

Written evidence from Her Majesty's Government (SIT 10)

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

Introduction

1. The Government welcomes the inquiry from the Committee and the opportunity to provide written evidence.
2. As a general comment, the Government would direct the Committee to its response to the House of Lords International Agreements Sub-Committee Report: Treaty Scrutiny, Working Practices (September 2020). It also recalls the Government response to the House of Lords Constitution Committee Report: Parliamentary Scrutiny of Treaties (July 2019) and the written evidence of the Foreign and Commonwealth Office to the Committee's earlier inquiry on The Role of Parliament in the UK Constitution: The Scrutiny of International Treaties and other Agreements (October 2019), which closed due to the general election on 12 December 2019.

Role and Purpose of treaties / international agreements

3. Treaties have long been an essential tool for the conduct of international relations and this has continued to be the case in the 21st century. They provide clarity, precision and predictability for states and international organisations in their mutual legal relations and are a vitally important vehicle for ensuring stability, and the pursuit of shared values and objectives, in international affairs.
4. In preparation for, and following, the UK's departure from the European Union, the Government's International Agreements Programme has marked a historically busy period for UK treaty-making, with almost 150 treaties successfully concluded by the end of the transition period, covering a broad range of issues. These are, however, just a part of the extensive network of bilateral and multilateral treaties which the UK has concluded throughout history, and which continue to provide the framework for the conduct of its international relations.
5. The terms "treaty" and "international agreement" are generally used interchangeably.^{1 2} While they can take many forms and have a variety of names, it is the intention of the parties to create obligations under international law which is determinative of whether they constitute a treaty.
6. As such, treaties and international agreements are distinct from other instruments and arrangements which are not intended to be binding under international law and which contain political commitments or administrative arrangements. Such instruments are

¹ A "treaty" is defined at Article 2(1)(a) of the Vienna Convention on the Law of Treaties 1969 as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

² An international agreement can also be concluded between States and an international organisation or between international organisations. https://legal.un.org/ilc/texts/instruments/english/conventions/1_2_1986.pdf

often in the form of a memorandum of understanding (MOU), but, again, can take a range of forms and have a variety of names. In determining whether an instrument is intended to be legally binding, the language and terminology used, the form and name of the instrument, as well as any provisions on its legal status will all be relevant in assessing the intention of the participants.

Constitutional Relationship

7. In the United Kingdom, treaty-making (negotiating and entering into international agreements) is undertaken by Her Majesty's Government under the Royal Prerogative. The United Kingdom is a dualist system, and therefore treaties to which the UK becomes a party do not automatically become part of UK law. In accordance with Parliamentary sovereignty, entering into international obligations under the Royal Prerogative cannot change UK law – that can only be done by legislation.³
8. The Government always carefully considers whether domestic legislation will be required to implement the UK's international obligations when negotiating a treaty. Under international law, a State may not invoke the provisions of its internal law as justification for its failure to perform a treaty,⁴ and it is the Government's general practice to refrain from consenting to be bound by a treaty until Parliament has adopted any necessary implementing legislation.
9. 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.
10. The Government is also committed to continue working constructively on treaties with the Crown Dependencies and Overseas Territories, for whose international relations the UK is responsible. In international law, the UK is responsible to the relevant treaty body for the Crown Dependencies' and Overseas Territories' compliance with their international obligations in respect of any treaty extended to them. The UK must therefore make sure, not only that the Crown Dependencies and Overseas Territories are willing to accept the obligations contained within a treaty that is extended to them, but also that they can fulfil them. Consultation with the Crown

³ See *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)* [2017] UKSC 5 at paragraph 167: ["...] although the Crown can undoubtedly enter into treaties in the exercise of prerogative powers, it cannot, by doing so, alter domestic law. That is known as the dualist approach to international law, in distinction to the monist approach adopted by many other countries, under which treaties automatically take effect in the domestic legal system."

⁴ Vienna Convention on the Law of Treaties 1969 at Article 27

Dependencies and Overseas Territories regarding the extension of treaties is a matter of essential policy and administration and is undertaken during the course of treaty negotiations where the treaty is suitable for extension.

11. Explanatory Memoranda are laid alongside treaties subject to scrutiny under the Constitutional Reform and Governance Act 2010 (CRaG) and summarise the nature of consultations and responses from the Devolved Administrations, Crown Dependencies and Overseas Territories. 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.

Scrutiny Arrangements

12. Part 2 of CRaG placed the former Ponsonby rule regarding treaty scrutiny on a statutory footing. It requires all treaties subject to ratification first to have been laid by a Minister of the Crown before Parliament for 21 sitting days.⁵ Treaties laid under CRaG are published as Command Papers and must be accompanied by an Explanatory Memorandum.⁶ Parliament has 21 sitting days to resolve that a treaty should not be ratified. If either House so resolves, a Minister may lay a statement indicating that they are of the opinion that the treaty should nevertheless be ratified and explaining why. If the resolution against ratification was passed by the House of Lords, the treaty may still be ratified. If the resolution was passed by the House of Commons, the treaty must be laid for a further 21 sitting days. If the House of Commons again passes a resolution that the treaty should not be ratified, the Minister's statement may again be laid. In short, CRaG enables the House of Commons to prevent ratification indefinitely.

13. 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.

14. As set out above, the Government is committed to facilitating effective treaty scrutiny within the CRaG framework through constructive engagement and information-sharing. As noted in the Government's responses to previous Parliamentary inquiries, and as mentioned above, the Government has worked constructively with Parliament to establish practices in addition to the CRaG framework, where that is proportionate and justified having regard to the particular sector and subject-matter. For example, the Government has made extensive commitments on information-sharing in relation to new FTAs, which due to issues such as their length, breadth of scope and complexity, warrant bespoke arrangements.⁷ During the Parliamentary passage of the Trade Act 2021, the Government supported an amendment to enhance scrutiny in the event of Parliamentary concerns on credible reports of genocide within the territory of a prospective FTA partner.⁸

⁵ Defined under section 20(9) of CRaG 2010 as "a day on which both Houses of Parliament sit"

⁶ CRaG 2010, section 24

⁷ See for example, the statement made by the Secretary of State for International Trade, Elizabeth Truss, on 'Transparency and Scrutiny Arrangements for New Free Trade Agreements' on 7 December 2020, available at: <https://questions-statements.parliament.uk/written-statements/detail/2020-12-07/hcws623>

⁸ See section 3 of the Trade Act 2021, available at: <https://www.legislation.gov.uk/ukpga/2021/10/section/3/enacted>

15. In respect of making time for debates, requests must be balanced against other demands on parliamentary time. The Government recognises the restraint Parliament has shown in limiting requests for debates, and remains committed to considering requests for parliamentary time as part of the CRaG process.
16. The Government 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. Beyond that, the establishment of, or amendment to, structures within Parliament to coordinate scrutiny of treaties and implementing legislation is a matter for Parliament itself.
17. The Government 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 to ensuring that all amendments to treaties are published in the UK Treaty Series, including those that are not subject to CRaG.
18. The Government remains committed to transparency proportionate to the importance of, and public interest in, a treaty. We have adopted a number of non-statutory practices to deliver on that commitment. Beyond those established procedures and practices, the Government continues to consider the provision of information to Parliament on a case-by-case basis, taking account of Parliament's scrutiny responsibilities and the Government's responsibility to conduct effective negotiations on behalf of the nation. That involves weighing factors such as confidentiality and security requirements, risks of prejudicing the UK's negotiating position, concerns of negotiating partners and read-across to the UK's relationship with other states.
19. Departments will consider how best to engage with Parliament at the outset of negotiations. Where appropriate, the Government may provide additional information. For example, the Department of International Trade has developed a bespoke regime of engagement and information provision through non-legislative commitments as well as statutory obligations in the Agriculture Act 2020 as amended by the Trade Act 2021.

The Role of Parliament

20. The Government does not intend to comment on how the House of Commons chooses to scrutinise treaties, however we would note the useful role played by the House of Lords International Agreements Committee in assessing all treaties laid under CRaG. We would also note the positive steps taken by the Department for International Trade in ensuring the House of Commons International Trade Select Committee and the House of Lords International Agreements Committee are routinely informed of the progress of international trade negotiations, and that both have spoken positively of this engagement.

Information and resourcing requirements

21. The Government notes that confidentiality can be critical to a treaty negotiation, depending on the particular circumstances of the individual negotiation. A need for confidentiality might arise in relation to some or all of the substance, or occasionally

to the very existence of negotiations themselves. It will always be necessary to consider how to approach each treaty on its own merits.

22. Whilst the Government must retain ultimate discretion over the amount and detail of any information shared with Parliament, we remain committed to transparency and positive engagement as set out above. The Government reiterates that it will continue to consider the provision of information to facilitate effective Parliamentary scrutiny on a case-by-case basis.

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