European Union.

[119] Interview with Lord Goldsmith.

[120] Oral evidence from Angus Robertson MSP to PACAC , 22 November 2022.

[121] Written evidence from the Welsh Parliament to PACAC, November 2022.

Given the importance of new FTAs, particularly on agricultural and environmental interests in Scotland, Northern Ireland and Wales, maintaining the current situation could pose risks for broader constitutional relations in the United Kingdom.

Structures for scrutiny in Parliament

As can be seen from the preceding chapter, the structures for scrutiny in the UK Parliament are suboptimal. Provision for systematic scrutiny is only made in the House of Lords, which also has a greater capacity to conduct such scrutiny given the constraints on time and treaty expertise in the Commons.[122] Following the abolition of the ITC, it is plain that scrutiny in the Commons is likely to be both underpowered (given the various other priorities of the BTC) and potentially somewhat ad hoc.

This is particularly problematic given that the single significant power under CRAG – the power to delay ratification of a new treaty repeatedly – is provided only to the House of Commons.[123]

When the issue of how Parliament should scrutinise treaties was first considered, during the Brexit process, some suggested that this problem might be addressed by establishing a Joint Committee. Such a committee would avoid experts having to present their relevant cases twice, once in the Commons and once in the Lords. Arabella Lang, then the Commons official who took the lead on treaty scrutiny, argued in evidence to the House of Commons Liaison Committee that:

> "Given that the Commons has more power over treaties than the Lords, it would not be appropriate for only the Lords to take on this function. So there could be a Commons Committee, or separate Commons and Lords committees, or a Joint Committee. This is largely a political choice. But a Joint Committee would seem the most sensible and practical, even if it would be more complex to establish and run. […] A Joint Treaty Committee would combine the greater perceived legitimacy of the Commons with possibly greater expertise and time available in the Lords."[124]

Whether or not such an idea might have been workable in 2019, it is unlikely to be considered today, given that the Lords has a well-established mechanism in place.[125] Members of the House of Lords we spoke to during the course of our research made the point that a Joint Committee was not very desirable.[126]

In part, this may be for cultural reasons. The House of Lords is simply less partisan and party political;[127] there is a sense that it can be better relied upon to do the technical, less glamorous, work of line-by-line scrutiny. Lords Members may also be less constrained by the pressures of time than MPs. Lord Goldsmith set out another objection when he observed that Lords Committees do not have a Government majority, whereas (depending on the results of any general election) a Joint Committee could end up being Government-dominated.[128] However, the rejection of a Joint Committee does not mean there should not be additional cooperation between the leading Commons committees and the IAC (as we propose in our final recommendations).

Given that we are now into the final twelve months of the current Parliament, it is unrealistic to imagine that the House of Commons will be in a position to set up a dedicated mechanism for treaty scrutiny in advance of the next general election. Nonetheless, it is imperative that a system is established in the next Parliament as it is not sustainable that comprehensive treaty scrutiny only takes place in the unelected House.

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[122] Interview with Lord Goldsmith. With regard to time, MPs need to spend time on the constituencies, with regard to expertise, MPs are on average younger and accordingly lack the professional experience of Peers. Interview with Lord Kinnoull.

[123] Constitutional Reform and Governance Act 2010, Section 20(4)(b). It is worth noting that this provision has never been used and, due to the Government's broad control of time in the House of Commons, it is not entirely clear how effective it would be in circumstances where, for example, the Business and Trade Committee had concerns about an FTA and wished to have it debated on a substantive motion.

[124] A. Lang, Written evidence on the effectiveness and influence of the committee system.

[125] Interview with Arabella Lang.

[126] Interview with Baroness Hayter; Interview with Lord Kinnoull.

[127] Interview with Lord Kinnoull.

[128] Interview with Lord Goldsmith.

Parliament's Powers

Parliament's powers in the process of treaty scrutiny are currently largely limited to delaying treaty ratification.[129] This tool is further limited by the requirement to obtain parliamentary time, rendering indefinite delay an illusion and making the process of ensuring a vote de facto so cumbersome that Parliament does not resort to using the tool.

The current system means that Parliament has limited options to enforce any demands it might have either with regard to the content of a treaty or with regard to the procedural scrutiny requirements that exist, or would be desirable.

While Parliament has no guaranteed vote on the treaty, as a nuclear option in case of opposition to a treaty Parliament could have a formal vote of no confidence in the Government. Such a scenario appears both extreme and improbable in normal circumstances.

[129] Things are different where implementation through statute law is needed, as in those cases by convention the implementing legislation is put to Parliament before ratification. As pointed out above, however, this procedure is rather limited in scope and ironically does not even encompass all cases where implementation through legislation is eventually needed.

Proposals for change

Reform of CRAG

The legislative basis for treaty scrutiny is not fit for purpose.[130] Attempts to reform the process through formal and informal governmental commitments as well as changes in parliamentary practices have proven to be insufficient. We accordingly suggest that the best way forward is to update the legislative basis for scrutiny. A number of changes seem advisable. Our proposal includes a paradigm change towards a parliamentary consent motion.

It is a matter of practicality which of the changes should be inscribed into a reformed CRAG and which of them should be allowed to develop more freely as a matter of convention.[131] Our view is that a systemic change towards a parliamentary consent vote would give Parliament a powerful tool with which it can discipline Government and allow proper structures for scrutiny to develop over time. In any event, however, governmental commitments should be fixed in a more formal manner – through legislative change and/or a concordat between government and Parliament,[132] whereas the practical arrangements in Parliament can evolve through experience.[133]

We should point out that while there is broad agreement on the need for scrutiny reform, not everyone agrees with us that legislative reform is the most promising approach. Lord Grimstone pointed out that if you placed requirements in formal, legal documents agreed with Government, there was a risk that the content might be watered down. Whereas the organic development of practices, alongside commitments, might be more effective in practice.[134] Lord Kinnoull was sceptical that any Government would accede to the idea of a formal parliamentary veto.[135]

The need for a parliamentary consent motion

The first, and most fundamental, proposal for reform is to give the UK Parliament a formal power requiring its consent to conclude treaties, expressed in a vote on the treaty ("consent vote").[136] Such a consent vote would be limited to significant treaties including, but not restricted to, FTAs. Many jurisdictions require such a consent vote for certain categories of treaties, but they vary as to which categories of treaties are subjected to such a vote.[137] In the UK it should be up to a sifting mechanism to decide whether a formal vote needs to be held.[138] A

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[130] Interview with Baroness Hayter.

[131] Baroness Hayter pointed out that steps forward in that direction are possible without legislative changes. Interview with Baroness Hayter. In that vein Lord Kinnoull does not consider pursuing legislative change as the most promising route, preferring an accord. Interview with Lord Kinnoull. Arabella Lang made the point that given that CRAG exists, CRAG reform becomes necessary.

[132] Interview with Arabella Lang. Mario Mendez has proposed a separate treaties act. Mendez, Neglecting the Treaty-Making Power in the UK: The Case for Change, 136 L.Q.R. 630 (2020).

[133] Interviews with Baroness Hayter and Arabella Lang,.

[134] Interview with Lord Grimstone.

[135] Interview with Lord Kinnoull.

[136] Interview with Lord Goldsmith. Baroness Hayter would give such a vote to the Commons. Interview with Baroness Hayter (who proposes a capacity to veto rather than the requirement of a consent vote). Lord Kinnoull does not consider the establishment of an up or down vote as likely. Interview with Lord Kinnoull.

[137] Under Article 218(6)(a) TFEU, the European Parliament needs to consent to association agreements, agreement on Union accession to the ECHR, agreements establishing a specific institutional framework by organising cooperation procedures, agreements with important budgetary implications for the Union, agreements covering fields to which either the ordinary legislative procedure applies or the special legislative procedure where consent by the European Parliament is required. Art. 53 of the French Constitution requires an Act of Parliament with regard to peace treaties, trade agreements, treaties or agreements relating to international organizations, those committing the finances of the State, those modifying provisions which are the preserve of statute law, those relating to the status of persons, and those involving the ceding, exchanging or acquiring of territory. Art. 59(2) of the German Basic Law requires parliamentary participation in the form of a federal law for treaties that regulate the political relations of the Federation or relate to subjects of federal legislation.

[138] Interview with Baroness Hayter. Baroness Hayter proposed a choice between a sifting mechanism with a high bar to hold a vote or a low bar, but the requirement of a 2/3 majority to veto a treaty. Her preference is a for a sifting mechanism, as

consent vote should be an up-or-down vote on a finalised treaty, i.e. a vote in which Parliament can either vote the treaty down, in which case it cannot be ratified, or consent to it, in which case ratification can go ahead, but Parliament cannot amend the treaty.[139] Where a mandate has to be submitted to scrutiny, a vote on the mandate could also be held.[140]

Such a reform would, for the documents subject to it, switch the essential decision to conclude a treaty from being part of the Crown prerogative to part of Parliament's domain. This would be in line with a general development of restricting prerogative powers and highlighting the importance of Parliament as the seat of democratic decision-making. Importantly, it would acknowledge that decisions on treaties are, nowadays, of similar import for the country as decisions on legislation.[141] Finally, an up-or-down vote would legitimise the agreements submitted to it.[142]

This recommendation was adopted by the IAC in 2021 when it stated that Parliament's consent should be required, prior to ratification, "for all trade agreements, and other significant treaties which it draws to the special attention of the House."[143]

Prior to its dissolution, the ITC argued that the House of Commons "must have the opportunity not only to debate an FTA but also to vote on a substantive motion during the period in which it retains its power to delay ratification if it considers this appropriate." In truth, this may well amount to much the same thing. While the power to delay does not amount to a veto, it is evident that unless an agreement which did not command the support of Parliament was amended, it would be difficult for any Government to proceed.

Perhaps surprisingly, such a move has the support of Lord Frost, the former Brexit Chief Negotiator. He told PACAC that:

> "Personally, I cannot see a good argument for there not being a yes or no vote on significant treaties. I don't think it will work for everything, but you have to define what is significant. Certainly, free trade agreements would be in that category."[144]

Several arguments are adduced against a parliamentary consent motion. In the end, none of them should prevail. We have already stated why the UK's dualist approach to treaties does not resolve the issue. Other arguments concern the demands on parliamentary time; the need for urgent approval of some treaties; a perceived lack of interest in the Commons in treaty scrutiny; the complexity parliamentary involvement brings into the negotiation process; and the assured majority that the Government has in a Westminster-type Parliamentary system.

The concerns regarding parliamentary time, the possibility for quick ratification of a treaty and worries regarding interest in the Commons in treaty scrutiny are not unjustified: The restructuring of the ITC shows that the Commons cannot (nor do they want to) scrutinise every treaty in depth. The quick ratification of NATO enlargement in the face of Russian aggression was arguably a political necessity and was supported by the IAC.

However, these arguments seem to us to speak less against a consent vote and more to the manner in which scrutiny is organised. Even with a consent vote the Commons can approve a treaty quickly or agree to forego scrutiny entirely. A sifting process can be organised in a way that quick semi-automatic approval becomes the default where this is appropriate.

Nevertheless, a consent vote would be a paradigm change. Whereas currently the Government can waive parliamentary scrutiny at its discretion, the requirement of a consent vote would mean that a waiver of scrutiny

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the Government should not be held up over insignificant treaties and as too many votes would clog up the parliamentary machinery. Additionally, a list of relevant treaties is helpful. Arabella Lang proposes the following categories: treaties aiming to modify domestic law, of relevance for human rights/equality, with financial implications, regarding membership in international organisations, affecting devolved competences, trade as well as military and territorial treaties. Interview with Arabella Lang. Lord Kinnoull pointed out that a review class regarding criteria might be helpful. Interview with Lord Kinnoull.

[139] Otherwise Parliament would try to amend the terms of a finalised agreement, which is problematic given the counterparty agreed. Interview with Lord Grimstone.

[140] Interview with Baroness Hayter.

[141] Interview with Lord Goldsmith.

[142] Interview with Lord Grimstone.

[143] International Agreements Committee, Working practices: one year on, 17 September 2021.

[144] Oral evidence from Lord Frost to PACAC, 7 June 2022.

procedures would be in the gift of Parliament. This, to us, seems to be the correct approach in a democratic system that emphasises the importance of sovereignty of Parliament.

The argument that a parliamentary consent vote unnecessarily complicates negotiations does not convince us, either. While parliamentary consent imposes another hurdle, it is the hurdle of democratic legitimacy. It has at times been argued that the need for parliamentary consent even benefits the negotiation process as negotiators can strengthen their position by an appeal to the need to "get the agreement past Parliament".

A final argument against a paradigm change for treaty scrutiny is that the Westminster system ensures a parliamentary majority for the Government anyway, so that a consent vote would, in practice, be the Government approving its own treaty. There is some truth to this observation: a vote would likely divide on party lines and the Government would accordingly (under normal circumstances) win.[145] That does not mean that the legitimacy conferred with a parliamentary vote is unimportant. If it were correct to say that a parliamentary vote would simply be the Government reaffirming its own position, a parliamentary vote could also be dispensed with in legislative procedures and, indeed, all other procedures. It seems rather obvious that this is not the case. It should not be the case with treaties, either.

A consent vote would increase the relevance of Parliament in the treaty-making process and would, ultimately, lead to the organic development of practices reflecting Parliament's new powers.[146] Government would be more amenable to inform Parliament promptly and fully about treaties and, unable to simply waive scrutiny requirements, would have to make time available for debate, as it would otherwise risk defeat in the Commons.

Documents subject to scrutiny

A reform of treaty scrutiny should also close the loopholes that currently allow the Government to either avoid treaty scrutiny entirely by choosing a different document / route of entry into force, or that allow amendments to treaties that Parliament has scrutinised / consented to.

Accordingly, all treaties and not just treaties subject to ratification should become subject to clear parliamentary processes.[147]

It should be made explicit that all side letters, MoUs and other documents made in connection with the treaty should be published and submitted to scrutiny along with the treaty.[148] Documents that are not part of the agreement itself, but produced by the Government to understand the agreement, such as explanatory memoranda and impact assessments will be discussed below.

Similarly, all treaty amendments as well as UK involvement in treaty body decisions that affect an agreement subject to scrutiny should become the subject of parliamentary scrutiny, even if the sheer number of such documents would entail significant sifting to ensure that only legally and politically contentious matters were put before parliamentarians.[149] Reservations should be subjected to scrutiny as well, as they modify the content of treaties.

As to the use of MoUs, we propose to submit important MoUs, defined as a minimum as those affecting individual rights or having (significant) budgetary or economic implications, to parliamentary processes like

[145] Interview with Lord Grimstone. Clearly, the period of coalition Government between 2010-15 and the parliamentary turmoil during the Brexit years also demonstrates that the age of majority governments getting their own way over every measure cannot be guaranteed.

[146] This is what happened in the European Parliament. Interview with Frank Hoffmeister.

[147] Interview with Arabella Lang.

[148] Interview with Lord Grimstone. The CPTPP offers an example of relevant side letters. The Arrangement between the Government of the USA and the Government of the UK relating to the Agreement between the USA and the UK on Technology Safeguards Associated with US Participation in Space Launches from the UK has been published as an MoU relating to the Agreement between the UK and the USA on Technology Safeguards.

[149] We duly note that it can be the subject of debate to what extent a treaty body decision actually affects an agreement.

treaties.[150] The categories of MoUs subject to scrutiny[151] would require clear definition to avoid scrutiny from becoming a matter of governmental discretion.[152] We note, in this regard, that the third limb of the Ponsonby rule already commits the Government to disclose agreements, commitments and undertakings that involve international obligations of a serious character.

The increase in the number of documents subject to scrutiny implies the need to set up a comprehensive sifting process in both Houses, perhaps similar to the scheme which operated during the UK's membership of the European Union, which we discuss further below.

Structures for scrutiny

The increase in the scrutiny workload of Parliament implies the need for a sifting process. We propose that such a more formalised process would continue to be handled by the IAC in the Lords and suggest the establishment of a Treaty Sifting Committee in the Commons. That committee would become the Commons' hub with regard to treaties and expertise regarding treaties.[153] The sifting process would identify the documents that are of sufficient political or legal importance to merit the attention of the committees. It would also decide which documents require a full consent vote. Documents not meriting such attention could be (formally) consented to en bloc at the end of the sifting process or could be excluded from the requirement of a consent vote. A thorough sifting process would minimise the additional delay by having an organised process in the Commons.[154]

The scrutiny itself would, in the Lords, be undertaken by the IAC. The IAC would undertake all scrutiny work, including scrutiny of agreements with the European Union to pursue a consistent cross-departmental approach.[155]

In the Commons, we propose to embed treaty scrutiny as a core task of all Commons committees. Guesting arrangements with other committees could resolve the issue of treaties touching upon diverse subject matters.[156] Scrutiny could then be led by the committee under whose mandate the subject matter of the document fell.

Treaty experts located in the Commons Treaty Sifting Committee would assist with regard to treaty scrutiny tasks.[157] The different arrangements of a cross-departmental scrutiny process in the Lords and a departmental one in the Commons would not just take account of the different traditions concerning committees in the two Houses, but also combine the strength of an expert treaty-focused process in the Lords[158], with a policy-oriented departmental one in the Commons. The Government's approach to these processes should be expected to differ. Whereas the first one is likely to be dealt with on an expert level, the latter would no doubt be rather more political.

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[150] Interviews with Baroness Hayter, Lord Goldsmith and Lord Kinnoull. A ban on using MoUs in such ways would be ill advised as counterparties might not agree to a treaty. Interview with Baroness Hayter, Interview with Arabella Lang.

[151] Lord Grimstone emphasised how prevalent MoUs are and that few of them deserve to occupy parliamentary time. Interview with Lord Grimstone.

[152] The problems of leaving sifts to Government were pointed out by Baroness Hayter, Lord Goldsmith and Lord Grimstone. Interviews with Baroness Hayter, Lord Goldsmith and Lord Grimstone.

[153] Interview with Arabella Lang. Alternatively, the sifting could be handled jointly. Interview with Baroness Hayter.

[154] Lord Grimstone pointed to this additional delay. Interview with Lord Grimstone. In light of the traditional reluctance of the respective Houses of relying on the other House's work product, however, we do not see a viable alternative to a full scrutiny process in the Commons.

[155] This entails the downside of losing the subject matter expertise on the EU located in the European Affairs Committee, which Lord Kinnoull emphasised. Interview with Lord Kinnoull.

[156] Lord Goldsmith emphasised the role of guesting for taking account of the full breadth of evidence. Interview with Lord Goldsmith. Lord Kinnoull emphasises the importance of chair to chair and clerk to clerk conversations. Interview with Lord Kinnoull.

[157] Lord Kinnoull emphasised the necessity of treaty (and not just subject matter) expertise in treaty scrutiny, but points out the need for that expertise also with members and not just staff, which is why he prefers a treaty committee. Interview with Lord Kinnoull.

[158] This strength was emphasised by Lord Grimstone (Interview with Lord Grimstone), although we acknowledge that the process does not go so far as to check the quality of legal scrubbing.

To ensure Parliament benefits from proper stakeholder and expert input, scrutiny committees should strive to identify affected communities and try to draw on testimony from stakeholders representing all of these communities.[159] Not all stakeholders are sufficiently organised for such engagement and established committees have more experience and easier access to relevant stakeholders.[160] We note the lack of a voice for some individual and consumer interests[161] and suggest that experts should be identified for certain subject areas who can then be called on with the explicit purpose of giving these interests a voice.

To avoid doubling the scrutiny workload, scrutiny of the finalised treaty could either be conducted by the IAC, in cooperation with the leading Commons Committee.[162] Alternatively the leading Commons Committee and the IAC could issue a joint call for evidence and jointly examine the evidence.[163] Reports by the IAC should become seen as useful tools for Commons members when they put questions to the ministers, and if they ultimately chose to debate a proposed new treaty.[164]

Scrutiny Process

Significant treaties (including FTAs) cannot properly be scrutinised if the process starts after the finalisation of the treaty,[165] but require parliamentary involvement starting with the laying down of negotiating objectives, where applicable, to ensure the legitimacy of the outcome.[166] Parliament must be informed about the objectives, scoping exercises and public consultations and kept abreast of the negotiations.[167] At a minimum, texts made available publicly by the counterparts in their internal procedures must be made available to Parliament as well.[168] Furthermore, in public and private hearings, high-level officials must be made available to committees. Early involvement would allow early feedback to be given, potentially improving the outcome, and would also improve scrutiny of the finalised agreement.[169]

Ultimately, the treaty text must be laid before Parliament along with an explanatory memorandum as well as an impact assessment, at least in the case of trade agreements. The explanatory memorandum should contain more detailed information on how the government interacted with devolved administrations and overseas territories to take their interests into account than is currently the case. It should also break down what the treaty does and how it affects stakeholders in an accessible manner.[170] Impact assessments for treaties subject to a consent vote must contain detailed information on the impact relevant to the treaty, i.e. e.g. human rights, environmental impact, and/or financial impact.[171]

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[159] Lord Kinnoull points out that this requires extensive discussion between committee chair, committee members and staff. Interview with Lord Kinnoull.

[160] Interview with Lord Kinnoull.

[161] Interview with Baroness Hayter.

[162] Interview with Baroness Hayter.

[163] Interview with Lord Goldsmith.

[164] Interview with Baroness Hayter.

[165] Interview with Lord Kinnoull (who made the point with regard to treaties in general).

[166] We are aware that under the current approach, relevant negotiating mandates are held at a high level of classification and the published negotiating objectives somewhat anodyne. (Interview with Lord Grimstone.) We harbor doubts to what extent the level of secrecy is necessary and whether mandates cannot be made available to the relevant committees (or at least their chairpersons) on a confidential basis. We note that even a debate about the (admittedly anodyne) negotiating objectives would be beneficial for important treaties.

[167] It is a matter of debate whether this should include access to textual proposals, as is the case with free trade agreements in the United States. Access to such texts would allow Parliament to have a say on the content of the treaty itself, on the other hand it would complicate the work of negotiators. Lord Grimstone argued that text should only be put to the Committee after it has been fully negotiated, but could be put to the Committee in confidence pre-scrubbing. Interview with Lord Grimstone.

[168] The IAC has at times pointed out to the Government that documents treated as confidential on the UK side were made available on the Internet by the counterparty. Interview with Lord Grimstone.

[169] Interview with Baroness Hayter.

[170] Interview with Baroness Hayter.

[171] Interview with Arabella Lang.

There should also be the opportunity for a debate about the negotiating objectives (including the ability to influence the objectives) and/or about the finalised treaty,[172] should the IAC or the relevant Commons committee request such a debate. While, in extremis, circumstances may arise that make foregoing such a debate advisable, there is no good reason why this decision should be within the gift of the Government. This concern is illustrated by the practice of the current Government: in the case of the UK-Australia FTA and the TCA the Government claimed the need to forego debate for reasons of speed, but in both cases, these claims were not justified.[173] Where a matter is truly urgent there is no reason not to trust Parliament to exercise sound judgment.[174]

The sifting committee should, as a matter of good practice, notify all documents of relevance (including document on trade) to the devolved assemblies and overseas territories and provide them with the opportunity to point out issues of interest to the devolved administrations that are of relevance in the treaty scrutiny process (including discussions on negotiating objectives).[175] While treaties are and remain a reserved matter, it is important not just to include the devolved administrations, but also to make sure that they are seen to be included to prevent the nation from drifting apart.

As a matter of democratic accountability scrutiny procedures should, as a rule, be public. However, with regard to scrutiny taking place before the finalisation of the agreement, the possibility of confidentiality must be provided for.[176] Similarly, for matters of national security, confidential procedures must be available. It should be noted that Parliament has a good record on maintaining confidentiality where it is provided for.[177]

Following the current practice, the committees tasked with scrutiny should produce reports on scrutinised agreements. To raise awareness of the agreements, it seems advisable to accompany reports with an easily understood two-paragraph press summary in cases where issues should be brought to the public's attention and circulate these to the media.[178] At present, engagement with the press appears somewhat unfocused and ad hoc. If reports are to have impact, it is imperative that parliamentary committees engage with specialist journalists and broadcasters on a regular basis.

The time required for proper treaty scrutiny differs dramatically from treaty to treaty.[179] It seems inopportune to fix one harmonised timetable for all treaties. The timetable for scrutiny should, accordingly, be subject to agreement by the business managers in Parliament. While, in practice, this grants the ultimate power to the Government, it should be made clear that where a relevant Committee in the Commons or Lords requests a debate in good time, that debate should be facilitated in Government time.

In urgent cases (as illustrated by events surrounding Russia's aggression against Ukraine), Parliament could give Government the permission to ratify a treaty and grant its consent immediately, waiving detailed scrutiny procedures.

We are convinced that if these proposed reforms are adopted the process of parliamentary treaty scrutiny would be improved significantly. This would not just strengthen the legitimacy of treaties the UK becomes a party to, it would also have the potential to improve outcomes and thereby benefit the UK as a whole.

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[172] Lord Goldsmith emphasises the importance of the possibility to influence the objectives. Interview with Lord Goldsmith. However, such influence is also by necessity limited as negotiations involve the counterpart. This was emphasised by Lord Grimestone. Interview with Lord Grimstone.

[173] In respect of the TCA, the European Parliament insisted on time to scrutinising the agreement, resulting in it being provisionally applied for several months. By contrast, the UK Government rammed legislation through Parliament and disapplied the CRAG scrutiny process.

[174] Arabella Lang pointed out the possibility to provide for different grounds of waiving scrutiny and leaving a waiver for national security in the hands of government as long as there was general parliamentary oversight afterwards. Interview with Arabella Lang.

[175] This process would be in addition to existing structures such as interministerial groups. These do, at times, not work as well as hoped for. Interview with Lord Kinnoull.

[176] We recognise that there is some resistance to confidential procedures as being against the open culture prevailing in Parliament. However, it seems advisable to provide for confidential scrutiny (and confidentially criticising government where necessary) rather than forego scrutiny entirely where confidentiality is of the essence.

[177] Interview with Baroness Hayter.

[178] The importance of an easily understood summary was emphasised by Baroness Hayter. Interview with Baroness Hayter.

[179] Interview with Lord Grimstone.

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