



HOUSE OF LORDS

European Union Committee –
International Agreements Sub-Committee

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Rt Hon. Dominic Raab MP
Secretary of State for Foreign Affairs
Foreign, Commonwealth & Development Office
King Charles Street
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9 October 2020

Croughton Annex

Dear Secretary of State,

We are writing, formally, to request disclosure of the documents relating to the Croughton Annex on immunity arrangements for US personnel and their families, which you highlighted in your written ministerial statement of 22 July.

Following informal discussions, we understand that the Foreign Office is unwilling to provide a copy to our Committee, even in confidence, on the basis that it is not Government practice to do so. This would set a very unfortunate precedent. You will no doubt recall that the third limb of the Ponsonby Convention was a commitment that, in addition to the undertakings made in respect of ratifiable treaties, the Government desired that Parliament should:

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

We believe that the Croughton Annex agreement meets these criteria, and the fact that you made a Written Ministerial Statement to Parliament would support this view.

We note the Government's response to our recent *Treaty scrutiny: working practices* report simply states that Memoranda of Understanding (MoUs) are “not published or laid before Parliament as a matter of Government practice”. Nonetheless, during the debate on that report, on 7 September 2020, Lord Ahmad indicated that “in situations where MoUs raise questions of public importance, it might be appropriate for the Government to draw such matters to Parliament's attention.” This reflects the view of (then) Lord Chancellor, Rt Hon Jack Straw MP, who told the Joint Committee which considered that Draft Constitutional Renewal Bill (which eventually became the Constitutional Reform and Governance Act 2010) that disclosure of MoUs could be done on an *ad hoc* basis, depending on importance, and that “for the future, I could envisage that, if such a memorandum were disclosable, albeit in confidence, it might be examined by a Select Committee.”

Our working practices report merely requested that a system be put in place for the disclosure of politically important MoUs. There are precedents for the disclosure of important MoUs to select committees, on request. For example, in 2005, the MoU between the UK and Libya, signed in 2005 to facilitate returns to Libya, was disclosed to the EU Select Committee and published in a report. Our strong view is that the new Croughton Annex agreement merits consideration by a select committee on an *ad hoc* basis, and as it is within our remit to consider such agreements, we wish to do so. The refusal to allow Parliament to do so, or to provide an explanation indicating that the request has been considered on its merits rather than on the basis of practice, would strike us as rowing back from the constructive discussions we have had with the Foreign Office about working practices.

While we accept that there is a distinction between documents which are intended to create legal relations and political agreements, the distinction between these instruments can sometimes be blurred, and on occasion treaty-like documents, such as MoUs, may be more important in their effects than most treaties. It would be most unfortunate if the Government sought to create a blanket rule of non-disclosure in respect of these documents, in breach of the convention underpinned by the Ponsonby Rule.

Suggestions have been made that MoUs are not disclosable because they are not legally binding. Yet simply calling a document an MoU is not sufficient to guarantee that it does not constitute a treaty for the purpose of the Vienna Convention on the Law of Treaties. Article 2 of that Convention provides that:

“1. For the purposes of the present Convention:

- a. “treaty” means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”

In the light of the case of *Somalia v Kenya* (2017, International Court of Justice), where it was stated by the court that the MoU at issue there was a treaty, it is evident that there is at least a risk that a document that the Government identifies as an MoU might actually be a treaty for the purposes of the Vienna Convention, if it is deemed that there was an intention to create legally binding obligations between the parties.

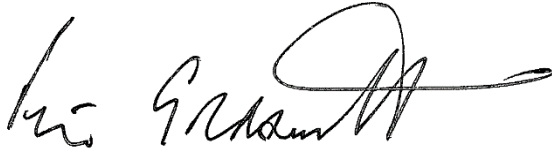
In the current case, it would be particularly concerning if it appeared that there was an attempt to conceal from Parliament an agreement which potentially impacted upon the interpretation of the Vienna Convention on Diplomatic Relations, as well as extradition arrangements with the United States, which have proved so controversial in the Harry Dunn case.

Accordingly, we would ask that your officials contact our Clerk to settle upon the most appropriate way to disclose the document.

I am copying this letter to Tom Tugendhat MP, Chair of the Foreign Affairs Committee, to whom you wrote regarding the Agreement, Chris Shaw, Clerk to the Foreign Affairs

Committee, Rt Hon. Harriet Harman MP QC, Chair of the Joint Committee on Human Rights,
and Lucinda Maer, Clerk to the Joint Committee on Human Rights.

Your sincerely,

A handwritten signature in black ink, appearing to read 'Lord Goldsmith', with a large, stylized flourish at the end.

Rt Hon. the Lord Goldsmith QC
Chair of the House of Lords International Agreements Sub-Committee