HOUSE OF COMMONS

Public Administration and Constitutional Affairs Committee

Oral evidence: The Scrutiny of International Treaties and other international agreements in the 21st century, HC 485

Tuesday 8 February 2022

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Watch the meeting

Members present: Jackie Doyle-Price (in the Chair); Ronnie Cowan; Mr David Jones, John McDonnell; Tom Randall; Lloyd Russell-Moyle; Karin Smyth; John Stevenson.

In the absence of the Chair, Jackie Doyle-Price was called to the Chair.

Questions 1 - 40

Witnesses

I: Alexander Horne, former legal adviser to the House of Lords European Union Committee and International Agreements Committee; Jill Barrett, Visiting Reader in the School of Law at Queen Mary University of London and former legal counsellor at the Foreign & Commonwealth Office; and Arabella Lang, Deputy Research Director, Public Law Project, and former clerk in Parliament and Treaties Hub and House of Commons Library.

Written evidence from witnesses:

– Alexander Horne

Examination of witnesses

Witnesses: Alexander Horne, Jill Barrett and Arabella Lang.

[*This evidence was taken by video conference*]

Q1 **Chair:** Good morning and welcome to this meeting of the Public Administration and Constitutional Affairs Committee. Today's evidence is the first in our inquiry into the scrutiny of international treaties and other international agreements in the 21st century. This opening session is

designed to provide the background on how treaties interact with the UK domestic legal and political systems and to give us an opening to exploring further sessions where we dig into the important role that Parliament plays in our democracy.

We are very grateful to our witnesses today, who will help set the scene for this inquiry. I would like each of our panellists to introduce themselves formally for the record, starting with Jill Barrett.

Jill Barrett: Good morning. I work as an independent international law consultant. I am also an associate member at Six Pump Court chambers. I am co-author of the "Handbook On Good Treaty Practice", published by Cambridge University Press in 2020. I joined the Foreign Office as a legal adviser in 1989 and I worked there until 2010. During my 20 years at the FCO, I negotiated, advised on and interpreted numerous treaties and also supervised the FCO treaty office in its handling of treaty procedures and parliamentary process. During 2008-10, I led the Government's work on part 2 of the Constitutional Reform and Governance Act 2010, but anything I say about that process here today reflects my personal views only.

Alexander Horne: Good morning. Thank you for having me this morning. I am a barrister. I worked in Parliament for nearly 20 years, most recently as legal adviser to the European Union Committee and the International Agreements Committee, where I helped set up in the House of Lords the scrutiny practices for treaties that we now have in place. I am now in private practice at Hackett & Dabbs LLP. I am also a visiting professor at Durham University. I continue to work as specialist adviser for the International Agreements Committee so I should stress that everything I say here today is in a personal capacity.

Arabella Lang: Good morning. I am delighted to be here this morning. Thank you for the invitation. I am the head of research at the Public Law Project, which is a legal charity focusing on access to justice and accountability. Before that, I worked for the House of Commons for over 20 years, including time as the international law specialist in the House of Commons Library. I also set up and ran something called the Parliament and Treaties Hub, which was designed to help co-ordinate and inform treaty scrutiny in the House of Commons. I worked closely with Alex on the issues about setting up the new Lords Committee as well.

Q2 **Chair:** Splendid. Thank you. My first question is to Jill Barrett. Could you explain how the UK negotiates and agrees treaties and other international agreements—a big question—going through what the stages are?

Jill Barrett: It is a huge question and the process varies enormously from one treaty to another. The main difference is between bilateral treaties with one other state and multilateral treaties where there are more than two, but within that there is a huge difference between negotiating, say, with two or three other western European states and a

global treaty such as climate change, where up to 200 states could be involved.

I mention the diversity of treaties at the outset because it is an important factor for the Committee in deciding what kind of treaty procedures could be legislated for, or where the Government could be expected to give a blanket commitment applicable to all treaties and where it simply is not practicable or realistic.

Having said that, I would say that the essential stages are normally first the negotiations, which are normally done by officials, led by the lead subject matter Department. That could be across Whitehall, it could involve devolved officials as necessary, and occasionally Ministers are involved, either as head of a delegation or, very occasionally, negotiating on their own with a counterpart.

The second stage is when you have finished the negotiations, the treaty text is adopted or initialled to signal that that is the end of the negotiation and it is referred back to Governments and national Parliaments.

The third stage is signature, where each Government signs the text—normally a Minister or ambassador does that. The legal effect of signature varies. It can be definitive and bring the treaty into force in a one-step process, but in other cases signature is subject to ratification and does not bring the treaty into force by itself; it is simply step one of a two-step process. Normally, the treaty itself defines which it is.

The fourth stage is ratification for those treaties that have been signed subject to ratification and that is an international process where the Foreign Secretary signs an instrument to ratification and it is sent to the other Government or to the international organisation that is hosting the treaty. That process of ratification should not be confused with what is sometimes called ratification by Parliament. That term is not usually used in this country but it is in some others. International ratification is the process of the state giving its consent to be bound by the treaty.

Finally, you have international entry into force of the treaty and domestic implementation.

Q3 **Chair:** When we were members of the EU, many of these treaties were negotiated on this country's behalf by the EU. To what extent does leaving the EU change the complexion of how we approach treaties? Does it make it more straightforward, because it is a bilateral thing, or is it more complex because there are more? What is your observation on that?

Jill Barrett: There will be more because there were many instances where, if the treaty was in exclusive EU competence, the negotiating would be done, or led, by the Commission and supported by national Governments, whereas now the UK is in charge of its own negotiations,

which means it has to put more resources into it; there is no question about that.

Q4 **Karin Smyth:** Still with you, Ms Barrett, we are particularly interested in the differences between a treaty and a memorandum of understanding from the perspective of the Government's use of either. Could you talk us through which circumstances the Government might use a memorandum of understanding rather than a treaty?

Jill Barrett: That is a very important question. An essential element of a treaty is that the parties intend it to be binding and governed by international law. Something that is not a treaty, something that is non-binding, could look quite similar to a treaty, but if the parties do not intend it to be legally binding, it is not a treaty.

In the multilateral field, examples of non-binding texts could include the Universal Declaration of Human Rights or the Rio Declaration on Environment and Development. At the bilateral level, more recent examples could include the Memorandum of Understanding between the UK Space Agency and the Australian Space Agency regarding civil space co-operation in 2018 or the India-UK Enhanced Trade Partnership announced in 2021. Why would the Government choose one rather than another? There is a range of reasons, some of them better than others.

The importance of the subject matter is a factor. Generally, if a matter is extremely routine and technical and not contentious at all, it might not be considered worth using a treaty, but you cannot assume that something that is not a treaty is not politically important because just occasionally there are other reasons, such as confidentiality, for not using a treaty and that could be a matter of quite high importance; for example, concerning defence or security.

Duration of commitment is another factor. If it is very short, a treaty might simply not be necessary or worth the effort.

Another factor is how important it is to pin down the other side to legal commitment. If what has been negotiated is a framework for co-operation, for example, to facilitate actions, it may simply be that a treaty is not necessary.

Domestic law may be a factor. For certain things, if they need implementation in domestic law, it might have to be a treaty if you are trying to do it using secondary legislation where the primary power grants that power only where there is a treaty.

Flexibility is a consideration. If you are having a text that you know is going to be frequently updated, particularly for technical reasons, it is much easier to update a non-binding instrument.

I am not calling them MOUs, by the way, because it is not the title that determines the status—an MOU could be a treaty—so I am calling them non-binding instruments.

We get on to other reasons, which of course you might consider to be less good reasons, such as the desire to avoid parliamentary procedures. That may be for good reasons because there may be genuine urgency, but of course if it is simply to avoid the Government having to be scrutinised, that would be a bad reason. It may often be that the other partner, the other Government concerned, or some of the other Governments concerned, that you are negotiating with do not want to go through their Parliaments and may insist on it being non-binding for that reason, so the UK may have to go along with that if that is the only basis on which the other countries are prepared to do the deal.

Q5 **Karin Smyth:** Thank you for that comprehensive answer. Given the variety of intent around the non-binding agreements, would it be better practice perhaps for the Government to signal somehow their intent around it so that it is more transparent?

Jill Barrett: Yes. Certainly, as a Foreign Office legal adviser, whenever I was asked by officials to advise them one of my first questions would be, "Do you intend this to be legally binding?" and the truth is that they often did not know, they had not decided, or they had a view but had not yet raised it with the other Government concerned. Of course, it is good practice for Governments to be clear at least in their own mind what their aim is. Sometimes a negotiation can continue for quite a while with the parties deliberately putting on one side whether the end product will be a treaty. In other words, the parties may discuss several options, that it could be a treaty, it could be a non-binding instrument, it could be a combination of the two, and they put that to one side and come back to it at the end. That is sometimes even done deliberately and openly in multilateral negotiations. It may be that for genuine and good reasons the UK Government's officials involved do not know and cannot tell you yet whether what they are negotiating will end up being a treaty or not and occasionally it is not decided until the last moment.

Q6 **Karin Smyth:** Thank you. Moving on to you, Ms Lang, you have said that there has been an expansion of the scope and effect of international agreements in the last 100 years. Can you talk us through the impact of that expansion and its effect on the United Kingdom?

Arabella Lang: Yes, but I would like to start with a couple of more introductory comments, one of which, of course, is that treaties are law and they can be extremely long-lasting, often long outlasting the Government that made them. There are also treaty actions around losing the effect of treaties, amending treaties and withdrawing from treaties, which can be of equal importance to making the treaty in the first place.

I also wanted to draw attention to the fact that there is always a tension between the freedom to make treaties or take treaty actions by Governments, which is a well-recognised position, and other important constitutional principles, such as parliamentary accountability, parliamentary sovereignty and the rule of law. I can talk a bit more about those now or later.

Karin Smyth: I think we will come on to lots of those questions later, thank you.

Arabella Lang: There has undoubtedly been a huge increase in the breadth and depth of treaties over the last 100 years. I would argue that that increase means that, without a corresponding development in scrutiny and accountability, effectively there is more power for the Government.

Thinking about the breadth of treaties, they are no longer just about matters of high policy such as war and peace and territory and so on and they cover all sorts of areas of daily life, everyone's daily life. They cover things like police co-operation, domestic violence, migration, social security, cross-border family disputes, a huge range of things. Even trade treaties have changed massively in scope recently. They are about not just removing border taxes, but aligning domestic regulation in all sorts of areas, and can include employment rights, the provision of healthcare and data flows. For example, countries are increasingly making treaties, and particularly the UK now, to try to increase data flows—an important part of international trade—but the risk is potentially to personal data and we have seen that. Concerns have been raised, for instance, with the UK-Japan treaty that was signed last October or November.

There has also been a huge expansion in the number of international organisations over the last 100 years, by something like 10 times, and many of those make rules and regulations of their own which have an effect in international law.

That leads to the point about the depth of treaties. They have more fundamental effects, reaching into domestic legal systems, than they did 100 years ago. We saw that first with the mid-20th century expansion of human rights treaties, many of which have their own reporting mechanisms and occasionally even courts to interpret and apply them. Less often talked about, perhaps, is the late-20th century expansion of treaties to protect investors. They frequently give rights to sue Governments outside the national court system and we see that in things such as the Energy Charter Treaty and the WTO agreement on intellectual property, but also thousands of other bilateral and regional treaties.

Many other treaties also contain binding mechanisms for resolving disputes between states, which means that their provisions can win over conflicting obligations in other treaties.

Q7 **John McDonnell:** This is a question for Alex Horne. You advise the House of Lords European Union Committee and the International Agreements Committee on treaty scrutiny. How would you describe the current scrutiny arrangements for international agreements in the UK?

I know you have provided us today with the letter that Baroness Hayter has written to the Foreign Secretary. There will be opportunities for

further questioning from other members of the Committee where you will be able to draw upon that, I am sure.

Alexander Horne: Perhaps I can just contextualise this by saying first that this a very longstanding problem. Given the nature of this Committee, perhaps a quote from Walter Bagehot's seminal work "The English Constitution" might serve well. He said, in 1872: "Treaties are quite as important as most laws, and to require the elaborate assent of representative assemblies to every word of the law, and not to consult them even as to the essence of the treaty, is prima facie ludicrous." We have moved on from there to some extent.

Arabella has described the increase in the scope of treaties. We obviously have the Constitutional Reform and Governance Act 2010, which we will explore later, I am sure, but in terms of what we do, pretty much all systematic treaty scrutiny in Parliament takes place in the House of Lords at the moment. It started off, very recently actually, with the Secondary Legislation Scrutiny Committee, which only started doing it in about 2015. Then, when Brexit was contemplated, I and a couple of other senior officials in the House of Lords met the Foreign & Commonwealth Office, as it then was, DExEU and the Department for International Trade. This was in the context of *The Financial Times* reporting that 700 treaties would have to be renegotiated. It turned out to be much fewer than that but as it was, a lot of the work moved into the European Union Committee, which then looked at all the Brexit-related agreements for a couple of years. We then created an International Agreements Sub-Committee and last year that was turned into a full Committee of the House of Lords, which is the International Agreements Committee.

In its first year as a full Committee, the International Agreements Committee, just to give you some context, has considered 40 treaties. Six of those have been debated in the House of Lords and there has also been a report and a debate on the UK's proposed accession to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership.

The way it works in the House of Lords is that the Committee has drawn up specific criteria. I can take you through those if it would be useful but, broadly speaking, the main one that is in use is whether or not the agreement is politically or legally important. There are also criteria around major defects, or the lack of appropriate information provided to Parliament, or that consultation has been insufficient, particularly with the devolved Administrations. If those criteria are met, the treaty is drawn to the special attention of the House of Lords and there is then the possibility of a debate. In our most recent working practices report, we told the Government that we would advise them, whether or not the Committee was seeking a debate, but obviously it is open to any other member of the House of Lords, to table one.

The process has been very incremental. We have been learning from experience. The European Union Committee put out a report called "Lessons Learned", which set out its experience of treaty scrutiny. Then

the sub-committee put out a working practices report. In the autumn of last year, the full Committee put out another working practices report with several proposals for reform. One of these reforms included a proposed concordat between Parliament and the Government in respect of trade agreements. This concordat was simply designed to pick up the commitments that the Government had already made to Parliament in a bunch of consultation papers and letters to parliamentary Committees and in statements on the Floor of the House, and the Government have thus far refused to do that. All we essentially were asking was for those commitments to be placed in a concordat, or an exchange of letters, so that Parliament, and stakeholders, could be properly informed about how these processes would work in practice. That is the context of the letter that you mentioned today, where Baroness Hayter, the Chair of that Committee, has written to the Government to ask them to reconsider that issue. Obviously, it is deeply disappointing, given that we are only asking for the commitments that have already been made to be honoured and put in one place, that we have not got anywhere with that thus far.

There are many other points that I could make, but perhaps we should move through to the next questions, unless you have any follow-ups on that.

John McDonnell: To describe these developments since 1872 as incremental I think demonstrates the way in which you have a history of advising Parliament in the past. Thank you.

Q8 **Mr David Jones:** Ms Barrett, I would like to turn to the Constitutional Reform and Governance Act. You have described part 2 of CRAG as being modest in its aims and effects and you have highlighted a number of deficiencies as you see them. Could you explain, briefly, to the Committee how part 2 of CRAG works, what you think those deficiencies are, and what needs to be done to remedy them?

Jill Barrett: Part 2 of CRAG only codified what the Government were already doing at the first stage of the process, which is to publish the treaty if it is subject to ratification. It is published in advance of ratification, it is laid before the Parliament for 21 sitting days—in other words, it is a waiting period—and only then do the Government go ahead and ratify. The only innovation in the Act was to give legal effect to a vote of the House of Commons against ratification. It was assumed, I think, before that that politically if there was a vote against ratification the Government could not ratify. By giving legal effect to that at the time, we did not think that it was going to result in any different outcomes, simply that it would be a signal to Parliament that it had real power.

It left out the crucial middle part: the parliamentary procedures that would enable a debate and a vote to take place. That was not in the Act and that was deliberate because the view in Government was that these things are matters for Parliament to make its own rules, and you need a certain political momentum behind it for that to happen, including buy-in

by parliamentary business managers for reforms, which I think, it is fair to say, was not there at the time.

The deficiencies that are left in the process are, first and foremost, parliamentary procedures for debating and voting on a treaty. It was remarked on at the time and acknowledged, even, by Jack Straw, who was the Secretary of State at the time, that there simply is no procedure whereby if a certain number of MPs sign a motion calling for a debate, there must be one.

The second fundamental thing is parliamentary time for treaty debates and votes. If it is simply left up to the Opposition and Back-Bench MPs to use their own time, there is simply too much competition and too little time for that to be realistic, so I think that there has to be some way for the Government to provide their own time to debate a treaty when there is a request to do so.

The third area is the flow of information from the Government to Parliament. There is one provision in CRAG on explanatory memoranda that simply codifies what was already the practice, that an explanatory memorandum must be laid with a treaty, but it does not specify what the content has to be. I think Parliament needs to be more proactive at setting out what it expects to be in the EM and also commenting publicly when the EM falls short, but also perhaps providing information at an earlier stage. The problem with the treaty-laying process in the EM is that it tends to come very late in the day. It comes a short time before the Government intend to ratify and there may have been a long delay between the Government signing and the Government being ready to ratify.

The fourth thing is provision of information by Parliament to the public. Of course, that is not covered by legislation. It was at its best when the Treaties Hub was in operation and I am sorry to see that it is not now; it would be very good if that were to be revived, or something like it.

Of course, the Act did not set up institutional mechanisms, a treaty-sifting committee, for example, or a treaty secretariat, because that was, I think quite rightly, assumed to be something that Parliament would wish to be in control of and ought not to be the subject of legislation.

Q9 **Mr David Jones:** Do you find it surprising that parliamentary procedures have not been introduced?

Jill Barrett: Disappointing; disappointing certainly. I am not sure I can say that it is surprising. I remember following the Rebuilding the House initiative, which was going on at the time, and I had hoped that some new procedure would be introduced as part of that but it wasn't. It just wasn't a high enough political priority at the time. So, yes, I am disappointed that it has not happened since.

Q10 **Mr David Jones:** Ms Lang, you have also been highly critical of CRAG's

ability to enable effective scrutiny. What changes do you think ought to be made?

Arabella Lang: There is a huge range of changes that I think would help us move on from what I would categorise as a weak, opaque and outdated system that is not fit for purpose.

It is important to look first at what is needed and then how best to introduce the changes and there are definitely questions around whether new legislation is the most appropriate route, or something else.

I would echo a lot of what Jill and Alex have said. Some additional weaknesses, or gaps, that I think you can identify are that the 21 sitting days in CRAG is not always long enough for the scrutiny of a treaty, and the Government recognised that with the Australia trade deal recently.

It does not cover all treaties. CRAG's requirements are determined by the process rather than the importance of the treaties and there is a wide discretion to apply it for exceptional cases.

Another important aspect is that it does not connect with implementing legislation. I think there is something quite fundamental here about Parliament's understanding of treaties and the effect where I think it can be assumed that Parliament has its say over treaties because any implementing legislation to make an effect in domestic law goes through the normal parliamentary procedures and that is seen as protection of parliamentary sovereignty. I would argue that in practice that sovereignty is constrained by treaties that create obligations under international law that Ministers are obliged to uphold and that treaties in fact in practice tie Parliament's hand by determining the content of any implementing legislation, things like regulatory reform in trade treaties, but also, and perhaps more importantly, they can constrain what Parliament can do in the future. For instance, new environmental laws might not be passed because there was a risk that businesses could take expensive action against the Government under the Energy Charter Treaty and there are lots of examples like that.

When you are looking at how to make changes, it is about adjusting the balance between government and Parliament. It is not a black and white thing; it is more shades of grey. The principle of parliamentary involvement is clearly accepted, Parliament already has formal and informal roles and the Government have accepted a stronger role for free trade agreements. The question instead is how and when Parliament should be involved. As Jill Barrett says, without Government support, there is little that Parliament can do to increase scrutiny on its own because it is so dependent on the Government for changing its own committees or rules of procedure, but I would argue that it is in the Government's interests to increase Parliament's scrutiny role, that we make better treaties, build deeper consent, more trust and perhaps broader consensus around the UK's post-Brexit place in the world and it would bring in more expert input from committee witnesses and so on.

It is also important to have a look at what the barriers are to parliamentary engagement with treaties—obviously, a respect for the prerogative and recognition that negotiating treaties is a job for the Government, but also this idea that I mentioned earlier, that treaties have no impact without domestic legislation and perhaps Parliament often feels that it has enough of a say through looking at any implementing legislation.

Here is a really important aspect of it: perhaps Parliament feels it has no incentive to engage because it has no real power over treaties and that is a result of the UK, unlike the vast majority of other countries, having no requirement for parliamentary consent to treaties. CRAG simply is a sort of weak negative resolution procedure. Not only that, but Parliament cannot amend treaties. It is not involved at the stage where treaties are being negotiated.

Of the main changes I would like to see, certainly the biggest one would be a consent requirement for at least some treaties and that is not just an end in itself; it is a way of stimulating engagement throughout the process. You could say that it is not a sufficient requirement for scrutiny but arguably it is a necessary precondition.

There are some other minor changes you could imagine for CRAG to narrow the exceptional circumstances rule or introduce rules on the provisional application of treaties, where they apply before Parliament has anything to do with them, but there is a range of changes that do not require any legislation and where, in fact, legislation might be inappropriate, as Jill Barrett was suggesting, or even unhelpful. You could argue that CRAG has sort of ossified one part of the system and elevated it at the expense of other important parts.

Picking up on Alex's point about some kind of concordat to bring together all the Government's commitments on treaty scrutiny, I think that would be perhaps the most practical development at this stage, something agreed between Parliament and the Government, setting out their respective roles and their commitments. That would be quite a different thing from the scattered Government announcements that we have seen that may or may not be commitments. I see this morning that something we thought there was a commitment to, given during the trade treaty debates, turns out now not to be a commitment. Having something that is quick and flexible but also public and comprehensive would be very helpful.

Then things like requirements for committee involvement, treaty debates and co-ordination with implementing legislation last year—I would say that those should be in standing orders rather than in any kind of legislation or informal documents.

Q11 **Mr David Jones:** Thank you. That is very clear. Mr Horne, you have raised your own concerns about the effectiveness of CRAG. You have said that it "places modest burdens on the Government" that "can hardly be

described as onerous". What changes to legislation or procedure would you say should be made?

Alexander Horne: If I had a wish list, I think I would give you three points. First, I think it is important for Parliament to have a role earlier in the process. You can see that with trade agreements where the Department for International Trade has become a bit more flexible in terms of telling Parliament, first, that it is entering into negotiations, secondly offering to hold debates on negotiating mandates, and so on. We cannot expect Parliament to be involved in the negotiation of these agreements. That is a prerogative power. The Government, I think, have to be able to go away and negotiate; that is for sure. However, the point that has been made is that once the thing has been signed, it is almost impossible to get it amended so if Parliament only gets the signed agreements, you are left with Parliament only having the nuclear option of saying no and I think that in itself is problematic with some more important, complex agreements. It would be useful if Parliament had a role earlier in the process.

Possibly there is a stage that Jill did not mention, where treaties become initialled—which means that the drafters have essentially finished—but before they are signed. When we looked at this with the European Union Committee, our view was that Parliament might get to see the initialled draft, possibly in confidence, and could raise any issues with the Government at that stage, before the Government signed it.

Secondly, I think the problem with CRAG at the moment is that it does not make clear what treaty actions have to be laid before Parliament. We will come to speak about this later, I am sure, but there are a number of issues to do with amendments, termination and reservations to treaties, which can be equally important as the agreements themselves and it is not clear quite how that information ought to be made available to Parliament or whether Parliament ought to have a say, for example, if an important treaty is terminated. We saw that problem with the Miller judgment, where essentially the courts stepped in and had to say Parliament should have a role here, but that was only in the most specific circumstances that were set out in that judgment. In normal circumstances, the Government can simply terminate a treaty without any recourse to Parliament.

On the best-case scenario, I agree entirely with Arabella Lang. I have a piece, which I hope you have received, in *Prospect Magazine* today in which I said I hope that Parliament should have to consent to important treaty actions. We set out in the most recent working practices report at the International Agreements Committee how you might separate those out and essentially possibly only look at the large trade agreements and those other agreements that we would draw to the special attention of the House. If you look at the proportionality of that, if the IAC has considered 40 treaties but has only debated six of those, I don't think that would be an enormously onerous requirement on the Government,

to have those consented to by Parliament. That would be my wish list in terms of practical changes.

Q12 **Lloyd Russell-Moyle:** Alex, prior to CRAG coming into force, treaty scrutiny was done via the Ponsonby Rule. You have indicated that had three limbs but only two of them were included in CRAG. Could you explain to us what was not included in CRAG?

Alexander Horne: This is an interesting debate that we are having with Government. The Ponsonby Rule was implemented in 1924 so is very long standing. The commitment related to treaties but there is a third limb to it, which was made on the Floor of the House, which said that other important instruments that did not amount to a ratified treaty should be drawn to the attention of Parliament. This takes us back to the issue of memoranda of understanding that we were discussing with Jill earlier.

Our great concern—certainly my own great concern—is this: memoranda of understanding, or non-legally binding agreements as Jill correctly describes them, can be very important. We have seen them used in a variety of circumstances, including the deportation of terror suspects. The Government were suggesting that they might use them to provisionally apply to trade agreements, thus rather blurring the distinction between the two things.

The Government are currently claiming that there is no third limb to the Ponsonby Rule and that, therefore, they do not have to disclose memoranda of understanding to Parliament. The problem with this is the circumstance in which they can be used. Jill was discussing this earlier. We took great concern about the fact that in reality it does seem quite optional and I will draw your attention to something that Anthony Aust, who was the former deputy legal adviser to the Foreign & Commonwealth Office, said in his book "Modern Treaty Practice". He said, "The use of MoUs is now so widespread that some officials may see the MoU as the norm, with the treaty being used only when it cannot be avoided". If we take that as the approach that may take place in some Government Departments and we also take the view that some MoUs, or in fact most MoUs, may never be disclosed to Parliament, if we do not put in place a system that important MoUs are scrutinised, treaty scrutiny or international agreement scrutiny essentially become optional in many circumstances. It would be as though Parliament passed an Act in some circumstances but then allowed the Government to go away and make all the secondary legislation without recourse to Parliament. It is a very unfortunate state of affairs.

I would hope that in part of this process you might look at that. It was certainly something that was looked at during the time of the Governance of Britain review. I think Jack Straw, who was then Secretary of State for Justice, acknowledged the fact that some MoUs were equally as important as treaties. It is not a question that Parliament is going to want to see all of these documents. There will be far too many of them to be scrutinised.

The approach that the International Agreements Committee took was to try to suggest certain criteria based on importance, whether they had a large economic effect or whether they interfered with human rights or other things that would make them politically important enough that Members of Parliament would want to see them, and I think that is what is missing. If the Government say they do not believe that they are under an obligation under the Ponsonby Rule to disclose them, and equally it is not in the statute, I think that is a big lacuna.

Q13 **Lloyd Russell-Moyle:** I will come to Arabella Lang in a moment. Following up on what you are saying there, Alexander, are you saying that, in fact, a bit like we saw with the Fixed-term Parliaments Act, where only some elements were put into statute, it kind of weakened the other convention parts of the Convention, and that has kind of happened here, that CRAG brought some bits into statute but that meant the weakening of that third limb? Is that a summary of what you are saying?

Alexander Horne: I think in part that captures it. I think it is also a problem that is highlighted by the fact, as Arabella Lang has mentioned, that there seem to be a lot more international agreements these days. This is a latter half of the 20th century problem, to do with the fact that the Government sometimes want confidentiality so they will use MoUs in relation to defence agreements, but they are also used in relation to air services agreements to ensure commercial confidentiality. They have used MoUs to fill in the details of treaties. We had one that appeared in front of IAC that related to space flights. Essentially, they wanted a technology transfer agreement with the United States so that they could launch satellites from Scotland. The bulk of the detail was provided in a treaty but they said, "There is an underlying MoU, which we haven't published". We went back to them and said, "Will you publish this?" and they said, "Fine". When they did, it turned out that quite a lot of the detail as to how this would work was contained in the MoU. As I said, sometimes this will be a bit like essentially you getting to see part of it but not all of it. The AUKUS agreement is another good example.

Q14 **Lloyd Russell-Moyle:** You are saying there is no central location for all these international agreements that someone could go and look at, even if it is a redacted—

Alexander Horne: No, exactly. Treaties have to be published, MoUs do not. If you want to come to some sort of arrangement that is not legally binding but is still politically binding between states, you can do so in complete confidence, not having to publish it. The Aust book makes clear that Departments have to find some means of keeping hold of these things so that the next Administration can find them because they are not registered and logged in a central repository necessarily, as we understand it. It is a very strange state of affairs.

Q15 **Lloyd Russell-Moyle:** It is as simple as you could get a new Administration coming in, not told about MoUs, and then another Government knocking on the door saying, "Hang on a second, you have

signed all these agreements with us. You cannot do X, Y and Z"?

Alexander Horne: The Departments should be in a position to tell the new Ministers what they signed, be it an MoU or a treaty, but the difference is that it is not there. It is not on the face of the record in the same way that a treaty is, which would be lodged at the UN and published on the Government website. That is where the problem arises. I think Jill would be able to tell you what the practical effect of this is in terms of the important agreements which may or may not be lodged. It is worth spelling out that a lot of MoUs are going to be of no interest whatsoever to Parliament, so what we really need is a situation where the really significant ones are drawn to the attention of Parliament.

Just to give you one example, if the Government go and make an announcement to the press that they have entered into an agreement with another state by way of an MoU, you might think that, in those circumstances, that MoU really ought to be disclosed to Parliament but it does not have to be with the arrangements we have in place at the moment.

Lloyd Russell-Moyle: Arabella, you had your hand up.

Arabella Lang: Yes, I was just going to make the point, which I think Alex also did make, that it is not only that there is no public register of these non-treaty arrangements, but there does not appear to be any internal government record of them. It is up to Departments to make their own list and my understanding is that that is worse than the previous position, but Jill may be able to illuminate that.

Q16 **Lloyd Russell-Moyle:** Jill, you mentioned a bit about the treaty unit or something that no longer existed. Is that what Arabella is referring to saying, "It is worse now"?

Arabella Lang: That was the Parliament and Treaties Hub in the House of Commons. That was me.

Lloyd Russell-Moyle: Oh, that was you and you have gone now. Jill, how have things got worse?

Jill Barrett: I don't know that they are worse, other than the fact that there are probably even more non-binding instruments floating around government than ever, simply because once upon a time it was the Foreign Office that handled most international relations. Now pretty well every home Government Department deals directly with its counterparts in other countries and it doesn't go through embassies or the Foreign Office for most of its international business. There are deals being made all round Whitehall directly with the home Department in another Government or Governments and the Foreign Office Treaty section knows nothing about them.

Other Government Departments are advised that they should always clear such things through the treaty section, primarily to make sure that

they have not inadvertently drafted them in treaty language and entered into a binding agreement without intending to. Once the treaty section sign-off is advised on that, they go back and conclude it. They often do not send the final version to the treaty section for information at the end of the process. They are treated like policy documents. It is the responsibility of the Department concerned to file it in its files with its papers as it does for any other kind of policy paper.

For there to be an obligation to present such things to Parliament, you would have to have quite a fundamental reorganisation within Government to make sure that there is some kind of register or repository of the things that Parliament needs to see.

It is possible to define by criteria what kind of non-binding instrument Parliament wishes to see. Alex and Arabella have outlined several. I would also add to the list any non-binding instrument that interprets or implements a treaty. If it is directly related to a treaty, I think that Parliament should be informed about that. The Court of Appeal has even commented on this in relation to MoUs interpreting tax treaties, that it is not fair to the taxpayer if they cannot find those documents that interpret tax treaties, but I do not believe any practice has changed as a result of that judgment.

It is certainly possible to define a core of non-binding instruments that Parliament wishes to see. You simply could not have a blanket rule that all of them must be relayed to Parliament because you cannot define the outer limits of what a non-binding instrument is. For example, I googled "MoU" yesterday and what came up was the Department for Education page on MoUs for school partnerships. MoUs and such things are used in all kinds of contexts, so there is no outward limit that you could define, but you could define an inner core of really important non-binding texts that concern human rights or relate to treaties and so on that Parliament wishes to see.

Q17 **Lloyd Russell-Moyle:** I am a bit confused why, Jill—and I think all of you have referred to this—it would be difficult to have everything laid before Parliament. I understand about it being voted on by Parliament, but why couldn't every document that is an international agreement of any kind, even a letter between Ministers committing to anything, at least be laid in one of the Libraries for information? Why is that too high of a threshold? I am not saying debated, just deposited or having an international agreements commission or depository service set up. Even if it has to be ratified, at least you know there is an agreement there with a number. You seem to be suggesting that that would be too difficult.

Jill Barrett: I think you would create a bureaucratic nightmare, both for Government and for Parliament. There are so many bits of paper that might conceivably be called an agreement, an agreement that X official is going to meet with X official from another country at 2 o'clock. Do you see what I mean? There are so many things that are of only passing interest or may even be quite far from central Government. Local

authorities or police authorities can enter into understandings and arrangements with their counterparts. Where would you draw the limit?

Q18 **Lloyd Russell-Moyle:** I am interested in this because my initial instinct would be to require that, if a police force has entered into an international agreement with someone else, there should be somewhere where that is deposited, whether that is the House of Commons Library or whether it is a new commission set up—I don't really care where—or a requirement at least for each of those bodies to have it publicly listed in a depository. Even if it is just the number, agreement X undisclosed, but you know an agreement has been agreed. Why would it be problematic for, say, an agreement to have a meeting? You are not talking about coffee between ambassadors. You are talking about a formal agreement to enter into negotiation in a meeting. Why would that be difficult to just put on a website?

Alexander Horne: In practical terms, what we did at International Agreements was look at this in terms of what we would have the capacity to scrutinise as a Select Committee. We were very keen to make sure that we had agreed criteria that would mean that a committee was capable of looking at all these documents. As Jill has said, the scale of things that could end up being swept into this if you did not do this is enormous.

We came up with five criteria. We said that notification and deposit should be required if an agreement is politically or economically important, it imposes material obligations on UK citizens or residents, it has human rights implications, it is directly related to a treaty—which is the one that Jill mentioned—or it would give rise to significant expenditure. We took the view that those criteria were sufficient to make sure that Parliament, in terms of its scrutiny role, was looking at anything that it ought to be doing.

I think the point you make is a very separate point, which is: should there be a separate repository for those people who are interested to have a look at everything that the Government sign up to? In terms of doing parliamentary scrutiny, our request is pretty much as much as anyone would be able to do. If you wanted to make a separate recommendation that there should be some central repository, I think that would be something that you would want to discuss with central Government as to the practicalities of that. There may well be benefits in doing it, but I do not think that would bring benefits to Parliament, per se.

Q19 **Lloyd Russell-Moyle:** No, point taken. The other question I have here—I feel like you have answered it but I will give you a chance if there is anything that is not covered—is: how effective do you think the conventions are regarding treaty scrutiny and what aspects of the current conventions should be converted into statute that aren't yet? I think you have already covered that where you have said something should be in the Standing Orders of the House, but are there any other bits that would

be advisable for us to put in statute?

Alexander Horne: I would not be suggesting that in relation to the old conventions. In terms of what we are looking at as new requests, I think all of us have set out some things, some asks, which we think would work. We obviously set out in that letter that you have in front of you that we had understood, for example, that the commitments being made by Lord Grimstone might turn into a convention. These were about the obligation to have debates about negotiating mandates and to have debates where Committees had reported on treaties and had asked for them. We had understood that those were going in the direction of a proper commitment from Government to Parliament, which I would then describe—if it was kept to—as turning into a convention. I think that is generally the way that these things are recognised, much like the War Powers Convention or any others.

As you will have seen, the Government seem to have rowed back from that a bit and that would certainly be the next thing that I would have turned to to say, "Maybe we need some new conventions about how treaties are handled going forwards". I am not sure in relation to the old Ponsonby Rule there is anything much more that I would have settled on. Arabella or Jill may well have some thoughts on that.

Arabella Lang: I agree with Alex. The second limb of the Ponsonby Rule is not talked about too much either. It is the agreement to have debates on treaties and I don't think that is necessarily an appropriate thing for legislation, and similarly with informing the House about non-treaty arrangements, so the third limb of Ponsonby. I think the main thing that would need legislation is introducing a consent requirement for all or some treaties, and potentially also mirroring that with a consent requirement for withdrawing from treaties.

Jill Barrett: Yes. The five areas that I outlined earlier that I think need reforms are things that could be done within CRAG, which do not need any legislative amendments. I do think that, if legislative amendment is being considered, there is no reason why affirmative votes could not work but, if you are going to require affirmative votes for all treaties, you would have to have a pretty substantial rearrangement of parliamentary time to make sure that is possible.

That was one reason why it wasn't introduced at the time of CRAG because the worry was that, if you required an affirmative vote for all treaties, there would not be a desire by Parliament to debate all treaties and treaties would just pile up for months on end for no good reason waiting for Parliament to have time to vote them through.

Lloyd Russell-Moyle: Deferred Divisions are a wonderful thing.

Jill Barrett: You would have to make sure that there was definitely going to be parliamentary time at regular intervals and it would be more practical to require affirmative votes only for some treaties. I am a little

bit sceptical about trying to define which ones by subject matter or category, and I think that the Australian system is probably more practical where treaties are graded 1, 2 and 3 in terms of priority and that determines how much scrutiny is needed.

The Government assign the priority but the parliamentary Committees can overturn that. In other words, if the relevant parliamentary Committee says, "We want to put this up to category 1 and have a debate and vote" that should be required. I think this is roughly what Alex was getting at by saying if you look at the rate at which the House of Lords Committee has requested debate, it is manageable. If you leave it in Parliament's hands as to which treaties it decides it wants to have a debate and an affirmative vote on, that is probably a better way of doing it than saying that all treaties must have an affirmative vote.

Q20 **Lloyd Russell-Moyle:** Why would a deferred Division system be impractical?

Jill Barrett: I am sorry?

Lloyd Russell-Moyle: We have a system of deferred Divisions at the moment where I can go into the Lobby and vote for eight different things at once on paper on a Wednesday, on things that are not contentious if no one has called them. Why couldn't it be a system where it was all positive votes, but they automatically went into the deferred Division unless they were then called for debate by the Opposition or a Committee? Therefore, you still have the positive vote, but the question about whether parliamentary time is needed is then down to whether someone has called it or not.

Jill Barrett: I am certainly not saying that it could not be done or could not be realistic. I think it is a matter that Parliament has to arrange for itself and make sure there is a deal with parliamentary business managers. At the time of CRAG going through, that simply wasn't politically possible or wasn't happening.

Lloyd Russell-Moyle: The managers ruling the politicians. That is fine.

Alexander Horne: I think the way that we were looking at this was to try to align whether or not there would be a debate and whether or not there would be a vote with whether or not a Committee was particularly interested in an agreement, so that people's time then wasn't used unecessarily. Otherwise, if there is a risk that everything is going to be voted on you are going to have a whole contingent of civil servants knocking around waiting to see if there is going to be a vote, waiting to see if they have to advise the Minister on it.

Whereas, once you set the thing out and essentially say, "We have a system that says, 'This treaty has been drawn to the special attention of the House and a motion has been put down to have a debate about it'", you then realise it is significant enough that it is worth occupying people's

time, in terms of doing that sort of thing, and having a vote if that is what people want to do.

The alternative is to essentially have a lot of treaties floating round where it is not entirely clear what Parliament wants to do with them. I think that may be what Jill was getting at earlier when she was talking about the proportionality of all this.

Lloyd Russell-Moyle: I see what you are saying. I am not sure I fully agree but I do see what you are saying. Thank you very much.

Q21 **John McDonnell:** Just on a minor point, I want to be absolutely clear, Alex, the idea of the concordat was to lead towards a parliamentary convention. You were not looking for legislative change in those discussions?

Alexander Horne: If you read the report—I would subdivide it into two things. I saw this working organically and with our current Government, in reality, the way they have responded to treaty-related issues, building a convention that these things would happen struck me as being a good thing. I think that is how the Committee saw it. At the end of the Committee's report, it sets out the fact that, even if all the Committee's recommendations were accepted by the current Government, there would still be a problem with treaty scrutiny and that the Committee's ultimate recommendation—much as Arabella and I have suggested—is that there needs to be a consent mechanism for important treaties.

In the first instance, if we are going to have what the Government would class as being best practice in Westminster treaty scrutiny, we took the view that this concordat setting everything out, turning it into a convention, was a good way to start making sure that all these things were put in place firmly so that a future Administration would not come in and just say no.

To give you an example of where that was problematic, if you look at the first working practice report, I think Liam Fox was then Trade Secretary and he put out a consultation paper that had a series of commitments. By the time we were doing some later work on this, we had a new Trade Secretary, and when we asked, "Do those commitments still stand?" they weren't 100% sure that they did.

I think, if you leave these things in consultation papers and letters and so forth, they just do not have any bite. Whereas, if you establish something like a concordat there is at least a political cost if somebody wants to row back from that. They cannot simply say, "That was something that the last Minister said but this Minister wants to do something different".

Q22 **John Stevenson:** Ms Lang, we have discussed the level of scrutiny already to quite a large extent, but to what extent has the level of scrutiny changed since we have left the EU, and has it improved?

Arabella Lang: I am afraid I probably cannot say it has improved. This is because there was a level of scrutiny for treaties that were negotiated on the UK's behalf by the EU that the UK simply has not replicated since leaving the EU. For areas like trade and the environment, where the EU negotiated treaties, the European Parliament had quite significant powers that were developed over a number of years, chief among which was that there was a requirement for its consent to most treaties.

That led to its building up a whole raft of other scrutiny mechanisms, including quite detailed information requirements. It has to be informed at all stages of the negotiations. It has access to classified negotiating text. There is an inter-institutional agreement that sets out what has happened with its recommendations. There have to be reasons given if those recommendations are rejected and things like that. There is also well-developed engagement with civil society and national entities in the EU that has not been replicated for the UK.

Lastly, the domestic procedures in the UK where the European Scrutiny Committees in both the Commons and the Lords scrutinised UK Ministers' actions on EU treaties and the Council of Ministers under their formal scrutiny reserved powers, again, those have not been replicated since leaving the EU.

Lord Boswell, who was then Chair of the Lords EU Committee, told the Constitution Committee in 2019 that those mechanisms should be regarded as part and parcel of the UK's constitutional settlement. He suggested that failure to replicate them domestically would be a retrograde step, reducing transparency and democratic accountability. That was part of the reason for the developments that Alex described, the Lords EU Committee scrutinising treaties and then setting up the International Agreements Committee. However, as we have seen, that Committee has nothing like the powers that the European Parliament Committee had and not even anything like the scrutiny reserved power that the UK's European Scrutiny Committees had.

Q23 **John Stevenson:** To a certain extent, we have compared with the EU regime that was. How do we compare with other countries in the world in terms of their treaty scrutiny arrangements? Are there any countries that you would give examples of that we should probably be following, countries that this Committee should be looking at?

Arabella Lang: The thing that stands out is that the vast majority of other countries in the world have consent requirements for some or all treaties, mostly for a limited category of important treaties. Something like 90% of countries in the world have that kind of consent requirement for treaties.

What often happens is that the UK is compared with other Westminster-style systems in this respect, but it is also important to compare it with other dualist systems. Just to explain what that means, that is the concept that international law and domestic law operate on separate

planes and that international law has no effect on the domestic system, formally speaking. Other dualist systems include, for instance, a lot of the Nordic countries, Norway, Sweden and Finland.

What I tend to prefer to do, instead of comparing it with one particular country, is to pick out the best elements from a whole range of other systems and use those as good examples. For example, Australia has its own dedicated joint treaty scrutiny committee. That was set up something like 25 years ago. In Norway, the Government holds confidential discussions with a parliamentary committee at the early stages of negotiating treaties. Those help work out whether a Government will get Parliament's consent to those treaties where there is a consent requirement.

In South Africa, I think all treaty actions stand referred to a committee formally and the Government does not take any binding treaty action until the report is published. Another example is that New Zealand has changed its rules relatively recently. It was struggling to find time to debate treaties, but instead it decided to change its Standing Orders so that there is a debate on the treaty itself in place of the First Stage debate on any implementing legislation, so that is quite an interesting idea. Looking a bit further down the process, in South Korea there is an arrangement where the National Assembly is supposed to carry out monitoring of the effects of FTAs on domestic industries. There is a whole range of examples of good practice across all sorts of countries across the world.

Q24 **John Stevenson:** You are not recommending any specific one or two, you are saying we should be looking to them all and picking the best and incorporating them into our system?

Arabella Lang: Exactly.

Chair: Alex, you had your hand up.

Alexander Horne: Yes, just very briefly on this one. I agree with everything that Arabella has said. In terms of the way in which this works, there were two brief points I want to make. The first relates to the fact that the UK is a dualist system. Sometimes I think—as Arabella has said—this gives people the misconception that Parliament's role is in the legislation-making bit of this process.

The only thing I want to highlight is that a lot of the time there isn't necessarily a legislation-making bit of the process. Sometimes these powers already exist so the making of the treaty is the only thing that happens. The rest of the time the legislation-making process is frequently by way of delegated secondary legislation, so it doesn't necessarily receive very much parliamentary scrutiny. I would have said that the bulk of the treaties we have looked at by the IAC have been implemented in regulations or secondary legislation of some kind. One should not think

that the fact that we live in a dualist system means that Parliament is getting its say on treaties.

Secondly, in terms of the best systems, I had some experience of the EU system. I think sometimes people portray it as better than it was, but it is certainly a lot better than what we do. The information-sharing provisions and some of the other provisions contained in Article 218 of the treaties are well worth studying.

The only other thing I would say is that a lot of the time people—the Government in particular—highlight the Westminster systems because they are not the best at doing treaty scrutiny for historical reasons. There is some movement there. Arabella has noted New Zealand. I have been advising the Fijian Parliament this past year on treaties. They have a sort of model constitution. It does two things. In the constitutional bit, it has a consent requirement, which is what we were discussing earlier. It then sets out in the Standing Orders what the Standing Committee that does this work has to do, and I think if you were looking at a Westminster system that has done this, that is a model that, at least theoretically, ought to work reasonably well.

The Australian system is also much more well-honed than ours because obviously they have been doing this for 30 years or so. If you compare their scrutiny, I think they have a lot more stakeholder engagement because people know what is going on. I would speak to the Australians, although their system is not as ambitious as perhaps what we are suggesting to you today.

Q25 **Mr David Jones:** Mr Horne, as we have already discussed today, Parliament is consulted only at the ratification stage of treaty negotiations. What would be the benefits of earlier consultation with Parliament in the negotiating process and at what stages do you think that that would be optimal?

Alexander Horne: I think it depends on the importance of the agreement. Our negotiations with the Department for International Trade—and when I say "our", I mean Parliament—have been much more successful I think than those with FCDO. The Department for International Trade has made various commitments about informing Parliament about trade agreements, giving Parliament private briefings, discussions around negotiating mandates and the potential for debates in Parliament before the agreement is signed if there are issues around those negotiating mandates.

I do not think that in relation to the 40-odd treaties a year you could expect to have those same commitments being made about all of them because some of them won't be of any great interest to Parliament. The real question then is to find some way of ensuring that importance is judged: say, a big extradition agreement with a large country where there are political difficulties or a big agreement on the environment that does not really focus on trade. You can think of quite a lot of other types

of agreement where you would think that similar mechanisms ought to be put in place, where Parliament has come in at some earlier stage of the process. I mentioned, for example, at the very least where those agreements were being initialled by the two states, so that it is not set in stone. I think that would be my first point.

The second point I would make—we have touched on this already—is the need to bring in rules around aligning domestic legislation with the CRAG procedures, just to make sure that you do not pass the domestic legislation in advance of the Committees that are doing this work being able to report. Certainly, it is the case that the International Agreements Committee has already made a recommendation of this sort and unfortunately the Government have said no to that. I think that there has to be room, even if the Government have the ability in exceptional circumstances to skip that stage, for aligning those procedures so that essentially those people who are making the domestic legislation have the ability to read the report that has been put out by the Committee. Otherwise, I think that is a real issue.

The only other point that I would make is I think that there is still a need for certainty in respect of the period after the CRAG process has finished. There are some circumstances in which the CRAG process finishes but in fact the treaty isn't ratified and, in those circumstances, Parliament has no powers to do anything about that.

One example that we looked at, at the International Agreements Committee, is the Istanbul Convention on violence against women and girls. That was signed by the Government in 2012. You may be aware that there is legislation now asking the Government to report to Parliament every year about progress being made towards ratification, but here we are 10 years down the line and the thing has still not been ratified and Parliament has not managed to convince the Government to do that, despite the fact that I think there is a groundswell of opinion in Parliament that that convention ought to be ratified.

That is another lacuna, I suppose, in our current arrangements. What happens after signature? What happens even in terms of ensuring ratification? I think those would be the points that I would make there if that helps.

Arabella Lang: I want to make the point also that for trade treaties at the moment the Government involve a lot of industry representatives in the negotiations and give them access to confidential information. I think you could make a strong argument that Parliament should be given access to the same information as those industry representatives. It would also perhaps potentially allow the voices of constituents and civil society to be represented in a way that they are not at the moment.

Also, on the wider point, it can be hard sometimes to see when the best stage is to involve Parliament. It often feels like, as I describe it, watching pears ripening. You sit there and, "Not yet. Not yet. Not yet.

Too late". It can be very hard to work out exactly when to do it. There are all sorts of options, starting from even just having a public list of treaty negotiations that are proposed or under way. That happens in a lot of countries. You could imagine a treaty scrutiny reserve for starting negotiations or for setting negotiating aims, then I gave the example of early confidential discussions with Committees.

There is also something that I think we might come on to later, which is the scrutiny by devolved legislatures, so UK Ministers' engagement with perhaps the devolved Administrations on treaties. There are all sorts of bits and pieces that could be put in place.

Jill Barrett: I want to add three points to what Alex and Arabella have just said. First, on the question about aligning the debate on a treaty with the debate on implementing legislation, that is very important. There seems to have been an assumption in Government, certainly, and possibly in Parliament as well, that if implementing legislation has been debated you do not need to have a separate treaty debate, that the treaty will somehow be swept up with or considered at the same time as the legislation.

I think a very good example of when that simply did not happen was the UK-US extradition treaty, where the debate focused solely on the provisions in the legislation that was going through and the MPs debating it simply did not realise that the treaty had asymmetric obligations. It wasn't until some while later, when the treaty was in force, that it was realised that the obligations taken on by the United States were different from the ones that the UK had assumed. That was because there was no separate treaty debate.

Secondly, the question about earlier involvement in scrutinising negotiating mandates, yes, that is important and certainly should be done in certain cases. This is one area where you could not have a one-size-fits-all approach. Therefore, I think it would be very difficult to put it into legislation because some negotiations happen so fast there would not be time for it. There also isn't always a separate initialling and signature stage. There isn't always a gap between the two, so some negotiations may finish and the text is initialled and then the very next day they are signed, so, again, that gap isn't always a good opportunity for parliamentary scrutiny.

What I would like to suggest, though, is that this is something that would be best done by each of the subject matter Select Committees. If they considered part of their function as being to keep a track of the international negotiations that the Department they are shadowing is engaged in and asked regularly for lists of what negotiations are taking place and might lead to a treaty, then they need to pinpoint at an early stage where they want to be involved in examining the Government's negotiating mandates. It might work that way.

Otherwise, I think it would be difficult because, as I said earlier, the Government officials concerned don't always even know at an early stage when they are going to end up with a treaty. To some extent, it has to be a two-way process of communication between the Select Committee for the subject and the Government Department concerned to tease that out. Yes, that was my third point.

Q26 **Mr David Jones:** Ms Lang, you have already mentioned the fact that the United Kingdom has a dualist system, so implementing legislation has to be passed before many aspects of treaties can be brought into force domestically. Can you explain how treaty scrutiny and implementing legislation are currently co-ordinated?

Arabella Lang: The quick answer is that they are not co-ordinated at all because there is no rule on the stage on when the implementing legislation should happen before, during or after the CRAG process, if there is a CRAG process. Actually, there probably would be for anything that implemented legislation.

The wider point is one that Alex made just now, which is that for most treaties there is highly unlikely to be any primary legislation. We just started a public law project looking at the implementation of treaties. Of those 35 or so recent treaties that we looked at, over half had no implementing legislation whatsoever. The rest were all in regulations or orders or the immigration rules. The challenges of scrutiny of secondary legislation are well documented, so in effect you get a kind of accountability and scrutiny challenges squared. You get unscrutinised treaties being implemented by unscrutinised legislation.

The other aspect of it is that amending a Bill does not amend a treaty, and I think that is something that is not always well appreciated. Of course, statutory instruments cannot be amended themselves. Where there is implementing legislation—I think as Alex said—it is really important to co-ordinate the scrutiny of the legislation and the treaty and not take any binding action until that scrutiny has happened. We see that in quite a few other countries. For instance, in Canada, which is often cited as a place that is behind the UK in treaty scrutiny, they have an arrangement whereby implementing legislation is not introduced until 21 sitting days after the treaty is laid before Parliament. Therefore, you could have a rule like that but, as Alex said, the Government have rejected the IAC's recommendations to that effect.

You could have members of the treaty scrutiny committee looking at the legislation and the implementing legislation. You could have rules about limiting the use of SIs to implement treaties. Of course, sometimes it is appropriate but there aren't any clear guidelines at the moment, as far as I know, on how and when that is done. Another—

Q27 **Mr David Jones:** Forgive me for interrupting but you mentioned guidelines there. How should those guidelines be produced and who should produce them?

Arabella Lang: That takes us back to the question of who speaks for Parliament. I am not an expert on statutory instruments and I know that there have been some rules or guidelines produced over the years on when they are appropriate, but I am not sure of the extent to which those are applied or enforced. Perhaps it is something that if and when there was some kind of concordat along the lines that we are suggesting, that could be an element of that concordat, something agreed between Parliament and Government about what is appropriate.

The last point I wanted to make is that it is almost impossible to work out how a treaty has been implemented and to track through from the treaty and whatever the Government have said they will do to implement it to what has actually happened. There is nothing linking those bits of information or putting them together in one place. We often don't know or find it very hard to work out what exactly the UK's obligations are that it has brought into domestic law. Therefore, I think there is a very strong argument for some kind of overhaul of the public treaty information to bring those types of information together.

Q28 **Mr David Jones:** Mr Horne, the IAC working practices report recommends that implementing legislation should not be introduced until parliamentary committees have been able to report on the treaties themselves. Could you expand on that and say what is envisaged there?

Alexander Horne: I think what is essentially envisaged, as Arabella was discussing earlier, was simply better co-ordination. Obviously, we have the rule under CRAG that the treaty is laid for 21 sitting days. That means that the committee is essentially bound to report on that treaty within the 21-day period. All we are saying is that legislation is not laid and voted on. If you are doing it with primary legislation, you do not have a much of a problem. If you are doing it with secondary legislation, it is going to mean that you do not have any votes on affirmative instruments before the committee has reported. If you were to do that, it would not build a very big delay into the process because Parliament only has the treaty to report on for 21 sitting days. Essentially, it is just a question of best co-ordination and making sure that Parliament has not assented to the legislation before it has even had the ability to read the report on the underlying treaty, which is the mischief that we are looking to address here.

Q29 **Mr David Jones:** Ms Barrett, there are frequently significant changes to treaties after ratification. Could you explain the different ways in which treaties may be changed and what arrangement currently exists to scrutinise any potentially significant changes?

Jill Barrett: Yes, treaties can be changed in a number of ways. The first obvious way is by a treaty amendment and most treaties provide a procedure for amendments. The second way is that under a treaty the parties to a treaty may adopt a binding instrument, which does not change the face of the treaty but adopts something that is related to the treaty and may be binding.

Other ways can be that treaty partners adopt understandings that interpret a treaty. We have already covered the third way in a discussion about non-binding instruments, so I will talk about the first two. If the Committee is looking at possible legislative reforms to CRAG, one area of the provisions that should be looked at again is Section 25, the meaning of treaty. I digress slightly for a moment but it is a pity that when CRAG was being passed originally there was never any debate on Section 25, either in the House of Lords or the House of Commons and I think it is a pity that it was never examined.

Treaty amendments are actually treaties. Under Section 25 a treaty amendment that changes the face of the treaty is subject to the CRAG procedure but, like treaties, only if it is subject to ratification. A treaty amendment, subject to ratification, is CRAG-able. A treaty amendment, however, that can be adopted by the parties and comes into force without ratification—and that is quite common; there can be a silent procedure—is not subject to CRAG, simply because there is no ratification stage. There is a lacuna there and I know that the Government have recently been asked to commit to always publish such treaty amendments and they have confirmed that they will do so, but that does not enable any prior scrutiny.

The third situation is where you have treaty parties that use powers under a treaty to adopt a legally binding instrument that does not in itself amend the treaty. That is accepted from CRAG by the provision in Section 25(2), which says, "'Treaty' does not include a regulation, rule, measure ... made under a treaty" if it does not actually amend the treaty itself. The problem there is that it was excluded for good reason at the time, and at the time our analysis was that there was not very much in this category but if in the future it expanded it might simply overload the system. The problem with having excluded it from CRAG is that we now simply do not know what it is that the Government are not laying under CRAG because it is excluded.

I think there is a need for a scoping exercise. There is a need for the Government, going forward—it would probably be too difficult to do it retrospectively—to say what are the things caught by Section 25(2) that they have not laid under CRAG because they are excluded by that section and for a parliamentary committee to look at it and to say, "We're not concerned about this. It's all technical stuff and we do not want to scrutinise it" or, "We can see some things here that we would want to scrutinise". Then it is a question of whether you have an arrangement with the Government for them to lay it voluntarily or whether you think that you should legislate, for example by abolishing that provision.

Alexander Horne: Jill makes an enormously important point there, which is that treaties do not necessarily crystallise when they have been ratified and there can be changes to them. Working out how Parliament gets to scrutinise those changes is pretty much as important as working out how Parliament gets to scrutinise the underlying treaties. If one

imagines, for example, changes to the two Brexit agreements, it would be almost unbelievable to imagine that having spent so long scrutinising how we got to where we were in terms of Brexit, the Government could then go away and start meddling with those agreements without necessarily coming back to Parliament. The question as to whether or not something has to be ratified seems to be a very circular one and we have never really got to the bottom of what it is, in terms of an amendment, that the Government can get away without laying.

The International Agreements Committee has been discussing that with the Government for over two years. Eventually, in its most recent report, it set out a series of criteria. I will briefly describe those to the Committee. It set out five criteria, very similar to those set out in relation to MoUs, that amendments ought to be subject to scrutiny when they are, "Politically, legally or economic important; [where they] impose material obligations on UK citizens or residents; [where they have] human rights implications; [where they] would give rise to significant expenditure; [or where they] would change the underlying agreement significantly, or have provisions which are novel". That is what we asked to be laid before Parliament, "Whether or not they are subject to the ratification requirements under CRAG". We left it to the Government as to whether they wanted to amend the legislation or whether they simply wanted to agree with us that those amendments would be laid.

Again, unfortunately, we have had no commitments there, so what you have is a Government commitment to lay a treaty but then they can go away and amend that treaty to their heart's content and we are not sure whether those amendments will be subject to any scrutiny at all. I leave it to the Committee as to whether it thinks that that is an acceptable scenario.

Chair: Thank you. We are running short of time, so in the interests of time I would ask everyone to be brief.

Ronnie Cowan: I do have an interesting question here.

Chair: I was not intending to put you off but we have had some repetition.

Q30 **Ronnie Cowan:** Primarily through the frequent use of every question seeming to start with, "Now that the UK has left the EU". Many of the areas in which international agreements might reach could impact areas of devolved competence, but international relations, including treaty agreements, is a reserved or exempted area in the UK. How and to what extent are devolved Administrations consulted on treaty negotiations?

Arabella Lang: There has for a long time been an arrangement and a memorandum of understanding between Westminster and the devolved Executives, which includes a concordat on international relations and gives some roles for devolved Executives, like co-operation on exchanging information and formulating UK foreign policy as well as on

negotiating and implementing treaties. It also suggests that Ministers and officials from the devolved Administrations can form part of UK treaty negotiating teams. I believe that does happen from time to time. Another aspect of that is that under the intergovernmental review that has just completed there may be a bigger role for devolved Administrations under the Inter-ministerial Group on Trade but we will have to wait and see what shape and form that takes. The question that is much less appreciated is how devolved legislatures are engaged, given that they have responsibility for legislating to implement treaty obligations.

Q31 **Ronnie Cowan:** We are going to come on to that because that is my next question. Just concentrating on this one here, you said that there is a memorandum of understanding, which we have seem to have given a bad time this morning so far. You said, "It suggests" and, "From time to time". Can you give us a more solid thing that I can hang my hat on and say that this is going to happen and it is going to happen in this timely manner? Do we have such a thing or do we know the contents of this mysterious memorandum of understanding?

Arabella Lang: This is a public one so its terms are there for everyone to see. It is an agreement between institutions in the UK. It is not the international MoU that we have also been talking about. I think you would get a different interpretation or a different reflection on how effective that arrangement is depending on who you talk to. Certainly, there has been quite a lot of pressure from the devolved Administrations to amend and update that in the light of the UK's leaving the EU.

Q32 **Ronnie Cowan:** I know that other countries—the Ukraine, Belarus, India, Philippines—all entered into treaties before they were independent countries. Is that not open to Northern Ireland, Wales or Scotland?

Arabella Lang: Not under the UK's current constitutional arrangements.

Alexander Horne: I am not sure it would even work in terms of international treaty law. We had one where the UK entered into an agreement with the Palestinian territories and it made very clear that it was not a treaty because the Palestinian territories were not a state for the purposes of the Vienna Convention on the Law of Treaties, because the Vienna Convention says that a treaty is between a state and another state. If you have a multilateral treaty there is a different set of provisions. If you are not a state for that purpose, I think that you would have some difficulty in calling something a treaty. Jill may have some thoughts on that.

Q33 **Ronnie Cowan:** How come Hong Kong, Bermuda, Jersey, the Cook Islands, New Caledonia, Quebec, Wallonia, Flanders, the Austrian Länders and the Swiss cantons can all enter into treaties?

Jill Barrett: If I may intervene, it is certainly possible and it is established practice that the UK's overseas territories and Crown dependencies can negotiate and conclude their own treaties under an entrustment from the UK Government for HMG. It may have to be a

specific entrustment for a specific treaty or it might be a general one for a class of treaties. I am not aware that there is such a thing as an entrustment for a devolved Government to do likewise, but in principle I do not see any reason why they could not be authorised by HMG to negotiate a treaty if that was considered a desirable thing to happen. They certainly cannot do it on their own initiative because they are not sovereign states and I think other states would not accept them as such. They would want to know from HMG that they have the power in international law to enter into a binding agreement.

Q34 **Ronnie Cowan:** An overseas territory can enter into its own treaties but Northern Ireland, Scotland and Wales cannot?

Jill Barrett: It is established practice that HMG does sometimes issue entrustments for overseas territories and Crown dependencies to enter into specific types of treaties either with another territory or even with a sovereign Government. I don't know whether Scotland, Northern Ireland or Wales have ever asked to have an entrustment as such from HMG. I do not know whether such a possibility has ever been discussed.

Alexander Horne: You can always compare it to maybe Gibraltar.

Jill Barrett: If you can do it for an overseas territory, it must be possible to do it for a region of the UK, but I do not know whether it has been considered.

Alexander Horne: Likewise. The most obvious comparison might be Gibraltar where there has been a treaty negotiated recently on tax-related issues on its behalf by the UK Government and Spain. That shows you the way that we have gone about doing it. In reverse, the Danish have orchestrated an agreement with the Faroe Islands with us about fish. But the signature of the agreement has been by the state not by the other body, be it Faroe Islands or Gibraltar. I think Scotland and the other devolved nations would fall within that, as Jill has set out.

Q35 **Ronnie Cowan:** We shall press on before I contest the fact that Scotland is not a sovereign nation. What role should the devolved legislatures have in treaty scrutiny and how can it best be achieved and coordinated?

Arabella Lang: It is tricky because the devolved legislatures have no power to scrutinise the UK Government. On the other hand, the devolved Administrations that they can hold to account have no treaty powers, as we have just been discussing. In effect, the devolved legislatures' ability to scrutinise treaties depends on how the UK Government involve the devolved Administrations in treaty matters, on the one hand. I am going to have three hands here. The second issue is how the UK Parliament considers the devolved legislatures' positions and then, of course, the extent and influence of the UK Parliament's role in treaty scrutiny. It is all at one reserve. There has been a lot of interest in the devolved legislatures on treaty scrutiny. They have taken the initiative and set up

their own procedures. How much difference that can make is a bit harder to see.

There is also a question of co-ordination and I know that the International Agreements Committee has been trying to involve the devolved legislatures in the scrutiny that it is doing. Alex might have some comments on how effective that has been. There are some other ways that co-ordination could happen and there are procedures in the Standing Orders for the Commons Welsh Affairs Committee to invite members of Senedd committees to attend and participate in its proceedings. Those could potentially be extended to other committees; there is a precedent there.

Something else that was helpful in an informal way in the past was something called the Inter-Parliamentary Forum on Brexit, which members of the Committee may be familiar with, but that went into abeyance. It is due to be relaunched, I understand, this spring with new terms of reference. That brought together the chairs of various interested parliamentary committees to hold informal discussions and information sharing. In the past it had shown an interest in treaty scrutiny, so that may be another avenue for co-ordination in the future.

Alexander Horne: Arabella mentioned that we had been looking at this. I would add two other very brief points. The first is that if you look at the reports that have come out from the International Agreements Committee, probably 50% of those raise issues around consultation with the devolved Administrations. It is a problem. We asked that the Government be much clearer that they had consulted, and eventually the explanatory memorandum template was changed in order to make sure that there was some information provided about the level of consultation that had occurred. What we have never managed to get the UK Government to do is to tell us whether or not the devolved Administrations have raised any particular concerns, so it is very much up to them to get in touch. We do liaise with the devolved legislatures. We quite often get reports, particularly from the Senedd in Wales.

The other thing to bear in mind is the CRAG scrutiny period is very short. It is 21 sitting days so the legislatures are likely to only see these documents when they are signed and published, much as we do in the UK Parliament very often. That is a very short timescale for a committee to meet, agree a report, agree concerns and raise those concerns with the Westminster Parliament, so some degree of better co-ordination needs to happen in terms of information sharing if that is going to be effective. I do not think that the UK Government are going to move away from their proposition that making international agreements is a reserved matter for the UK, unfortunately, so there needs to be some sort of workaround that essentially acknowledges how much of an impact treaties can have.

Taking trade agreements, for example, an awful lot of the agricultural provisions are going to hit on the devolved nations, given where

agricultural produce, particularly meat, comes from. Whisky is another one, salmon, all of these other things. The tariffs and tariff-rate quotas on those are going to be of great interest to the devolved Governments. It is almost unarguable to say that they ought to have some input in working out which of their industries' interests they want to be taken into account. That is why it is important and much more could to be done.

Q36 **Tom Randall:** Alex, could I come to you? You mentioned earlier that the House of Lords has established the International Agreements Committee. In light of the working of that Committee, how do you think the House of Commons might effectively develop its own arrangements to scrutinise international agreements and how do you think the Commons and the Lords might work together to ensure the thorough scrutiny of international agreements?

Alexander Horne: As I set out in my written evidence, the first question is to avoid duplication. I think the Commons should develop its own arrangements to take advantage of its strengths. Its strengths are the specialist departmental Select Committees. My starting point would be that those committees ought to have the Departments that they shadow routinely disclose relevant treaties. At the moment, as I understand it, the only committees which would routinely receive agreements are International Agreements in the Lords, International Trade in the Commons, JCHR, if it raises specific human rights points, and in theory Foreign Affairs, although I do not think it does actually receive the treaties and I do not think that has ever worked in practice. Having the expertise of the departmental Select Committees looking at the small number of treaties per year that come from their Department would make sure that you were not duplicating the work of the International Agreements Committee, which is going to look at all of these treaties but on a rather more technical basis.

We do not have the expertise in the House of Lords committee to make sure that the policy issues of every one of those 40 treaties are dealt with in detail. We rely on stakeholders to bring us information about their concerns as much as the internal policy background of staff, whereas the Commons committees have the benefit that they will have policy analysts and so on who know a great deal about the particular issues at hand. That would be the starting point.

Secondly, I think that there ought to be some degree of co-ordination, particularly where the House of Lords International Agreements Committee draws a treaty to the special attention of the House. The reason I say that is that CRAG gives the powers to the Commons. In the House of Lords if we put out a report and the House of Lords resolves that a treaty ought not to be ratified, that only has the result that the Government have to put out a statement explaining why the treaty ought to be ratified. The House of Commons has specific powers, if it can get a motion on the Order Paper, to delay the ratification of a treaty, but at the moment I do not think there is sufficient co-ordination between the Lords

committee publishing a report saying that there might be an issue with the treaty and any committee in the Commons, or any group in the Commons, essentially saying, "Do we want to have a debate about this? Do we want to use the powers under CRAG?" They need to think again about that.

The third issue that I would raise very briefly is about engaging stakeholders. At the moment treaties are one of those things that, other than in the context of trade, are very under-recognised. We found it, when we started up, quite difficult to get engagement from stakeholders, even though, as I said at the beginning, these are laws. These are going to impact on people but a lot of time they only seem to become aware of them when the Department might hold some brief consultation about the secondary legislation or so on and so forth.

ITC is very well placed to deal with stakeholders about trade agreements but committees like Home Affairs, Environment and so on will have a whole load of stakeholders that they could probably engage with on the small number of treaties that are going to appear before them. That would be the third point, that stakeholder engagement is really important.

Q37 **Tom Randall:** If I could come to you, Jill—you may have touched on this already—in terms of the information that the Government provide regarding treaties, is that sufficient and is it presented in a timely manner?

Jill Barrett: I have commented in previous submissions on the insufficiency of many of the explanatory memoranda, some of them woefully inadequate. I have noticed that the Government have recently improved the content of EMs. Certainly, the FCDO has put out more detailed guidance to other Government Departments, which is now publicly available on the Government website, so there has been an improvement.

However, it is still at the moment in the gift of Government. What I think should happen is that Parliament should be more proactive at stating what it wants to see in an EM, in the way that is done already for statutory instruments. For example, there is a House of Lords Merits Committee on statutory instruments. Parliament should set out what it expects to see and Parliament should be a bit bolder at calling out EMs that are not adequate and that do not provide the information that is expected. There should be a mechanism for Parliament to be able to ask the Government to go back and provide a supplementary with the missing information.

As for timeliness, no. The problem is that the EM is only laid with the treaty. Because you have to put both together—that is the way that Section 24 was drafted—what tends to happen is that the Government could only get the EM ready when they are at the end of their preparatory process for ratification. They have to get together their implementing

legislation, decide on reservations, consultations and so on. That means that the whole thing, the package, the treaty and the EM, are only laid at the last minute when the Government are about to trigger the CRAG process, the 21 sitting days, and that is all that Parliament gets.

It would be much better if information was laid at an earlier stage and either that the CRAG process was longer or the information could be laid in a more informal way at an early stage before the CRAG process is formally triggered. That could be done by sending it to the committee concerned, because CRAG is only triggered when it is formally laid before Parliament.

Q38 **Tom Randall:** Where a statutory instrument and a treaty might differ is that the treaty might contain confidential or sensitive information. What do you think would be the best information available, or should it be made available to Parliament? If so, what would be the best way of trying to achieve that?

Jill Barrett: Do you mean a treaty under negotiation? Because if it is a treaty that is completed, treaties by definition have to be published and registered with the United Nations. A treaty cannot have confidential information in it, which is one reason why the Government might conclude a non-binding instrument if it is confidential. Are you referring to confidentiality during the negotiating process?

Tom Randall: Yes.

Jill Barrett: That is difficult and I believe that the House of Lords Committee has had some discussions, and I am sure Alex can comment on this, about special arrangements like reading rooms and so on where members of a parliamentary committee can be shown confidential information at negotiating stage, in confidence. How effective it would be I am not sure because I am sure that from the Government's point of view they may think, "We're pretty sure we know who all these members of the Committee are and they are all trustworthy, but there might be one who will leak it". It only takes one leak for the confidentiality to be destroyed and that could be very harmful in a negotiation where the other Government or Governments concerned are trusting the UK Government to keep something confidential. You would have to have quite a high degree of trust and I do not know how easy it is to build that. Perhaps Alex can comment on the attempts that have been made so far.

Alexander Horne: I am very happy to do that, if that would help.

Chair: Can I just bring Lloyd in on this point?

Q39 **Lloyd Russell-Moyle:** I wondered how the European Union or other bodies do it, where they give this confidential information to parliamentarians, and the level of leaks that come from that. It can be created as fearmongering but we have lots of evidence, surely, of other

places.

The other thing I wanted you to reflect on—I sit on the International Agreements Committee—is that the Government did give confidentially the Japan deal to the Committee but has not given confidentially any other deals to the Committee. The Government have changed their approach to give less confidentially now. Is there any reflection on why that might be? We do not know.

Alexander Horne: I am happy to try to address some of this. Jill said, and is correct in saying, that we have processes in place in the House of Lords. It has been iterative, if I am honest. It started out as a process where I and a couple of other senior officials in the House of Lords would meet officials at the Government Departments. This was mainly about the Brexit rollover deals, of which there were many. The negotiations that were happening were not that secret because everybody knew because the Government had published a list of which were going on. We would have weekly meetings when those were going on, because there were so many of them, with officials. That was not hugely helpful for parliamentarians. It meant that the reports that we drafted to present to them were informed by official discussions but it did not bring any democratic mandate to anything that was going on.

Subsequently, with trade agreements, as you will be well aware, there have been various commitments made. Certainly, in terms of the Lords Committees we have had meetings informally with Government Ministers on a number of them about the negotiations. As you mentioned, the Japan deal was given in confidence to both Committees slightly in advance, although in a very unorthodox fashion, with documents that were quite hard to deal with. You have to appreciate that for members of the Committee trade deals can be 2,000 or 3,000 pages long and even conveying the documentation can become problematic.

My understanding—and you will know this as well as I do—was that in relation to the Australia and New Zealand agreements, rather than doing everything in confidence the idea was, as Jill has suggested, that there would be an informal process where these would be laid much earlier than the CRAG process so that the deliberations of both Committees could be informed by stakeholders, rather than with the Japan deal where essentially the Committees had a very dense text but no input from external parties. I hope that that is perceived as progress in the sense that with those new deals there will be a much longer scrutiny period where everyone will get to see them. Rather than 21 sitting days I believe that the discussion is around a period of more like three months. That makes the process much more transparent for everyone.

When the deals are under negotiation, I do not see a better way of doing it than private briefings. As people have said, there is the slight risk of leaks. I do wonder to some extent how far officials feel able to provide the most confidential information even in those circumstances. Looking at the way that other countries do it, I think New Zealand has been pretty

transparent throughout the process in terms of its negotiations with us, so it can be done.

As to the EU, I am a bit reluctant to comment on that in the sense that I only have a third-hand experience of how those committees operate, having seen the results. When I was in the EU there was always the impression that there was some degree of gossip and some documents may or may not become available slightly before. I did not have the impression that it was a major problem, to be honest, but I would defer to those who have been involved in that process directly.

Q40 **Tom Randall:** I think Arabella may have wanted to come in on that point specifically.

Arabella Lang: Thank you. It was about an earlier point about the level of information provided. Something that I do not think has been mentioned yet is the importance of independent information and impact assessment on treaties. It is something that the Government have started doing to a certain extent with trade treaties but there is a lot more scope for it. In general, in making treaty explanatory memorandums much more comprehensive, there is a strong argument that they should include information on any disproportionate impact on groups with protected characteristics or groups that experience disadvantage for their socioeconomic status, for example. That is particularly important where those groups are excluded from information sharing during the negotiations. You see the effect on businesses and industry but you do not see the effect on those particular groups.

Another aspect of it is the thing that I mentioned earlier about having an overhaul of all public treaty information. Something that I have advocated for a long time for is a new database showing exactly what the UK's treaty obligations are and how they are implemented and how they are amended, to be able to look at any point and see that this is what binds the UK right now.

Q41 **Tom Randall:** That may answer my final question, which is to you, Arabella. If the House of Commons is to develop its capacity to scrutinise international agreements, what resources are needed to do this effectively?

Arabella Lang: It does have some resources at the moment but they are rather spread around and not the resources it once had either. I believe that at the moment there is no international law specialist on the staff of the Commons library, for example, but there are international law specialists working in the Office of Speaker's Counsel who can give advice to Committees and so on.

I would also argue that Parliament needs specific expertise in treaty processes and procedures that it does not have at the moment. It was what I was providing through the Parliament and Treaties Hub but, as Jill mentioned, that does not exist anymore. It is about co-ordinating the

work done by individual Select Committees and the work done by staff who may already be there so that they can be brought in where necessary for looking at a particular treaty and also for co-ordinating with the Lords, as Alex mentioned, and with experts and interested groups outside Parliament. If you had somebody saying, "Who do I phone in the House of Commons about treaties?" you would not know who to call. That is a crucial part for the Commons and what could help to give it its own voice distinct from the Lords' voice in treaty scrutiny.

The other expertise that is needed is subject specialists on the subjects of the treaties, but that is, as Jill said, what the Commons already has in abundance. The question is more about co-ordination, treaty processes and procedures and advice on treaties.

Q42 **Tom Randall:** Thank you. Alex, you wanted to come in briefly.

Alexander Horne: Only very briefly to say that I think Arabella and Jill are right. Subject specialist expertise is already there. I do not think anyone is advocating for a sudden influx of a large number of staff. What you probably need is a bit of legal advice, which may already be there in the presence of the lawyers and obviously the Speaker's Counsel. The Lords does much of this on a shoestring budget with some excellent staff who I work with. There is a clerk and a policy analyst and another special adviser who essentially do the drafting elements of this. The Commons, as long as it relied on the Committees that it already has, could do this without that much additional resource, but I would not try to emulate the Lords and do everything on a shoestring either. I do think some proper expertise in international law would be helpful.

Q43 **Tom Randall:** A last word to Jill.

Jill Barrett: I agree with what has just been said about staffing and the need for international law advice, but I am wondering about the House of Commons itself. I agree totally that the subject matter committees are the ones best suited to doing the scrutiny of the subject matter treaties, but should there be some kind of permanent treaty committee in the House of Commons to look at the constitutional issues in the sort of way that you are doing now, monitoring across the board how well the Government are doing in terms of providing information and so forth and how well CRAG is working and whether new legislation is needed, in a way that any individual subject matter Committee cannot do? I do not know whether setting up a new treaty Committee is practicable at all and one would not presumably want it to give the impression that it was going to step on the toes of the subject matter committees.

If it was not practicable, would an existing Committee, whether it be PACAC or the Foreign Affairs Committee, take it on as a new function to add to what they already do, that they would monitor all treaties as they come in, make sure that they are going to the appropriate subject matter committee and look at the cross-cutting and the constitutional issues?

Those are all the things that we talked about today, including how devolved input is dealt with and so forth.

Tom Randall: That is an interesting question. Thank you, all.

Chair: This Committee will take a view on exactly the points that have just been raised. Thank you, everyone, for your time today. You have set the scene beautifully and given us plenty to think about as we undertake our inquiry. Thank you very much indeed.