

## **GOVERNMENT RESPONSE TO THE HOUSE OF LORDS INTERNATIONAL AGREEMENTS SUB-COMMITTEE REPORT: TREATY SCRUTINY, WORKING PRACTICES**

The Government notes the House of Lords International Agreement Sub-Committee (IAC or 'the Committee') report on 'Treaty scrutiny: working practices', which was published on 10 July 2020.

### **Introduction**

The Government has carefully considered the Committee's report and the issues it raises. The Government's formal response to the Committee's recommendations and conclusions is set out below. The Committee's findings are in bold and the Government's responses are in plain text. For ease of reference, paragraph numbering follows the 'Conclusions and recommendations' section of the Committee's report (pp. 27-30).

The Government welcomes the establishment of the IAC as a forum for scrutiny of all treaties laid before Parliament under the Constitutional Reform and Governance Act 2010 (CRaG) and for consideration of the Government's conduct of negotiations with states and other international partners. In relation to trade-related agreements, the Government looks forward to working closely and constructively with both the IAC and the International Trade Committee in the House of Commons.

The Government continues to believe that the legislative framework set by CRaG is appropriate and provides sufficient flexibility to permit Parliament to undertake treaty scrutiny prior to ratification. The current framework recognises that treaty-making is a function of the Government under the Royal Prerogative. This enables the Government to negotiate internationally with a single voice on behalf of the United Kingdom. It ensures that partners understand the United Kingdom's views and are able to have faith that the position as presented formally in negotiations is the position of the United Kingdom.

The Government welcomes the Committee's willingness to explore pragmatic and proportionate ways, without seeking legislative change, to work with the Government to facilitate treaty scrutiny, particularly in relation to future free trade agreements (FTAs).

The Government was pleased to receive the Committee's recognition and support for non-statutory practices that it has adopted to uphold its commitment to transparency. The Department for International Trade (DIT) and the Foreign, Commonwealth & Development Office (FCDO) commit to working with other Government departments to share best practice on this.

- 6. We are grateful for the support of the usual channels in finding time to debate motions relating to international agreements to which special attention has been drawn. This reflects the earlier recommendation by the House of Lords Constitution Committee. We look forward to the continuation of this support. (Paragraph 41)**
- 7. In circumstances where it is not practicable to hold a debate within the CRAG timetable, we would expect that the 21-sitting-day period be extended, unless there are exceptional circumstances to justify the ratification of the agreement without a debate. (Paragraph 42)**

All treaties requiring ratification, including FTAs, follow the established domestic scrutiny process set out in CRaG. This provides parliamentarians a period of 21 sitting days to scrutinise treaties before they can be ratified.

Requests for debates must be balanced against other demands on parliamentary time. Finding time for Parliament to grant express approval for even a small percentage of the treaties negotiated in one year may be challenging. We recognise the restraint the House has shown limiting requests for debates to those international agreements to which special attention has been drawn.

The Government believes the best way to ensure treaty scrutiny can take place within 21 sitting days is through engagement and information sharing. In this regard, the Government commits to continuing the regular constructive meetings between our officials. In addition, it may be appropriate in certain cases for the Government to share an initialled, or signed, treaty text with a relevant Select Committee and/or the IAC in advance of laying formally under CRaG, to help a Committee manage its scrutiny workload. The Government will also consider the use of section 21 of CRaG, whereby ministers can extend the 21 sitting days scrutiny period, where appropriate.

- 8. International agreements may impinge on devolved competencies and interests. While there are representatives within the UK Parliament from the constituent parts of the UK, this does not necessarily mean that Wales, Scotland and Northern Ireland will automatically be fully involved in the UK Parliament's treaty scrutiny processes. (Paragraph 50)**
- 9. While it will be for the devolved administrations and Parliaments to negotiate their precise arrangements between themselves and with the UK Government, we would encourage the creation of a real and meaningful consultation process to ensure that agreements reflect the interests of the constituent parts of the UK. (Paragraph 51)**
- 10. On the interparliamentary front, it is vital that Westminster committees engage closely with the Welsh and Scottish Parliaments and the Northern**

**Ireland Assembly in scrutinising the negotiation and agreement of future treaties. As a first step, we invite the Interparliamentary Forum on Brexit to consider the options for developing processes to support such engagement. (Paragraph 52)**

As reflected in the devolution settlements, the UK Government is responsible for the UK's international relations and alone has the power to enter into international agreements binding on the whole or any part of the UK. The Government recognises the interest of the devolved administrations (DAs), notably where implementing action by the DAs may be required, and is committed to working constructively with them to facilitate the effective implementation of our international obligations.

The Government's engagement with the DAs in treaty processes is framed by the International Relations Concordat, which is part of the Devolution Memorandum of Understanding between the United Kingdom Government and the DAs. The Government uses the International Relations Concordat as a framework for information sharing and consultation with the DAs on international matters that touch on or impact devolved matters. Under this, departments have further developed ways of engaging with the DAs, such as regular teleconferences to update on progress in continuity negotiations.

In relation to our trade agenda, DIT has built close relationships with colleagues in Wales, Scotland and Northern Ireland. These discussions will continue to develop as the UK pursues an ambitious independent trade policy. We are grateful to the DAs for the constructive and useful discussions to date and it will be critical for these to continue in the future.

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

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

The Government notes this and looks forward to considering the IAC's proposals on categorisation as a tool to facilitate the proportionate scrutiny of treaties.

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

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

The Government is supportive of the Committee's efforts to build relations with stakeholder groups and recognises the importance of sector specific expertise to trade policy. That is why we have established the Trade and Agriculture Commission, which represents farmers, retailers and consumers in the UK, advising Government on trade policies to adopt to secure opportunities for UK farmers. This is in addition to other DIT engagement structures including: the Strategic Trade Advisory Group and Expert Trade Advisory Groups.

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

The Government shares the view that high-quality, informative Explanatory Memoranda (EM), as provided for in section 24 of CRaG, are a key part of effective treaty scrutiny. The Government has taken previous parliamentary concerns into account in the development of the new EM template, which is publicly available [here](#).

**16. We are grateful that the Department for International Trade has confirmed that the commitments made in its Command Paper, Processes for making free trade agreements, published in February 2019, continue to apply. In particular, we believe that the commitment to allow committees time to make detailed reports on any agreement that has been reached, prior to laying the agreement under the CRAG Act, will prove essential to allow**

- for proper scrutiny. We encourage other departments across Whitehall to now follow the Department for International Trade's lead. (Paragraph 82)**
- 17. We welcome the constructive engagement that we have received from the Department for International Trade as we begin our work. The public-facing documents on the proposed UK-US and UK-Japan Free Trade Agreements have been helpful in initiating our scrutiny work. (Paragraph 91)**
- 18. It is important that the Government sets out, at an early stage in the process, clear negotiating aims and objectives, so that the public can understand why the Government is seeking these FTAs, and Parliament can evaluate how effectively the Government has met its objectives. (Paragraph 92)**

#### Free Trade Agreements:

The Command Paper, "Processes for making free trade agreements" was published by the previous administration, prior to the 2019 General Election. This Government's position is that it is committed to transparency and will ensure that Parliament is kept appropriately engaged and informed on its trade policy, notably the negotiation of FTAs with partner countries. We are committed to striking the right balance between respecting the UK's constitutional arrangements, ensuring the Government can negotiate in the best interests of the UK; and ensuring that Parliament has information to effectively scrutinise our trade policy.

In that vein, the Government has re-stated a number of commitments in relation to trade agreements. The actions this Government has taken to uphold transparency and work with Parliament include:

- Providing extensive information to Parliament on our negotiations, including publishing our objectives and economic scoping assessments prior to the start of talks.
- Keeping Parliament informed through regular updates on the progress of negotiations, including close engagement with the International Trade Committee in the House of Commons and the IAC in the House of Lords.
- At the end of negotiations, a commitment to produce an impact assessment of the final treaty prior to it being laid before Parliament for scrutiny under CRaG.
- In addition, the Government will seek to allow time between finalising a new FTA and laying it before Parliament under the CRaG procedure, so the relevant scrutiny committees in Parliament may produce an independent report on the agreement. This will assist parliamentarians and the public in understanding the agreement and its potential implications and reflects the Government's commitment to transparency.

- Requests for debates must be balanced against other demands on parliamentary time. The Government commits to continuing regular constructive meetings between our officials, to consider any requests for time to debate as part of CRaG.

The Government welcomes the Committee's recognition of these actions as constructive and supportive of parliamentary scrutiny.

The Government is pleased to note the Committee's positive comments on the comprehensive publications that DIT published ahead of starting negotiations with the US, Japan, Australia and New Zealand. These documents included: our negotiating objectives for each partner country; the Government's response to public consultations/call for evidence on negotiations with those partners; and an initial economic scoping assessment for each negotiation. These included assessments on the potential impacts on UK businesses, consumers and workers. The Government will continue to publish its negotiating objectives ahead of entering into negotiations on new FTAs with partner countries.

To provide additional transparency and assist Parliament in the scrutiny process for our trade continuity programme, the Government has been publishing Parliamentary Reports on all continuity FTAs to explain our approach to delivering continuity and any differences between signed continuity FTAs and the related EU agreements. These reports have helped to inform the Committee's scrutiny reports on those FTAs.

### Non-trade-related treaties

The profile and nature of FTAs, including their length and breadth of scope, warrants the specific regime of engagement and information provision that DIT has developed. For other treaties, the Government is committed to information provision, proportionate to their importance and the level of public interest.

Whilst the Government must retain ultimate discretion over the amount and detail of any information shared with Parliament, the Government remains committed to the principles of transparency and positive engagement and will carefully consider the provision of information to facilitate Parliament's treaty scrutiny role on a case-by-case basis. At the outset of negotiations, departments will consider how best to engage with Parliament. Where appropriate, the Government may provide such additional information as notifying Parliament of the opening of negotiations and updating on ongoing negotiations, via confidential or public briefings, written ministerial statements, letters or official-level meetings.

Decisions on information provision will be considered by weighing the need for transparency and positive engagement with Parliament against a range of factors including: any confidentiality requirements of negotiations; third country concerns, or the UK's relationship with other states; and, whether doing so could be detrimental to the UK's negotiating position.

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

The Government appreciates the Committee’s understanding on the limits of sharing confidential information regarding ongoing free trade agreement negotiations. The Government has a responsibility to protect UK interests in our international negotiations and ensure we do not release information that would undermine our negotiating positions or our partners’ legitimate expectations of confidentiality. A presumption – or even requirement – to share sensitive information, including legal texts, would be inappropriate.

Parliament itself has recognised this important principle in other contexts, including the Freedom of Information Act 2000, which contains an exemption covering international relations.

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

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

Memoranda of Understanding (MOUs) are used where it is appropriate to conclude a statement of political intent or political undertaking, and where there is no requirement for a legally binding framework. They can be useful tools for arrangements to be established quickly or operate flexibly, for detailed provisions which change frequently,

for primarily technical or administrative matters, or for situations where confidentiality is required, for example, in defence matters or technology.

In general terms, MOUs are drafted in non-legally binding language to reflect political commitments. They are not binding as a matter of international law and are not published or laid before Parliament as a matter of Government practice.

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

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

Amendments to treaties that require ratification are laid before Parliament, alongside an Explanatory Memorandum, in accordance with CRaG. It is the Government's intention that the majority of important treaty amendments will be subject to ratification and therefore will be submitted to Parliament for scrutiny in accordance with CRaG.

However, some amendments to treaties do not require ratification and would therefore not trigger CRaG. It is usual for such amendments to make technical changes to treaties, for example, to technical schedules within FTAs. The Government agrees with the IAC that it is important to have a complete and up-to-date record of the treaties to which the UK is a party, and so the FCDO is working with departments to ensure that all amendments to treaties are published in the UK's Treaty Series, including those that are not subject to CRaG.

A recent example of this is the publication by the Government of Decision 1/2020 of the Withdrawal Agreement Joint Committee, which made largely technical amendments to the UK-EU Withdrawal Agreement. Where many technical amendments may be made in the course of implementation of a treaty, the lead department will decide how best to notify Parliament, including whether to include explanatory material.

**25. We invite the Government to engage with committees to determine the most effective way of supplying additional information on international agreements, including decisions on derogations, withdrawal from**

**agreements, and decisions arising under dispute resolution provisions. We acknowledge that these should be scrutinised in a proportionate way: a sifting mechanism, perhaps similar to that of JSCOT, could offer a way forward. (Paragraph 115)**

The Government welcomes the Committee's interest in the ongoing implementation of international agreements, and acknowledges that parliamentary scrutiny does not necessarily end with ratification.

The volume and scope of such additional information will vary according to the type of treaty. The Government would welcome engagement with the IAC and other relevant parliamentary Committees to consider the best way to supply additional information on treaties, including decisions on derogations, withdrawals and those that arise under dispute resolution provisions. With regard to FTAs, DIT envisages accounting for their implementation in an annual report on the UK's trade policy.