Written evidence from Sir Michael Wood (SIT 03)

Public Administration and Constitutional Affairs Committee
The Scrutiny of International Treaties and other international agreements in the 21st century inquiry

I am a barrister at Twenty Essex Chambers, London, practising in the field of public international law. Since 2008 I have also been a member of the UN International Law Commission. I was the Legal Adviser to the Foreign and Commonwealth Office (FCO) between 1999 and 2006, having joined as an Assistant Legal Adviser in 1970.

While at the FCO, and since, I have been involved in many treaty negotiations, including on behalf of the United Kingdom (e.g., the 1982 UN Convention on the Law of the Sea and the 1990 Treaty on German Unification) and Timor-Leste (the 2018 Maritime Boundaries Treaty with Australia).

1. In 2018 I gave evidence to the House of Lords Select Committee on the Constitution in connection with its inquiry on 'Parliamentary scrutiny of treaties'.[1] In doing so, I set out my views on certain matters that are also raised in the present inquiry. In the evidence below I take account of the important developments since my 2018 evidence, including the Report of the House of Lords Committee on the Constitution, the Government's response thereto, and the establishment, in February 2021, of the House of Lords International Agreements Committee.

2. If the House of Commons decides to develop an enhanced role in the scrutiny of treaties, which would certainly be welcome, it may wish to consider having a Joint Committee of both Houses of Parliament. This could ensure an effective and efficient Parliamentary scrutiny. A Joint Committee could offer considerable advantages in ensuring good use of available expertise while avoiding unnecessary duplication.

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3. I make two basic points at the outset. First, treaties as such do not become the law of the land in the United Kingdom; they bind the State at the international level, but only become part of national law if implemented in legislation. This 'dualist' system distinguishes the United Kingdom from States with a 'monist' system (such as France and Germany), and is relevant to the role of the legislature in relation to treaties.

4. Second, under public international law, there is a fundamental distinction between international agreements that are binding at the international level, and non-binding international instruments, which may be politically important but are not legally binding. Whatever their designation, binding international agreements are often referred to by public international lawyers as 'treaties'.[2] They "may take a number of

[1] Written evidence (PST 0012) to the House of Lords, 20th Report of Session 2017–19 (HL Paper 345).
[2] For the purposes of the 1969 Vienna Convention on the Law of Treaties (to which the United Kingdom is a party), "treaty" means "an international agreement concluded between States in written form and governed by

forms and be given a diversity of names".[3] Non-binding international instruments are likewise designated in a wide variety of ways; they are sometimes referred to as 'Memoranda of Understanding'.[4]

5. While the designation given to an international instrument may indicate its status, it is not decisive. What matters is whether there is an intention on the part of the States concerned to create legally binding obligations: this essentially depends on "the nature of the act or transaction to which the [instrument] gives expression".[5] It may sometimes be difficult to decide whether an instrument is binding under international law, as is explained in the decisions of international courts and tribunals. Ultimately, whether a document is binding or not must be assessed on a case-by-case basis to determine whether the negotiating States intended the instrument to be (or not to be) binding under international law. To make such a determination, one "must have regard above all to its actual terms and to the particular circumstances in which it was drawn up".[6]

6. Under the United Nations Charter all treaties have to be registered with the United Nations: I believe that the United Kingdom is scrupulous in fulfilling this important Charter obligation.[7] Non-binding arrangements, on the other hand, are not required by international law to be made public.

7. Treaties are not the only international instruments that may create international obligations for States. For example, the acts of international organizations may do so where the treaties establishing the organization in question so provide (e.g., binding decisions of the UN Security Council, or the international health regulations adopted by the World Health Organization). Unilateral declarations of States may also be capable of creating legal obligations.

8. I now turn to certain aspects of the questions listed in the call for evidence. I do so having regard in particular to the international law of treaties and the practice of international relations.

1) Role and purpose of international treaties/agreements

9. Treaties continue to play an important role in the 21st century. They remain a useful way to secure international commitments, and to advance foreign policy objectives. They ensure stability in international relations, given the principle enshrined in the Vienna Convention on the Law of Treaties that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.".[8]

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international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation" (article 2.1(*a*)).

[3] *Maritime Delimitation und Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994*, p. 120, para. 23.

[4] For example, in *Treaties and Memoranda of Understanding (MOUs), Guidance on Practice and Procedures* published by the Foreign, Commonwealth & Development Office (FCDO) Treaty Section.

[5] *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, p. 39, para. 96.

[6] *Ibid*.

[7] Article 102.1 of the UN Charter reads: "Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it."

[8] Vienna Convention on the Law of Treaties, article 26 ('*Pacta sunt servanda*').

10. Treaties come in all shapes and sizes. Some are of central importance in international and national affairs, while others are of strictly limited interest. Some create new obligations for the States concerned, while others may be declaratory (at least in part) of obligations already existing under international law.

11. It is difficult to classify treaties in the abstract, apart from the obvious distinction between those that are bilateral and those that are multilateral. Another important distinction is between those that require domestic legislation before they can be implemented and those that do not. The latter apply at the international level, establishing rights and obligations between the Parties, in implementation of foreign policy objectives.

2) Constitutional relationships

12. The call for evidence asks to what extent is there a tension between the sovereignty of Parliament and the ability of the Government to sign treaties that require or constrain future legislative changes. As explained above, under our 'dualist' system obligations set forth in treaties do not form part of United Kingdom law unless and until they are incorporated by statute. At the same time, it is the practice of the United Kingdom not to bind itself to a treaty until the necessary legislation is in place (though there have been rare exceptions in cases of special urgency). The FCDO's position in this regard is described in the Treaty Section *Guidance on Practice and Procedures*.[9] There may, however, be cases where it is not be known that legislation is needed, since the precise meaning of a treaty may evolve over time.

13. Consideration might be given to whether the Government should be invited to give an assurance to the effect that it will endeavour so far as possible not to bind itself to a treaty until any necessary implementing legislation is in place; it would seem difficult to go further since, given the nature of international relations, there may be exceptional reasons for urgency and as indicated above it may not be known early in the life of a treaty that legislation is needed.

14. The call for evidence asks what role British overseas territories should have in relation to treaties. Clearly they should continue to be consulted whenever a treaty is being negotiated or signed that could particularly affect them. In very rare cases, a British overseas territory may be authorized by the UK Government to conclude a treaty,[10] which is then binding on the United Kingdom but not subject to Constitutional Reform and Governance Act 2010 ('**CRaG**').

3) Effectiveness of current scrutiny mechanisms

15. Part 2 of the CRaG placed the 'Ponsonby rule' on a statutory basis. It provides a good framework within which to develop arrangements for Parliamentary scrutiny of treaties.

[9] Note 4 above.
[10] See FCDO Treaty Section *Guidance on Practice and Procedures*, note 4 above.

16. Whether further improvements in scrutiny mechanisms need to be enshrined in statute is an open question. There would seem to be merit, and at least in the early days and without excluding future legislation, in retaining the flexibility that exists when arrangements develop organically based on experience and cooperation between Parliament and the administration.

17. Many aspects of the Parliamentary scrutiny of treaties are dealt with in existing arrangements, including sections 20 to 25 of the CRaG. The legislative framework strikes a balance between the roles of Parliament and of the Executive, and leaves scope for improvements through incremental change.

18. It is sometimes suggested that it would be desirable for there to be more scrutiny of treaties before ratification. It has been said that that would ensure more democratic oversight, in particular if a Parliamentary committee were to look at important treaties (filtered with the help of their staff) that do not involve legislation. This could take the form either of a more active role on the part of the relevant Select Committee, or the establishment of one or more committees specifically mandated to consider treaties.

19. If such further change were considered desirable, there are no doubt useful models and experience to be found in other countries, though in making comparisons a key distinction is the one already mentioned: whether treaties automatically become part of national law (as in some other countries) or not (as in the United Kingdom).

20. The Committee ask how effectively the implementation of international treaties, including the decisions of new decision-making bodies, is being scrutinised. This reference to 'the decisions of new decision-making bodies' may refer to certain bodies with wide-ranging powers established under recent treaties, such as the joint committees under some of the UK's 'continuity' treaties following exit from the EU.

21. It has long been the case that treaties establish bodies with the power to take decisions binding on the parties to the treaty. Mention has already been made of the Charter of the United Nations (1945), under which the UN Security Council may (and frequently does) adopt decisions binding on all Member States.[11] Another example is the Constitution of the World Health Organization (1946), under which the World Health Assembly may adopt international health regulations establishing obligations binding on all Member States.[12] Likewise, there are many examples, going back years, where treaty amendments may be adopted by an organ established by the treaty or by 'simplified' procedure and entry into force for all States Parties without ratification by the individual States. In all these cases, the power has been conferred by States by virtue of their original agreement to be bound by the treaty.

22. The CRaG applies to treaties that enter into force upon ratification (ratification being defined broadly in section 25). Public international law allows for great flexibility in matters of treaty form and procedure. Not all treaties are subject to ratification. Some

[11] Article 25 of the UN Charter reads: *"The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."*

[12] Article 22 of the WHO Constitution reads: *"Regulations adopted pursuant to Article 21 shall come into force for all Members after due notice has been given of their adoption by the Health Assembly except for such Members as may notify the Director-General of rejection or reservations within the period stated in the notice."*

enter into force upon signature or upon an exchange of notes (though in the latter case entry into force may be delayed pending completion of any constitutional requirements). These are usually (but not always) the less significant treaties, and do not require implementing legislation. There may be practical difficulties with scrutiny of such treaties. In particular, the text may not in fact be finalized until immediately prior to signature. It may be important, in order to clinch a deal, to move to signature as soon as the negotiations are completed and while the negotiators are still face-to-face.

23. The provisional application of treaties is a well-recognized institution of international law, being the subject of article 25 of the Vienna Convention on the Law of Treaties.[13] At its current session, the UN International Law Commission is expected to adopt on second (and final) reading a *Guide to Provisional Application of Treaties*.[14] The provisional application of a treaty produces a legally binding obligation to apply the treaty, except to the extent that the treaty provides otherwise or it is otherwise agreed.[15] States may usually terminate provisional application relatively easily.[16] The value of provisional application, as a way to give effect to treaties ahead of their entry into force, is beyond doubt, as recent United Kingdom practice following exit from the EU has shown. It serves a useful function in international relations by enabling a treaty or a part thereof to be applied swiftly, even where one or more of the States concerned is unable to ratify the treaty immediately.

4) Role of the House of Commons

24. The Committee ask what role Parliament, and the House of Commons in particular, should have at different stages of the treaty making and implementation process. They further ask what role Parliament should have in relation to different types of treaties.

25. As explained in my 2018 evidence,[17] and as the House of Lords recognized in its 2019 report, there are obvious limits to Parliamentary scrutiny of treaty negotiations while they are ongoing. Negotiating in the glare of publicity is unlikely to be effective. The negotiation of a treaty is often sensitive, with one or both or all parties demanding a high degree of confidentiality (sometimes extending even to the very fact that negotiations are taking place). In addition, treaty negotiations are often conducted in highly informal and unpredictable ways, and are frequently time sensitive.

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[13] Article 25 of the 1969 Vienna Convention on the Law of Treaties reads:
1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:
(a) the treaty itself so provides; or
(b) the negotiating States have in some other manner so agreed.
2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

[14] For the text of the 12 draft guidelines, of which the UN International Law Commission took note on 3 June 2021, see UN Document A/CN.4/L.952, available at https://documents-dds-ny.un.org/doc/UNDOC/LTD/G21/113/75/PDF/G2111375.pdf?OpenElement

[15] *Ibid.*, draft guideline 6.

[16] *Ibid.*, draft guideline 9.

[17] Note 1 above.

26. There may be a case for singling out particular types of treaties. This is already done, for example in relation to double taxation treaties. Particular attention is currently being paid to wide-ranging free trade agreements, and some special arrangements are already in place in this regard. But it is not always possible to divide treaties into 'types'. While in a sense all treaties 'affect people's lives', how they do so varies greatly.

27. There may be cases where there is particular scope for a degree of Parliamentary involvement, for example where negotiations last a considerable time and/or take place in multilateral forum, within the United Nations or other international or regional institutions. But it would hardly be practical to lay down general requirements for Parliamentary scrutiny during the negotiation of a treaty. If such arrangements are considered desirable in a specific case, they may be designed *ad hoc*. No doubt experience would in due course enable best practices to develop.

5) Information and resourcing requirements

28. The call for evidence asks how, and at what stages of the treaty making process, the Government should share information with Parliament. Given the great variety of treaty negotiations, it does not seem practical to lay down hard and fast rules, going beyond the conclusions in the 2019 House of Lords report.

29. The call for evidence also asks what sort of expertise Parliament needs to scrutinise treaties. Clearly expertise across a wide range of law and international relations is needed, both among the members of any scrutiny committee and among their staff. This is particularly so in the field of public international law, including treaty law and practice; treaty interpretation is quite different from the interpretation of statutes or contracts.

30. Whether present arrangements for Parliamentary scrutiny of treaties should be enhanced in some way raises obvious resource issues (for Parliament and for Government). The human resource and other costs need to be weighed against the advantages. Such weighing will be crucially affected by the particular arrangements decided upon. It may also be felt that the broad range of quite specialized expertise required points in the direction of a Joint Committee.

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