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Public Administration and Constitutional Affairs Committee

Parliamentary Scrutiny of International Agreements in the 21st century

Second Report of Session 2023–24

Report, together with formal minutes relating to the report

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Public Administration and Constitutional Affairs Committee

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Summary

The UK's constitutional arrangements for reaching international agreements and how they are scrutinised by the UK Parliament has been brought to the fore by the UK's withdrawal from the European Union. We have found these arrangements to be wanting in terms of the opportunities provided for scrutiny and in the unfettered exercise of the international relations prerogative power, and as a consequence consider the status quo to be constitutionally inappropriate in the 21st century.

International agreements broadly take two forms: legally binding agreements known as 'treaties', and agreements that are politically but not legally binding, known as 'non-legally binding instruments (NLBIs)'. Under the UK's constitutional arrangements, the power to negotiate and enter into treaties is drawn from the royal prerogative. This means that the power still rests notionally with the sovereign, but in practice is exercised exclusively by the Government, who have considerable power and flexibility in how it is used. In order for the exercise of the prerogative power by the Government to be legitimate, a Minister must assure themselves that they are acting in accordance with the will and confidence of the House of Commons.

The UK is a dualist state, meaning that our domestic law (law that has effect within the state) is separate from international law (law that places obligations on the state at the international level), and so international law obligations must be implemented to have effect in domestic law. At first glance, this appears to provide Parliament with the opportunity to consider treaties during their implementation phase. However, treaties are often implemented either only in part through primary legislation or through secondary legislation. As such it is clear that Parliament's opportunity to debate, approve or reject implementing legislation is no substitute for proper parliamentary consideration of the entirety of a treaty.

While the UK was an EU Member State, many of the treaties the UK was party to were negotiated and scrutinised at the EU level. Now the UK has left the EU, treaty scrutiny arrangements have reverted to those that emerged and crystallised almost a century ago. It is clear that during the last century there has been significant quantitative and qualitative changes to the nature of international agreements. International agreements now reach into people's everyday lives in the UK and around the world, with agreements now concerned with domestic as well as international affairs. Accordingly, this makes them an issue of fundamental concern for Parliament and the scrutiny of international agreements one of its core constitutional functions.

Until 2010, Parliament had no statutory role at all in the process of the UK entering into international obligations. Instead, by convention, Parliament was given the opportunity to consider and scrutinise treaties (at least, that is, those that require ratification) for 21-sitting days. The Constitutional Reform and Governance Act 2010 (CRAG) sought to place this convention into statute which, for the first time, provided the House of Commons with a legal tool to delay ratification where it was not satisfied with a treaty. Under CRAG, the Government is required to lay some treaties, along with an explanatory memorandum, and after a period of 21-sitting days, if the Commons has not voted to delay ratification, a treaty can be ratified. The evidence we received was clear that

CRAG has been an insufficient legislative tool to facilitate meaningful Parliamentary scrutiny of treaties. We identified three main areas of concern with the current system for parliamentary scrutiny of international agreements under CRAG:

- the current legislation provides only a passive role for Parliament and as such there is no opportunity for Parliament to express its explicit approval or disapproval of a treaty.
- several categories of treaty are not captured by CRAG at all.
- the 21-sitting day period is an arbitrary and, in many cases, wholly insufficient period for the scrutiny of treaties, especially in light of their increasing length, complexity and impact on the domestic level.

In order for the arrangements for entering into treaties to respect the core constitutional principle of Parliamentary sovereignty, Parliament must be given the opportunity to give its express approval to all treaties before they can be ratified or enter into force. We recommend that CRAG be amended to implement new arrangements to give effect to this principle and propose a new system by which the House of Commons must indicate its explicit approval of international agreements for them to bind the UK.

Under the new system, the Government would be required to submit all treaties to a sifting committee, which would have 21-sitting days to recommend either a 'standard' scrutiny period of 21-sitting days, or an 'extended' scrutiny period which will vary in length depending on the content of the treaty itself. The purpose of the scrutiny period is to allow parliamentary committees, as well as other stakeholders across the UK, to carry out effective scrutiny of the treaty and to inform the debate in the House of Commons to approve the treaty. A treaty would then be brought forward for a debate and approval vote in the House of Commons. Amendments to treaties by contracting parties or bodies established under those treaties, which are currently often not captured under the CRAG arrangements, should also be provided to the sifting committee so that Parliament can consider those which the committee deems to require scrutiny and approval.

The other category of international agreements we examined in this inquiry is non-legally binding instruments (NLBIs). These are political agreements reached between states or other international actors which create no legally binding obligations under international law, but can impose political obligations that guide Government action and can even result in financial obligations being placed on the UK. When the UK makes such commitments, this should be viewed as essentially equivalent to making a legally binding obligation. In our view, Parliament needs to be kept informed of all international agreements, including NLBIs. We therefore call for the establishment of a central repository for all non-binding instruments - to be published on GOV.UK - and for Parliament to be notified of all new or updated documents added to the repository. We also recommend that a convention be established whereby if Parliament raises concern about an NLBI, the Government will make time for a debate on that instrument on the floor of the House.

For Parliament to carry out its constitutional role effectively in regard to the scrutiny of international agreements, it is not enough for it only to be involved at the end. A new

approach to thinking about how the UK reaches international agreements, whereby Parliament is involved throughout the treaty process, including a role in setting negotiating mandates and monitoring ongoing negotiations, is required. We recommend that a working practices agreement setting out arrangements for how Parliament will be informed of the progress of negotiations and consulted on negotiating mandates be produced.

While there has been a recognition that Parliament's role in the scrutiny of international agreements is insufficient for some time, the House of Commons has still not developed satisfactory systematic scrutiny arrangements. The House of Commons' ability to carry out satisfactory and effective scrutiny was further set back by the abolition of the International Trade Committee in 2023. The departmental committee structure in the House of Commons, however, makes it well placed to carry out detailed policy-focused scrutiny on international agreements. We recommend that the scrutiny of international agreements be added to the core tasks and remit of all relevant committees. Moreover, we recommend that a dedicated treaty scrutiny committee is established to act as the focal point for and to lead on the scrutiny of international agreements in the House of Commons.

While the legal authority and responsibility for international agreements rests with the UK Government, devolved governments and legislatures will necessarily have a legitimate interest where agreements intersect with areas of devolved competence. We found that the current arrangements for timely and meaningful consultation between the UK and devolved governments on the negotiation of international agreements that impact areas of devolved competence are not working effectively, and have thus recommended that they be updated or replaced. Devolved legislatures will also have an interest in scrutinising aspects of an international agreements that fall within areas of devolved competence. We recommend that time for this scrutiny is factored into the sifting committee's considerations when setting the scrutiny period for treaties.

Finally, the UK represents both the Crown Dependencies and the Overseas Territories at the international level. This means that the UK negotiates treaties on their behalf or extends treaties to them with their consent. Under the new system we recommend in this report, these actions would require the approval of the House of Commons. As such, a convention should be established whereby the House of Commons would not be called upon to approve a treaty or extension of a treaty relating to a Crown Dependency or an Overseas Territory unless the relevant territory had already expressed its approval for that treaty or treaty extension.

1 Introduction

1. This report considers the UK's constitutional arrangements for making international agreements and how these agreements are scrutinised by Parliament and by other relevant stakeholders. This issue has been brought to the fore by the UK's withdrawal from the European Union, but is also an issue that touches on the core constitutional arrangements of the United Kingdom.

2. The UK's withdrawal from the European Union has already stimulated a considerable amount of interest and work in this area. In 2019, the House of Lords Constitution Committee published a report on the parliamentary scrutiny of treaties. This recommended the establishment of a treaty scrutiny committee. The establishment of an International Agreements Sub-Committee of the House of Lords European Union Committee, and subsequent creation of the International Agreements Committee (IAC), has seen that House take the lead on international agreement scrutiny activities in the UK Parliament. The House of Commons has lagged behind the House of Lords in this area to date; indeed, the House of Commons International Trade Committee, which was established in 2017 and was undertaking the most systematic scrutiny in an area of international agreements of any Commons committee, was abolished in April 2023 after machinery of government changes moved the functions of the Department for International Trade into the newly-created Department for Business and Trade. While this inquiry has looked at the overall arrangements for parliamentary scrutiny of international agreements, we have had a particular focus on how the House of Commons currently carries out its scrutiny and how it can improve that scrutiny in the future.

3. We are grateful for the work already done in this area by the House of Lords Constitution Committee in its *Parliamentary Scrutiny of Treaties* report, the EU Committee's International Agreements Sub-Committee in its *Treaty Scrutiny: Working Practices* report, and the International Agreements Committee in its *Working Practices: One Year On* report. We are also grateful for the work done by the House of Commons International Trade Committee, and we note with special interest its *UK trade negotiations: parliamentary scrutiny of free trade agreements* report. All of these reports have looked at the immediate issues around international agreement scrutiny post-EU Exit and the short-term practical issues that need to be addressed. Our inquiry has sought to undertake a wider and deeper consideration of this area.

4. This report will demonstrate that the scrutiny of international agreements in the 21st century must be considered as a core constitutional function of Parliament, thus as a necessary part of the core constitutional functions of legislating (parliamentary sovereignty) and holding the Government to account (parliamentary accountability).

5. At the outset, we note that there are a number of overlapping terms commonly used in relation to international agreements. In this report, 'international agreements' refers to all agreements, both legally binding and non-legally binding. We will use the term 'treaty' to refer to all legally binding agreements. We will use the abbreviation 'NLBI' to refer to all non-legally binding instruments and memorandums of understanding.

6. In carrying out this inquiry, we received 28 written submissions and held eight oral evidence sessions. We would like to extend our thanks to all those who have contributed to this inquiry. As part of the inquiry, we also conducted a number of overseas visits to consider

different aspects of the treaty process in other jurisdictions. In Norway, we held meetings with members of the Storting (Norwegian Parliament), the Norwegian Government and other stakeholders; in the European Parliament, we met with committee representatives, MEPs, and officials to better understand the EU treaty system. In Brussels, we met with committees of the Belgian federal and Walloon Parliament, as well as representatives of the Belgian federal government. In Gibraltar, we met with representatives of the Government of Gibraltar, Parliament of Gibraltar and various stakeholders, and explored the relationship between the UK and its Overseas Territories in relation to international agreements. We would like to extend our thanks to all those who met with us and facilitated these visits, as they were both enlightening and informative.

2 The constitutional position: the royal prerogative, the dualist system and international law

The foreign relations prerogative

7. The royal prerogative provides the legal basis for the Crown (executive) to act where historic authority has not been superseded and forever removed by an Act of Parliament. Over time, the breadth and extent of prerogative power has diminished, and the person or persons effectively exercising the prerogative power has also changed, with the rise of representative government and the development of democratic institutions. As the constitutional scholar A. V. Dicey described it in 1885, the royal prerogative power that exists today is:

> both historically and as a matter of actual fact nothing else than the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown.[1]

8. Our predecessor committee looked in some detail at the historical origins and development of the royal prerogative and how its legitimate use has changed over time in the UK's constitutional arrangements.[2] In this report, we have sought to draw and build on this consideration, rather than revisit the matter afresh. As our predecessor committee set out, the understanding of the legitimate authority to use the prerogative powers has changed over time, from the idea that they are exercised on the authority of the divine right of kings,[3] to the king acting as a delegate and sovereign representative of the people, to the king acting in council with ministers, to the view that the powers must be exercised by ministers acting on behalf of the sovereign. In a parliamentary democracy in the 21st century, our predecessor committee took the view that:

> the authority for the Government to exercise the royal prerogative is derived from having the confidence of the elected House of Commons. This fact in no way diminishes the responsibility and accountability of the Government for its policy in relation to foreign affairs and the use of military force. It is, therefore, of paramount importance that every Member of the House of Commons understands that the Government of the day ultimately enters into military conflict on the basis of an authority which Members themselves have conferred through the mechanism of the confidence of the House.

1 A.V. Dicey, Introduction to the Study of the Law of the Constitution, Liberty Fund (1915), 828

2 Public Administration and Constitutional Affairs Committee, Twentieth Report of the session 2017–2019, The Role of Parliament in the UK Constitution: Authorising the use of Military Force, HC 1891

3 The divine right of Kings, is view that kings derive their authority directly from God and so cannot be held accountable by any earthly authority. It is a reformation concept often associated with Henry VIII of England and James VI &I of Scotland and England. Its origins in European politics lay in the medieval conception of God awarding temporal power to political rulers in parallel to the award of spiritual power to the church.

9. Among the most significant of the remaining prerogative powers are those relating to the conduct of foreign relations, in particular the power to use force externally, and to negotiate and enter into agreements with other states and international actors. As the UK Government sets out:

> In the United Kingdom, treaty-making (negotiating and entering into international agreements) is undertaken by [His] Majesty's Government under the Royal Prerogative.[4]

Royal prerogative powers are a source of non-statutory executive authority exercised by or on behalf of the sovereign. This means that there is no statutory legal basis for the Government to negotiate, sign, ratify, derogate, or withdraw from treaties. No Parliament has ever purposefully vested the executive with these powers or functions. Instead, these powers (and other prerogative powers) rest with the sovereign and thus in practice are exercised exclusively by the Government as the prerogative power in this area has never been disturbed.

10. Nigel Huddleston MP, Minister of State in the Department for Business and Trade, set out in evidence to us that the Government considers the authority for its exercise of these prerogative powers to derive from the support it commands in the House of Commons:[5]

> The Executive branch negotiates the deals, but it is obviously in many cases subject to the scrutiny of Parliament, and that makes sense. The underlying principle is that we do not negotiate treaties or agreements that are not in the UK's interests. Therefore, there should always be a hope and expectation that when the Executive is negotiating a deal, and therefore presenting a deal to Parliament, it should transparently be in the UK's interest and, therefore, the expectation is that it should command support from Parliament. We should not be conducting treaties if we are not confident, they command the support of Parliament. As long as we are confident they are in the best interest of the UK, we should always be in a comfortable position.[6]

11. David Rutley MP, Parliamentary Under-Secretary of State at the Foreign, Commonwealth & Development Office (FCDO), explained to us that the powers the Government uses to negotiate and reach treaties:

> derive from powers that historically came from the Crown, but over the years their exercise has gradually passed to the Government. This is simply the exercise of Executive power as we know it. It is entirely standard practice across the world that, in the areas of international relations and treaty making, these powers vest in the Executive branch of Government. That ensures we have one single voice at the international level and are able to respond flexibly and effectively to developments in what is a fast-changing world, and we have seen that particularly over the last few years.[7]

12. The view that the main effect of the prerogative is to place the power to make treaties with the executive was supported throughout our evidence. Dr Mario Mendez, Reader in

4 H. M. Government (SIT0010)
5 Q367
6 Q368
7 Q366

Law at Queen Mary University of London, explained to us that most countries expressly allocate the power to make treaties to their executive branches, and, even in those countries that do not do this, the Vienna Convention on the Law of Treaties 1969 (the Vienna Convention) recognises the roles of "Head of State, the Head of Government and the [Foreign] Minister" for the purposes of concluding treaties.[8] Dr Mendez concluded that:

> In short, it is an executive power. It is also an executive power when it is the royal prerogative, as it is in the United Kingdom. I don't think much currently turns on whether it is a prerogative power, as is the case in the United Kingdom, or if it is expressly allocated in your constitutional text as a constitutional power.[9]

13. However, some concerns have been raised about the continuation of the prerogative in this area. For example we have heard concerns from Keep Our NHS Public that the current arrangements mean that "the Executive is free to act without the approval of Parliament at almost every step in the negotiation process".[10] To address what they describe as the "current democratic deficit" in this area, they argue that the royal prerogative should be removed.[11] The Public Law Project also highlighted that one option for reform would be that "treaty powers could be transferred out of the royal prerogative entirely, and placed under statutory authority, following the trajectory of other prerogative powers".[12] However, this was not included as one of their recommendations to us.

14. Baroness Hayter of Kentish Town, the then Chair of the House of Lords International Agreements Committee, expressed concern about how the Government treated the royal prerogative, telling us that it has a tendency to use it as "a sort of excuse for doing what they want over agreements".[13] She said her preference was for the powers to be set out in statute, but told us:

> whether it is in statute that we give it to Government to do, or whether it is the historical powers, it seems to me that the important thing is that Government, even when it is using the royal prerogative, is doing it on behalf of Parliament.[14]

15. **Under the UK's constitutional arrangements, the power to negotiate and enter into international agreements is a prerogative power; as such, the power still sits notionally with the sovereign, but in practice is exercised exclusively by the executive (i.e Ministers of the Crown). Prerogative powers are legitimately exercised by Ministers owing to the fact that they are understood to have the confidence of the House of Commons and are ultimately accountable to Parliament for any such exercise.**

16. **While we believe that the prerogative should continue to be the source of the power for the Government to negotiate and enter into international agreements, it is clear that the manner and way in which that prerogative power is exercised needs to be more clearly and widely understood. The current arrangements grant the Government**

8 Q325
9 Q325
10 Keep Our NHS Public (SIT0005)
11 Keep Our NHS Public (SIT0005)
12 Public Law Project (SIT0019)
13 Q262
14 Q264

considerable power as well as flexibility in how they are used. We favour maintaining this flexibility but are alive to concerns about the potential for abuse of this power. As such, it must be understood that there are clear constitutional limits on the use of this power by ministers. The authority for a Minister, and the Government in general, to exercise the prerogative power is derived from the Government having the confidence of the democractially elected House of Commons. Each and every exercise of prerogative power by a Minister should have the confidence of, and conform to the will of, the House of Commons. It is the responsibility of all Ministers, in their exercise of these powers, to assure themselves that they are acting in accordance with the will and confidence of the House of Commons.

The UK's dualist system

17. Monist states are those in which treaties can directly form part of domestic law and be referred to by domestic courts once those treaties have been brought into force (through ratification or other means), without the need for further domestic implementation. Dualist states, such as the UK, are those in which treaties have no status in domestic law in and of themselves and must be incorporated through domestic legislation to have effect or be relied on in domestic courts. This means that in the UK, domestic law (law that has effect within the state) is separate from international law (law that places obligations on the state to act in the international realm). So, while the UK may enter into a treaty, through which it commits to do or act in certain ways, this by itself does not bind the UK as a matter of domestic law. Incorporation into domestic law can be done either directly through a new Act of Parliament, through secondary legislation powers set out in an existing Act of Parliament, or through non-statutory mechanisms such as updates to guidance or rules. This legal position was clearly set out in much of the evidence to this inquiry.[15]

18. At first glance, the dualist system appears to provide a neat division of responsibilities whereby the Government is tasked with negotiating and reaching agreements at the international level, and then Parliament is tasked with scrutinising the implementation - in domestic law - of any new or expanded international obligations. However, in practice in the UK, this is a false dichotomy. Frequently, there is no legislative stage to the process, because the international law obligations are capable of being met by existing legislation or achievable by non-statutory means. Where there is a legislative requirement, this can often be achieved via secondary legislation alone, which involves minimal parliamentary scrutiny. Where primary legislation is required, this will frequently only be for particular parts of the agreement and not for the agreement as a whole, thus the scope of a debate on implementing legislation may cover only a small aspect of a wide-ranging agreement.[16] Moreover, even where such legislation is required to implement new legal obligations, it does not give Parliament the power to reject or amend the treaty itself and it generally comes too late in the process to influence the content of the treaty.[17]

19. Alex Horne, former legal adviser to both the House of Lords European Union Committee and its International Agreements Committee, raised the concern that the UK's

15 For example see: H.M. Government (SIT0010); Sir Michael Wood (Barrister; Member of the UN International Law Commission at Twenty Essex Chambers; UN International Law Commission) (SIT0003);The Bar Council (SIT0013)

16 Qq160–170

17 Dr. Emily Jones (Associate Professor at Blavatnik School of Government, University of Oxford); Danilo Garrido Alves (Research Officer at Blavatnik School of Government, University of Oxford); Anna Sands (Research Officer at Blavatnik School of Government, University of Oxford) (SIT0012)

dualist system "gives people the misconception that Parliament's role is in the legislation-making bit of this process".[18] In many other dualist systems, the legislature is involved earlier in the process and considers not simply those parts of a treaty that need to be implemented in domestic legislation, but the treaty as a whole. This concern was shared by Arabella Lang, Director of Research at the Public Law Project, and former Clerk in the House of Commons Parliament and Treaties Hub and House of Commons Library, who told us:

> 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.[19]

20. A concern raised throughout the evidence received was that debates and votes on implementing legislation were taken by the Government to indicate Parliament's approval of the overall treaty. Both Minister Huddleston and Minister Rutley suggested to us that they felt implementing legislation is one way in which Parliament can indicate its approval or otherwise of a treaty.[20] However, a recurring theme in the evidence we received was that implementing legislation is not an "effective substitute for a debate of the treaty itself".[21] Richard Gardiner raised the concern that the decision on whether to become a party to a treaty and how to implement a treaty get "rolled up" when they are in fact separate stages of treaty consideration.[22] Furthermore, the concern was expressed to us that, under the current arrangements, it is not clear that Members of Parliament will be aware of the full context or content of the treaties they are legislating to implement. Penelope Nevill told us that often "debating one instrument, a statutory instrument, or a piece of primary legislation, perhaps might not shed much light on the agreement as a whole".[23] Furthermore, Jill Barrett, former legal counsellor at the Foreign & Commonwealth Office, told us:

> 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.
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> 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

18 Q24
19 Q26
20 Q386, Qq401–402,Q412
21 Dr. Emily Jones (Associate Professor at Blavatnik School of Government, University of Oxford); Danilo Garrido Alves (Research Officer at Blavatnik School of Government, University of Oxford); Anna Sands (Research Officer at Blavatnik School of Government, University of Oxford) (SIT0012)
22 Q177
23 Q176

> 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.[24]

21. It was also clear in our evidence that while in theory domestic and international law are technically separate in the UK dualist system, in practice the two are intertwined, and what is agreed at the international level will inevitably affect the domestic level. For example, Professor Lorand Bartels, Professor of International Law at the University of Cambridge, told us:

> There needs to be a match between what treaties do at the international level and what parliaments enact at the domestic levels, otherwise there is a problem. The treaty is binding on the state and then if domestically the state wants to do something different or does not bring into force the legislation that the treaty requires, the state is in violation of its international treaty obligations. It is very important to make sure that what happens at the international level in entering into international obligations is reflected domestically otherwise that mismatch constitutes a breach and that is bad news under international law. Even if under domestic law you can say, "We are sovereign domestically, we don't much care", that does not help you at the international level.

22. **The UK is a dualist state, meaning that, in order for obligations entered into through treaties to have effect in UK law, domestic implementation is required. This is an important feature of the UK's constitutional system, ensuring that any changes to domestic law needed to implement treaties must be considered by Parliament. While treaties bind the UK as a matter of international law, they do not automatically have effect as a matter of domestic law. Often, provisions do not require new primary legislation to have effect in domestic law; delegated powers to make secondary legislation may be used, or only parts of agreements are presented to Parliament to consider as the remaining obligations can be met without legislating. Furthermore, the current process tends towards presenting Parliament with a treaty whose terms have already been finalised, leaving it with no meaningful scope to amend or even influence the terms of the treaty.**

23. **We found the arguments that implementing legislation provides an appropriate opportunity for scrutinising and considering treaties in their entirety to be wholly unconvincing. As such, the current arrangements do not deliver a constitutionally sufficient level of scrutiny; nor do they provide an opportunity for Parliament to approve important policies which can have a significant impact on domestic affairs. *Parliament's opportunity to debate and approve or reject implementing legislation is not a substitute for proper parliamentary consideration of a treaty. Agreement to implementing legislation should not be taken to represent approval of a treaty as a whole. This should be clearly set out in the Cabinet Manual and reflected in other guidance to ministers and civil servants.***

24 Q25

International agreements in the 21st century: Changes to the scope, extent, and quantity

24. The Statute on the International Court of Justice (a treaty) lists four formal sources of international law,[25] one of which, as Professor Bartels set out to us, is: "Treaties, which are contracts between states but also between states and international organisations".[26]

25. Professor Malgosia Fitzmaurice, Professor of Public International Law at Queen Mary University of London, told us that treaties are "the most important source of international law". They are, she explained, "the central means by which states, and international organisations conduct their business".[27] The Vienna Convention includes the definition of a treaty as being:

> 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.[28]

26. A common theme in our evidence was that while the nature of treaties as contracts between states has not changed, the range of issues that they cover has expanded significantly. Professor Bartels explained to us that a century ago, when the UK's current arrangements for scrutiny of international agreements came into being, treaties were far more limited and covered what he described as the "traditional scope or coverage of a treaty", focused mainly on areas where states "rub against" each other: alliances, peace, and demarcation of territories.[29] Professor Holger Hestermeyer, Professor of International and EU Law at Kings College London, similarly explained that "past international law treaties were about determining the limits to sovereignty—'This is what we do; this is what you do'—and we put a division between the two".[30] Post-1945, however, Professor Bartels described treaties as having "come to cover much of the same ground as domestic law making" and concluded that modern treaties "cover virtually everything that you would find in domestic law".[31] Similarly, Professor Hestermeyer told us that:

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25 Article 38 of the statute of the international court of justice, list four sources:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

26 Q114

27 Q115

28 Vienna Convention of the Law of Treaties, 1969, Article 2; 1. The Vienna Convention however only covers a particular set of treaties between states in written form. While the Vienna Convention definition is the best starting point for understanding how treaties are dealt with and operate, it is important to be aware it does not include and is not the authority for a range of categories of treaties such as: tacit agreements, oral agreements, agreements between states and international organisations nor the succession of states to existing treaties. Our focus here is only on treaties that are written (the latter two), but it important to be aware of the wider range of way the UK can enter into international obligations.

29 Q116

30 Q324

31 Q116

> modern international law is about problem solving as well—problems that cannot be solved alone. That means that the form of treaty goes from what you would recognise as a contract to what you would regard as a statute.[32]

27. Dr Mario Mendez explained to us that the significance of this change is that treaties now have "very different, and much more intrusive, roles and functions" compared to those at the start of the twentieth century. He went to say that virtually all areas of human activity are now covered by treaties and, while this is not commonly recognised, "our daily lives are directly and increasingly affected by treaty obligations in a way that simply was not the case in earlier times".[33] Dr Emily Jones, Associate Professor of Public Policy at the Blavatnik School of Government, University of Oxford, explained to us that treaties have gone from "a few pages to… thousands of pages of dense legal text".[34] The scope of these agreements she went on to explain has also changed "enormously"; while traditional areas like agriculture, manufacturing, services are still included, new areas like competition policy, subsidies, human rights, environment, and labour rules now from part of these agreements.[35]

28. The problem that was set out to us, however, was not the fact that the scope, number, or content of treaties on the whole have changed, but rather that the UK has not developed the appropriate mechanisms and structures for scrutiny to keep pace with these changes. Professor Hestermeyer told us: "If Parliament wants to retain its role as the primary determiner of the rules that are applied, it cannot just neglect treaties or the rules will be set elsewhere".[36] Arabella Lang told us that the heart of the issue was that, because of the changes to treaties over the last century since the UK's parliamentary scrutiny procedures were first developed and crystallised, "without a corresponding development in scrutiny and accountability, effectively there is more power for the Government".[37] Dr Jones told us that "our scrutiny arrangements have not kept pace, so they are largely in line with the arrangements we had in 1924".[38] Dr Mendez told us: "Parliament should care about the exercise of the treaty-making power and not only should they care about that, they have an invaluable contribution to make in regulating the exercise of the treaty-making power".[39]

29. The Government maintains the view that the current arrangements for scrutiny are appropriate, regardless of the changes that have taken place to treaties over the last century. Paul Berman, Legal Director at the FCDO, questioned whether the nature of treaties had in fact fundamentally changed, telling us:

> If one looks at the huge expanse of treatymaking after the Second World War, you had treaties that were very significant and had a significant domestic impact as well. We had the setting up of the United Nations, the adoption of the European Convention on Human Rights—which of course had an important impact internally as well—and we had GATT in the economic sphere. While it is certainly true that the number of treaties the UK has engaged in has increased since Brexit—particularly FTAs—treaties

32 Q324
33 Dr Mario Mendez (Reader in Law, School of Law at Queen Mary University of London) (SIT0020)
34 Q324
35 Q324
36 Q324
37 Q6
38 Q324
39 Q324

> agreed since the Second World War have always had an important and fundamental impact across all areas of policymaking. Therefore, we do not take the position that the nature of treaties has fundamentally changed. There are areas that have been covered by new treaty-making throughout the decades since the Second World War. However, we would suggest that the importance and significance of treaties has remained consistent since 1945.[40]

30. **Over the last century, there have been significant quantitative and qualitative changes to the nature of international agreements; they now reach into people's everyday lives in the UK and around the world. They seek not only to deal with relations between states, but increasingly to address problems which one state cannot solve alone. In many instances, treaties have, as a consequence, become more akin to domestic legislation. International agreements are now concerned with domestic as well as international affairs, and accordingly this makes them a fundamental concern for Parliament.**

31. **Parliament is not sufficiently engaged with international agreements. The UK's parliamentary democracy operates on the basis of the dual constitutional principles of parliamentary sovereignty and parliamentary accountability. As such it must be understood that scrutiny of international agreements is a core constitutional function of the UK Parliament.**

32. **Currently, there is no requirement for Parliament to approve treaties. We find this situation untenable. Parliament's approval must be sought when the Government seeks to bind or change in any material way the UK's obligations under international law.** ***We therefore recommend that, as a matter of constitutional principle, all treaties should require the explicit approval of the democratically elected House of Commons before they enter into force. To be clear, this would not change the fact that treaties are negotiated and entered into under prerogative power; instead it would make the exercise of that prerogative to enter into an agreement that places, alters or removes a legal obligation on the UK, or to withdraw from such an agreement, conditional on the explicit, active approval of the House of Commons.***

International agreements and devolution

33. In relation to the UK's constitutional framework as regards devolution, while the legal authority and responsibility for international agreements and international law rests with the UK Government, devolved governments in the UK will understandably have an interest in any agreements which touch on areas of devolved competence. It is the UK Government that is responsible under international law for creating and complying with binding international obligations. The devolution statutes reflect this clear legal and constitutional position, with international relations being listed as a reserved/exempted matter in each of them.[41] The observance and implementation of international obligations may, however, overlap with devolved competence. Many of the areas in which international agreements may be reached or already exist touch on areas that would be within devolved competence, making the devolved administrations responsible for taking steps to ensure

40 Q373

41 Scotland Act 1998, Schedule 5 Part 1 Section 7; Government of Wales Act 2006, Schedule 7A Part 1 Section 10; Northern Ireland Act 1998, Schedule 2 Section 3.

that the UK meets its international obligations. This means that the devolved legislatures could, in theory, either by act or omission, place the UK in breach of international obligations, for which the UK would be legally responsible at the international level. All three devolution statutes thus include mechanisms to enable the UK Government to prevent a devolved institution placing the UK in breach of its international obligations. Given these intersections, there are arrangements in place for intergovernmental working in this area, which are set out in the Concordat on International Relations (the COIR), one of the supplementary agreements appended to the Devolution Memorandum of Understanding (the Devolution MoU). Large parts of the Devolution MoU have now been superseded by the new intergovernmental relations (IGR) arrangements set out in the IGR Review published in January 2022, but the COIR was not replaced or amended by this review.

34. The COIR sets out working practices, including making commitments for information sharing between the UK and devolved governments, in situations where international agreements are likely to impact on areas of devolved competence, or where areas of devolved competence have implications for international agreements. The COIR states that:

> The [FCDO], and where appropriate other lead UK Departments, will provide the devolved administrations with timely, relevant and comprehensive information and analysis on international developments that may affect their responsibilities or be relevant to their interests. This will include relevant reporting from UK Missions overseas, and proposals for new UK legislation and early copies of proposed UK legislation on international relations.[42]

As devolved matters can in turn impact upon international relations, there is also a commitment that:

> The devolved administrations will provide the [FCDO], and where appropriate other lead UK Departments, with timely, relevant and comprehensive information and analysis on developments in or as regards Northern Ireland, Scotland and Wales that may affect their responsibilities or be relevant to their interests. This will include information on contacts and discussions with foreign national or subnational governments or counterparts in international organisations, and proposals for new legislation and early copies of proposed legislation on devolved matters.[43]

35. Mick Antoniw MS, Counsel General and Minister for the Constitution in the Welsh Government, acknowledged that there was engagement in these areas from the UK Government, particularly around trade, at both official and ministerial level. However, he stressed that since leaving the EU there is "really no strategic structure or framework overall for the way in which international agreements are engaged with by devolved Governments".[44] Rt Hon. Angus Robertson MSP, Cabinet Secretary for the Constitution, External Affairs and Culture in the Scottish Government, told us that "there is a significant gap between the theory and the practice of intergovernmental relations, between that

42 Cabinet Office, Devolution: memorandum of understanding and supplementary agreements, October 2013
43 Cabinet Office, Devolution: memorandum of understanding and supplementary agreements, October 2013
44 Q209

which is aspired to and indeed that which is agreed". He went on to explain his concerns with the current level of engagement and operation between the UK Government and devolved governments:

> despite bearing responsibility for implementing devolved aspects of any completed treaty, devolved Governments rarely have any say in the formulation of the negotiating line that determines the content of the treaty. What should be the negotiating line for the UK as a whole is practically merely the UK Government's negotiating line and has not taken on board any of the needs, interests, concerns and expectations of the devolved Governments and the views of the legislatures. In my 18 months as Cabinet Secretary with responsibility for this area, I have not had one single meeting with a UK Government Minister to discuss treaty or other agreement negotiations and the Scottish Government's priorities.[45]

36. Both Mick Antoniw and Angus Robertson told us that they thought the arrangements in the COIR would be sufficient if they were fully adhered to, but that leaving the EU meant that it was now out of date and that, in reality, adherence to the letter and spirt of COIR often fell short. Angus Roberson told us:

> This is where it is really important to separate an understanding of the formal position from the actual reality. The United Kingdom Government no doubt will avow the fact that they do their best to maintain good relations with devolved Administrations, that they consult and that they listen to what devolved Administrations have to say. There is no commitment to act on that… We know that we will have different views and priorities. I appreciate that, but I am just talking about the processes. The processes themselves largely do not work. They do not even follow the undertakings that have been given.[46]

In a similar vein, Mick Antoniw told us:

> It is because the post-EU situation is now dysfunctional. Departments do not have any overarching strategic structure within which they could work. There is not really a formalised structure. What used to exist has fallen by the wayside. Where there is good practice, it is the result of particular relations, circumstances or individuals, or from the inter-ministerial groups and so on. There is no clear overarching umbrella in terms of how it is operating, and there is no monitoring.[47]

37. The UK Government told us that the starting point for consultation was the COIR and that this made clear that the UK Government must consult the devolved administrations on formulation of the UK's negotiating position.[48] Leonie Lambert, Deputy Director of Parliamentary Policy and Strategy at the Department for Business and Trade, explained to us how this operated in practice for trade agreements:

45 Q209
46 Q214
47 Q214
48 Q438

> we have established structures for engaging with the devolved Administrations at both ministerial and official level. At ministerial level, that takes the form of the Interministerial Group for Trade, which I think meets quarterly. It met most recently in May 2023, and I think it was chaired by the Minister sat next to me [Nigel Huddleston MP, Minister of State for International Trade]. That is supplemented by bilateral engagement on key moments. For example, when we announce that we have reached agreement to accede to CPTPP, there would be bilateral calls with the devolved Administrations specifically on that.[49]

When asked about whether the devolved administrations might be at the table as part of any potential international agreement negotiations, Minister Rutley told us:

> No. We would seek their input, but the negotiation is being done by the UK Government, which has the reserved powers. We have two Governments, with very clear responsibilities, working for the Scottish people. Sometimes individuals seek to blur those distinctions, but I am not one of them.[50]

38. **The UK Government carries out negotiations and enters into treaties for the whole of the UK. However, under the UK's devolution arrangements, day to day responsibility for areas of domestic policy which could be impacted by treaties often lies with the devolved institutions in Northern Ireland, Scotland and Wales. In these areas, consultation and coordination between the UK Government and devolved governments is done under the auspices of the Concordat on International Relations. This Concordat has not been updated since 2013. Since this time there have been significant developments in the field of intergovernmental relations; the devolution statutes themselves have changed, the UK has left the EU, and a new intergovernmental relations system has been established.**

39. **While many of the principles in the Concordat on International Relations appear to us to continue to be the right ones, the Concordat itself clearly needs to be updated, and the cooperation that it facilitates must take place in earnest.** ***We recommend that the Concordat on International Relations be replaced or updated. This new or revised document should set out clear arrangements for timely and meaningful consultation with devolved institutions on the issue of treaties and clarify how the processes for reaching treaties interact with the recently revised IGR structures. The production of or update to this document should be prioritised, and the agreed arrangements published within six months of the publication of this report.***

49 Q435
50 Q443

3 Concluding treaties

40. Treaties can be concluded in a number of different ways. They often enter into force in accordance with their terms after all parties have signalled their consent to be bound by the treaty, which is often done by a two-stage process of signature followed by ratification. Ratification is the process by which one party notifies the other party or parties that it has implemented the agreement and is ready to accept its obligations.[51] Some treaties however provide that they enter into force immediately upon signature. In other cases, even where there is a two-stage entry into force process, all or part of the treaty may be provisionally applied by the parties, which means that it takes effect before the parties have indicated consent to be bound.

41. As set out above, the negotiation and finalising of treaties are exercises of prerogative power in the UK. The ratification of treaties is the only point in the treaty process where Parliament has any formal involvement, and even this is limited. For most of the 20th and early 21st centuries, Parliament's involvement was based on a convention known as the 'Ponsonby Rule' - that a signed treaty subject to ratification will be placed before Parliament for at least 21-sittings days before it is ratified. In 2010, the Constitutional Reform and Governance Act sought to place this convention into statute, for the first time giving the House of Commons a legal tool to delay ratification if it were so minded. This, however, does not represent a formal mechanism by which Parliament can approve or reject treaties. In this part of the Report, we review the existing legislative framework and make recommendations for how it should be altered so that a treaty cannot be entered into, amended or withdrawn from without the House of Commons' active approval.

The Constitutional Reform and Governance Act 2010

42. Sections 20–25 of Part 2 of the Constitutional Reform and Governance Act 2010 (CRAG) provide the statutory basis for Parliament's involvement in the conclusion of treaties, and provides the House of Commons with a theoretical power of indefinite delay. This part of the Act operates in the following manner:

- The Government must lay the text of a signed treaty and an Explanatory Memorandum before Parliament and cannot ratify for 21-sitting days (days when both Houses sit) after it was laid before Parliament. *(Section 20)*
- If, during the 21-sitting days, either House resolves that a treaty should not be ratified, the Government may lay before Parliament a statement setting out the reason for ratifying in spite of Parliamentary disapproval. *(Section 20)*
- If the House of Commons so resolves, a new 21-sitting day period is triggered from when the Government statement is laid, and during this period the Government cannot ratify the treaty. This process may theoretically be repeated indefinitely. *(Section 20)*
- If the House of Lords resolves against ratification but the Commons does not, then the treaty can be ratified once the Government has laid its statement setting out the reason for ratifying despite Parliamentary disapproval. *(Section 20)*

51 In CRAG the term "ratification" is used to cover a number of different but analogous two-stage entry into force procedures.

- During the original 21-sitting day period, a Minister can extend the period by up to a further 21-sitting days. *(Section 21)*
- In exceptional cases, a Minister can ratify a treaty without going through the stages set out in Section 20. This provision cannot be used once either House has resolved against ratification. In these exceptional cases, a Minister must lay the treaty along with a statement indicating why there is an exceptional case before Parliament, as soon as practicable. *(Section 22)*
- A number of types of treaty are excluded from the Section 20 process. These include: double taxation treaties, and treaties concluded by governments of British Overseas Territories or the Crown Dependencies. *(Section 23)*
- There is a requirement for an explanatory memorandum to accompany any treaty laid under Section 20. *(Section 24)*
- The Act only applies to a certain category of international agreement, and to achieve this it is set out that a "treaty" means a written agreement between states or international organisations binding under international law. The Act also sets out exclusions so that the provisions of the Act:
    - do not apply to decisions made under the treaty, including by bodies established by the treaty, unless they amend the treaty or replace it in whole or in part; and
    - only applies to treaties which are subject to ratification, acceptance, approval or the notification of completion of constitutional requirements (agreements that have a two-stage procedure of signature and consent to be bound). This means for example that agreements that enter into force on signature are excluded from the Section 20 procedure. Also, treaties subject to provisional application may not go through a Section 20 process for some time, but the obligations of the treaty are in effect. *(Section 25)*

Concerns with current statutory framework

43. Throughout our evidence, CRAG has been labelled as being an insufficient statutory tool to facilitate meaningful parliamentary scrutiny of treaties in the 21st century. While it only became law in 2010, the principle underlying the mechanisms that it placed in statute are now almost a century old and were not intended to be statutory arrangements in the first place. Ultimately, CRAG placed in statue a political process that had flexibility to adapt and respond to the substance and circumstance of treaties with a process that applied it to one category of treaty, namely those with a two-stage process (where an agreement is first signed and then later consent to be bound is indicated). In addressing the question of whether CRAG enables effective parliamentary scrutiny of treaties, the Public Law Project told us:

> No. It does not require Parliamentary approval of treaties, nor scrutiny, debates or votes on treaties, or even create any triggers or mechanisms for them. It neither provides nor facilitates a power to influence the terms of a treaty while those terms might still be changed. It does not even cover all treaties (those that come into force on signature alone are not covered,

> although they may have significant impacts), let alone all treaty actions or non-treaty international arrangements. There is no clear rule on when a UK treaty or treaty amendment should require ratification and therefore trigger the CRAG requirements. And it is easy for the Government to avoid CRAG's treaty requirements, for example with a simple statement of exceptional circumstances. Its introduction had no discernible impact on parliamentary engagement.[52]

Similarly, Dr Mendez answered this question by telling us:

> CRAG is demonstrably an inadequate framework for ensuring parliamentary scrutiny of the treaty-making power and that an overhaul of CRAG combined with a Joint International Agreements Committee would be the best way to ensure more effective parliamentary scrutiny.[53]

Concerns with CRAG fall broadly into three areas: the role of Parliament, the range of treaties; and time for scrutiny and consideration.

The role of Parliament

44. The system in place under CRAG does not provide for parliamentary approval of a treaty; instead, it creates a system of 'negative approval' whereby a treaty is deemed to be approved by Parliament if Parliament fails to do anything to indicate it does not approve within the 21-sitting day period.[54] While the House of Commons can theoretically indefinitely delay the ratification of a treaty, this requires the House to actively delay ratification in perpetuity every 21-sitting days. CRAG sets out the consequence of a negative vote against a treaty's ratification, but it does not set out any mechanism or requirement for such a vote to be held; instead, it is down to the Government to allow time for the treaty to be debated following a request, or for the Opposition to use one of their allotted days for debate, provided that the Government schedules such an opportunity within the 21-sitting day period. The House of Lords, which currently carries out the majority of detailed policy scrutiny of treaties under the auspices of the International Agreements Committee, has no power to delay the ratification of a treaty if the Government wishes to ratify.[55] Jill Barrett, who was part of the team that drafted CRAG, told us that the lack of parliamentary process was "deliberate because the view in Government was that these

52 Public Law Project (SIT0019)

53 Dr Mario Mendez (Reader in Law, School of Law at Queen Mary University of London) (SIT0020)

54 Dr. Emily Jones (Associate Professor at Blavatnik School of Government, University of Oxford); Danilo Garrido Alves (Research Officer at Blavatnik School of Government, University of Oxford); Anna Sands (Research Officer at Blavatnik School of Government, University of Oxford) (SIT0012)

55 The Committee notes that the House of Lords held the first ever debate under Section 20 of CRAG on the UK–Rwanda Agreement on an Asylum Partnership on Monday 22 January 2024. The House of Lords resolved that the Government: "…should not ratify the UK-Rwanda Agreement on an Asylum Partnership until the protections it provides have been fully implemented, since Parliament is being asked to make a judgement, based on the Agreement, about whether Rwanda is safe…". This debate was held following a report by the International Agreements Committee, published on 17 January 2024, which recommended a debate under Section 20 of CRAG be held, which was granted by the Government. We also note that the House of Commons Home Affairs Committee also recommended, on 12 January 2024, that the Government schedule a debate in the House of Commons under Section 20. At the time of agreeing this report, no such debate had yet been scheduled by the Government. International Agreements Committee, 4th Report of Session 2023–24, Scrutiny of international agreements: UK– Rwanda Agreement on an Asylum Partnership, HL 43; Home Affairs Committee, Second Report of Session 2023-24, UK-Rwanda treaty: provision of an asylum partnership, HC434

things are matters for Parliament to make its own rules [about]".[56] But she described it as a "clear deficiency" that there was no procedure for a certain number of MPs to trigger a debate and a vote. She also noted that there was simply too much competition for debates and too little time allotted for those types of debates to be realistic for opposition and backbench time to be used.[57]

45. Our evidence raised concerns not only with the lack of powers Parliament has under CRAG in this regard, but also with the whole approach to the scrutiny of treaties in the UK which CRAG represents. Dr Mendez reflected the majority of our evidence, summarising that:

> CRAG created the façade of additional democratic legitimacy for the assumption of treaty obligations, while it enshrined a model in which parliamentary inaction regarding treaties so laid, the standard practice, effectively gives the Government free rein. The fact that the Commons can in theory prevent the Government ratifying a treaty laid under CRAG, which has never occurred nor to my knowledge has there been a vote on such a motion, did not incentivise parliamentary scrutiny much less effective parliamentary scrutiny. This is unsurprising given that CRAG formalised the long-standing Ponsonby Rule that had been operating in a parliamentary system where treaty-making scrutiny had long been neglected.

46. Professor Hestermeyer took a similar view, highlighting to us that the power that Parliament has at the end of the process shapes how treaty scrutiny is viewed and approached from beginning to end, telling us that, "if the only thing Parliament can do is delay the process, we can't expect any of the procedural safeguards to be really strong".[58]

47. Furthermore, CRAG also contains a provision for the Government to bypass Parliament's power to delay ratification indefinitely, should it wish to do so. Section 22 of CRAG allows a Minister of the Crown to disapply the Section 20 scrutiny requirements if the Minister "exceptionally" thinks a treaty should be ratified without those arrangements being adhered to. There are however no clear criteria set out indicating when and in what circumstances a Minister can disapply Section 20.[59] So, in theory, it could be done for any treaty as long as the Minister is prepared to set out the Government's reasons in a statement to both Houses. Section 22 has been used for example to ratify the assession of Finland and Sweden to NATO.[60] The CRAG procedures can also be disapplied in implementing legislation, as was the case during the passage of the European Union (Withdrawal Agreement) Act 2020 in respect of the Withdrawal Agreement, and again by the European Union (Future Relationship) Act 2020 in respect of the Trade and Cooperation Agreement.

48. The overwhelming view expressed in our evidence was that this negatively-framed process is wholly unsatisfactory and only pays lip service to parliamentary involvement in the treaty process and the resulting obligations placed on the UK. Furthermore, it is clear from our evidence that a straight 'up or down' vote is the only way to ensure effective

56 Q8
57 Q8
58 Q331
59 Other than this route may not be pursued once the section 20 process has already started or if either House has resolved that the treaty should not be ratified.
60 HCWS188 [Sweden and Finland NATO Accession] 6 July 2022;

parliamentary oversight of treaties, and to improve the scrutiny procedures throughout the treaty process, as the Government would be wise to engage meaningfully from the start in light of the possibility of parliamentary rejection at the end.

Range of treaties

49. Several contributors to our inquiry also raised the issue that CRAG "does not cover all treaties".[61] This is because, as Arabella Lang explained to us, CRAG's requirements are determined by the process used to conclude the treaty rather than the importance of the treaty itself. This means that all treaties that meet the two-stage criteria should be subject to Section 20, whether important or not, whereas regardless of importance, if a treaty or treaty action does not have the two-stage process, it does not engage CRAG and there is no statutory mechanism requiring the treaty to be laid before Parliament at all. Treaties that do not trigger CRAG include: treaties that come into force on signature, some categories of treaties that amend the original treaty, or derogation of a treaty. The withdrawal from treaties, which is usually done simply by an act of denunciation through a diplomatic note, also does not trigger CRAG. The challenge for Parliament under CRAG is that whether or not it gets a say is based not on the substance and significance of the agreement, but on the process used at the international level for indicating consent to be bound with the treaty or a decision made under the treaty.

50. Professor Hestermeyer described the wording in Section 25 of CRAG, which sets out what treaties are covered by the legislation, as "vague", telling us that the definition of a treaty does not include a regulation, rule, measure, decision or similar instrument made under a treaty, and that this "leaves ample space for decisions by treaty bodies to not be subject to CRAG when possibly they should be".[62] Building on this point, Dr Mendez told us that:

> Part of what is going on here is that binding law is made by the executive branches across the world and they are trying to find mechanisms that make it easier for them to amend their law without going through parliamentary procedures.

51. Moreover, while some treaties may fall within the criteria to engage Section 20, the treaty may be in effect before Parliament has completed or even has the opportunity to carry out scrutiny; this is through a process called 'provisional application'. Professor Bartels explained to us that provisional application means a treaty is signed and by agreement of the parties, without ratification, is said to be provisionally applied by the parties. This he told us:

> has the same effect as ratification but a treaty can be provisionally applied without this going to parliament, and in fact that is pretty much the point of it. The treaty is then treated as though it is in force with parliament not having a say.[63]

52. Despite the fact that a provisionally-applied treaty can be withdrawn from more easily than a ratified treaty, it has the same effect as if it had been ratified during its provisional

61 Q10
62 Q346
63 Q122

application, and will be treated as such by courts, both domestically and internationally. Professor Bartels highlighted that provisional application can last for long periods of time, telling us that provisional application was increasingly being used to get treaties going earlier, but that "ratification can take a very long time indeed".[64]

53. It is clear from our evidence that while most treaties are covered by CRAG provisions, the focus on process (being triggered by two-stage process of signature followed indication of consent to be bound), rather than importance of content, means that treaties of considerable importance could never be considered by or approved by Parliament under the provisions of CRAG.

Time for scrutiny and consideration

54. At the heart of the CRAG process is the 21-sitting day period. The evidence we received points overwhelmingly to this statutory period being too short for proper parliamentary scrutiny to take place. Indeed, the Government's decision to provide the International Agreements Committee and the International Trade Committee with copies of the New Zealand and Australia Free Trade Agreements well in advance of triggering the CRAG period indicates that they also recognise this fact. Baroness Hayter highlighted this when she told us:

> The idea that a major agreement could be laid and we could be given 21-sitting days is fanciful. In fact, the 21 days seems to go back to 1924, or possibly earlier, when neither this House nor ours had the idea of having Committees of inquiry and hearing witnesses to interrogate an agreement, so the agreement that we have had on trade—this is with the former Minister—was that much more reasonable time would be given and we would see it in advance. In fact, for Australia and New Zealand, we had it some months before it was laid. That gave us time, but that was, if you like, a gesture. That sounds a bit weedy: it was an agreement, a commitment by the Government, to do that rather than legislation.[65]

55. The Chair of International Trade Committee, Angus Brendan MacNeil MP, told us that, from his perspective, 21-sitting days was "far from adequate".[66] When asked what kind of period would be sufficient, he explained that in his Committee's experience the time needed to carry out scrutiny of a trade treaty varied depending on its length and the nature of what its sets out, so there is no set period you could say would be right for all treaties.[67] Similar concern with the inadequacy of this period was expressed throughout our evidence, and the point was made that it compares poorly with arrangements in other jurisdictions such as the US.[68] Concern was also expressed by devolved legislatures, who told us that 21-sitting days was not sufficient time to "scrutinise in any way or to actively engage with stakeholders".[69]

64 Q122; For example, Professor Bartels highlighted the example of one of the longest treaties that was provisionally applied internationally was the General Agreement on Tariffs and Trade, It dates from 1948, signed by the UK in 1947, was provisionally applied as of 1 January 1948 and continued to be provisionally applied all the way through to the establishment of the World Trade Organisation in 1995. He also highlighted that most EU trade agreements are provisionally applied because one of the member states as failed to ratify them.

65 Q272

66 Q276

67 Q277

68 Q360

69 Q246

56. When the Government was asked if it considered a 21-sitting day period to be sufficient, Minister Huddleston said the following:

> It is not just the 21 days. There were months—more than six months in the case of Australia—between the signing of the agreement and the transparency of the agreement being available. I should also say it is 21-sitting days as well, so this is quite a long period of time. Canada is the same. Australia is either 15 or 20 and New Zealand is 15. Again, we stack up well compared with other parliamentary democracies… We are conscious of the requirement and the reasonable expectation that parliamentarians have time to digest what can be quite complex material. I think we have a reasonable timeframe. Sometimes we may need to move very, very quickly on some agreements. Therefore, having a point of principle of extending it, we would be doing that for the sake of extending it and then we would lose our flexibility. We have also said we would consider extending CRAG if there was not a parliamentary debate and Parliament expressed a will for there to be a debate.[70]

57. Our evidence in this respect leads to two clear conclusions: first, the 21-sitting day period is insufficient time for Parliament, parliamentary committees, and other interested parties to consider a treaty and to assess whether there are issues of importance or concern; and second, that the Government is already aware of this and has taken proactive steps to provide trade agreement treaties in draft to relevant stakeholders - parliamentary and otherwise - at earlier points to give them additional time to conduct relevant scrutiny.

Active parliamentary approval

58. The general consensus in our evidence is that Parliament should be given the opportunity to expressly indicate its approval of a treaty via a vote.[71] When we asked the Government whether Parliament should be able to have a straightforward vote on whether it agrees to a treaty or not, Minister Huddleston told us:

> An up or down vote, no. I think the process we have at the moment is appropriate. Also most trade agreements, and many other agreements, require implementing legislation, on which Parliament does have an up or down vote.[72]

Minister Rutley concurred, telling us:

> I think the important thing is that, in our approach, we have very clear lines as to where the royal prerogative lies and the ability to exercise Executive

70 Q398

71 Arabella Lang Q10; Alex Horne Q10; Q63; Q333; Q336; Q338UKTPO - University of Sussex (SIT0007)National Farmers Union (SIT0014)Dr Mario Mendez (Reader in Law, School of Law at Queen Mary University of London) (SIT0020)Dr. Emily Jones (Associate Professor at Blavatnik School of Government, University of Oxford); Danilo Garrido Alves (Research Officer at Blavatnik School of Government, University of Oxford); Anna Sands (Research Officer at Blavatnik School of Government, University of Oxford) (SIT0012)Trade Justice Movement (SIT0002) RSPCA (SIT0004)Keep Our NHS Public (SIT0005)Fairtrade Foundation (SIT0006)Friends of the Earth England, Wales and Northern Ireland (SIT0015)Trade & Animal Welfare Coalition (TAWC) (SIT0016)Public Law Project (SIT0019); Holger Hestermeyer & Alex Horne, Treaty Scrutiny: The Role of Parliament in UK Trade Agreements, CITP Briefing Paper 9, 22 January 2024

72 Q402

> power. The Government are held to account and—I know it is a separate question from the point you want to pose—Parliament has the power to resolve against ratification and also, as the Minister said, the ability to pass the implementing legislation[73]

59. As part of our inquiry, we visited Norway, Belgium, and the European Parliament to look at different systems and approaches to treaty scrutiny by other legislatures. In both the Norwegian and EU systems, the legislature is required to expressly approve treaties, and the executive cannot proceed to ratification unless the legislature has done so.[74] However, what was clearly conveyed to us on both visits was that the most important consequence of this parliamentary approval requirement was not merely the fact that the legislature was able to block or veto treaties, but rather that this potential eventuality led to greater consultation and cooperation with the legislature earlier in the treaty making process - including sufficient and timely information-sharing and the creation of sufficient space for effective and comprehensive scrutiny to take place ahead of that approval vote - meaning that rejection at the end of the process is almost unthinkable. The evidence of the efficacy of this approach is clear: the Storting (Norwegian Parliament) has never voted down a treaty, and the European Parliament has done so only once, in 2012, the direct consequence of which was the development of mechanisms expanding the consultation with and involvement of the European Parliament at earlier stages of the treaty process ahead of the approval vote. We also learned in Belgium that, even in a system with many levels of executive and legislative power, this express approval requirement encourages information sharing and cooperation, creating the space for meaningful and effective scrutiny at all relevant levels ahead of that vote.

A sifting committee

60. The case was made to us by a number of people that if Parliament is to take the scrutiny of international agreements seriously, what is needed is a sifting committee that can identify agreements of significance, so that Parliament can effectively deploy its time and resources on meaningful scrutiny activities. Proposals were made to us for both a Commons Committee and Joint Committee of both Houses to carry out this function. Dr Jones told us:

> it makes sense to me to have some kind of joint mechanism for sifting because you do not want to duplicate effort at that level. Once it has been sifted, the question is whether you want different scrutiny arrangements

73 Q402

74 The Norwegian constitution (Article 27) sets out that the king has the right to "conclude and denounce treaties", but this is subject to a requirement that "Treaties on matters of special importance, and, in all cases, treaties whose implementation, according to the Constitution, necessitates a new law or a decision by the Storting, are not binding until the Storting has given its consent thereto."

In the European Union Article 218 of the Treaty on the Functioning of the EU set out that the European parliaments assent is required for association agreements; (ii) agreement on Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms; (iii) agreements establishing a specific institutional framework by organising cooperation procedures; (iv) agreements with important budgetary implications for the Union; (v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required.

> in the Lords and in the Commons. An option would be then for the International Agreements Committee to pick up the ones that have met the scrutiny bar and then have different systems of scrutiny.[75]

61. Professor Hestermeyer suggested a similar model to us:

> A sifting committee that does the sifting task and then include treaty scrutiny as a core task of all the committees, saying, "This is a digital trade agreement and it can go to a specialised committee. This is an agriculture treaty and this can go to a specialised committee", and make certain that it is then in the specialised committee.[76]

62. Dr Mendez told us that he favoured a joint committee similar to the Joint Standing Committee on Treaties (JSCOT) model in Australia,[77] which carries out scrutiny itself, but that he could "see the case for having the sifting committee, as [Professor Hestermeyer] suggests, with treaty scrutiny work taking place by departmental select committees when it pertains to their area".[78]

63. **It is clear from the evidence we received that the arrangements set out in the Constitutional Reform and Governance Act 2010 are unsatisfactory in a modern democratic society. We identified three main areas of concern. First, the legislation provides a passive role for Parliament which need only be notified of a new treaty and has only a limited power (in practice) to delay ratification. These arrangements do not provide Parliament with the opportunity to approve a treaty or not, and do not create the space for the level of scrutiny necessary for genuine democratic oversight and authorisation. Second, while many treaties are captured by the current legislation, there are several categories of treaty that are not. We firmly believe that all treaties need express parliamentary approval. Third, while we understand the historic origin of the 21-sitting day period, and accept that for some treaties it may be sufficient time for scrutiny, we are of the view that it is an arbitrary and, in many cases, insufficient period of time for the scrutiny of treaties, given their increasing complexity, and should therefore not be the default scrutiny period. In light of these findings, it is clear to us that, in order for the arrangements for entering into treaties to respect the core constitutional principle of parliamentary sovereignty, and to bring them into line with international comparators, Parliament must give its express approval to all treaties before they can be ratified or enter into force.**

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76 Q360

77 The Joint Standing Committee on Treaties (JSCOT) is a committee of the Australian Commonwealth Parliament, has members for both the House of Representative and the Senate. It was first established in 1996 as part of a package of reforms to improve the openness and transparency of the treaty-making process in Australia. JSCOT appointed to inquire and report on:

(a) matters arising from treaties and related National Interest Analyses and proposed treaty actions and related Explanatory Statements presented or deemed to be presented to the Parliament;

(b) any question relating to a treaty or other international instrument, whether or not negotiated to completion, referred to the committee by:

(i) either House of the Parliament, or

(ii) a Minister; and

(c) such other matters as may be referred to the committee by the Minister for Foreign Affairs and on such conditions as the Minister may prescribe

78 Q360

64. ***The explicit, active approval of the House of Commons should be a requirement for all treaties (legally binding international agreements) to be allowed to proceed to ratification or for it to be otherwise indicated that the UK gives consent to be bound by an international instrument. This means that the Government should not be able to proceed to ratify or otherwise indicate consent to be bound by a treaty until approval has been signified by a vote in the House of Commons.***

65. ***To achieve this end, we recommend that the mechanisms contained in Sections 20 to 25 of the Constitutional Reform and Governance Act 2010 are amended to implement the following arrangements in line with this principle of active approval: The legislation should set out that a Minister of the Crown is required to send all treaties to a parliamentary sifting committee, the composition of which will be determined by the House. This sifting committee will have 21-sitting days to recommend either:***

i) ***that the treaty can proceed to the floor of the House of Commons for debate and that a vote to approve the treaty or otherwise should take place no less than 21-sitting days after this recommendation is made (standard scrutiny period); or***

ii) ***that the treaty is of such a nature that it requires enhanced scrutiny, and that an appropriate period should be set for that enhanced scrutiny (to be determined by the sifting committee) before which the treaty cannot be brought to the floor of the House of Commons for a debate and a vote (extended scrutiny period).***

In a situation where, following the expiry of the 21-sitting day sifting period, the sifting committee does not make a recommendation in accordance with either points (i) or (ii) above, the Government may bring a treaty forward to the floor of the House of Commons for a vote to approve the treaty or otherwise as soon as parliamentary time allows.

66. ***The exact criteria on which this decision should be made will be for the sifting committee to determine and to set out. The purpose of this longer scrutiny period would be to allow for the relevant parliamentary committees and other interested stakeholders, including but not limited to devolved legislatures and administrations, to carry out inquiries and set out their findings ahead of the parliamentary debate and vote to approve the treaty, so that the full implications of a treaty can be fully understood ahead of that vote. Where a treaty would enter into force on signature alone, a draft of the treaty should be provided in the same way as for other treaties, as Parliamentary approval would still be required to sign such a treaty.***

67. ***If the Government does not wish to accept the longer period of scrutiny set out by the sifting committee, a Minister of the Crown must make a statement to the House setting out the reasons why they believe the period is not appropriate and schedule a vote in the House of Commons to override the recommendation of the sifting committee. If that vote approves the Government's motion to override the sifting committee's recommendation, the Government can then schedule a debate and vote to approve the ratification of the treaty no less than 21-sitting days after the override vote.***

68. **We recognise that, while rare, there may be circumstances where a treaty needs to enter into force as a matter of urgency.** ***To account for such circumstances, the amended legislation should set out the criteria under which the Government should be able to***

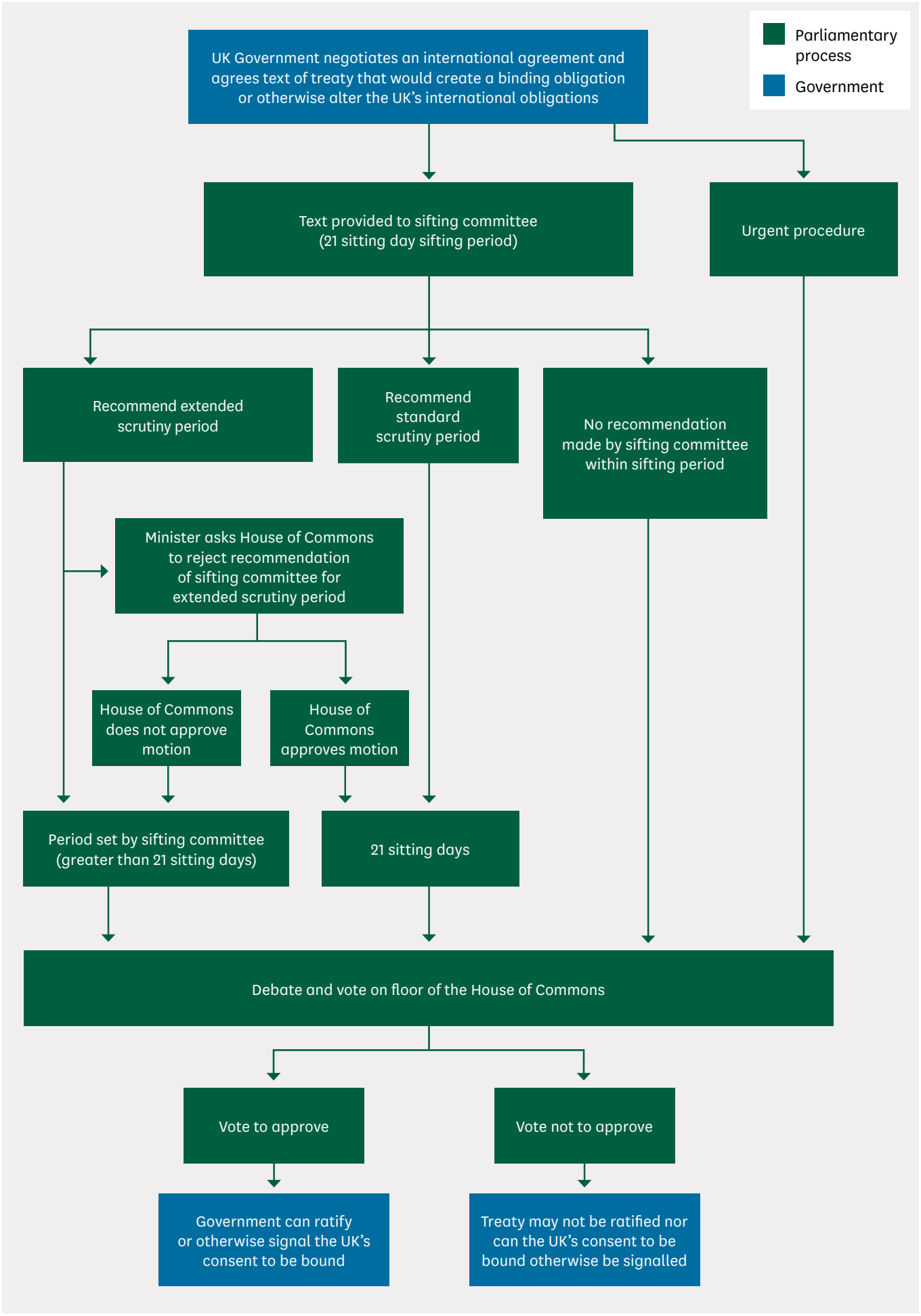
bypass the sifting committee and proceed straight to the approval debate and vote, but it must nevertheless require the Minister to make a statement to the House setting out the reasons why the urgent procedure is being used in that particular case. This provision should not be able to be used once the process set out in Paragraphs 65–67 above has started - that is once the treaty has been provided to the sifting committee.

69. ***We recommend that the existing requirement to provide an explanatory memorandum along with the treaty in Section 24 of the Constitutional Reform and Governance Act 2010 is retained.***

70. **We believe that adequate time should be available for both Houses to conduct meaningful scrutiny of treaties. However, it is a matter for the House of Lords how it chooses to arrange its business, both in its committees and chamber. We would, however, hope that a practice might develop whereby the House of Lords carries out scrutiny and holds a debate and vote on a treaty prior to that which will take place in the House of Commons under the amended legislation, so that the views of that House can be taken into account when the elected chamber votes on whether to approve a treaty.**

71. **The negotiation and conclusion of treaties is a reserved matter. As such, devolved legislatures do not currently have a formal role in the scrutiny of treaties. However, many treaties, in particular following the UK's withdrawal from the European Union, may cover subject matters that touch on areas of devolved competence. It is important that the devolved legislatures are able to consider the impact of a treaty on these areas. We believe that adequate time should be available for devolved legislatures to conduct meaningful scrutiny of treaties that impact on areas of devolved competence. However, it is a matter for the devolved legislatures how they choose to carry out scrutiny and arrange their business, both in their committees and their chambers. We would, however, hope again that a practice might develop whereby the devolved legislatures carry out scrutiny, produce reports and hold debates on a treaty in sufficient time so that the views of the devolved legislatures can be taken into account when the House of Commons votes on whether to approve a treaty.**

Figure 1: Process for parliamentary scrutiny and approval of treaties



Changes to treaties

72. Once a treaty is ratified and has come into force, that is often not the end of the process, as treaties are often changed and updated. While some changes may trigger the arrangements under CRAG, many, if not most, modifications will not be caught, and therefore Parliament will not be given the opportunity to express a view on the changes and in some instances they may not be brought to the attention of Parliament at all. We also heard that treaties often set up decision-making bodies that can amend the terms of the treaty itself, or make rules and regulations under it (such as the Withdrawal Agreement Joint Committee) or include binding mechanisms for resolving disputes (such as Investor-State Dispute Settlement, a mechanism often included in free trade or investment treaties that allows an investor from one country to bring arbitral proceedings directly against the country in which it has invested). Powers to make secondary legislation to implement amendments to treaties are often also included in domestic legislation, to allow those changes to be implemented swiftly and with ease, although this is often to the detriment of proper parliamentary scrutiny of any such treaty changes.

73. Addressing the importance of this area, Professor Bartels told us that many treaties are 'living instruments'. This is particularly the case with treaties that regulate activity and overlap with what happens domestically, as these instruments can set "a framework for future acts between the parties". He went on to say:

> Particularly in my area, which is trade agreements, as I have said before, most of these treaties, the same with international organisations that are established by treaties, are like constitutions in a limited area. They set up organs through which the parties can act. They meet, they make decisions, they implement, they create policies, they agree to do various things. If you look at treaties in that sense, it is not quite right to think of them as contracts that just say, "We will do this and you will do that" or "we both agree this is the border" or "we will sell you something". They are more like public law, they are more like legislation in that sense and the two parties can act together, two executives get together in these organs and agree on what to do.[79]

74. Alex Horne explained to us that "treaties do not necessarily crystallise when they have been ratified".[80] He argued that "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".[81] Jill Barrett highlighted that while treaty amendments are actually treaties in and of themselves, they are often excluded under the current arrangements for scrutiny under CRAG. She explained that a treaty amendment that changes the text of the original treaty can be subject to the procedure under Section 20 of CRAG. However, this is the case only when the amendment is subject to ratification. Section 25 of the Act sets out that when an amendment is not subject to ratification, Parliament does not have to be notified or consulted.[82] Professor Hestermeyer also told us that, in his view, the current arrangements in CRAG for monitoring and scrutinising amendments to treaties,

79 Q130
80 Q29
81 Q29
82 Q29

particularly those made by treaty bodies, are insufficient.[83] He suggested that while many of the decisions made under treaty bodies are "excruciatingly uninteresting and technical", they can also make decisions of importance that should be scrutinised. He suggested that a sifting function could identify those changes of interest.[84] Dr Mendez also raised the concern with us that:

> Part of what is going on here is that binding law is made by the executive branches across the world and they are trying to find mechanisms that make it easier for them to amend their law without going through parliamentary procedures.[85]

75. The House of Lords International Agreements Committee (IAC) has also raised concerns over the reporting of changes to treaties. The Government has made commitments both to IAC and to us on "ensuring that all amendments to treaties are published in the UK Treaty Series, including those that are not subject to CRAG".[86] However, the IAC has reported that little has happened in practice. In its response to the IAC's report *Working Practices: one year on*, the Government said that all amendments were published as committed to.[87] Paul Berman further told us that:

> It is the Government's policy to publish all treaty amendments as Command Papers in the treaty series. They are laid before the House. They are also made available on the Foreign Office's online database, Treaties Online, and circulated in something called the Treaty Action Bulletin, which we send out to subscribers, including some officials here in Parliament. All amendments are intended to be published under the Government's policy.
>
> In addition, where an amendment is subject to ratification, CRAG would kick in. Therefore, it would be laid beforehand in the country or miscellaneous series and then it is subject to scrutiny under CRAG. The Government have previously indicated that they would expect the majority of important amendments to be subject to ratification and, therefore, subject to CRAG, but we cannot unilaterally agree that because whether something is subject to ratification is determined in the treaty and is, therefore, a matter for negotiation with other state parties.[88]

76. **There is clearly potential for significant changes to be made following the conclusion of a treaty, and for those changes - for various reasons - not to be subject to parliamentary scrutiny under the current arrangements. All treaties, including any subsequent amendments or decisions of bodies made under those treaties that either modify the treaty itself or modify the UK's obligations under the treaty - regardless of whether those amendments or decisions have an impact on the domestic level - must be subject to parliamentary approval. Under the new arrangement for approval of treaties we have recommended in paragraphs 65–68 above, many amendments to treaties would be subject to a parliamentary vote. It is our view however that, moving**

83 Q346
84 Q346
85 Q346
86 H. M. Government (SIT0010)
87 International Agreements Committee, Government Response to 7th Report of Session 2021–22, Working Practices: one year on, published 8 February 2022
88 Q413

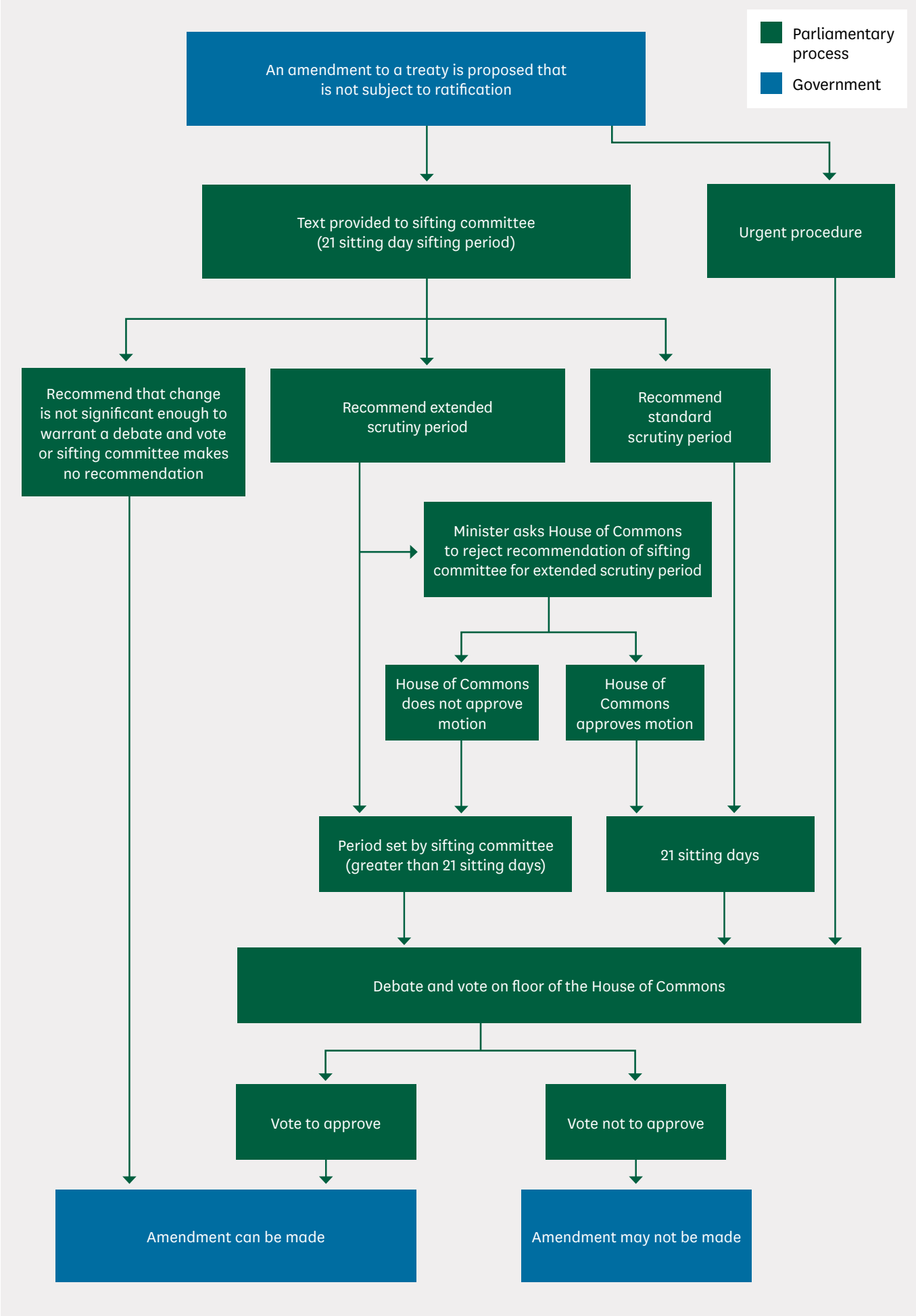
forward, it would be impractical for Parliament to be required to debate and vote on every treaty amendment. ***When the Constitutional Reform and Government Act 2010 is amended in line with our recommendations in paragraphs 65–68 above, it should include a mechanism to ensure that all amendments to treaties, or decisions made under them, are considered by the sifting committee. That committee can recommend, within 21-sitting days following notification by the Government, that the amendment is either:***

i) ***of such a nature as to not require a debate and vote; or***

ii) ***is, in its view, of such a nature that it should be subject to the process set out in paragraphs 65–67 above.***

In a situation where the sifting committee has does not make a recommendation within the 21-day sitting period, it will be considered as if that committee had recommended that the measure is of such a nature as to not require a debate and vote.

Figure 2: Process for parliamentary scrutiny and approval of amendments to treaties



4 Non-Legally Binding Instruments (NLBIs)

77. Aside from treaties, there are a range of other international agreements that can be concluded between states which do not create binding legal obligations under international law. These non-legally binding instruments (NLBIs), often referred to as 'Memorandums of Understanding' (MoUs), are generally agreed between states, or international organisations, on any topic, but are not considered to create any binding legal obligations which a state must fulfil. Rather, an NLBI often expresses political commitments or aspirations, or outlines cooperation and coordination at an operational level.

78. The Foreign, Commonwealth and Development Office (FCDO) guidance describes an MoU (or NLBI) in the following way:

> A Memorandum of Understanding [MoU/NLBI] records international commitments, but in a form and with wording which expresses an intention that it is not to be binding as a matter of international law. An [NLBI] is used where it is considered preferable to avoid the formalities of a treaty - for example, where there are detailed provisions which change frequently or the matters dealt with are essentially of a technical or administrative character; in matters of defence or technology where there is a need for such documents to be classified; or where a treaty requires subsidiary documents to fill out the details. Like a treaty, an [NLBI] can have a variety of names (e.g. arrangement) and can also be either in the form of an exchange of notes or a single document. However, the formalities which surround treaty-making do not apply to it and it is not usually published.[89]

79. Professor Fitzmaurice explained to us that:

> [NLBIs] are a very popular instrument by the Government to deal with matters that are of technical assistance, matters that change, because the amendment of an [NLBI] is much simpler than an amendment of a treaty.[90]

80. She went to explain that NLBIs avoid many of the technical requirements of treaties, including the need to register them with the UN, a step which would contribute to making them more public. While some new treaties, as well as many changes to treaties, would trigger the arrangements set out under the Constitutional Reform and Governance Act 2010 (CRAG), there is no requirement for NLBIs to be approved, nor even for Parliament to be notified of them. Further amendments to an NLBI can also be made without notification on as regular a basis as the parties agree.

81. NLBIs can be used for a variety of purposes, ranging from short-term, routine or technical agreements, where a treaty is not seen as necessary, to potentially highly contentious agreements where confidentiality and flexibility is deemed to be necessary.[91] The key aspect is that it is clear in the text of the agreement that neither party gives the

89 Foreign, Commonwealth and Development Office, Treaties and MoUs: Guidance on Practice and Procedures, 15 March 2022

90 Q138

91 Q4

impression that they intend to create a legal commitment.[92] Even in such circumstances, there are instances when international exchanges which, while non-binding and not implemented through legislation, can nonetheless have a legal impact on the domestic plane.[93]

82. Alex Horne and Arabella Lang highlighted to us the concern not only that there is no public register or repository for NLBIs, but that there does not appear to be any centralised record of them in government either.[94] This is a particular issue because, as Jill Barrett told us, there are more NLBIs "floating around" than ever before. In the past, most foreign relations were handled by the Foreign and Commonwealth Office and its direct counterparts. In more recent times, other government departments have begun to deal directly with their counterparts in other states and agree NLBIs with one another in their respective areas of responsibility.[95] She explained that, while draft language may be sent to the FCDO treaty section to make sure the language did not legally bind the UK, the final version was often not sent back to the FCDO as they are treated more like policy documents and so are deemed the responsibility of the relevant line department.

83. Professor Hestermeyer told us that it is very difficult to find quantitative data on NLBIs as they can include such a wide range of provisions, but that as an indication of the scale of these types of agreements, he pointed to an estimate from the FCDO's Mexican counterpart that NLBIs makes up 70% of their work, while their German counterpart said that they process around 15 NLBIs a month, which is more than the number of treaties they will process in that same period.[96] He was clear that:

> The old argument that these are not legally binding and accordingly we can do whatever we want as long as we put the clause in that this is not legally binding seems to no longer hold water, because the reality is that they have an impact.[97]

An example of this in the UK he set out was the Memorandum of Understanding (NLBI) with Rwanda, which, but for a few provisions, looked very much like a treaty.[98] He told us that what was needed in the UK was for there to be a repository for NLBIs as a matter of good record-keeping, which would also have the collateral benefit of guaranteeing institutional memory within government - insulated against personnel or machinery of government changes - with a thorough record of what has been agreed.[99]

84. NLBIs have also been raised as an issue by the IAC. In its *Working Practices* report, the IAC said that, in line with the third limb of the Ponsonby Rule, namely that the Government should routinely notify Parliament of "significant non-legally binding instruments". This third limb was a commitment that the Government of the day will draw to the attention of Parliament:

92 Q139
93 The Bar Council (SIT0013)
94 Q15
95 Q16
96 Q351
97 Q351
98 This is a refence to: Home office, Memorandum of Understanding between the government of the United Kingdom of Great Britain and Northern Ireland and the government of the Republic of Rwanda for the provision of an asylum partnership arrangement, Policy paper, 14 April 2022; See also: Home Office, Addendum to the Memorandum of Understanding, Policy paper, 6 April 2023
99 Q352

> 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 limb of the Ponsonby Rule was not placed into statute in CRAG. The IAC *Working Practices: one year on* report highlights that the Government has "consistently refused" its request to continue to adhere to that limb, the result being that:

> the Government's approach is that it allows the Government to enter into secret arrangements which it does not disclose to Parliament on the grounds that it asserts that they are not legally binding in international law. In addition, and no less significantly, the use of NLBIs allows the Government to fill out the details of a treaty it has signed—a practice which it acknowledges in its own Guidance on Practice and Procedures. This appears to be akin to producing an Act of Parliament with associated delegated legislation, but never showing Parliament the detailed regulations made under the parent legislation.[100]

85. The IAC has proposed a new set of criteria with the aim of ensuring that notification of significant non-legally binding instruments is provided to Parliament, namely that:

> Notification and deposit should be required only if an agreement—
>
> (a) is politically or economically important;
>
> (b) imposes material obligations on UK citizens or residents;
>
> (c) has human rights implications;
>
> (d) is directly related to a treaty; or
>
> (e) would give rise to significant expenditure.[101]

86. The IAC has also raised serious concerns over the Government's use of NLBIs in the context of the UK-Rwanda agreement on asylum. In its report on the agreement, the IAC raises concerns over the choice of an NLBI in this instance rather than a treaty, given that the content of the agreement raises fundamental questions about individual rights, and creates financial obligations on the UK. They also conclude that the NLBI appears to not comply with the Government's own guidance on when an NLBI should be used in place of a treaty. The IAC concluded that:

> The Government's approach in this case has meant that Parliament has had no opportunity to consider whether the [NLBI] is compatible with the UK's obligations under international law; whether the policy objectives are coherent and achievable, the financial implications, the basis in domestic law for its implementation; or whether any safeguards ought to have been introduced.

100 International Agreements Committee, 7th Report of Session 2021–22, Working Practices: one year on, HL 75, para 76

101 International Agreements Committee, 7th Report of Session 2021–22, Working Practices: one year on, HL 75, para 83

> It is unacceptable that the Government should be able to use prerogative powers to agree important arrangements with other states that have serious human rights implications without any scrutiny by Parliament.[102]

87. Baroness Hayter reiterated to us that the IAC viewed it as important that Parliament is informed and can scrutinise important NLBIs. She said she supported the idea of there being a centralised repository for NLBIs but emphasised that such a development would also necessitate the formalisation of arrangements around notification and scrutiny of the arrangements themselves.[103]

88. Angus Brendan MacNeil MP told us that the then Department for International Trade routinely informed his committee of NLBIs it was concluding. However, he said that they were only able to note their contents due to the workload that would have been involved in scrutinising each and every one of them. Scrutinising this additional set of agreements was, he told us, far beyond the capacity of the International Trade Committee (ITC), especially when compared with the number of officials working on and generating NLBIs in that Department.[104]

89. The increase in the number of NLBIs being used internationally is still a fairly recent phenomenon and so corresponding scrutiny arrangements are still nascent across the world. The United States has recently passed legislation (the National Defence Authorisation Act (NDAA)) that has been described as making it a 'world leader' in the scrutiny of NLBIs. In addition to expanding the reporting requirements in relation to executive agreements, the NDAA for the first time introduces a requirement for non-binding agreements to be reported and published.[105] This means that significant NLBIs reached by the US executive, while not legally binding, must nonetheless be reported to Congress, and that the US Government must provide a description of the legal authority upon which they can become operational.

90. When we asked the Government whether it thought Parliament should be consulted on NLBIs, Minister Rutley told us:

> The key thing to bear in mind is that [NLBIs] are non-legally binding instruments and are distinct from treaties. They are not binding in international law and they have a different status as a result. They are not a formal or distinct category. The important thing to bear in mind is that they vary from joint press releases right through to much more complex documents. Because of that, they are not subject to part 2 of CRAG. There has never been a convention in the UK […]that NBIs are routinely

102 International Agreements Committee, 7th Report of Session 2023–23, Memorandum of Understanding between the UK and Rwanda for the provision of an asylum partnership agreement, HL 71, para 45–6

103 Qq320–321

104 Q321

105 This requirement applies to "qualifying non-binding instruments" which is defined as those that "could reasonably be expected to have a significant impact on the foreign policy of the United States" and those that are the subject of a request from the Chair or Ranking member of either Senate or House Committees. Qualifying non-binding instruments must be reported to Congress and published. Moreover, the legislation requires that the US Secretary of State provide a "detailed description of the legal authority that, in the view of the Secretary . . . provides authorization for each qualifying non-binding instrument . . . to become operative". The NDAA also expands the definition of "text" of international agreements to include a wider range of documents, which previously have not been reported. This includes "any annex, appendix, codicil, side agreement, side letter, or any document of similar purpose or function ... that is entered into contemporaneously and in conduction", as well as implementing agreements and arrangements.

> submitted to parliamentary scrutiny, nor are we aware of any other state or international organisation that handles NBIs in the same way as treaties. They are a very different instrument.[106]

91. When asked about the recent strengthening of oversight and scrutiny arrangements in the United States, Minster Rutley told us:

> We do not believe we need to go down that route. As I said in answer to your earlier question, we need the flexibility. They are not legally binding. We will watch with interest to see how the latest developments that you have highlighted take effect in the US. That will involve considerable cost and could probably have some impact on flexibility. We will watch this space, no doubt along with the rest of the Committee.[107]

92. We also questioned the Government on concerns expressed to us regarding the recording of NLBIs both within Government and the idea of a central public repository. Minister Rutley told us that it was down to individual departments to maintain their own database of NLBIs, and that there is no central oversight. He further indicated that the Government does not think it would be practical to have a single database "because [NLBIs] are often created and changed in fast-moving environments. It would not be cost-effective either. We also think it could detract from the flexibility we need in these instruments".[108]

93. **While non-legally binding instruments (NLBIs) do not place legal obligations on the UK, they can impose 'political obligations' that can guide government action and even result in financial obligations being placed on the UK. The UK is an internationally trusted nation; when it makes a political commitment, this should be viewed as essentially equivalent to making a legally binding obligation. We do however recognise that NLBIs can range from the very mundane to the very significant.**

94. **There was considerable concern expressed to us that adequate records of NLBIs were not being kept and that there is insufficient public access to those NLBIs which have been reached. We received calls for a central repository of all NLBIs to be established. We were encouraged by the Government's assurance that individual departments do indeed keep records of the NLBIs that are reached. However, we were not convinced by the argument that establishing and maintaining a single repository for non-legally binding instruments would be overly burdensome. *We therefore recommend the establishment of a central repository for all non-legally binding instruments, to be coordinated by the Foreign, Commonwealth and Development Office and made public on GOV.UK, and call for Parliament be notified of all new or updated documents added to that repository by way of a Written Ministerial Statement.***

95. **It is clear that NLBIs are already a significant part of how states manage relations between one another and make policy decisions internationally. Arrangements therefore need to be put in place for Parliament to be informed of new NLBIs and, if necessary, to scrutinise them. We would not expect routine and regular votes to approve**

106 Q417
107 Q420
108 Q418

NLBIs, but this does not diminish the obligation on ministers to assure themselves in reaching such agreements that they are acting in accordance with the will of, and with the confidence of, the House of Commons.

96. ***We further believe that if a request is made by a parliamentary committee or the Leader of the Official Opposition for a debate and vote on an NLBI, the Government should make time for this on the floor of the House. This practice should be set out in guidance to ministers and civil servants.***

97. **We recognise that, on occasion, there may be good reasons why the Government has to reach NLBIs in secret, for instance in relation to matters of defence or national security. This does not diminish the Government's accountability to Parliament for placing obligations on the UK.** ***As such, we recommend that when such an agreement is reached, arrangements are made to brief the appropriate House of Commons committee(s) in confidence, to facilitate a degree of scrutiny to take place, and provide the opportunity to express any concerns to the Government.***

Devolution and NLBIs

98. The Concordat on International Relations (COIR) sets out that devolved administrations, in addition to implementing and observing international obligations, are also responsible for observing non-binding commitments made by the UK Government in NLBIs. The COIR sets out that the FCDO or other lead department will formally notify devolved administrations of NLBIs concerning devolved matters.[109] Angus Robertson MSP, Cabinet Secretary for the Constitution, External Affairs and Culture in the Scottish Government, told us that he had not seen a record of UK-level NLBIs that impact on devolved competence. Similarly, Mick Antoniw MS, Counsel General and Minister for the Constitution in the Welsh Government, told us:

> The position in relation to non-binding agreements [NLBIs] is less structured and more informal in nature. We have not traditionally sought to hold central records of all international agreements, and it is not possible to say with certainty whether the lead UK Government department always notifies relevant Welsh Government departments, and if so at what stage it does so. This is something that we propose to consider further, together with the UK Government and the other Devolved Governments, when the overall 'Devolution Memorandum of Understanding and Supplementary Agreements' document is reviewed in light of the Inter-Governmental Relations Review outcome.[110]

99. It is also worth noting that as NLBIs have no binding legal effect on the UK, devolved governments are also capable of reaching such agreements with other states or substate actors in their own right, provided that these agreements "do not purport to bind the UK in international law, affect the conduct of international relations or prejudice UK interests".[111]

109 Cabinet Office, Devolution: memorandum of understanding and supplementary agreements, October 2013
110 The Welsh Government (SIT0027)
111 Cabinet Office, Devolution: memorandum of understanding and supplementary agreements, October 2013

Both Angus Robertson and Mick Antoniw told us that their governments had reached a number of NLBIs with states and substate actors. They also told us that they thought there was no obligation on them to inform the UK Government about these NLBI's[112]

100. **We stress the importance of the UK Government consistently informing devolved governments when it reaches an NLBI that has implications for devolved competence, and for this to be indicated in the central repository recommended in paragraph 94 above. Furthermore, we would expect devolved governments to keep a record of all NLBIs that they reach with international partners and for these agreements to be notified to the Foreign, Commonwealth and Development Office for recording in the central repository held by the UK Government. It is a matter for those administrations to make arrangements with their legislatures regarding the monitoring and scrutiny of such agreements.**

112 Qq229–230

5 Mandates and negotiations

101. We received a considerable amount of evidence throughout this inquiry making the case that Parliament should not only have a formal role at the end of the treaty-making process - giving its express approval to treaties - but also a formal role earlier in the process, namely in the setting of negotiating mandates, and that there should be reporting requirements on an ongoing basis during negotiations. We heard considerable evidence that early scrutiny of the process in terms of the negotiating mandates and the progress of negotiations was likely to aid scrutiny and approval of treaties at the end of the process.

102. In discussing his experience of leading negotiations with the EU, Lord Frost, Former Chief Negotiator at Task Force Europe, noted that one of the negotiating difficulties he faced was that it was not clear what Parliament wanted from the withdrawal negotiations. He told us that:

> Ideally … there would have been, after the referendum, a clear view set by Parliament and Government that we sought to deliver, but obviously it never worked out like that… In normal circumstances, you would want Parliament to be expressing its view, at least in broad terms, fairly early on in the negotiation.[113]

103. Lord Frost was clear that he thought that there was an important role for Parliament to play at the beginning of treaty negotiations:

> In any significant international negotiation, Parliament ought to set out its view. Very often with the way our system works, it is going to be the same as the Government's view—except at the margins, where there may be different politics in play and Parliament will want to emphasise some issues more than others. Then the negotiator has to reflect that and try to take it into account. The more information you have as a negotiator at the start of a process about how it might land at the end and what is and isn't really important, the better it is.[114]

104. Throughout our evidence, there was a consensus that consulting Parliament on negotiating mandates, and getting parliamentary agreement to them, would in fact strengthen the UK's position, particularly in trade negotiations. For example, the Trade Justice Movement made the case to us that it should be set out in legislation that Parliament needs to debate and vote on proposals in order to enter formal trade negotiations.[115] Others also argued that there should be a requirement for the mandate and accompanying analytical material to be given to Parliament, and that there should be a requirement for Parliament to approve negotiating mandates.[116]

105. However, while emphasising the importance of giving Parliament a role in mandate setting and the negotiations process, we also heard evidence that setting a single approach

113 Q48
114 Q61
115 Trade Justice Movement (SIT0002)
116 UKTPO - University of Sussex (SIT0007) National Farmers Union (SIT0014) Dr. Emily Jones (Associate Professor at Blavatnik School of Government, University of Oxford); Danilo Garrido Alves (Research Officer at Blavatnik School of Government, University of Oxford); Anna Sands (Research Officer at Blavatnik School of Government, University of Oxford) (SIT0012)

for all international agreements is not straightforward. Jill Barrett told us that mandate setting and negotiations are not areas where you can have a "one size-fits-all approach" and so it would be difficult to put in place legislative provisions setting out the role of Parliament in these stages of the treaty-making process.[117] Rather, she suggested to us that involvement in the negotiating process should be included as a core function of 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.[118]

106. We also heard arguments that holding a parliamentary vote to approve mandates would likely strengthen the Government's hand in negotiations. Baroness Hayter told us that Lord Kerr, a member of her Committee who had been a trade negotiator, had said that the idea of secrecy being so important during negotiations is "complete nonsense" as his experience of negotiating with the United States was that they shared information with Congress and that the "Americans would simply say, 'Can't get it through Congress—really sorry,' and it was obvious".[119] She then added the example from her own experience of knowing "what the European Parliament would not accept, and it influenced our Government" in the negotiations following the UK's decision to leave the European Union.[120] Angus Brendan MacNeil MP reiterated the advantages of getting parliamentary approval for negotiating mandates, telling us that "[a] practical effect of that is that you arrive at the negotiations with an extra club in your bag". It would, he went on to say, avoid the risk of bringing a take it or leave it vote to Parliament at the end of a negotiation process on a difficult political position.[121]

107. We heard that both the US and the EU have what was described as the 'gold standard' of scrutiny in regard to trade negotiations, as the mandates have to be approved, and regular updates on negotiations rounds must be provided to the legislature. Similarly, during in our visit to Norway, we heard that there was extensive discussion and consultation with the Storting (Norwegian Parliament) at the start of and during negotiations, and that members of relevant parliamentary committees were even often included in negotiation delegations.

108. In the European Union, the European Parliament must vote to approve certain treaties before they are concluded, as set out in Article 218 of the Treaty on the Functioning of the European Union (TFEU), and a requirement that the European Parliament be "immediately and fully informed at all stages of the procedure" set out for negotiating, conducting and concluding treaties. There is also a requirement to "report regularly to … the European Parliament on the progress of negotiations" in Article 207 TFEU. This has led to a process being established in the European Union whereby, following a public consultation, the European Commission (which conducts the negotiations) makes recommendations to open negotiations and often provides draft negotiating mandates to

117 Q25
118 Q25
119 Q282
120 Q282
121 Q282

the Council of the European Union (the Council). At this point, these draft proposals are shared with the European Parliament for their scrutiny and input. It is for the Council to authorise the opening of negotiations, adopt negotiating directives, authorise the signing of agreements and conclude them. Following each negotiating round, a report is made to both the Council and the European Parliament, and the European Commission will publish reports online. The status and progress of negotiations are frequently considered by the relevant committees in the European Parliament. We heard that this early consultation had an important influence on the EU's negotiation positions, and that this open cooperation and discussion is largely viewed as beneficial to the overall negotiation process as there is a recognition that, ultimately, the final agreement has to be agreed to by the European Parliament, and thus their involvement throughout negotiations is vital to securing that end stage asset.

109. Dr Jones set out to us that in the US, Congress needs to be notified before negotiations towards a trade agreement are initiated. It then has extensive input into the mandate and observes the negotiations very closely, and, like in the EU, has access to confidential information throughout the negotiating process:

> there are very strong advantages to having a negotiating mandate […] endorsed by the legislative branch. […]The United States will say in the negotiations, "We can't possibly agree to X because there is no way I can get it passed through Congress." Similarly, in the EU it is common practice. Where you have priorities for government that are clearly set out or that Parliament voiced, I think it is a distinct advantage and a sort of leverage in negotiation[122]

110. **To carry out its constitutional function effectively in regard to the scrutiny of international agreements, it is not enough for Parliament to be involved only at the end of the process. A new approach to conceptualising international negotiations and international agreements needs to be developed in the UK whereby Parliament is involved throughout the process or 'lifecycle' of an international agreement, from early considerations on whether to open negotiations, through the negotiation rounds themselves, and on to indications of consent (for example, by way of a formal vote on whether or not to approve treaty), and then beyond, into implementation and review.**

111. **Given our recommendation that all treaties need to be subject to a parliamentary process for the UK to indicate consent to be bound, it would be in a Government's best interest to consult and update Parliament regularly. *We recommend that a working practices agreement is reached between the Government and Parliament which would set out the arrangements for how Parliament will be informed of the progress of negotiations. Such an agreement should also set out that Parliament would normally be consulted on, and may be asked to approve, the setting of negotiating mandates.***

122 Q327

6 Parliamentary arrangements for the scrutiny of international agreements

112. We have set out above that, as a matter of constitutional principle, all treaties should be subject to a parliamentary process and, in appropriate cases, require the explicit consent of the House of Commons before they enter into force. This is necessary for arrangements to properly reflect the core constitutional principle of parliamentary sovereignty, providing proper democratic oversight and authority for treaties. We are conscious, however, that while an approval vote provides the space for enhanced parliamentary scrutiny, it does not necessarily guarantee it. What was clear from our evidence is that there also need to be changes to the practices and expectations within Parliament, and in particular in the House of Commons, in relation to the scrutiny of international agreements.

The slow development of parliamentary scrutiny of international agreements.

113. The issue of Parliament's role in international agreement scrutiny is not a new one. For example, in *The English Constitution,* Walter Bagehot raised concerns about Parliament's lack of a role in treaty scrutiny, setting out that the origins of the current system where the Government (Crown) using prerogative powers to agree treaties comes from a time when Parliament met seldomly. Reflecting on this he observed that:

> 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.[123]

He expressed concern that "the Government which negotiates a treaty can hardly be said to be accountable to any one" and argued that it would be advantageous to "require that in some form the assent of Parliament" should be given to treaties, and that "we should have a real discussion prior to the making of such treaties".[124] As set out previously, international agreements have become only more important since Bagehot's time, particularly in terms of the extent to which they affect the internal affairs of states.

The Ponsonby Rule

114. The first major development in parliamentary scrutiny of treaties in the 20th century came after the end of the First World War. Known as the 'Ponsonby Rule', this convention originated from a statement made by Arthur Ponsonby, Under-Secretary of State in the Foreign Office, during the Second Reading of Treaty of Peace (Turkey) Bill on 1 April 1924. It followed a commitment by the then Labour government to the principle of greater democratic control over foreign policy and as a measure to allay concerns about the role of secret treaties in the outbreak of the First World War.[125] The publication of treaties had been a general principle since 1890, but the Ponsonby Rule set out that every treaty which is subject to ratification, when signed, will be laid before both Houses of Parliament for a

123 Walter Bagehot, The English Constitution, (Cambridge, 2001) [1872], p212
124 Walter Bagehot, The English Constitution, (Cambridge, 2001) [1872], p212–3
125 David Natzler and Charlotte Sayer-Carter, Parliamentary scrutiny of international agreements should not be limited to legally binding treaties, Constitution Unit Blog, July 12 2022

minimum of 21-sitting days before ratification. It also made a commitment to allow time for debate on important treaties where such a demand was made by the Leader of the Official Opposition or of any other party.[126]

115. While the rule was briefly withdrawn during the first Baldwin government (1924–29), it has been a constitutional practice observed by all governments since 1929. The Foreign and Commonwealth Office guidance from 2010 set out that it was considered that the convention applied also to "accession, approval and acceptance, as well as to ratification".[127] It also noted that while there is no presumption that Parliament will debate every treaty, but for important and controversial treaties "it is difficult in practice for the Leader of the House to resist a debate on it".[128]

116. The Ponsonby Rule practices were further developed in 2000 when, following the House of Commons Procedure Committee's *Parliamentary Scrutiny of Treaties* report,[129] the Government committed to:

> ensure that a copy of each Command Paper and accompanying Explanatory Memorandum (EM) for treaties laid before Parliament under the Ponsonby Rule is sent to what the FCO judges to be the relevant departmental select committee. It would then be for the lead committee to decide whether the Command Paper and EM might be more relevant to another committee or relevant to more than one committee and to pass it on accordingly.[130]

The then Government further went on to commit to:

> undertake normally to provide the opportunity for the debate of any treaty involving major political, military and diplomatic issues, if the relevant select committee and the Liaison Committee so request.[131]

Previous proposals for change

117. Parliament, of course, has always been able to debate any issue it wishes, including treaties, providing that time can be found in the course of parliamentary business. The establishment of Ponsonby Rule in the early twentieth century better positioned it to be able to identify where and when those debates may need to take place. But concerns that Parliament was not effectively scrutinising treaties persisted. In the late 1990s, the Defence Committee, in its consideration of NATO Enlargement, concluded:

> We believe that the current situation, in which the level of involvement of the UK Parliament in treaty-making is decided by the Government's business managers, is unclear and inadequate. Many suggestions as to how Parliament's role in relation to the exercise of the Crown Prerogative could be formalised and improved have been made. These include the establishment of a specialist select committee to scrutinise draft treaties, or

126 1 April 1924, vol 171, cols 2000–05
127 Factsheet P14 Procedure Series, Treaties, House of Commons Information office, August 2010
128 Factsheet P14 Procedure Series, Treaties, House of Commons Information office, August 2010
129 Procedure Committee, Second Report of the 1999–2000 session, Parliamentary Scrutiny of Treaties, HC 210
130 Procedure Committee, Second Special Report of the 1999–2000 session, Government Response to the Second Report of the Committee: Parliamentary Scrutiny of Treaties, HC 990
131 Procedure Committee, Second Special Report of the 1999–2000 session, Government Response to the Second Report of the Committee: Parliamentary Scrutiny of Treaties, HC 990

> a review of the 'Ponsonby Rule' so as to make Parliament's role more explicit. It is not our intention to debate them here, but we express the hope that the Committee on the Modernisation of the House of Commons will turn its attention to the current unsatisfactory arrangements for Parliamentary examination of international treaties and other aspects of the exercise of the royal prerogative in relation to ratification.[132]

118. The aforementioned 2000 report by the Procedure Committee, which stopped short of recommending a dedicated House of Commons Committee to scrutinise treaties, said that the arrangements at that time under the Ponsonby Rule were sufficient and that both the Defence and Foreign Affairs Committees had "little trouble keeping track of those treaties which fall within their remit".[133] While the then Chairs of those two committees argued in favour of enhanced scrutiny, the Procedure Committee was clearly persuaded by arguments from other committee Chairs who were not keen on enhanced scrutiny arrangements. The arguments raised against new scrutiny arrangements at this time were:

- that Members would not volunteer to sit on a sifting committee;
- that committees would not take kindly to instructions on what should be included in their programme of work;
- that committees are already capable of choosing to scrutinise a treaty within their remit should they choose to do so; and
- that the requirement to scrutinise treaties would impose a greater burden on some committees than others.[134]

These objections appear to be the same considerations as would apply today. The Procedure Committee, however, also expressed the view that existing committees "should be encouraged to develop expertise in this field".[135] The Government, in its response to the report, accepted that if a request for a debate on the floor of the House on a treaty was made by a select committee and supported by the Liaison Committee, then the Government would normally accept the request.[136] It should be noted that a large section of treaties at this time, in areas such as trade, were being negotiated and agreed at the EU level and not the UK level, and therefore the expected flow of treaties being concluded - which were not otherwise being scrutinised – was far less than is being experienced today and is expected to materialise in the future.

132 Defence Committee, Third Report of the Session 1997–98, NATO Enlargement, HC 469, para 106
133 Procedure Committee, Second Report of the 1999–2000 session, Parliamentary Scrutiny of Treaties, HC 210, para 29
134 Procedure Committee, Second Report of the 1999–2000 session, Parliamentary Scrutiny of Treaties, HC 210, para 19–22
135 Procedure Committee, Second Report of the 1999–2000 session, Parliamentary Scrutiny of Treaties, HC 210, para 31
136 Procedure Committee, Second Report of the 1999–2000 session, Parliamentary Scrutiny of Treaties, HC 210, para 32–33; Procedure Committee, Second Special Report of the 1999–2000 session, Government Response to the Second Report of the Committee: Parliamentary Scrutiny of Treaties, HC 990

Recent developments in arrangements for scrutinising international agreements

119. In 2007, the Governance of Britain Green Paper set out the then Government's view that "the procedure for allowing Parliament to scrutinise treaties should be formalised" and expressed its intention to put the Ponsonby Rule on a statutory footing.[137] As we have seen, this was achieved by way of Part 2 of Constitutional Reform and Governance Act 2010 (CRAG) - which we discuss in detail in Chapter 3 above. However, this statutory change was not accompanied by substantively new arrangements for greater scrutiny by either House or their committees, with the CRAG provisions focusing more on notification rather than scrutiny or approval.

120. New systematic scrutiny arrangements only emerged in 2014, when the House of Lords Secondary Legislation Scrutiny Committee (SLSC) undertook to carry out scrutiny of treaties falling under CRAG. Between 2014 and 2019, the SLSC considered 69 treaties, reported on 18 of them for information, but did not draw any of them to the 'special attention' of the House.

121. The UK's decision to leave the European Union, however, brought with it the immediate task of scrutinising the new EU-UK agreements, as well as the prospect of a much wider range of treaties being directly negotiated by the UK with third countries now that negotiations would not be taking place at the EU level on the full range of subject matters previously within EU competence. At this time, the House of Lords Constitution Committee recommended the creation of an international agreements scrutiny committee.[138] Due to the focus being primarily centred on EU negotiations at this time, an International Agreements Sub-Committee of the House of Lords EU Committee took on the role of treaty scrutiny. This became a full committee in its own right in 2021, namely the International Agreements Committee (IAC). The new European Affairs Committee now examines all EU and EEA agreements under CRAG, while the International Agreements Committee examines all other agreements.

122. While the House of Commons has continued to carry out ad hoc scrutiny of international agreements, no corresponding arrangements have been made to routinely and systematically scrutinise international agreements in a way that mirrors the arrangements in place in the House of Lords. The International Trade Committee (ITC) was beginning to develop a practice of more systematic scrutiny of new trade deals, but it was abolished on 26 April 2023 following the machinery of government changes that moved the functions of the former Department for International Trade into the newly created Department for Business and Trade. It is not yet clear what level of priority the new Business and Trade Committee will attach to the scrutiny of trade, and related, treaties.

The limits of current scrutiny arrangements

123. The IAC has made a clear effort to establish effective mechanisms within the existing statutory framework. However, despite meaningful positive developments both in their own work and from the Government, significant concerns still persist. This is clearly set out in its *Working Practices: One Year On* report:

137 Ministry of Justice, he Governance of Britain Green Paper (Cm 7170, July 2007)

138 Constitution Committee, 20th Report of the 2017–19 Session, Parliamentary Scrutiny of Treaties, HL345

> The Government should not see parliamentary scrutiny of treaties as a rubber stamp at the end of the process to convey simple approval. For the system to function effectively, there must be meaningful consultation between the Government and Parliament (having also involved the devolved administrations). In particular, for agreements that have significant implications for the UK's domestic policy and regulatory framework, such as trade agreements, it is important that this consultation and dialogue starts before a mandate is established, so the final mandate can be informed by Parliament, and continues throughout the negotiation process.[139]

124. Furthermore, the Government has set out a series of commitments in letters to the IAC, which have crystallised into a practice known as 'the Grimstone Rule'. Two key commitments made were: that Government will consider facilitating a debate on the negotiating objectives for Free Trade Agreements (FTAs) subject to parliamentary time being available; and that, were IAC to report on an FTA laid under CRAG and a debate requested in a timely manner, then the agreement would not proceed to ratification without that debate having first taken place. The IAC has reported that, even in the short time since the Grimstone Rule has been in effect (since 2021), the commitments made by the Government "have been subject to frequent and iterative change".[140] IAC has also raised concerns about the lack of clarity around when changes to treaties will be subject to ratification, and has noted that the commitment to publish all amendments has not been adhered to. IAC has recommended that the Government at least publishes amendments to agreements that meet the threshold criteria set out in their *Working Practices: one year on* report.[141] Similarly, the IAC has raised concerns about not being informed of important non-legally binding instruments (NLBIs) and has also set out criteria for what NLBIs should be notified to the Committee.[142] Finally, the IAC recommends that Parliament should be formally consulted on the objective and mandates for free trade agreements; that all treaties should be provided to Parliament in draft prior to signature; and that Parliament's 'consent' should be required for trade agreements and other important treaties drawn to the special attention of either House.[143]

125. The report of the now defunct House of Commons International Trade Committee, *UK trade negotiations: Parliamentary scrutiny of free trade agreements,* also painted a concerning picture of the state of the current scrutiny arrangements. ITC also acknowledged that the Government has made efforts to improve information and communication, and stated that the commitments set out in the Grimstone Rule letters, as well in letters to ITC from successive Secretaries of State for International Trade, had not been adhered to

139 International Agreements Committee, 7th Report of Session 2021–22, Working Practices: one year on, HL 75, para 45

140 International Agreements Committee, 7th Report of Session 2021–22, Working Practices: one year on, HL 75, para 47

141 International Agreements Committee, 7th Report of Session 2021–22, Working Practices: one year on, HL 75, para 68–9

142 International Agreements Committee, 7th Report of Session 2021–22, Working Practices: one year on, HL 75, paras 82–3

(a) is politically or economically important; (b) imposes material obligations on UK citizens or residents; (c) has human rights implications; (d) is directly related to a treaty; or (e) would give rise to significant expenditure.

143 International Agreements Committee, 7th Report of Session 2021–22, Working Practices: one year on, HL 75, para 94

and did not go far enough.[144] ITC called for the Government to "undertake a full review of how it informs and engages with others before, during and after FTA negotiations".[145] ITC raised particular concerns that the parliamentary scrutiny arrangements set out in CRAG "do not reflect the changes made since the UK left the European Union and so are therefore not fit to scrutinise future FTAs",[146] and called for CRAG to be included as part of the review of current arrangements. ITC also expressed considerable concern that, despite commitments to information sharing and consultation during the mandate setting and negotiation stages, Parliament has merely been informed of decisions and outcomes after the fact. It stated clearly that this "needs to change".[147] Finally, the ITC report set out the concerns that it had around securing a debate on an important FTA during the CRAG period, and made the following recommendation:

> For CRAG to have any meaning, the House of Commons must have the opportunity not only to debate an FTA but also to vote on a substantive motion during the period in which it retains its power to delay ratification if it considers this appropriate. The Government must commit to accepting a timely request for a debate on a substantive motion for any new FTA, rather than seeking a general debate instead.[148]

126. The then Chairs of IAC and ITC, Baroness Hayter and Angus Brendan MacNeil MP, made clear to us their view that the current arrangements simply are not sufficient. Baroness Hayter told us:

> we as a Committee don't think that the scrutiny is sufficient, partly because the statutory basis was established at a different time, as far as Europe goes, and because of the way Parliament is working.[149]

Angus Brendan MacNeil expressed concern that the Government was treating both the negotiation and the parliamentary scrutiny of FTAs as a 'sausage factory': "get the thing in, get the thing through, get the thing done and let's not worry about what's in it".[150] There was very little engagement and involvement with Members in either House with these agreements. Overall, he told us:

> The scrutiny was insufficient […] the promises we got from Secretaries of State and various people round about us were not really worth the paper or the words uttered in the final analysis, particularly in the Australia agreement. That was disappointing and led to frustration, not just for me as Chair, but unanimously, cross party in our Committee.

144 International Trade Committee, Fourth Report of Session 2022–23, UK trade negotiations: Parliamentary Scrutiny of free trade agreements, HC 815, paras 3, 28, 33, 35, 43, 45, 65, 71
145 International Trade Committee, Fourth Report of Session 2022–23, UK trade negotiations: Parliamentary Scrutiny of free trade agreements, HC 815, para 8
146 International Trade Committee, Fourth Report of Session 2022–23, UK trade negotiations: Parliamentary Scrutiny of free trade agreements, HC 815, para 32
147 International Trade Committee, Fourth Report of Session 2022–23, UK trade negotiations: Parliamentary Scrutiny of free trade agreements, HC 815, para 54
148 International Trade Committee, Fourth Report of Session 2022–23, UK trade negotiations: Parliamentary Scrutiny of free trade agreements, HC 815, para 78
149 Q262
150 Q263

> Regardless which part of the political spectrum you come at this from, and regardless of who is in power, there should be a procedure of how these things are looked at, understood and engaged with by Parliament.[151]

Baroness Hayter was very clear with us that, even taking into account the changes that IAC has managed to bring about by way of ministerial commitments to engagement, the current legislation was not sufficient to guarantee Parliament can effectively scrutinise and influence treaties, telling us that "the legislation—the 21 days—does not work, and the idea that the only grip at all is at the very end does not match what I think today's parliamentarians want".[152] Angus Brendan MacNeil, told us simply that "I do not think that CRAG is the answer to anything at all. We have to design something with which people on all sides are comfortable".[153] Similarly, Baroness Hayter's predecessor as Chair of IAC, and its current Chair, the Rt Hon. Lord Goldsmith KC, summed up the situation when he wrote to us saying:

> Overall, we believe that Government has made important progress on the road to an effective scrutiny system, but it still falls short of where it needs to be, and in particular by comparison with some of our most important trading partners.[154]

Enabling parliament to scrutinise international agreements

127. There was a range of suggestions for how Parliament, and in particular the House of Commons, could improve its scrutiny of international agreements. Other than legislative changes (on which we have made recommendations in paragraphs 65–77 above), these suggestions focused on improving the scrutiny work undertaken by committees. A number of contributors suggested that the House of Commons could benefit from using the existing departmental committee structure. Arabella Lang and Alex Horne both emphasised to us that there was existing subject expertise in the House of Commons departmental committee structure, but that what was needed was "specific expertise in treaty processes and procedures that it does not have at the moment".[155] Similarly, Jill Barrett acknowledged that current departmental select committees were in a good position to scrutinise relevant treaties but also posed the question of whether there should nonetheless be "some kind of permanent treaty committee in the House of Commons".[156]

128. Professor Bartels, reflecting on his experience as Chair of the Trade and Agriculture Commission,[157] told us there are essentially two different role profiles in terms of expertise relevant to the scrutiny of treaties and other international agreements: the international law expert, who can interpret treaties, and the policy expert who understands what effect treaties will have domestically. Similarly, reflecting on his experience in carrying out international negotiations, Lord Frost told us he thought what Parliament needed to scrutinise and understand treaties properly was more resources, in particular:

151 Q263
152 Q272
153 Q284
154 International Agreements Committee, House of Lords (SIT0021)
155 Arabella Lang Q42
156 Q43
157 The Trade and Agriculture Commission (TAC) is an independent body (but supported by a Department for Business and Trade secretariat) that scrutinises signed FTA for whether they are consistent with the maintenance of UK levels of statutory protection in relation to UK animal and plant health, animal welfare, and environmental standards.

> a mix of legal expertise and trade policy expertise, which often means domestic expertise in the areas that are in a trade agreement. It is not traditional for parliamentary Committees to have large amounts of secretariat support, but, without creating a competing bureaucracy, there could reasonably be a bit more than there is at the moment.[158]

129. Both Angus Brendan MacNeil and Baroness Hayter drew attention to the difficulties of coping with the number of international agreements the Government had reached, not to mention their scope and complexity, within current staffing levels.[159]

130. There was considerable support in our evidence for the establishment of a dedicated House of Commons Committee or Joint Committee, for the purposes or sifting and coordinating the scrutiny of international agreements. As set out in paragraphs 60–62 above, there was also considerable support for combining the sifting function carried out by one dedicated committee with the House of Commons departmental committee structure then conducting detailed scrutiny on significant international agreements in relevant subject areas.

131. Angus Brendan MacNeil emphasised to us the importance of getting multiple angles and perspectives, e.g. those of agriculture, financial services, business, House of Commons, and House of Lords, on international agreements to avoid 'groupthink', but he also said it was important to coordinate between both Houses to avoid duplication of work.[160] Baroness Hayter agreed that it was important to maintain independent workstreams on treaty scrutiny in each House, but added that it was important to have a shared understanding on expectation, such as what the Government should be providing and at what juncture.[161]

132. When we raised the issue of the abolition of ITC and how the House of Commons should scrutinise international agreements going forward with the Government, both Minister Huddleston and Minister Rutley were clear that it was a matter for Parliament to make whatever arrangements it considers necessary to enable scrutiny in this area. The Government was also clear that, from its perspective, the experience of dealing with one committee in the House of Lords was helpful, and pointed out that there were other countries, such as Australia, where a single joint committee of both houses of the relevant legislature operated successfully.[162]

133. **The current arrangements in Parliament for the scrutiny of international agreements are not commensurate with their constitutional importance. The House of Lords has taken steps to address this constitutional lacuna with the establishment of the International Agreements Committee. By contrast, the scrutiny arrangements in the House of Commons are currently insufficient to carry out what is a core function of Parliament, namely the scrutiny of international agreements. This core function should be understood to include involvement in the mandate setting and negotiation phases, the ultimate approval of treaties, and holding the Government to account for their exercise of powers to negotiate and reach these agreements. The important work done by the International Trade Committee during its existence has demonstrated**

158 Q102
159 Q321
160 Q322
161 Q322
162 Qq428–434

the vital nature of a strategic approach to the parliamentary scrutiny of treaties. Furthermore, we are of the view that the statutory changes we have recommended earlier in this report, requiring all treaties to be subject to parliamentary process and, in appropriate cases, expressly approved by the House of Commons, should result in a greater focus from committees on international agreements. It is clear that the House of Commons is well placed to use its existing subject specialism in the departmental committee structure to provide detailed policy-focused scrutiny of international agreements. However, we note that this may not be sufficient by itself. ***We recommend that the Liaison Committee adds the scrutiny of international agreements to the core tasks of all relevant committees. To further support this aim, we call on the Government to bring forward a motion to amend the Standing Orders to add "scrutiny of relevant international agreements" to the remit of all relevant committees. Moreover, to ensure that scrutiny of international agreements is given the necessary attention in the House of Commons, we further recommend that a bespoke committee is established, along the lines of the International Agreements Committee in the House of Lords, to act as the focal point for such scrutiny and to lead on this scrutiny in the House of Commons.***

134. **Effective scrutiny of international agreements requires both policy expertise and expertise in international agreements and law.** ***We recommend that a review is carried out to consider whether and what additional resource is required to support effective scrutiny of international agreements in the House of Commons.***

Devolved scrutiny of international agreements

135. Clare Adamson MSP, Convener of the Constitution, Europe, External Affairs and Culture Committee in the Scottish Parliament, told us that the devolved legislatures have no formal role in scrutinising treaties or the work of UK ministers. Instead, the role of devolved legislatures and their committees is to scrutinise their (devolved) ministers, who have the ability to raise issues within devolved competence with the UK Government that relate to planned or ongoing international negotiations, and in turn to scrutinise the (devolved) legislation brought forward to implement international obligations.[163] Huw Irranca-Davies MS, Chair of the Legislation, Justice and Constitution Committee in the Senedd Cymru (Welsh Parliament), told us that in the absence of a formal role in the treaty scrutiny process, the Senedd had established a system to monitor and scrutinise all treaties that impact on devolved competence.[164] We heard that the primary issue for devolved legislatures in carrying out scrutiny in areas of devolved competence is information sharing at the intergovernmental level, which means it does not filter down to legislatures.[165] Both Huw Irranca-Davies and Clare Adamson made clear to us that they thought that devolved legislatures need to have useful information "to input into the process that would be helpful from a UK perspective", but were also clear that to do this they needed to be given notice of upcoming agreements and sufficient time to carry out scrutiny and share their views.[166]

136. **How the devolved legislatures choose to carry out effective scrutiny of relevant aspects is a matter for them to determine. However, we believe that their scrutiny of international agreements which involve areas of devolved competence is important.**

163 Q243
164 Q243
165 Q244
166 Q254

As set out above, the need for this scrutiny to take place should be a consistent factor in the sifting committee's determination of the appropriate period for scrutiny of a treaty.

Crown Dependencies and Overseas Territories

137. The Crown Dependencies and Overseas Territories are not recognised internationally as sovereign states in their own right but as territories for which the United Kingdom is responsible in international law. The UK remains the responsible international actor for all of these territories not only in terms of negotiating treaties on their behalf but also in terms of the legal responsibility for the adherence of these territories to international obligations.

138. Crown Dependencies and Overseas Territories cannot sign up to or bring into force treaties independently but can have the UK's ratification of such instruments extended to them. The only exception to this is where a letter of entrustment is issued by the UK Government which gives permission for a Crown Dependency or Overseas Territory to negotiate an agreement for themselves. In these circumstances, the UK still remains responsible internationally for these territories fulfilling their obligations under such agreements.

139. When the UK ratifies, accedes to, or accepts a treaty, convention or agreement, by long-standing practice it does so on behalf of the United Kingdom of Great Britain and Northern Ireland and any of the Crown Dependencies or Overseas Territories that wish the treaty to apply or are included within the territorial scope of the relevant agreement.[167] The UK's ratification, accession or acceptance can also be extended to Crown Dependencies or Overseas Territories at a later date. This means that the UK Government has time to consult with Crown Dependencies and Overseas Territories. The Ministry of Justice - the UK Government department with responsibility for policy on the Crown Dependencies - states that consultation with territories regarding extension is a matter of:

> essential policy and administration. International instruments which propose provisions relating directly to the Crown Dependencies should not be negotiated unless consultation in good time in advance has taken place with the Islands in question. Where applicable, the views of each Crown Dependency may also be required to formulate the UK negotiating position on an International Instrument.[168]

Similarly, the FCDO - the UK Government department with responsibility for policy on the Overseas Territories - set out the conditions on which it will consider extending treaties to one or more Overseas Territories, including that:

- The Territory is both willing to accept treaty obligations and, in the view of the UK, able to fulfil them (e.g. through having required legislation or policies in place).

167 Falkland Islands Government (SIT0025)States of Guernsey (Government of Guernsey) (SIT0008) Government of Jersey (SIT0018) HM Government of Gibraltar (SIT0026)

168 Ministry of Justice, Annex B: How to Note on the Extension of International Instruments to the Crown Dependencies.

- The Territory governments are first made aware of any issues and have time to raise concerns with any text. This may include the Territory acting as part of the UK delegation.
- The UK provides a briefing on the concept, perceived benefit, implementing process, and the UK stance on the treaty to the Territory.
- The Territory has formally requested extension (such as through a letter from the Governor).[169]

140. A key feature of the evidence we received from the Crown Dependencies and Overseas Territories was that there were already very effective arrangements in place for consultation about the extension of treaties.[170] However, some Overseas Territories did tell us that it felt sometimes like "the implications for Overseas Territories can be something of an 'afterthought'" for departments other than FCDO.[171]

141. Since Crown Dependencies and Overseas Territories are self-governing, and coordination activity is undertaken by the UK Government, they have no formal relationship with the UK Parliament on treaties. More widely, there is a convention that the UK Parliament will not legislate for the Crown Dependencies without their consent.[172] It is less clear whether such a convention applies to the Overseas Territories.[173] The new arrangements we set out above for treaty approval and the scrutiny of international agreements will, however, require a greater involvement by Parliament in treaties made for, or extended to, Crown Dependencies and Overseas Territories, because these treaties will need to be approved by the House of Commons.

142. **We are encouraged by the evidence we received on the regular and effective discussion and consultation between both the Ministry of Justice and Crown Dependencies and the FCDO and the Overseas Territories with regard to treaties that could be extended to them.** ***We call on the Government to ensure that it notifies the new sifting committee - as well as Justice Committee and Foreign Affairs Committee where appropriate - when it is in discussion with Crown Dependencies or Overseas Territories on the potential extension of treaties to them when negotiating an agreement on their behalf, or when it has provided a letter of entrustment.***

143. ***We are satisfied that the existing conventions are strong enough to ensure that a treaty will not be extended to the Crown Dependencies and Overseas Territories without their consent. This consent should also be communicated to Parliament at the point where the Government seeks to extend territorial applicability to include one or more jurisdictions. The changes to require the Government to seek Parliament's***

169 FCDO, Guidance on extension of treaties to Overseas Territories, November 2022

170 States of Guernsey (Government of Guernsey) (SIT0008) Government of Jersey (SIT0018) HM Government of Gibraltar (SIT0026) Falkland Islands Government (SIT0025)

171 Falkland Islands Government (SIT0025)

172 States of Guernsey (Government of Guernsey) (SIT0008)

173 The UK Government's 2012 White Paper 'Overseas Territories' makes clear that "as a matter of constitutional law the UK Parliament has unlimited power to legislate for the Territories". Foreign and Commonwealth Office, The Overseas Territories: Security, Success and Sustainability, June 2012, Cm 8374; An example of the UK Parliament legislating for Overseas Territories is Section 51 the Sanctions and Anti-Money Laundering Act 2018. This permits the Foreign Secretary to impose upon an Overseas Territory, via Orders in Council, publicly accessible registers of beneficial ownership should the Territories fail to establish such registers themselves by the end of 2020. See: The Overseas Territories: An introduction and relations with the UK, Research Briefing Number 9706, House of Commons Library, January 2023.

approval for all treaties will mean that treaties which include, or are to be extended to, Crown Dependencies and Overseas Territories, would require the approval of the House of Commons. A convention should be established between Parliament and the Government whereby the House of Commons would not be called upon to approve a treaty or extension of a treaty solely relating to a Crown Dependency or an Overseas Territory when the relevant jurisdictions had not yet expressed their approval.

Conclusions and recommendations

The constitutional position: the royal prerogative, the dualist system and international law

1. Under the UK's constitutional arrangements, the power to negotiate and enter into international agreements is a prerogative power; as such, the power still sits notionally with the sovereign, but in practice is exercised exclusively by the executive (i.e Ministers of the Crown). Prerogative powers are legitimately exercised by Ministers owing to the fact that they are understood to have the confidence of the House of Commons and are ultimately accountable to Parliament for any such exercise. (Paragraph 15)

2. While we believe that the prerogative should continue to be the source of the power for the Government to negotiate and enter into international agreements, it is clear that the manner and way in which that prerogative power is exercised needs to be more clearly and widely understood. The current arrangements grant the Government considerable power as well as flexibility in how they are used. We favour maintaining this flexibility but are alive to concerns about the potential for abuse of this power. As such, it must be understood that there are clear constitutional limits on the use of this power by ministers. The authority for a Minister, and the Government in general, to exercise the prerogative power is derived from the Government having the confidence of the democractially elected House of Commons. Each and every exercise of prerogative power by a Minister should have the confidence of, and conform to the will of, the House of Commons. It is the responsibility of all Ministers, in their exercise of these powers, to assure themselves that they are acting in accordance with the will and confidence of the House of Commons. (Paragraph 16)

3. The UK is a dualist state, meaning that, in order for obligations entered into through treaties to have effect in UK law, domestic implementation is required. This is an important feature of the UK's constitutional system, ensuring that any changes to domestic law needed to implement treaties must be considered by Parliament. While treaties bind the UK as a matter of international law, they do not automatically have effect as a matter of domestic law. Often, provisions do not require new primary legislation to have effect in domestic law; delegated powers to make secondary legislation may be used, or only parts of agreements are presented to Parliament to consider as the remaining obligations can be met without legislating. Furthermore, the current process tends towards presenting Parliament with a treaty whose terms have already been finalised, leaving it with no meaningful scope to amend or even influence the terms of the treaty. (Paragraph 22)

4. We found the arguments that implementing legislation provides an appropriate opportunity for scrutinising and considering treaties in their entirety to be wholly unconvincing. As such, the current arrangements do not deliver a constitutionally sufficient level of scrutiny; nor do they provide an opportunity for Parliament to approve important policies which can have a significant impact on domestic affairs. *Parliament's opportunity to debate and approve or reject implementing legislation is not a substitute for proper parliamentary consideration of a treaty. Agreement to*

implementing legislation should not be taken to represent approval of a treaty as a whole. This should be clearly set out in the Cabinet Manual and reflected in other guidance to ministers and civil servants. (Paragraph 23)

5. Over the last century, there have been significant quantitative and qualitative changes to the nature of international agreements; they now reach into people's everyday lives in the UK and around the world. They seek not only to deal with relations between states, but increasingly to address problems which one state cannot solve alone. In many instances, treaties have, as a consequence, become more akin to domestic legislation. International agreements are now concerned with domestic as well as international affairs, and accordingly this makes them a fundamental concern for Parliament. (Paragraph 30)

6. Parliament is not sufficiently engaged with international agreements. The UK's parliamentary democracy operates on the basis of the dual constitutional principles of parliamentary sovereignty and parliamentary accountability. As such it must be understood that scrutiny of international agreements is a core constitutional function of the UK Parliament. (Paragraph 31)

7. Currently, there is no requirement for Parliament to approve treaties. We find this situation untenable. Parliament's approval must be sought when the Government seeks to bind or change in any material way the UK's obligations under international law. *We therefore recommend that, as a matter of constitutional principle, all treaties should require the explicit approval of the democratically elected House of Commons before they enter into force. To be clear, this would not change the fact that treaties are negotiated and entered into under prerogative power; instead it would make the exercise of that prerogative to enter into an agreement that places, alters or removes a legal obligation on the UK, or to withdraw from such an agreement, conditional on the explicit, active approval of the House of Commons.* (Paragraph 32)

8. The UK Government carries out negotiations and enters into treaties for the whole of the UK. However, under the UK's devolution arrangements, day to day responsibility for areas of domestic policy which could be impacted by treaties often lies with the devolved institutions in Northern Ireland, Scotland and Wales. In these areas, consultation and coordination between the UK Government and devolved governments is done under the auspices of the Concordat on International Relations. This Concordat has not been updated since 2013. Since this time there have been significant developments in the field of intergovernmental relations; the devolution statutes themselves have changed, the UK has left the EU, and a new intergovernmental relations system has been established. (Paragraph 38)

9. While many of the principles in the Concordat on International Relations appear to us to continue to be the right ones, the Concordat itself clearly needs to be updated, and the cooperation that it facilitates must take place in earnest. *We recommend that the Concordat on International Relations be replaced or updated. This new or revised document should set out clear arrangements for timely and meaningful consultation with devolved institutions on the issue of treaties and clarify how the processes for reaching treaties interact with the recently revised IGR structures. The production of or update to this document should be prioritised, and the agreed arrangements published within six months of the publication of this report.* (Paragraph 39)

Concluding Treaties

10. It is clear from the evidence we received that the arrangements set out in the Constitutional Reform and Governance Act 2010 are unsatisfactory in a modern democratic society. We identified three main areas of concern. First, the legislation provides a passive role for Parliament which need only be notified of a new treaty and has only a limited power (in practice) to delay ratification. These arrangements do not provide Parliament with the opportunity to approve a treaty or not, and do not create the space for the level of scrutiny necessary for genuine democratic oversight and authorisation. Second, while many treaties are captured by the current legislation, there are several categories of treaty that are not. We firmly believe that all treaties need express parliamentary approval. Third, while we understand the historic origin of the 21-sitting day period, and accept that for some treaties it may be sufficient time for scrutiny, we are of the view that it is an arbitrary and, in many cases, insufficient period of time for the scrutiny of treaties, given their increasing complexity, and should therefore not be the default scrutiny period. In light of these findings, it is clear to us that, in order for the arrangements for entering into treaties to respect the core constitutional principle of parliamentary sovereignty, and to bring them into line with international comparators, Parliament must give its express approval to all treaties before they can be ratified or enter into force. (Paragraph 63)

11. *The explicit, active approval of the House of Commons should be a requirement for all treaties (legally binding international agreements) to be allowed to proceed to ratification or for it to be otherwise indicated that the UK gives consent to be bound by an international instrument. This means that the Government should not be able to proceed to ratify or otherwise indicate consent to be bound by a treaty until approval has been signified by a vote in the House of Commons.* (Paragraph 64)

12. *To achieve this end, we recommend that the mechanisms contained in Sections 20 to 25 of the Constitutional Reform and Governance Act 2010 are amended to implement the following arrangements in line with this principle of active approval: The legislation should set out that a Minister of the Crown is required to send all treaties to a parliamentary sifting committee, the composition of which will be determined by the House. This sifting committee will have 21-sitting days to recommend either:*

    i that the treaty can proceed to the floor of the House of Commons for debate and that a vote to approve the treaty or otherwise should take place no less than 21-sitting days after this recommendation is made (standard scrutiny period); or

    ii that the treaty is of such a nature that it requires enhanced scrutiny, and that an appropriate period should be set for that enhanced scrutiny (to be determined by the sifting committee) before which the treaty cannot be brought to the floor of the House of Commons for a debate and a vote (extended scrutiny period).

    In a situation where, following the expiry of the 21-sitting day sifting period, the sifting committee does not make a recommendation in accordance with either points (i) or (ii) above, the Government may bring a treaty forward to the floor of the House of Commons for a vote to approve the treaty or otherwise as soon as parliamentary time allows. (Paragraph 65)

13. *The exact criteria on which this decision should be made will be for the sifting committee to determine and to set out. The purpose of this longer scrutiny period would be to allow for the relevant parliamentary committees and other interested stakeholders, including but not limited to devolved legislatures and administrations, to carry out inquiries and set out their findings ahead of the parliamentary debate and vote to approve the treaty, so that the full implications of a treaty can be fully understood ahead of that vote. Where a treaty would enter into force on signature alone, a draft of the treaty should be provided in the same way as for other treaties, as Parliamentary approval would still be required to sign such a treaty.* (Paragraph 66)

14. *If the Government does not wish to accept the longer period of scrutiny set out by the sifting committee, a Minister of the Crown must make a statement to the House setting out the reasons why they believe the period is not appropriate and schedule a vote in the House of Commons to override the recommendation of the sifting committee. If that vote approves the Government's motion to override the sifting committee's recommendation, the Government can then schedule a debate and vote to approve the ratification of the treaty no less than 21-sitting days after the override vote.* (Paragraph 67)

15. We recognise that, while rare, there may be circumstances where a treaty needs to enter into force as a matter of urgency. *To account for such circumstances, the amended legislation should set out the criteria under which the Government should be able to bypass the sifting committee and proceed straight to the approval debate and vote, but it must nevertheless require the Minister to make a statement to the House setting out the reasons why the urgent procedure is being used in that particular case. This provision should not be able to be used once the process set out in Paragraphs 65–67 above has started - that is once the treaty has been provided to the sifting committee.* (Paragraph 68)

16. *We recommend that the existing requirement to provide an explanatory memorandum along with the treaty in Section 24 of the Constitutional Reform and Governance Act 2010 is retained.* (Paragraph 69)

17. We believe that adequate time should be available for both Houses to conduct meaningful scrutiny of treaties. However, it is a matter for the House of Lords how it chooses to arrange its business, both in its committees and chamber. We would, however, hope that a practice might develop whereby the House of Lords carries out scrutiny and holds a debate and vote on a treaty prior to that which will take place in the House of Commons under the amended legislation, so that the views of that House can be taken into account when the elected chamber votes on whether to approve a treaty. (Paragraph 70)

18. The negotiation and conclusion of treaties is a reserved matter. As such, devolved legislatures do not currently have a formal role in the scrutiny of treaties. However, many treaties, in particular following the UK's withdrawal from the European Union, may cover subject matters that touch on areas of devolved competence. It is important that the devolved legislatures are able to consider the impact of a treaty on these areas. We believe that adequate time should be available for devolved legislatures to conduct meaningful scrutiny of treaties that impact on areas of devolved competence. However, it is a matter for the devolved legislatures how they

choose to carry out scrutiny and arrange their business, both in their committees and their chambers. We would, however, hope again that a practice might develop whereby the devolved legislatures carry out scrutiny, produce reports and hold debates on a treaty in sufficient time so that the views of the devolved legislatures can be taken into account when the House of Commons votes on whether to approve a treaty. (Paragraph 71)

19. There is clearly potential for significant changes to be made following the conclusion of a treaty, and for those changes - for various reasons - not to be subject to parliamentary scrutiny under the current arrangements. All treaties, including any subsequent amendments or decisions of bodies made under those treaties that either modify the treaty itself or modify the UK's obligations under the treaty - regardless of whether those amendments or decisions have an impact on the domestic level - must be subject to parliamentary approval. Under the new arrangement for approval of treaties we have recommended in paragraphs 65–68 above, many amendments to treaties would be subject to a parliamentary vote. It is our view however that, moving forward, it would be impractical for Parliament to be required to debate and vote on every treaty amendment. It is our view however that, moving forward, it would be impractical for Parliament to be required to debate and vote on every treaty amendment. *When the Constitutional Reform and Government Act 2010 is amended in line with our recommendations in paragraphs 65–68 above, it should include a mechanism to ensure that all amendments to treaties, or decisions made under them, are considered by the sifting committee. That committee can recommend, within 21-sitting days following notification by the Government, that the amendment is either:*

    i of such a nature as to not require a debate and vote; or

    ii is, in its view, of such a nature that it should be subject to the process set out in paragraphs 65–67 above.

    In a situation where the sifting committee has does not make a recommendation within the 21-day sitting period, it will be considered as if that committee had recommended that the measure is of such a nature as to not require a debate and vote. (Paragraph 76)

Non-Legally Binding Instruments (NLBIs)

20. While non-legally binding instruments (NLBIs) do not place legal obligations on the UK, they can impose 'political obligations' that can guide government action and even result in financial obligations being placed on the UK. The UK is an internationally trusted nation; when it makes a political commitment, this should be viewed as essentially equivalent to making a legally binding obligation. We do however recognise that NLBIs can range from the very mundane to the very significant. (Paragraph 93)

21. There was considerable concern expressed to us that adequate records of NLBIs were not being kept and that there is insufficient public access to those NLBIs which have been reached. We received calls for a central repository of all NLBIs to be established. We were encouraged by the Government's assurance that individual departments do

indeed keep records of the NLBIs that are reached. However, we were not convinced by the argument that establishing and maintaining a single repository for non-legally binding instruments would be overly burdensome. *We therefore recommend the establishment of a central repository for all non-legally binding instruments, to be coordinated by the Foreign, Commonwealth and Development Office and made public on GOV.UK, and call for Parliament be notified of all new or updated documents added to that repository by way of a Written Ministerial Statement.* (Paragraph 94)

22. It is clear that NLBIs are already a significant part of how states manage relations between one another and make policy decisions internationally. Arrangements therefore need to be put in place for Parliament to be informed of new NLBIs and, if necessary, to scrutinise them. We would not expect routine and regular votes to approve NLBIs, but this does not diminish the obligation on ministers to assure themselves in reaching such agreements that they are acting in accordance with the will of, and with the confidence of, the House of Commons. (Paragraph 95)

23. *We further believe that if a request is made by a parliamentary committee or the Leader of the Official Opposition for a debate and vote on an NLBI, the Government should make time for this on the floor of the House. This practice should be set out in guidance to ministers and civil servants.* (Paragraph 96)

24. We recognise that, on occasion, there may be good reasons why the Government has to reach NLBIs in secret, for instance in relation to matters of defence or national security. This does not diminish the Government's accountability to Parliament for placing obligations on the UK. *As such, we recommend that when such an agreement is reached, arrangements are made to brief the appropriate House of Commons committee(s) in confidence, to facilitate a degree of scrutiny to take place, and provide the opportunity to express any concerns to the Government.* (Paragraph 97)

25. We stress the importance of the UK Government consistently informing devolved governments when it reaches an NLBI that has implications for devolved competence, and for this to be indicated in the central repository recommended in paragraph 94 above. Furthermore, we would expect devolved governments to keep a record of all NLBIs that they reach with international partners and for these agreements to be notified to the Foreign, Commonwealth and Development Office for recording in the central repository held by the UK Government. It is a matter for those administrations to make arrangements with their legislatures regarding the monitoring and scrutiny of such agreements. (Paragraph 100)

Mandates and Negotiations

26. To carry out its constitutional function effectively in regard to the scrutiny of international agreements, it is not enough for Parliament to be involved only at the end of the process. A new approach to conceptualising international negotiations and international agreements needs to be developed in the UK whereby Parliament is involved throughout the process or 'lifecycle' of an international agreement, from early considerations on whether to open negotiations, through the negotiation rounds themselves, and on to indications of consent (for example, by way of a formal vote on whether or not to approve treaty), and then beyond, into implementation and review. (Paragraph 110)

27. Given our recommendation that all treaties need to be subject to a parliamentary process for the UK to indicate consent to be bound, it would be in a Government's best interest to consult and update Parliament regularly. *We recommend that a working practices agreement is reached between the Government and Parliament which would set out the arrangements for how Parliament will be informed of the progress of negotiations. Such an agreement should also set out that Parliament would normally be consulted on, and may be asked to approve, the setting of negotiating mandates.* (Paragraph 111)

Parliamentary arrangements for the scrutiny of international agreements

28. The current arrangements in Parliament for the scrutiny of international agreements are not commensurate with their constitutional importance. The House of Lords has taken steps to address this constitutional lacuna with the establishment of the International Agreements Committee. By contrast, the scrutiny arrangements in the House of Commons are currently insufficient to carry out what is a core function of Parliament, namely the scrutiny of international agreements. This core function should be understood to include involvement in the mandate setting and negotiation phases, the ultimate approval of treaties, and holding the Government to account for their exercise of powers to negotiate and reach these agreements. The important work done by the International Trade Committee during its existence has demonstrated the vital nature of a strategic approach to the parliamentary scrutiny of treaties. Furthermore, we are of the view that the statutory changes we have recommended earlier in this report, requiring all treaties to be subject to parliamentary process and, in appropriate cases, expressly approved by the House of Commons, should result in a greater focus from committees on international agreements. It is clear that the House of Commons is well placed to use its existing subject specialism in the departmental committee structure to provide detailed policy-focused scrutiny of international agreements. However, we note that this may not be sufficient by itself. *We recommend that the Liaison Committee adds the scrutiny of international agreements to the core tasks of all relevant committees. To further support this aim, we call on the Government to bring forward a motion to amend the Standing Orders to add "scrutiny of relevant international agreements" to the remit of all relevant committees. Moreover, to ensure that scrutiny of international agreements is given the necessary attention in the House of Commons, we further recommend that a bespoke committee is established, along the lines of the International Agreements Committee in the House of Lords, to act as the focal point for such scrutiny and to lead on this scrutiny in the House of Commons.* (Paragraph 133)

29. Effective scrutiny of international agreements requires both policy expertise and expertise in international agreements and law. *We recommend that a review is carried out to consider whether and what additional resource is required to support effective scrutiny of international agreements in the House of Commons.* (Paragraph 134)

30. How the devolved legislatures choose to carry out effective scrutiny of relevant aspects is a matter for them to determine. However, we believe that their scrutiny of international agreements which involve areas of devolved competence is important.

As set out above, the need for this scrutiny to take place should be a consistent factor in the sifting committee's determination of the appropriate period for scrutiny of a treaty. (Paragraph 136)

31. We are encouraged by the evidence we received on the regular and effective discussion and consultation between both the Ministry of Justice and Crown Dependencies and the FCDO and the Overseas Territories with regard to treaties that could be extended to them. *We call on the Government to ensure that it notifies the new sifting committee - as well as Justice Committee and Foreign Affairs Committee where appropriate - when it is in discussion with Crown Dependencies or Overseas Territories on the potential extension of treaties to them when negotiating an agreement on their behalf, or when it has provided a letter of entrustment.* (Paragraph 142)

32. *We are satisfied that the existing conventions are strong enough to ensure that a treaty will not be extended to the Crown Dependencies and Overseas Territories without their consent. This consent should also be communicated to Parliament at the point where the Government seeks to extend territorial applicability to include one or more jurisdictions. The changes to require the Government to seek Parliament's approval for all treaties will mean that treaties which include, or are to be extended to, Crown Dependencies and Overseas Territories, would require the approval of the House of Commons. A convention should be established between Parliament and the Government whereby the House of Commons would not be called upon to approve a treaty or extension of a treaty solely relating to a Crown Dependency or an Overseas Territory when the relevant jurisdictions had not yet expressed their approval.* (Paragraph 143)

Formal minutes

Tuesday 23 January

Members present:

Mr William Wragg, in the Chair

Ronnie Cowan

Jo Gideon

Mr David Jones

John McDonnell

Damien Moore

Tom Randall

Lloyd Russell-Moyle

John Stevenson

Draft Report (*Parliamentary Scrutiny of International Agreements in the 21st Century*), proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 143 read and agreed to.

Summary agreed to.

Resolved, That the Report be the Second Report of the Committee to the House.

Ordered, That the Chair make the Report to the House.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order 134.

Adjournment

[Adjourned till Tuesday 6 February 2024 at 09.30am

Witnesses

The following witnesses gave evidence. Transcripts can be viewed on the inquiry publications page of the Committee's website.

Tuesday 08 February 2022

Alexander Horne, Former Legal Adviser to the House of Lords European Union Committee and at International Agreements Committee, House of Lords, Counsel at Hackett & Dabbs LLP and visiting professor, Durham University; **Arabella Lang**, Former Clerk in Parliament and Treaties Hub, House of Commons Library, Head of Research, Public Law Project; **Jill Barrett**, Independent international law consultant, associate member Six Pump Court and Former legal Counsellor at the Foreign & Commonwealth Office, Visiting Reader in the School of Law, Queen Mary University of London — Q1–40

Tuesday 07 June 2022

Rt Hon Lord Frost CMG, Former Chief Negotiator, Task Force Europe — Q41–112

Tuesday 21 June 2022

Professor Lorand Bartels MBE, Professor of International Law, Trinity Hall, Cambridge University; **Professor Malgosia Fitzmaurice**, Professor of Public International Law, Queen Mary University of London — Q113–158

Tuesday 05 July 2022

Richard Gardiner, Associate Member of the Faculty of laws, University College London (UCL); **Penelope Nevill**, representing the Bar Council, Barrister at Twenty Essex Chambers and visiting lecturer, Kings College London — Q159–207

Tuesday 22 November 2022

Rt Hon Angus Robertson MSP, Cabinet Secretary for Constitution, External Affairs and Culture, Scottish Government; **Mick Antoniw MS**, Counsel General and Minister for the Constitution, Welsh Government — Q208–241

Clare Adamson MSP, Convenor of the Constitution, External Affairs and Culture Committee, Scottish Parliament; **Huw Irranca-Davies MS**, Chair of the Legislation Justice and Constitution Committee, Senedd Cymru / Welsh Parliament — Q242–260

Tuesday 10 January 2023

The Baroness Hayter of Kentish Town, Chair, International Agreements Committee, Member of the House of Lords; **Angus MacNeil MP**, Chair, International Trade Committee, Member of the House of Commons — Q261–322

Wednesday 10 May 2023

Professor Holger Hestermeyer, Professor of International and EU Law, Kings College London; **Dr Emily Jones**, Associate Professor of Public Policy, Blavatnik School of Government, University of Oxford; **Dr Mario Mendez**, Reader in Law, Queen Mary University of London — Q323–364

Wednesday 14 June 2023

David Rutley MP, Parliamentary Under-Secretary of State (Americas and Caribbean), Foreign, Commonwealth & Development Office; **Paul Berman**, Legal Director, Foreign, Commonwealth & Development Office; **Nigel Huddleston MP**, Minister of State, Department for Business and Trade; **Leonie Lambert**, Deputy Director, Parliamentary Policy & Strategy, Department for Business and Trade	Q365–447

Published written evidence

The following written evidence was received and can be viewed on the inquiry publications page of the Committee's website.

SIT numbers are generated by the evidence processing system and so may not be complete.

1 Fairtrade Foundation (SIT0006)

2 Falkland Islands Government (SIT0025)

3 Friends of the Earth England, Wales and Northern Ireland (SIT0015)

4 Government of Jersey (SIT0018)

5 HM Government of Gibraltar (SIT0026)

6 Her Majesty's Government (SIT0010)

7 Horne, Alexander (Visiting Professor, Durham University); Lang, Arabella (Head of Research, Public Law Project); and Hestermeyer, Holger (Professor of International and EU Law and Director of the Centre for International Governance and Dispute Resolution, King's College London) (SIT0028)

8 Horne, Mr Alexander (SIT0001)

9 International Agreements Committee, House of Lords (SIT0021)

10 Jones, Dr. Emily (Associate Professor, Blavatnik School of Government, University of Oxford); Alves, Danilo Garrido (Research Officer, Blavatnik School of Government, University of Oxford); and Sands, Anna (Research Officer, Blavatnik School of Government, University of Oxford) (SIT0012)

11 Keep Our NHS Public (SIT0005)

12 Mendez, Dr Mario (Reader in Law, School of Law, Queen Mary University of London) (SIT0020)

13 National Farmers Union (SIT0014)

14 Parliament, The Scottish (SIT0023)

15 Parliament, Welsh (SIT0022)

16 Public Law Project (SIT0019)

17 RSPCA (SIT0004)

18 Senedd Cymru / Welsh Parliament (SIT0009)

19 States of Guernsey (Government of Guernsey) (SIT0008)

20 The Bar Council (SIT0013)

21 The Welsh Government (SIT0027)

22 Trade & Animal Welfare Coalition (TAWC) (SIT0016)

23 Trade Justice Movement (SIT0002)

24 Turks and Caicos Islands Government (SIT0024)

25 UKTPO - University of Sussex (SIT0007)

26 Wood, Sir Michael (Barrister; Member of the UN International Law Commission, Twenty Essex Chambers; UN International Law Commission) (SIT0011)

27 Wood, Sir Michael (Barrister; Member of the UN International Law Commission, Twenty Essex Chambers; UN International Law Commission) (SIT0003)

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5th	Governing England: Follow up to the Government's response to the Committee's Third Report of Session 2022–23	HC 1139
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1st Special	Coronavirus Act 2020 Two Years On: Government response to the Committee's Seventh Report of Session 2021–22	HC 211
2nd Special	The Cabinet Office Freedom of Information Clearing House: Government Response to the Committee's Ninth Report of Session 2021–22	HC 576
3rd Special	Parliamentary and Health Service Ombudsman Scrutiny 2020–21: PHSO and Government responses to the Committee's First Report	HC 616
4th Special	The Work of the Electoral Commission: Government Response to the Committee's Second Report	HC 1065

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6th Special	Parliamentary and Health Service Ombudsman Scrutiny 2021–22: Government and PHSO response	HC 1437
7th Special	The Role of Non-Executive Directors in Government: Government response to the Committee's Seventh Report of Session 2022–23	HC 1805
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