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International Agreements Committee

7th Report of Session 2021–22

Working practices: one year on

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International Agreements Committee

The International Agreements Committee is appointed by the House of Lords in each session to consider matters relating to the negotiation, conclusion and implementation of international agreements, and to report on treaties laid before Parliament in accordance with Part 2 of the Constitutional Reform and Governance Act 2010.

Membership

The Members of the International Agreements Committee are:

Lord Astor of Hever
Lord Foster of Bath
Lord Gold
Lord Goldsmith (Chair)
Lord Kerr of Kinlochard
Lord Lansley
Baroness Liddell of Coatdyke
Lord Morris of Aberavon
Lord Oates
Lord Robathan
Lord Sandwich
Lord Watts

Declaration of interests

See Appendix 1.

A full list of Members' interests can be found in the Register of Lords' Interests: http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests

Publications

All publications of the Committee are available at: https://committees.parliament.uk/committee/448/international-agreements-committee/publications/

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Committee staff

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CONTENTS

Page

Summary 2

Chapter 1: Introduction 5
This inquiry 5
Background 6

Chapter 2: Progress since the Committee's first Working Practices Report 8
Our review of scrutiny criteria and debate requests 8
Scrutiny of Free Trade Agreements 9
Incremental scrutiny commitments: a need for consolidation 10
UK Government engagement with other stakeholders 14
Scrutiny of other agreements 16
Outstanding issues from our previous inquiry 17
Consultation with the devolved administrations and legislatures 17
Amendments to international agreements 19
Memoranda of Understanding (or non-legally binding agreements) 20
The sequencing of implementing legislation 23

Chapter 3: Looking forward 24

Summary of conclusions and recommendations 26

Appendix 1: List of Members, declarations of interest and Committee staff 30

Appendix 2: Draft Concordat on scrutiny of Free Trade Agreements 32
Box 1: Proposals for further agreement 33

SUMMARY

This is our second report on Working Practices, published just over a year since we concluded our first inquiry. When we reported in July 2020, we stated that we would attempt to conduct practical and effective scrutiny of every international agreement laid before Parliament under the Constitutional Reform Act 2010 (CRAG 2010). However, we also noted that time and experience would tell whether it was possible to conduct meaningful treaty scrutiny within the current statutory framework.

This report provides details of how we have conducted our work over the past year; sets out some minor changes to our criteria for scrutiny and reporting to Parliament, proposes some further pragmatic steps which could be taken to improve scrutiny, and sets out our assessment of the statutory framework for treaty scrutiny.

Since we were established, we have reported on 46 treaties. Of these, 7 have been reported for the special attention of the House and 5 have been subject to debate. During this time, we have sought to formalise arrangements for treaty scrutiny with the Foreign, Commonwealth and Development Office (FCDO) and the Department for International Trade (DIT). This has met with limited success.

DIT has now set out a number of helpful commitments in respect of the scrutiny of trade agreements, which we have welcomed. However, these have been subject to frequent and iterative change, and are contained in a series of letters, consultation papers and undertakings given on the floor of the House. We recommend that these commitments should be consolidated into a formal concordat, to reflect the practices that have been established to-date. This should be jointly negotiated between the Government, this Committee and the International Trade Committee in the House of Commons. A draft of such a concordat is set out at Appendix 2 to this report.

Progress with the FCDO has been slower. Notably, it has failed to deliver on commitments made in September 2020 to publish all treaty amendments. Nor has it been able to agree a mechanism to notify Parliament of significant amendments to treaties, or important Memoranda of Understanding (MoUs) which involve international obligations of a serious character. To assist the Government in identifying the amendments and MoUs which should be notified, we have adopted some new criteria as to the types of documents which should be drawn to our attention.

We are also concerned that the laying of treaties and the introduction of associated legislation is not properly co-ordinated and that implementing legislation could be passed before we have had the opportunity to report. Accordingly, we request an undertaking from the Government not to pass legislation implementing any international agreement subject to ratification under CRAG 2010 in advance of our reporting, save in exceptional circumstances, and with a full explanation from the responsible Minister.

On the issue of devolution, we have consistently noted that the information that we are provided with in respect of the Government's consultation with the devolved administrations and legislatures is unsatisfactory. We welcome the fact that the Government has changed the guidance it provides on this

issue in its Explanatory Memoranda template and hope that this addresses the concerns we have raised. Nonetheless, we recognise that it is important that we are able to reflect a UK wide perspective in our reports and therefore invite the devolved governments and legislatures to engage with us if they consider the UK Government is seeking to enter into agreements which are not in the interests of Scotland, Wales, or Northern Ireland.

Finally, having scrutinised international agreements for over a year, we conclude that the statutory framework established under the Constitutional Reform and Governance Act 2010 is insufficient to facilitate the robust and effective scrutiny.

We believe that much could be learned from scrutiny systems operated in other jurisdictions and that, if a future administration is open to reforming the statutory framework, then priority should be given to the following measures: (i) ensuring that Parliament has a formal role, earlier in the process than it currently does; (ii) that Parliament should be provided with a treaty text in advance of signature (so that significant issues can be raised before the text is set in stone); and (iii) that Parliament's consent should be required, prior to ratification, for all trade agreements, and other significant treaties which are drawn to the special attention of either House.

Working practices: one year on

CHAPTER 1: INTRODUCTION

This inquiry

1. This inquiry follows up on the work of our first Working Practices inquiry, which considered how we could conduct practical and effective scrutiny of international agreements without the need for immediate legislative change. It also takes stock of developments in the House of Lords over the past year.

2. On 28 January 2021, the International Agreements Committee became a standalone select committee when it succeeded the International Agreements Sub-Committee.[1] Given the continuity in remit and membership, for the purposes of this report, we are treating both committees as if they were one and the same. Undertakings made by the Government to the former sub-committee are therefore reflected in our conclusions and recommendations.

3. This report provides a summary of the changes the Government has brought forward to address the concerns expressed in our earlier report, and highlights those matters which still need to be addressed. In addition, we have reviewed our criteria for scrutiny; when treaties that are drawn to the special attention of the House should be recommended for debate; and whether the Constitutional Reform and Governance Act (CRAG 2010) provides a suitable framework for treaty scrutiny.

4. Our work was informed by two roundtables with experts on treaties and trade agreements. We would like to thank the participants: Stephen Adam (Global Counsel); Jill Barrett (barrister and former Legal Councillor at the Foreign and Commonwealth Office); Professor Joanna Harrington (University of Alberta); David Henig (Director of Trade Policy at the UK Trade Policy Project);[2] Professor Holger Hestermeyer (King's College London); Emily Jones, Associate Professor in Public Policy (Global Economic Governance), Blavatnik School of Government, University of Oxford; Arabella Lang (Deputy Director (Research) Public Law Project) and Dr Mario Mendez (Queen Mary, University of London). We would also like to thank our specialist adviser for this inquiry, Alexander Horne (Counsel at Hackett & Dabbs LLP and Visiting Professor at Durham University).

5. While our report focuses on treaty scrutiny in the House of Lords, our work was conducted against the background of a review of treaty scrutiny by the House of Commons Public Administration and Constitution Affairs Committee (PACAC). Their inquiry aims to establish how the House of Commons should conduct treaty scrutiny and at what stages of treaty making it should be involved.[3]

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1 The International Agreements Sub-Committee of the European Union Committee had, since April 2020, taken on responsibility for scrutinising all international agreements laid before Parliament under CRAG.

2 David Henig also provides specialist advice to the Committee on the Trans-Pacific Partnership (CPTPP) accession negotiations and other trade-related questions.

3 See: Public Administration and Constitutional Affairs Committee, 'Inquiry into post-Brexit scrutiny of international treaties', 26 March 2021: https://committees.parliament.uk/work/1152/the-scrutiny-of-international-treaties-and-other-international-agreements-in-the-21st-century/news/153516/inquiry-into-postbrexit-scrutiny-of-international-treaties/

6. **We make this report to the House for debate.**

Background

7. On 10 June 2020, we published a report entitled Treaty Scrutiny: Working Practices.[4] It was the third report from a House of Lords Committee on the subject of treaties and followed on from the Constitution Committee's report Parliamentary Scrutiny of Treaties[5] and the European Union Committee's report Scrutiny of international agreements: Lessons learned[6]. These two reports had already emphasised the importance of treaty scrutiny and our first Working Practices report further expanded on their conclusions. All three reports were debated collectively in the House of Lords on 7 September 2020.[7]

8. We made recommendations in the following areas:

- Criteria for drawing a treaty to the special attention of the House;
- Circumstances where there should be debates on a treaty;
- Relations with other stakeholders, including other committees in Westminster, the devolved executives and legislatures, and the Crown dependencies and overseas territories;
- Information that should be provided on trade and non-trade agreements;
- The provision of confidential information and briefings;
- The provision of information on memoranda of understanding and amendments to agreements.

9. We also considered the adequacy of the current treaty scrutiny framework, including the Ponsonby Rule and the Constitutional Reform and Governance Act 2010 (CRAG). We noted that, following Brexit, there would be a loss of transparency and accountability if adequate new systems were not put in place, since the process of scrutiny of international agreements in the European Parliament was more advanced than the systems which had (then) been established by the UK Parliament.

10. In particular, we noted that the European Parliament had mechanisms to examine the mandates proposed by the Commission and the process of negotiations. Moreover, Article 218 of the Treaty on the Functioning of the European Union (TFEU) gave the European Parliament veto powers in respect of certain types of international agreements. We also referenced the scrutiny powers of the US Congress.

11. We further recalled the words of Walter Bagehot in his seminal work, *The English Constitution*, that:

> "Treaties are quite as important as most laws, and to require the elaborate assent of representative assemblies to every word of the law,

4 European Union Committee, *Treaty Scrutiny: Working Practices*, (11th Report, Session 2019-21, HL Paper 97)
5 Constitution Committee, *Parliamentary Scrutiny of Treaties*, (20th Report, Session 2017–19, HL Paper 345)
6 European Union Committee, *Scrutiny of international agreements: lessons learned* (42nd Report, Session 2017-19, HL Paper 387)
7 HL Deb, 7 September 2020, cols 105GC-107GC

> and not to consult them even as to the essence of the treaty, is prima facie ludicrous."[8]

12. We concluded that:

> "Time and experience will tell whether it is possible to conduct meaningful scrutiny within the current timescales. Much will depend on how far the Government is willing to share information in advance of laying an agreement under the CRAG Act. Accordingly, we anticipate reviewing our work within a year and making further recommendations. If we cannot make treaty scrutiny work within the current framework, legislative change may prove the only means to ensure adequate scrutiny of international agreements."[9]

13. We have been particularly struck that for two hugely significant agreements for the UK—the UK-EU Withdrawal Agreement and the Trade and Cooperation Agreement with the EU (TCA)—the relevant CRAG provisions were disapplied and therefore parliamentary scrutiny was circumvented.[10] Given the European Parliament did not complete its own scrutiny of the TCA until 28 April 2021,[11] there would have been ample time available for the UK Parliament to conduct its scrutiny on that agreement. Instead, neither House of Parliament had the opportunity for a formal debate or vote on the TCA itself, as opposed to the implementing legislation.

14. **This is our second report on working practices and it is published over a year since we concluded our first inquiry. This has given us the opportunity to take stock of how parliamentary scrutiny can be operated under the framework of the Constitutional Reform and Governance Act 2010 (CRAG), and whether there is a need for structural change.**

15. **We had hoped that, in the time since our first report, the Government would have established a framework for information sharing with clear, transparent and well-understood criteria. Unfortunately, this has not happened and we use the opportunity of publishing this report to set out some practical changes which we believe would make the treaty scrutiny process more effective.**

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8 Walter Bagehot, *The English Constitution*, 2nd Edition (Brighton: Sussex Academic Press, 1997), p 176

9 European Union Committee, *Treaty Scrutiny: Working Practices*, (11th Report, Session 2019-21, HL Paper 97), para 32.

10 While the scrutiny of agreements with the EU falls to the European Affairs Committee (previously the EU Committee), it should be noted that these have had an impact on other agreements we have scrutinised, including, for example, on the cumulation provisions of trade agreements.

11 European Parliament, 'Parliament formally approves EU-UK trade and cooperation agreement', 28 April 2021: https://www.europarl.europa.eu/news/en/press-room/20210423IPR02772/parliament-formally-approves-eu-uk-trade-and-cooperation-agreement [accessed 16 September 2021]

CHAPTER 2: PROGRESS SINCE THE COMMITTEE'S FIRST WORKING PRACTICES REPORT

Our review of scrutiny criteria and debate requests

16. Since we were first established in April 2020 as a sub-committee, we have considered 46 treaties. The majority of these were reported for information only, but seven were reported for the special attention of the House. Five agreements were also subject to a debate on the floor of the House or in Grand Committee. We are grateful for the support of the usual channels in finding time for those debates.

17. In determining whether to report an agreement to the special attention of the House we have used the following criteria:

    (a) that the agreement is politically or legally important, or gives rise to issues of public policy that the House may wish to debate prior to ratification;

    (b) in the case of any agreement that is intended to 'roll over' an agreement by which the UK was previously bound, as an EU Member State, that it differs significantly from the precursor agreement, or that it is inappropriate, in view of changed circumstances since the precursor agreement was concluded by the EU;

    (c) that it contains major defects, that may hinder the achievement of key policy objectives;

    (d) that the explanatory material laid in support provides insufficient information on the agreement's policy objective and on how it will be implemented;

    (e) that further consultation would be appropriate, including with the devolved administrations.

18. We believe that these criteria have worked well and have provided some guidance for the Government on the circumstances in which we may take a particular interest in a treaty. Nonetheless, with the conclusion of the post-Brexit trade continuity programme, criterion (b) is no longer relevant.

19. In most instances, reporting an agreement to the special attention of the House also led to the Committee requesting a debate, with the Chair tabling a motion for debate with the parliamentary authorities. To help us manage the volume of new agreements we are expecting to consider, and given that in due course we will also start reporting on the negotiating objectives of trade agreements (see paragraph 30), we have agreed to refine our approach to requesting debates. When agreements are reported for the special attention of the House, we will explicitly state whether we will be requesting a debate, or whether we are content for the Government to provide additional information in writing prior to ratification. This, of course, does not prevent other members of the House from requesting a parliamentary debate—and our revised approach should not be interpreted as a form of discouragement—but it should help to ensure that our and Parliament's time is used in the most efficient way.

20. **Our scrutiny criteria need to be updated now that the Government's post-Brexit trade continuity programme has been completed. In particular, criterion (b) (which relates to rolled-over trade agreements) is no longer relevant and will be deleted. The remaining criteria for scrutiny have worked well and will be retained, save for a wording change to criterion (e), which now reads "that further consultation is necessary, including with the devolved administrations".**

21. **We also intend to change the way that international agreements are reported to the House and debates are requested. When drawing an agreement to the special attention of the House we will either (a) explicitly recommend the agreement for debate, or (b) set out specific concerns and ask the Government to respond to these prior to the agreement being ratified. We hope that this change will be of assistance to both Members and the business managers in the House.**

Scrutiny of Free Trade Agreements

22. Following the end of the post-Brexit transition period, full powers over international trade have returned to the UK from the EU. The UK Government is seeking to make a number of new trade agreements, including with Australia and New Zealand, as well as seeking to accede to the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP), and to renegotiate some of the trade deals that it rolled over between 2019 and 2021.[12]

23. The Government has introduced a variety of measures to help Parliament and stakeholders scrutinise these arrangements. However, we note at the outset that these new measures continue to fall short of the European Parliament's powers, as set out in paragraph 10 and our first report on Working Practices.

24. Issues around the scrutiny of trade agreements were complicated during our first Working Practices inquiry, as the Government initially refused to stand behind earlier undertakings that it had set out in a series of papers published in February and July 2019, and March 2020.[13] Although the Government indicated that it would meet most of these, it did not commit to the full list,

12 In the immediate term, the Government is seeking to reach enhanced agreements with Canada and Mexico, building on the existing roll-over agreement. Its consultation, inviting comments for improving the existing trade deals, closed on 12 July 2021. It has also launched negotiations on a Digital Economy Agreement with Singapore. See Department for International Trade, 'Trade with Canada and Mexico: call for evidence', 18 May 2021: https://www.gov.uk/government/consultations/trade-with-canada-and-mexico-call-for-input [accessed 16 September 2021] and Department for International Trade, ' UK Singapore joint statement on the launch of negotiations on a Digital Economy Agreement', 29 June 2021: https://www.gov.uk/government/news/uk-singapore-joint-statement-on-the-launch-of-negotiations-on-a-digital-economy-agreement [accessed 16 September 2021]

13 DIT had originally indicated that it would publish an outline approach "which will include our negotiating objectives"; provide specialist committees of Parliament with access to "sensitive information" and "private briefings from negotiating teams" to ensure that parliamentarians can follow negotiations and take a comprehensive and informed position on any final agreement; publish Parliamentary Reports and impact assessments; and provide parliamentary committees advance sight of the agreement prior to laying it under CRAG

raising some doubts over the full list of commitments that would continue to apply.[14]

Incremental scrutiny commitments: a need for consolidation

25. Since then, Government commitments on scrutiny of trade agreements have developed in an iterative fashion, and have been communicated through different fora: through debates in the Chamber, in written parliamentary statements and in correspondence with us and the International Trade Committee in the Commons.

26. In December 2020, further to a conversation between our Chair, the Chair of the Commons' International Trade Committee, and Lord Grimstone of Boscobel Kt (Minister for Investment at the Department for International Trade and the Department for Business, Energy Industrial Strategy), the Government put on record a set of commitments for scrutiny of trade agreements through a Written Ministerial Statement (WMS).[15]

27. The scope of the WMS was limited to agreements with the US, Australia, New Zealand, and the UK's proposed accession to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). For other agreements, the Government stated that it would "provide further clarification at the appropriate time". The commitments made in the WMS are summarised in the table below:

Stage	Commitment in the WMS
Opening of negotiations	Publication of objectives and scoping assessments
Negotiations	Updates through 'Round Reports' on conclusion of each negotiation round
	Extensive stakeholder engagement on detail of negotiations
	Regular briefings with Parliamentarians
	Commons' International Trade Committee and Lords' International Agreements Committee (the Committees) to receive public and private briefings with Ministers and Chief Negotiators
Conclusion of negotiations	The Committees to be given confidential access to the agreement "a reasonable time" before laying under CRAG
	Publication of an Explanatory Memorandum and Impact Assessment alongside treaty text
	Should the Committees recommend a debate, the Government will "seek to accommodate" it, "subject to Parliamentary time"

14 Whereas the Committee stated that the full list of commitments should continue to apply, in its response to the Committee the Government merely stated that "the Government has re-stated a number of commitments in relation to trade agreements." In private discussions with officials, following the publication of the report, they repeatedly refused to commit to respecting the full list of commitments set out in the above-mentioned papers without setting out any commitments which they had particular concerns about. See HM Government, *Government response to the House of Lords International Agreements Sub-Committee Report: Treaty Scrutiny, Working Practices*: https://committees.parliament.uk/publications/2742/documents/27116/default/

15 Statement HLWS614, Session 2019–21

28. We noted that the commitments on parliamentary involvement at the start of negotiations fell short of those made by the previous Government in its 2019 Command Paper *Processes for making free trade agreements after the United Kingdom has left the European Union*.[16] The Command Paper had stated that "we will ensure that Parliament has a role in scrutinising these documents so that we can take its views into account before commencing negotiations".[17]

29. The absence of substantive Committee involvement regarding negotiating objectives prompted Members to engage with relevant amendments in the Trade Bill. Lord Lansley pressed a series of amendments that resulted in two new commitments from the Government, which have since been dubbed 'the Grimstone Rule'.

30. This new rule has two limbs: the first, in effect, includes a promise by the Government that it will facilitate a debate on the negotiating objectives if we request one.[18] The second limb relates to the ratification of an agreement for which we have requested a debate, and was couched by Lord Grimstone in the following terms:

> "I would like to state from the Dispatch Box that I cannot envisage a new FTA proceeding to ratification without a debate first having taken place on it, should one be requested in a timely fashion by the committee."[19]

31. This second limb of the Grimstone Rule was tested in relation to the proposed UK-Kenya Economic Partnership Agreement. During the debate, which was held after the end of the 21-day scrutiny period under CRAG, Lord Grimstone indicated that the Government had not yet ratified the agreement and delayed it deliberately "in order to ensure that Parliament has had the opportunity to effectively scrutinise the text".[20]

32. In March 2021, the then-Secretary of State for International Trade, the Rt Hon Elizabeth Truss MP, wrote to the Commons International Trade Committee.[21] She made clear that the terms of the Grimstone Rule would also apply to that committee, and, having previously been limited to negotiations with the US, Australia, New Zealand and the Trans-Pacific Partnership (CPTPP), extended the Government's commitments on scrutiny to all new free trade agreement negotiations:

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16 Department for International Trade, *Processes for making free trade agreements after the United Kingdom has left the European Union*, CP 63, February 2019: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/782176/command-paper-scrutiny-transparency-27012019.pdf [accessed 16 September 2021]

17 *Ibid.*

18 Lord Grimstone committed to the following: "If the International Agreements Committee should publish a report on those objectives, I can confirm that the Government will gladly consider that report with interest and, should it be requested, facilitate a debate on the objectives, subject to the parliamentary time available". See: HL Deb, 23 February 2021, col 724 While this commitment has not been tested yet, the Government has previously been very helpful in facilitating debates at the conclusion of negotiations.

19 HL Deb, 23 February 2021, col 724

20 HL Deb, 2 March 2021, cols 1134-1137 .The commitment to postpone ratification may also have been facilitated by delays experienced by the other party. Members of parliament in the Kenyan National Assembly had raised concerns that, ahead of ratification, additional documents were being tabled at short notice in breach of the standing orders. This led to deferred debates in the Kenyan Parliament. See: allAfrica, ' Kenya: MPs Refuse to Ratify Trade Pact Between Kenya and UK ', 26 February 2021: https://allafrica.com/stories/202102260229.html [accessed 16 September 2021]

21 Letter from the Secretary of State for the Department for International Trade to Chair of the International Trade Committee, 16 March 2020: https://committees.parliament.uk/publications/5136/documents/50660/default/

> "I can confirm my intention to further extend the principle of these arrangements to new FTA negotiations. This includes a commitment to undertake a public consultation/call for input, publish negotiating objectives, an initial scoping assessment and a Government response to the consultation/call for input before starting negotiations. In addition, should your Committee produce a report on these objectives and as part of this recommend a debate, then the Government will seek to accommodate a request, subject to available Parliamentary time. During negotiations, the Government will publish regular updates – usually after each substantive negotiating round, and undertake close engagement with the relevant Select Committees, including providing oral and written evidence in public and private. At the conclusion of negotiations, the Government will publish an independently scrutinised impact assessment, facilitate time for the relevant Select Committees to produce a report on the agreement and seek to accommodate a debate, subject to available Parliamentary time."

33. It remains unclear, however, whether these commitments will also apply to the following:

    (a) the 'enhanced' trade agreements the UK Government is expecting to negotiate with countries with which it already has a trade agreement. For example, the UK Government has just closed its public consultation on enhanced agreements with Canada and Mexico, with the aim of beginning negotiations with Canada and Mexico by the end of the year.[22]

    (b) agreements that are not 'full' FTAs but cover trade rules or seek to deepen economic collaboration between two countries, such as the Digital Economy Agreement the UK Government is negotiating with Singapore.[23]

34. In her letter, the Secretary of State also reiterated the Government's commitment to provide the two committees with "a reasonable time before the final agreement is laid in Parliament under the Constitutional Reform and Governance (CRAG) Act procedure, to produce a report on the agreement".[24] The letter suggested that the Government would seek to find "a pragmatic approach for how our new FTAs may be initially presented to Parliament ahead of the start of the 21 sitting day period under CRAG".

35. DIT officials are currently liaising with parliamentary authorities to enable these commitments to be met. Officials have suggested to our secretariat that they intend to make agreements available before formally laying them under CRAG, most likely around the time the agreement is signed. Officials are working to ensure that the system is in place for when the first new

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22 Department for International Trade, 'Trade with Canada and Mexico: call for input', 18 May 2021: https://www.gov.uk/government/consultations/trade-with-canada-and-mexico-call-for-input [accessed 16 September 2021]

23 Department for International Trade, ' UK Singapore joint statement on the launch of negotiations on a Digital Economy Agreement', 29 June 2021: https://www.gov.uk/government/news/uk-singapore-joint-statement-on-the-launch-of-negotiations-on-a-digital-economy-agreement [accessed 16 September 2021]

24 At the time of writing, the Committee had only reported on one new FTA–the UK-Japan Economic Partnership Agreement. This was disclosed to the Committee in advance, although the system for disclosure was suboptimal. The Government indicated that it would learn from this and disclose documents in a more useable format.

FTA—expected to be the trade agreement with Australia—has been signed. In relation to the Australia agreement, Lord Grimstone told us in his latest appearance before the Committee that he expects the committees to have access to the agreement text for "a period of at least three months—I stress at least three months—before the publication of the signed FTA and it being laid in Parliament for the purposes of CRAG".[25]

36. It remains to be seen how this system will operate in practice, but if it does work as planned, it will represent a significant improvement on our ability to conduct scrutiny of trade agreements.

37. Part of the rationale for increasing the time available for scrutiny derives from the need to provide the new Trade and Agriculture Commission (TAC)—a new statutory body to be set up under the Trade Act 2021—with sufficient time to conduct its scrutiny.[26] Its role is to examine the text of an FTA and provide advice to the Secretary of State on whether any of the FTA's measures on agricultural products have implications for the UK's domestic protections—specifically those relating to animal and plant health, animal welfare and the environment.[27] On receiving the advice from the TAC, the Secretary of State is required to produce a report on whether the FTA's measures are compatible with the maintenance of the UK's statutory protections and lay the report before Parliament alongside the TAC's advice.[28] Crucially, an FTA that includes measures on agricultural products cannot be laid in Parliament under CRAG until the Secretary of State has laid these other documents in Parliament first.[29]

38. The Government has also agreed to provide us with regular updates and confidential briefings on negotiations on trade agreements—and has delivered on this commitment. These updates and briefings provide useful context about the issues under discussion with proposed trade partners and enable us to line up evidence from appropriate stakeholders. They can, however, lack the level of granularity required for scrutiny purposes. This is true, in particular, of post-negotiation round updates—they tend to cover what has been discussed, but rarely give a flavour of the obstacles encountered during the negotiations. We also note that, in some cases, more detailed information has been made available publicly by the other party to an agreement. New Zealand is a particularly striking example. The New Zealand Government maintains a dedicated webpage on the negotiations, which includes detailed summary reports of each of the negotiation rounds.[30] We understand that there will be areas of negotiations that are sensitive and confidential, but we believe that the principle of scrutiny by parliament is important and should

25 Oral evidence taken on 19 July 2021 (Session 2021-22), Q 61 (Lord Grimstone of Boscobel)

26 Sections 8-11, Trade Act 2021. Although Sections 8-11 of the Trade Act still need to be commenced, our secretariat has been told by DIT officials that, in practice, the obligations in those sections would be honoured, even if commencement does not take place before the first new FTA is due to undergo parliamentary scrutiny. See: Letter from the Secretary of State for the Department for International Trade to Chair of the International Agreements Committee, 30 July 2021: https://committees.parliament.uk/publications/7127/documents/75430/default/

27 *Ibid.*

28 Section 42(4A), Agriculture Act 2020. Some reporting exemptions apply, including, for example, if the other party to the agreement is the European Union or one of its member states.

29 Section 42, Agriculture Act 2020

30 New Zealand Foreign Affairs & Trade, 'NZ-UK negotiating rounds': https://www.mfat.govt.nz/br/trade/free-trade-agreements/free-trade-agreements-under-negotiation/new-zealand-united-kingdom-free-trade-agreement/nz-uk-negotiating-rounds/ [accessed 16 September 2021]

be fully recognised, and we are open to discussing any arrangement that may help facilitate the sharing of confidential information.

UK Government engagement with other stakeholders

39. Since the publication of our last Working Practices report, the Government set up new trade advisory groups (TAGs), designed to secure input into free trade agreement negotiations from the wider business community.[31] We have heard from some members of the TAGs that, despite being required to sign non-disclosure agreements, there has been a reluctance to share the detail of the negotiations or draft text.[32] Despite the Government telling us that "all TAGs have been granted access to sensitive information during negotiations, which we have received positive feedback on from members",[33] we note that some TAG members have complained to the press about the apparent lack of meaningful information being shared.[34] In response to those concerns, press reports suggest the Government will look again at how input is sought and information shared with the TAGs.[35] It is, of course, too early to assess the impact this may have on the operation of the TAGs, but we tentatively welcome this development.

40. We similarly welcome the Government's decision on 7 September to allow trade union representation on the TAGs.[36] Arguing that the input sought from the unions was different to that being sought from industry, the Government, until recently, had engaged with the unions through a dedicated Trade Union Advisory Group. However, Unions raised concerns about the information being shared with that group and requested to be represented on the TAGs instead.[37] We note, however, that other civil society groups are not represented on the TAGs. When we asked the Government how they would ensure representation from non-business groups, Lord Grimstone replied that the Government engages with civil society organisations through "Ministerially-led roundtables and bilateral engagement", and that the Government would "continue to work with civil society … as we enter the next, crucial stages of negotiations".[38]

41. When it comes to engagement with the general public, a recent survey of 3,000 adults by consumer rights group Which? found that more than two

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31 Department for International Trade, ' Liz Truss brings key industries closer to trade negotiations', 26 August 2021: https://www.gov.uk/government/news/liz-truss-brings-key-industries-closer-to-trade-negotiations [accessed 16 September 2021]

32 See, for example, comments made by Geoff Taylor, the Chief Executive of the Phonographic Industry: Oral evidence taken on 2 December 2020 (Session 2019-21), Q25 (Geoff Taylor).

33 Letter from Lord Grimstone to Lord Goldsmith, 8 February 2021: https://committees.parliament.uk/publications/4847/documents/48617/default/

34 'Global Britain struggles to engage business in trade talks', *POLITICO* (23 July 2021): https://www.politico.eu/article/global-britain-struggles-to-engage-business-in-trade-talks-liz-truss-post-brexit/ [accessed 16 September 2021]

35 'UK reviewing how it gets trade deal advice amid business frustration', *POLITICO Pro Trade UK* (8 September 2020): available at https://pro.politico.eu/news/139914

36 'Government rows back on unions' role in trade talks', *The Independent* (7 September 2021): https://www.independent.co.uk/news/business/news/trade-unions-trade-deals-uturn-b1915065.html [accessed 16 September 2021]

37 'Government bars unions from 'seat at the table' in trade talks', *The Independent* (2 September 2021): https://www.independent.co.uk/news/business/news/government-bars-unions-trade-deal-talks-b1912453.html [accessed 16 September 2021]

38 Letter from Lord Grimstone to Lord Goldsmith, 8 February 2021: https://committees.parliament.uk/publications/4847/documents/48617/default/

thirds of consumers (67%) considered that the public was receiving too little information from the government around trade deals.[39]

42. As it reviews the operation of the TAGs, the Government should consider whether there are any improvements it can also make to how it engages on trade agreements with civil society and the wider public. Rather than focusing on promoting trade agreements in the media, the Government should recognise that parliamentary scrutiny, and in particular scrutiny of negotiating objectives, is an important contribution to its engagement with civil society.

43. **We welcome the steps the Government has taken towards greater transparency of new trade agreements, including the following commitments: to publish objectives ahead of negotiations; to Parliamentary debates; and to establish trade advisory groups. We also welcome the work it is undertaking with parliamentary authorities to ensure that the text of free trade agreements can be made available to us a reasonable time before being laid formally under CRAG.**

44. **Yet more needs to be done to improve the effectiveness of the existing scrutiny system and make it robust.**

45. **Significantly, formal points for engagement with the committee are always set for after Government decisions have already been taken, so we are effectively responding to a *fait accompli*. 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.**

46. **While we welcome that the Government has provided us with updates and private briefings on individual negotiations, it would be helpful if these could provide more in-depth information about the obstacles and points of contention in the negotiations. Cognisant of the sensitivities surrounding ongoing negotiations, we are open to discussing arrangements to ensure the confidentiality of any such information.**

47. **We are also concerned that, while the Government has offered a series of additional commitments in letters, consultations and on the floor of the House, including 'the Grimstone Rule', these have been subject to frequent and iterative change and have not been consolidated or formalised. As matters stand, any scrutiny that occurs is essentially in the gift of the Government of the day. The Government should also clarify whether, and to what extent, the commitments made in**

39 Which?, 'Consumers left in the dark on what trade deals will mean for them, Which? warns', 13 August 2021: https://press.which.co.uk/whichpressreleases/consumers-left-in-the-dark-on-what-trade-deals-will-mean-for-them-which-warns/ [accessed 16 September 2021]

respect of new agreements also extend to (a) new agreements with existing trade partners, and (b) agreements that, short of being full free trade agreements, seek to deepen economic relationships or contain trade rules.

48. **In the absence of legislation, we recommend that the Government consolidates the various commitments it has made to Parliament to-date on the subject of trade agreements into a formal concordat to demonstrate that these are requirements which are serious, certain, and concrete and should be respected by future administrations. The concordat should be jointly negotiated with us and the International Trade Committee in the House of Commons. We have included a draft of the proposed concordat at Appendix 2 to this report.**

Scrutiny of other agreements

49. The system for scrutinising non-trade agreements under CRAG is suboptimal and limited progress has been made to improve the system since our last Working Practices report. A specific challenge we have faced with non-trade agreements has been the absence of a formal mechanism to notify us of agreements that are about to be laid in Parliament for scrutiny. In most cases, agreements were only drawn to our attention once they were laid in Parliament.[40]

50. In the last 12 months we have scrutinised agreements as diverse as road and air transport agreements, agreements on the protection of classified information, the peaceful uses of nuclear energy, and the prevention of incidents at sea, as well as police cooperation and judicial cooperation agreements. The short time available for scrutiny under CRAG, combined with the wide range of subjects covered by international agreements, has made the task of scrutinising non-trade agreements particularly challenging. Expert input is often essential to enable us to identify all substantive issues with an agreement. It takes time, however, to source this expert input and without advance warning that an agreement is about to be laid in Parliament, it is difficult to obtain the necessary information and report within the confines of the 21-day timetable set out by CRAG.

51. Further to several discussions between our secretariat and Government officials, officials at the FCDO told our secretariat at the end of August that, in future, they would aim to send us a list of agreements each week based on those agreements for which an Explanatory Memorandum had been submitted to the FCDO Treaty Section.[41] A treaty being included in this list would mean that the agreement would likely be laid "in the next week or so". FCDO officials also cautioned that simply sharing a list of all signed

40 In its response to the Committee's Working Practices report, the Government said it would provide information on non-trade agreements on a case-by-case basis. It indicated that: "Where appropriate, the Government may provide such additional information as notifying Parliament of the opening of negotiations and updating on ongoing negotiations, via confidential or public briefings, written ministerial statements, letters or official-level meetings. Decisions on information provision will be considered by weighing the need for transparency and positive engagement with Parliament against a range of factors including: any confidentiality requirements of negotiations; third country concerns, or the UK's relationship with other states; and, whether doing so could be detrimental to the UK's negotiating position."

41 The FCDO Treaty Section supports other government departments with the conclusion of treaties and runs the UK Treaties Online database. See Foreign, Commonwealth & Development Office, 'UK Treaties Online': https://treaties.fco.gov.uk/responsive/app/consolidatedSearch/ [accessed 16 September 2021]

agreements with the Committee could give inconsistent timelines—for a variety of reasons, some signed agreements take longer to lay in Parliament than others. However, officials also said they would supply information on signed agreements where possible.

52. It is too early to tell how effective this new notification system will be, but we welcome this development and hope it will go some way to addressing the practical challenges we have dealt with when scrutinising non-trade agreements.

53. **The system that the Government has introduced for the scrutiny of trade agreements is more transparent than that under which non-trade agreements are scrutinised.**

54. **In particular, many of the non-trade agreements we have scrutinised were not notified to us until they were laid. This, in turn, limited the amount of time available to take evidence from stakeholders. We call on the Government to formalise the commitments recently made by FCDO officials to provide us with advance notice of agreements. A formal commitment could be included in response to this report, or conveyed through an alternative mechanism deemed suitable by ministers.**

Outstanding issues from our previous inquiry

55. We would like to thank FCDO and DIT officials for continuing to meet with our secretariat (and the staff of the House of Commons International Trade Committee) on a regular basis to share updates and discuss issues of concern. While we have seen some progress on the scrutiny of trade agreements, and on our request to provide us with advance notice of agreements due to be laid in Parliament, overall progress on the other issues we raised with the Government has been slow.

Consultation with the devolved administrations and legislatures

56. We have repeatedly had to ask the Government to provide information about consultation with the devolved administrations and whether they had raised any objections to the terms of agreements. This issue became sufficiently problematic that we began to contact the devolved administrations directly. The Foreign, Commonwealth and Development Office (FCDO) had promised to address this by revising their guidance for Government departments completing the Explanatory Memoranda (EM) that contain this information. We note that the guidance was updated on 31 August 2021 and now states that an EM should "describe the nature of consultations with the Devolved Administrations, including the focus of discussions and responses (to the extent possible)".[42] We welcome this development, but it remains to be seen to what extent this change to the guidance will lead to more information being provided.

57. In evidence to PACAC, the Government has acknowledged the interests of the devolved administrations in respect of treaties. It stated that:

42 Foreign, Commonwealth and Development Office, 'Treaties and MOUs: Guidance on Practice and Procedures', 31 August 2021: https://www.gov.uk/government/publications/treaties-and-mous-guidance-on-practice-and-procedures [accessed 16 September 2021]

> "The Government recognises the interest of the Devolved Administrations in relation to treaties. The Government's engagement with the Devolved Administrations in the area of treaty-making is underpinned by the International Relations Concordat, which is part of the Devolution Memorandum of Understanding between the United Kingdom Government and the Devolved Administrations. The Government continues to involve the Devolved Administrations in the formulation of the UK's position for international negotiations where these involve devolved matters (including non-devolved matters, which impact upon devolved areas). The Devolved Administrations also legislate to implement international obligations, which relate to devolved matters, and have responsibility for ensuring compliance, within their jurisdictions, with international obligations applicable to the UK. The Government is committed to working constructively with them to facilitate the effective implementation of the UK's international obligations …
>
> The Government has welcomed Parliament's suggestions to improve the quality of Explanatory Memoranda and intends to revise further the template contained in the FCDO Treaties and MOU Guidance in light of recommendations from the House of Lords International Agreements Committee."[43]

58. The Welsh Government has expressed support for formalising its engagement with the UK Government through a concordat that would go beyond the International Relations Concordat,[44] and which would extend to those areas that have an impact on devolved interests. We understand, however, that limited progress has been made. The Government should work with the devolved administrations to ensure that outstanding obstacles to agreeing such a concordat are overcome.

59. **We have consistently noted that the information we are provided with regarding the Government's consultation with its devolved counterparts and the devolved legislatures is unsatisfactory. While we accept that the negotiation of international agreements is a reserved competence, many agreements have a significant impact on devolved competencies and the system should be more transparent and consultation timely. We welcome the Government's changes to its guidance on Explanatory Memoranda and hope that the new guidance will ensure that the concerns we have raised are addressed.**

60. **In this context, we also note that the Welsh Government has proposed a concordat with the UK Government to formalise engagement, particularly in areas which, although not devolved, have a direct impact on devolved interests.**

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43 Letter from Lord Ahmad to Lord Goldsmith, 14 July 2021: https://committees.parliament.uk/publications/7023/documents/76807/default/

44 A 2013 Memorandum of Understanding between the UK Government and the administrations in Scotland, Wales and Northern Ireland sets out the principles that apply to inter-government relations. It also includes a Concordat on International Relations. See: Cabinet Office, *Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, the Scottish Ministers, The Welsh Ministers, and the Northern Ireland Executive Committee*, (1 October 2012): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/316157/MoU_between_the_UK_and_the_Devolved_Administrations.pdf [accessed 16 September 2021]

61. **In scrutinising and reporting on agreements, it is important that we are able to reflect a UK-wide perspective. We invite the devolved governments and legislatures to engage with us on international agreements, including if the UK Government is seeking to enter into agreements which are not believed to be in the interests of Scotland, Wales, or Northern Ireland. We, in return, will continue to press the issue of consultation with the devolved governments and parliaments in Westminster, to seek to ensure that concerns are heard in the UK Parliament.**

Amendments to international agreements

62. Most international agreements can be amended by the parties, although the mechanisms to do so vary. Most commonly, agreements make provision for amendments to happen through the mutual decision of the parties. This can happen through a variety of mechanisms, including Joint Committees (or similar structures) that are set up under the terms of the agreement itself.

63. Amendments to agreements can be as important as the underlying agreement itself, and so significant amendments ought to be subject to scrutiny. This is provided for under CRAG. However, the terms of section 25(2) of CRAG, which defines some of the exceptions to a treaty subject to ratification, are far from clear. Greater certainty is required about which amendments ought to be laid and scrutinised.

64. In addition, even if changes to an agreement are minor and technical in nature, and do not need to be laid under CRAG, or require legislation to be implemented, they may still be of interest and it is important that there is an accurate and publicly-available repository of this information.

65. We have two, longstanding, requests on the question of amendments to treaties. Both were discussed in our earlier Working Practices report.[45] The first was that the Government engage with us to devise a system for drawing new amendments to international agreements to the attention of Parliament. The second was that the Government should ensure that it maintains a list of amendments so that it is possible for anyone to find an up-to-date version of each international agreement.

66. While the Government has promised to implement both of these requests little has happened in practice.[46] It remains less than clear which amendments will be laid before Parliament for scrutiny, and whether there is a clear and logical rationale for any such decisions.

67. We note that the Government has now given evidence to PACAC that it "agrees with Parliament that it is important to have a complete and up-to-date record of the treaties to which the UK is a party, and has committed

45 European Union Committee, *Treaty Scrutiny: Working Practices*, (11th Report, Session 2019-21, HL Paper 97), paras 107–112

46 In its response to the Committee's report, published in September 2020, the Government indicated that: "It is the Government's intention that the majority of important treaty amendments will be subject to ratification and therefore will be submitted to Parliament for scrutiny in accordance with CRAG… The Government agrees with the IAC that it is important to have a complete and up-to-date record of the treaties to which the UK is a party, and so the FCDO is working with departments to ensure that all amendments to treaties are published in the UK's Treaty Series, including those that are not subject to CRAG." See HM Government, *Government response to the House of Lords International Agreements Sub-Committee Report: Treaty Scrutiny, Working Practices*: https://committees.parliament.uk/publications/2742/documents/27116/default/

to ensuring that all amendments to treaties are published in the UK Treaty Series, including those that are not subject to CRAG."[47] This reflects the response to our previous Working Practices report sent to us in September 2020. It is now time for this commitment to be put into action.

68. **The FCDO should publish clear guidelines on how it decides whether particular treaties and treaty amendments should be subject to ratification (and therefore laid under CRAG).**

69. **We call on the Government to honour the longstanding commitment it has made to publish all treaty amendments publicly and to make this information readily available online in a user-friendly format.**

70. **We recognise that it would be disproportionate to notify us in advance about each and every amendment. Since the Government has failed to come forward with a method for notifying us about significant amendments to treaties, we offer some additional guidance and criteria for amendments which we believe should be notified.**

71. **We recommend that the Government notifies us formally, and in advance where possible, of any amendments to international agreements which meet at least one of the following criteria:**

    (a) **The amendment is politically, legally or economically important;**

    (b) **The amendment imposes material obligations on UK citizens or residents;**

    (c) **The amendment has human rights implications;**

    (d) **The amendment would give rise to significant expenditure;**

    (e) **The amendment would change the underlying agreement significantly, or has provisions which are novel.**

72. **Any such amendments should be referred to us, whether or not they are subject to the ratification requirements under CRAG 2010.**

Memoranda of Understanding (or non-legally binding agreements)

73. In our original Working Practices report, we noted that the third limb of the Ponsonby Rule[48] meant that the Government should disclose agreements, commitments and undertakings (including Memoranda of Understanding, or MoUs) which "involve international obligations of a serious character" whether or not they met the specific criteria laid down under CRAG.

74. MoUs are commonly distinguished from formal international agreements on the basis that they are political agreements between states and not designed

47 Letter from Lord Ahmad to Lord Goldsmith, 14 July 2021: https://committees.parliament.uk/publications/7023/documents/76807/default/

48 The original Ponsonby Rule of 1924 had three limbs, the last of which was that the Government desired that Parliament should: "also exercise supervision over agreements, commitments and undertaking by which the nation may be bound in certain circumstances and which may involve international obligations of a serious character, although no signed and sealed document may exist." HC Deb, 1 April 1924, cols 2000–2005.

to be governed by international law[49]—yet they can still involve substantive obligations (and can sometimes even be treaties in their own right). In subsequent correspondence, we therefore indicated that important MoUs should be notified and, where appropriate, disclosed to the Committee on a routine basis.

75. Unfortunately, this request has been consistently refused by the Government, which has—at best—agreed to consider the issue on a case-by-case basis.[50] In its response to our original Working Practices inquiry, the Government contended that MoUs "can be useful tools for arrangements to be established quickly or operate flexibly, for detailed provisions which change frequently, for primarily technical or administrative matters, or for situations where confidentiality is required, for example, in defence matters or technology". It stated that "in general terms, MoUs are drafted in non-legally binding language to reflect political commitments. They are not binding as a matter of international law and are not published or laid before Parliament as a matter of Government practice".[51]

76. The issue around the disclosure of MoUs is one we have returned to because it is important. Put frankly, the difficulty with 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 MoUs 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.[52] 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.

77. An example of the sort of issues that can arise can be seen in our correspondence with the FCDO over a request for the disclosure of an agreement with the United States relating to the Croughton Annex (on diplomatic immunity arrangements for US personnel and their families) which came to light following the death of Harry Dunn.

78. A letter from our Chair noted the case of *Somalia v Kenya* (2017, International Court of Justice), where the International Court of Justice (ICJ) stated that the supposed MoU at issue in a case before it was in fact a treaty. Our letter indicated that the ICJ case demonstrated "that there is at least a risk that a document that the Government identifies as an MoU might actually be a

49 Article 2 of the Vienna Convention on the Law of Treaties defines a treaty as "an international agreement concluded between States in written form and governed by international law". See: United Nations, Vienna Convention on the law of treaties: https://treaties.un.org/doc/Publication/ UNTS/Volume%201155/volume-1155-I-18232-English.pdf [accessed 16 September 2021]

50 Thus far, the Government has refused to disclose an MoU relating to the Croughton Annex (which relates to the diplomatic immunity of certain US nationals under the Vienna Convention). It did disclose an MoU which related to a technology transfer agreement between the US and UK to allow for space launches from the UK.

51 HM Government, *Government response to the House of Lords International Agreements Sub-Committee Report: Treaty Scrutiny, Working Practices*: https://committees.parliament.uk/publications/2742/documents/27116/default/

52 Foreign, Commonwealth and Development Office, 'Treaties and MOUs: Guidance on Practice and Procedures' (August 2021): https://www.gov.uk/government/publications/treaties-and-mous-guidance-on-practice-and-procedures [accessed 16 September 2021]

treaty for the purposes of the Vienna Convention, if it is deemed that there was an intention to create legally binding obligations between the parties".[53]

79. That point was reinforced when the status of the MoU on the Croughton Annex was subsequently litigated by the Dunn family before the UK courts. Throughout this episode, the FCDO has refused to disclose the document to Parliament.

80. In the Third Edition of Modern Treaty Law and Practice, Anthony Aust (the former Deputy Legal Adviser to the Foreign and Commonwealth Office) acknowledged that "the use of MoUs is now so widespread, some officials may see the MoU as the norm, with a treaty being used only when it cannot be avoided".[54] He also noted that he was aware of several instances where there had been a disagreement on the status of a bilateral agreement between the parties, including some instances where this had happened after the agreement had become effective.[55]

81. Whatever their precise status, the Joint Committee on the Draft Constitutional Renewal Bill, which reported in 2008, recommended that the scrutiny of such documents should be enhanced. And it noted comments from the Foreign Affairs Select Committee that "many 'treaty-like' documents may be more important in their effects than most treaties". If MoUs are not disclosed, then there must be a risk that, as Arabella Lang has observed, such arrangements may be used as "workarounds" to enable scrutiny to be evaded where "parliamentary demands become too onerous".[56]

82. **We remain concerned that we are not informed of important agreements which are not subject to ratification, contrary to the third limb of the Ponsonby Rule. We accept that it is not necessary, and indeed would be disproportionate, to notify us of every Memorandum of Understanding that the Government enters into. However, there are some significant agreements which should be notified and sent to us for review—whether or not the Government believes that they meet the definition of a treaty under the Vienna Convention on the Law of Treaties.**

83. **In order to assist the Government in identifying these, we propose a new set of criteria to ensure that only significant Memoranda of Understanding are notified and sent to us. 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.**

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53 Letter from the Chair of the International Agreements Committee to the Secretary of State for the Foreign, Commonwealth and Development Office, 9 October 2020: https://committees.parliament.uk/publications/2909/documents/28098/default/

54 *Modern Treaty Law and Practice*,3rd Edition (Cambridge University Press, 2013), p 29

55 *Ibid.*, p 35

56 European Union Committee, *Treaty Scrutiny: Working Practices*, (11th Report, Session 2019-21, HL Paper 97), para 104

84. **We also believe that the terminology used to distinguish between treaties and political agreements can cause confusion, since documents that are entitled Memorandum of Understanding can actually be treaties. Going forward, we suggest that the Government uses the terminology of treaties and "non-legally binding agreements". Additionally, we propose that documents which are not intended to be legally binding should say so on their face to ensure that the intention of the parties is made clear.**

The sequencing of implementing legislation

85. To provide parliamentarians with a full picture when scrutinising legislation, it is important that substantive implementing legislation is not put before Parliament before we have had a chance to scrutinise and report on an agreement.

86. We were therefore concerned to note that in its evidence to PACAC, the Government indicated that it "considers that the flexibility to pass implementing legislation before, during or after CRAG scrutiny of a treaty is beneficial and sometimes essential, and should be preserved".[57] While there may be occasions where the Government is compelled to legislate in haste, in normal circumstances predictability is important and effective scrutiny is likely to be more difficult where Parliament has already passed the implementing legislation without sight of the underlying agreement.

87. **We are concerned that the laying of treaties and the introduction of associated legislation is not adequately co-ordinated and implementing legislation could be passed before we have had the opportunity to report.**

88. **We therefore ask the Government to provide a commitment that it will not pass legislation implementing any international agreement subject to ratification under CRAG 2010 in advance of our reporting, save in exceptional circumstances and with a full explanation by the responsible Minister. Such explanation should be provided to the Committee in writing.**

57 Letter from Lord Ahmad to Lord Goldsmith, 14 July 2021: https://committees.parliament.uk/publications/7023/documents/76807/default/

CHAPTER 3: LOOKING FORWARD

89. When we conducted our original Working Practices inquiry, we undertook to set out a series of pragmatic and proportionate recommendations to facilitate effective Parliamentary treaty scrutiny, without the need for legislative change. In so doing, we took the view that it was more important to get a scrutiny mechanism established and put in place before the end of the Brexit process, than to establish the ideal mechanism.

90. We also indicated, however, that we would reflect upon the restrictions imposed under the current statutory framework and return with further recommendations, should we consider them to be necessary.

91. We note that the Government has argued that treaty scrutiny mechanisms in the UK are "at least as strong as any other Westminster-style democracies".[58] It has gone further on social media, such as Twitter, arguing that "our scrutiny processes are amongst the most robust and transparent in the world".[59] In its evidence to the Commons' Public Administration and Constitutional Affairs Committee inquiry on the scrutiny of international treaties, the Government said:

> "The Government's position remains that the legislative framework in Part 2 of CRAG is appropriate and provides sufficient flexibility to permit Parliament to undertake effective treaty scrutiny prior to ratification.[60]

92. We respectfully disagree. In our previous inquiry, we identified other models which provide for more effective scrutiny,[61] and notwithstanding the improvements made thus far, we believe that more needs to be done.

93. **This is the fourth report on the principles of parliamentary scrutiny from the House of Lords. Our experience of scrutinising treaties for over a year reinforces the points raised previously by the European and Constitution Committees—we conclude that the statutory framework contained in CRAG is insufficient to ensure robust and effective scrutiny, even if the improvements called for in this report are implemented.**

94. **Much could be learned from the scrutiny systems which are operated in other jurisdictions. Most notably, we believe that if a future administration is open to reforming the statutory framework, then priority should be given to ensuring the following three improvements:**

    (a) **In respect of trade agreements, Parliament should be given a formal role in influencing the objectives when mandates are being set and this should be done transparently;**

    (b) **In respect of all other agreements, Parliament should be provided with a final draft text, in advance of signature, so that**

58 HC Deb, 7 December 2020, col 22WS
59 Rt Hon. Elizabeth Truss MP (@trussliz), twitter on [9 October 2020]: https://twitter.com/trussliz/status/1314491252956696577?lang=en
60 Letter from Lord Ahmad to Lord Goldsmith, 14 July 2021: https://committees.parliament.uk/publications/7023/documents/76807/default/
61 European Union Committee, *Treaty Scrutiny: Working Practices*, (11th Report, Session 2019-21, HL Paper 97), paras 83–87

any significant issues can be raised before the agreement is signed and the text is set in stone;

(c) **That Parliament's consent should be required, prior to ratification, for all trade agreements, and other significant treaties which are drawn to the special attention of either House.**

95. **Without such powers, Parliament's scrutiny of agreements is extremely constrained. While we are able to highlight issues, increase engagement with stakeholders, and conduct some technical scrutiny of the implications of new treaties, we are very much at the limits of what can be achieved under the restrictions imposed by the current statutory regime.**

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

Introduction

1. This is our second report on working practices and it is published over a year since we concluded our first inquiry. This has given us the opportunity to take stock of how parliamentary scrutiny can be operated under the framework of the Constitutional Reform and Governance Act 2010 (CRAG), and whether there is a need for structural change. (Paragraph 14)

2. We had hoped that, in the time since our first report, the Government would have established a framework for information sharing with clear, transparent and well-understood criteria. Unfortunately, this has not happened and we use the opportunity of publishing this report to set out some practical changes which we believe would make the treaty scrutiny process more effective. (Paragraph 15)

Progress since the Committee's Working Practices Report

3. Our scrutiny criteria need to be updated now that the Government's post-Brexit trade continuity programme has been completed. In particular, criterion (b) (which relates to rolled-over trade agreements) is no longer relevant and will be deleted. The remaining criteria for scrutiny have worked well and will be retained, save for a wording change to criterion (e), which now reads "that further consultation is necessary, including with the devolved administrations". (Paragraph 20)

4. We also intend to change the way that international agreements are reported to the House and debates are requested. When drawing an agreement to the special attention of the House we will either (a) explicitly recommend the agreement for debate, or (b) set out specific concerns and ask the Government to respond to these prior to the agreement being ratified. We hope that this change will be of assistance to both Members and the business managers in the House. (Paragraph 21)

5. We welcome the steps the Government has taken towards greater transparency of new trade agreements, including the following commitments: to publish objectives ahead of negotiations; to Parliamentary debates; and to establish trade advisory groups. We also welcome the work it is undertaking with parliamentary authorities to ensure that the text of free trade agreements can be made available to us a reasonable time before being laid formally under CRAG. (Paragraph 43)

6. Yet more needs to be done to improve the effectiveness of the existing scrutiny system and make it robust. (Paragraph 44)

7. Significantly, formal points for engagement with the committee are always set for after Government decisions have already been taken, so we are effectively responding to a fait accompli. 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. (Paragraph 45)

8. While we welcome that the Government has provided us with updates and private briefings on individual negotiations, it would be helpful if these could provide more in-depth information about the obstacles and points of contention in the negotiations. Cognisant of the sensitivities surrounding ongoing negotiations, we are open to discussing arrangements to ensure the confidentiality of any such information. (Paragraph 46)

9. We are also concerned that, while the Government has offered a series of additional commitments in letters, consultations and on the floor of the House, including 'the Grimstone Rule', these have been subject to frequent and iterative change and have not been consolidated or formalised. As matters stand, any scrutiny that occurs is essentially in the gift of the Government of the day. The Government should also clarify whether, and to what extent, the commitments made in respect of new agreements also extend to (a) new agreements with existing trade partners, and (b) agreements that, short of being full free trade agreements, seek to deepen economic relationships or contain trade rules. (Paragraph 47)

10. In the absence of legislation, we recommend that the Government consolidates the various commitments it has made to Parliament to-date on the subject of trade agreements into a formal concordat to demonstrate that these are requirements which are serious, certain, and concrete and should be respected by future administrations. The concordat should be jointly negotiated with us and the International Trade Committee in the House of Commons. We have included a draft of the proposed concordat at Appendix 2 to this report. (Paragraph 48)

11. The system that the Government has introduced for the scrutiny of trade agreements is more transparent than that under which non-trade agreements are scrutinised. (Paragraph 53)

12. In particular, many of the non-trade agreements we have scrutinised were not notified to us until they were laid. This, in turn, limited the amount of time available to take evidence from stakeholders. We call on the Government to formalise the commitments recently made by FCDO officials to provide us with advance notice of agreements. A formal commitment could be included in response to this report, or conveyed through an alternative mechanism deemed suitable by ministers. (Paragraph 54)

13. We have consistently noted that the information we are provided with regarding the Government's consultation with its devolved counterparts and the devolved legislatures is unsatisfactory. While we accept that the negotiation of international agreements is a reserved competence, many agreements have a significant impact on devolved competencies and the system should be more transparent and consultation timely. We welcome the Government's changes to its guidance on Explanatory Memoranda and hope that the new guidance will ensure that the concerns we have raised are addressed. (Paragraph 59)

14. In this context, we also note that the Welsh Government has proposed a concordat with the UK Government to formalise engagement, particularly in areas which, although not devolved, have a direct impact on devolved interests. (Paragraph 60)

15. In scrutinising and reporting on agreements, it is important that we are able to reflect a UK-wide perspective. We invite the devolved governments and legislatures to engage with us on international agreements, including if the UK Government is seeking to enter into agreements which are not believed to be in the interests of Scotland, Wales, or Northern Ireland. We, in return, will continue to press the issue of consultation with the devolved governments and parliaments in Westminster, to seek to ensure that concerns are heard in the UK Parliament. (Paragraph 61)

16. The FCDO should publish clear guidelines on how it decides whether particular treaties and treaty amendments should be subject to ratification (and therefore laid under CRAG). (Paragraph 68)

17. We call on the Government to honour the longstanding commitment it has made to publish all treaty amendments publicly and to make this information readily available online in a user-friendly format. (Paragraph 69)

18. We recognise that it would be disproportionate to notify us in advance about each and every amendment. Since the Government has failed to come forward with a method for notifying us about significant amendments to treaties, we offer some additional guidance and criteria for amendments which we believe should be notified. (Paragraph 70)

19. We recommend that the Government notifies us formally, and in advance where possible, of any amendments to international agreements which meet at least one of the following criteria:

    (a) The amendment is politically, legally or economically important;

    (b) The amendment imposes material obligations on UK citizens or residents;

    (c) The amendment has human rights implications;

    (d) The amendment would give rise to significant expenditure.

    (e) The amendment would change the underlying agreement significantly, or has provisions which are novel. (Paragraph 71)

20. Any such amendments should be referred to us, whether or not they are subject to the ratification requirements under CRAG 2010. (Paragraph 72)

21. We remain concerned that we are not informed of important agreements which are not subject to ratification, contrary to the third limb of the Ponsonby Rule. We accept that it is not necessary, and indeed would be disproportionate, to notify us of every Memorandum of Understanding that the Government enters into. However, there are some significant agreements which should be notified and sent to us for review— whether or not the Government believes that they meet the definition of a treaty under the Vienna Convention on the Law of Treaties. (Paragraph 82)

22. In order to assist the Government in identifying these, we propose a new set of criteria to ensure that only significant Memoranda of Understanding are notified and sent to us. 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. (Paragraph 83)

23. We also believe that the terminology used to distinguish between treaties and political agreements can cause confusion, since documents that are entitled Memorandum of Understanding can actually be treaties. Going forward, we suggest that the Government uses the terminology of treaties and "non-legally binding agreements". Additionally, we propose that documents which are not intended to be legally binding should say so on their face to ensure that the intention of the parties is made clear. (Paragraph 84)

24. We are concerned that the laying of treaties and the introduction of associated legislation is not adequately co-ordinated and implementing legislation could be passed before we have had the opportunity to report. (Paragraph 87)

25. We therefore ask the Government to provide a commitment that it will not pass legislation implementing any international agreement subject to ratification under CRAG 2010 in advance of our reporting, save in exceptional circumstances and with a full explanation by the responsible Minister. Such explanation should be provided to the Committee in writing. (Paragraph 88)

Looking forward

26. This is the fourth report on the principles of parliamentary scrutiny from the House of Lords. Our experience of scrutinising treaties for over a year reinforces the points raised previously by the European and Constitution Committees—we conclude that the statutory framework contained in CRAG is insufficient to ensure robust and effective scrutiny, even if the improvements called for in this report are implemented. (Paragraph 93)

27. Much could be learned from the scrutiny systems which are operated in other jurisdictions. Most notably, we believe that if a future administration is open to reforming the statutory framework, then priority should be given to ensuring the following three improvements:

(a) In respect of trade agreements, Parliament should be given a formal role in influencing the objectives when mandates are being set and this should be done transparently;

(b) In respect of all other agreements, Parliament should be provided with a final draft text, in advance of signature, so that any significant issues can be raised before the agreement is signed and the text is set in stone;

(c) That Parliament's consent should be required, prior to ratification, for all trade agreements, and other significant treaties which are drawn to the special attention of either House(Paragraph 94)

28. Without such powers, Parliament's scrutiny of agreements is extremely constrained. While we are able to highlight issues, increase engagement with stakeholders, and conduct some technical scrutiny of the implications of new treaties, we are very much at the limits of what can be achieved under the restrictions imposed by the current statutory regime. (Paragraph 95)

APPENDIX 1: LIST OF MEMBERS, DECLARATIONS OF INTEREST AND COMMITTEE STAFF

International Agreements Committee Members and staff

Lord Astor of Hever
No relevant interests
Lord Foster of Bath
No relevant interests
Lord Gold
Director, Gold Collins Associates Ltd
Principal, David Gold & Associates LLP
Balance Legal Capital
Lord Goldsmith (Chair)
Partner, Debevoise & Plimpton LLP
Admitted to the New South Wales Bar
Lord Kerr of Kinlochard
Chairman, Centre for European Reform
Deputy Chairman, Scottish Power plc
Member, Scottish Government's Standing Council on Europe
Lord Lansley
Director, LOW Associates Ltd
Chair, UK-Japan 21st Century Group
Trustee, Radix
Baroness Liddell of Coatdyke
Adviser, PricewaterhouseCoopers
Association Member, Bupa
Chair, Annington Ltd
Honorary Vice President, Britain-Australia Society Education Trust
Trustee, Northcote Educational Trust
Lord Morris of Aberavon
No relevant interests
Lord Oates
Chair, Advisory Committee, Weber Shandwick UK
Non-Executive Director, Centre for Countering Digital Hate
Director, H&O Communications Ltd
Lord Robathan
No relevant interests
Earl of Sandwich
No relevant interests
Lord Watts
No relevant interests

The Committee staff are Jennifer Martin-Kohlmorgen (Clerk), Andrea Ninomiya (Policy Analyst), and Robert Cocks (Committee Operations Officer).

Specialist Adviser

Alex Horne acted as Specialist Adviser to the Committee and declared the following interests:

Counsel, Hackett & Dabbs LLP; Visiting Professor at Durham University; and *Special Adviser, United Nations Development Programme (Pacific Region)*.

A full list of Members' interests can be found in the Register of Lords' Interests: https://members.parliament.uk/members/lords/interests/register-of-lords-interests

APPENDIX 2: DRAFT CONCORDAT ON SCRUTINY OF FREE TRADE AGREEMENTS

We invite the Government to negotiate a concordat jointly with us and the International Trade Committee in the House of Commons. The draft concordat below lists commitments already made by the Government in relation to free trade agreements. We have also included in a box further below several recommendations which are either under discussion already or we have newly made in this report, and which we invite the Government to consider as part of this and any future concordat negotiations.

This Concordat sets out the commitments relating to transparency and scrutiny of free trade agreements[62] and their negotiations, as agreed between the Lords' International Agreements Committee (IAC), the Commons' International Trade Committee (ITC) and the UK Government:

Opening of negotiations

- The Government will publish a public consultation and outline approach, including negotiating objectives.
- The Government will produce a written response to the public consultation before commencing negotiations.
- The Government will ensure that Parliament has the opportunity to scrutinise these documents and report.
- Where the IAC or the ITC publish a report on the draft negotiating objectives, the Government will facilitate a debate should parliamentary time allow.

During the negotiations

- The Government will provide updates to Parliament and the Committees at the conclusion of each negotiating round.
- The IAC and ITC will receive public and private briefings on request with Ministers and Chief Negotiators, including by way of oral and written evidence. Access to other officials may also be provided on a case-by-case basis.

Conclusion of negotiations

- IAC and ITC will be given access to the text of the signed agreement a reasonable time before the agreement is formally laid under CRAG.
- At the same time as the agreement text is made available ahead of the formal CRAG process, the Government will also make available an Explanatory Memorandum and independently scrutinised impact assessment.
- The Explanatory Memorandum will provide details of any relevant existing domestic legislation, any legislation required to be enacted, or other necessary implementing measures before the Treaty can enter into force, and how that legislation or measure will be brought into effect.[63]
- Where an agreement contains measures on agricultural products, or standards, the Government will provide a report and the advice it has received

62 [Agreed definition of free trade agreements to which this concordat applies to be inserted]

63 This commitment is made by the FCDO in its 'Treaties and MOUs: Guidance on Practice and Procedures', 31 August 2021: https://www.gov.uk/government/publications/treaties-and-mous-guidance-on-practice-and-procedures [accessed 16 September 2021]

from the independent Trade and Agriculture Commission to Parliament before laying the agreement under CRAG.

- The Government will not ratify a new FTA without a parliamentary debate, where one has been requested by the IAC or ITC, save in exceptional circumstances.

Box 1: Proposals for further agreement[64]

- It is important that Parliament is involved in close dialogue with the Government from the outset of the negotiations, as the Government recognised in its 2019 Command Paper Processes for making free trade agreements after the United Kingdom has left the European Union.[65] The Government should therefore ensure that we have had the opportunity to scrutinise and report on draft negotiating objectives, so Parliament can inform a mandate before it is formally set.
- Private briefings on individual negotiations and negotiation round updates should provide information about the obstacles and points of contention in the negotiations. We recognise that there will be areas of negotiations that are sensitive and confidential, but we believe that the principle of scrutiny by parliament is important and should be fully recognised. We are open to discussing arrangements to ensure confidentiality, consistent with a full commitment to parliamentary scrutiny.
- There is a risk that implementing legislation could be passed before we have had the opportunity to report on an international agreement. The Government should provide an undertaking not to pass legislation implementing any international agreement subject to ratification under CRAG 2010 in advance of us reporting, save in exceptional circumstances, and with an explanation from the responsible Minister.

64 This list only covers points identified by our Committee and does not seek in any way to limit additional requests by the Commons' International Trade Committee.

65 Department for International Trade, *Process for making free trade agreements after the United Kingdom has left the European Union,* CP 63 (February 2019): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/782176/command-paper-scrutiny-transparency-27012019.pdf [accessed 16 September 2021]