Written evidence from Dr Mario Mendez (SIT 20)

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

Summary

I make this submission in a personal capacity. I am a Reader in Law at Queen Mary University of London with a long-standing interest in the relationship between domestic legal systems and international law, including scrutiny procedures for treaty-making. I comment below on a number of the questions on which written evidence was sought. The core of my submission is that CRAG is demonstrably an inadequate framework for ensuring parliamentary scrutiny of the treaty-making power and that an overhaul of CRAG combined with a Joint International Agreements Committee would be the best way to ensure more effective parliamentary scrutiny.

What roles and functions do treaties and international agreements perform in the 21st century?

1. There has been a qualitative and quantitative transformation in treaty-making that can be considered a 20th century development, accelerating in the post World War II period and into the 21st century.[1] Basically treaties have very different, and much more intrusive, roles and functions than they did even when the Ponsonby Rule emerged in the early part of the 20th century. A dense and growing array of treaties and treaty derived law are now to be found in practically all areas over which governments regulate whether that be amongst other areas banking, consumer protection, counter-terrorism, data protection, defence, environmental protection, fisheries, cyberspace, environmental protection, food and farming standards, health, human rights, intellectual property, investment, migration, social security, taxation, telecommunications or transport. A central aspect of this development has been the proliferation of international organisations, from 37 in 1909 to 132 by 1956 and over 370 by 1985, and their law-making. [2] As one scholar of international organisations rightly emphasised 'there is hardly a human activity which is not, to some extent, governed by the[ir] work.'[3] In sum, and although still not commonly recognised, our daily lives are directly and increasingly affected by treaty obligations in a way that simply was not the case in earlier times.

2. Trade agreements are often raised as an example of this transformation in treaty-making, especially recently in the UK, with emphasis on the fact that they have long moved away from the narrow pre-World War I focus on eliminating and reducing tariffs on goods. Their

[1] That the overall quantity of treaty-making may be slowing down in the 21st century does not take away from the radical transformation relative to the earlier part of the 20th century.
[2] J. Alvarez, *International Organizations as Law-Makers* (OUP, 2005), at 23.
[3] J. Klabbers, *An Introduction to International Organizations Law* (CUP, 2015) at 22-23.

main focus now is on non-tariff barriers while frequently including amongst other things intellectual property rights, state aid rules, public procurement rules, provisions on environmental and labour standards and crucially dispute settlement provisions. As Jones and Sands recently noted 'contemporary trade agreements seek to align regulation between countries, so they have substantial implications for the way that different areas of the economy are regulated – from farming and food standards, to manufacturing, financial services and accounting, to the regulation of the digital economy, and healthcare.'[4] In short, contemporary trade treaty-making has profound implications for domestic regulatory autonomy.

3. However it is imperative that we recognise that trade treaty-making, even broadly defined, will ultimately be but a part of the UK's treaty making activity. And treaties can be put to many controversial uses that have nothing to do with trade. Just to mention two prominent 21st century examples that saw concerns expressed by UK Parliamentary committees: passenger name record treaties that gave the US access to passenger data from European airlines,[5] and the controversial 2003 UK-US extradition treaty under which the US would not need to show a 'prima facie case' to obtain extradition whilst the UK would be required to show a probable cause.[6] Ultimately treaty-making of considerable significance can happen in any area and so it is important that we move beyond focussing exclusively or at least primarily on trade treaty-making.

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, and what can be done to resolve any such tension?

4. There is a clear tension here that has long been inadequately reflected upon and may partly account for why more effective parliamentary controls on the treaty-making power have not developed in the UK. Dicey who is indissociably linked with the principle of parliamentary sovereignty was not troubled by any such tension, but he was writing when the status of international law as law was still often contested and when treaty-making was both qualitatively and quantitatively limited. The status of international law as law is no longer seriously contested. The Vienna Convention on the Law of Treaties of 1969 makes crystal clear that treaties are binding upon the parties and must be performed in good faith and that your domestic law, regardless of its constitutional rank, cannot be invoked as a justification for failure to perform a treaty.[7] The UK was one of the first countries to ratify the Vienna Convention, though in any event it represents customary international law in this respect.

5. One can insist formalistically that Parliament still remains legislatively sovereign as a matter of domestic law,[8] but in reality the dense and growing array of treaties and treaty

[4] E. Jones and A. Sands, 'Ripe for reform: UK scrutiny of international trade agreements', (2020) GEG Working Paper 144.
[5] See *The EU/US Passenger Name Record (PNR) Agreement* (21st Report of Session 2006-07, HL 108).
[6] See *The US-UK Extradition Treaty* (Home Affairs Committee, 20th Report of Session 2010-12, HC 644).
[7] Respectively Articles 26 and 27 VCLT 1969, albeit subject to the narrow and very rarely invoked argument of treaty invalidity under Article 46 VCLT.
[8] The Internal Market Bill episode in 2020 was instructive in this respect.

derived law by which the UK is bound – and that Dicey could never have imagined – do in practice constrain Parliament's legislative freedom. Over a decade ago a Ministry of Justice consultation document essentially acknowledged this in stating '[w]here the Government has accepted international obligations by treaty then those obligations may in practice constrain Parliament's ability to legislate, so long as those obligations continue'.[9] And of course not only can those obligations continue indefinitely, and be very difficult to amend, but they can also evolve outside of the control of the contracting parties for example via judicial or quasi-judicial interpretation. Ratification of the ECHR illustrated how an unincorporated treaty could require frequent legislative changes in order for UK law to be brought into compliance with its international law obligations in light of evolving judicial interpretation.

6. The long-standing practice whereby the government does not bind itself to treaties requiring domestic legal changes until those changes have been made does not detract from the tension with parliamentary sovereignty. Firstly, while parliament can in theory refuse to pass laws making necessary legal changes such that the government is then unwilling to bind the UK to a treaty, the most recent instance I am aware of in which this took place was over a century ago.[10] So this theoretical capacity for parliament to prevent the UK becoming bound by treaty obligations lacks credibility in a constitutional system where the executive that negotiated those treaties ordinarily commands a majority in the elected House. Secondly, domestic legal changes may not be thought necessary at the time of ratification, but may be required later (as the ECHR example powerfully illustrated). Thirdly, where this practice does lead to treaty implementing legislation, its content will logically be largely predetermined by the treaty obligations themselves that will ordinarily have been negotiated by the government without any parliamentary input whatsoever. And again as long as those treaty obligations continue, a future Parliament is not in practice free to legislate in conflict with them, or the implementing legislation, or alter the implementing legislation in a manner conflicting with the UK's international law obligations. It is worth highlighting in this respect the comments on the UK-EU Trade and Cooperation Agreement (TCA) by one of the UK's most eminent constitutional law scholars, namely that it 'contains countless substantive and procedural obligations that limit sovereign choice in a post-Brexit world'.[11] Limiting sovereign choices is obviously not specific to the TCA, this is what trade agreements do as Hestermeyer and Ortino highlight,[12] and one might add treaties more generally.

7. I do not believe anything can actually be done to resolve this tension, for it is a product of how the international legal order works: treaties create binding legal obligations and states cannot as a matter of international law invoke their domestic constitutional principles as some kind of protective shield vis-à-vis their treaty obligations. It is therefore unsurprising that clauses in the Internal Market Bill with the express objective of contravening treaty

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[9] Ministry of Justice, *The Governance of Britain—Judicial Appointments*, 2007, Cm.7210, at paras 1.8–1.9.
[10] The Naval Prize Bill that sought to give effect to the 1909 London Declaration Concerning the Laws of Naval Warfare was rejected by the House of Lords in 1909: see P. Drew, The *Law of Maritime Blockade* (Oxford University Press, 2017), at 45-46.
[11] P. Craig, 'Brexit a Drama, The Endgame—Part II: Trade, Sovereignty and Control' (2021) 46 EL Rev 129.
[12] H. Hestermeyer and F. Ortino, 'Towards a UK Trade Policy Post-Brexit: The Beginning of a Complex Journey' (2016) 27 *King's Law Journal* 452, at 455.

obligations were so controversial[13] – not least given the ministerial code reference to an overarching duty to comply with the law[14] – nor that the clauses were later dropped. It might be thought that the tension identified could be reduced by having a parliamentary approval requirement for at least certain categories of treaty, or by viewing treaty implementing legislation as a proxy for parliament having agreed to the UK being bound by specific treaty obligations. But this would do nothing to detract from the fact that future parliaments, or even the same one as with the Internal Market Bill episode, are not in actual practice free simply to later override those treaty obligations. This is precisely why we struggle to find any actual examples of parliament expressly legislating to breach its treaty obligations.

Does Part 2 of the Constitutional Reform and Governance Act 2010 (CRAG) enable effective parliamentary scrutiny of international treaties and other agreements?

8. In relation to non-legally binding agreements, CRAG is silent on the matter so clearly does nothing in relation to that significant issue (I remark further on such agreements at paras 15-17 below). In relation to treaties, CRAG did nothing to actually create effective scrutiny. As Lang pointed out: 'CRAG does not require Parliamentary approval of treaties. Nor does it require scrutiny, debates or votes on treaties, or even create any triggers or mechanisms for them.'[15] I recognise that from 2014 the Secondary Legislation Scrutiny Committee (SLSC) began to report on treaties laid under CRAG. It looked at over one hundred finalised treaties through to 2020, but the overwhelming majority were not commented upon. Less than one third were the subject of information paragraphs, usually literally a paragraph that sometimes covered more than one treaty. Only two treaties were referred to the special attention of the House. The first was a Bilateral Investment Treaty with Colombia and was only debated in the Lords after it was ratified, while the second was a data sharing Agreement with the US that was not debated in the House. With all due respect to the Committee, this cannot be considered effective parliamentary scrutiny.

9. I have previously suggested that CRAG created the façade of additional democratic legitimacy for the assumption of treaty obligations, while it enshrined a model in which parliamentary inaction regarding treaties so laid, the standard practice, effectively gives the government free rein.[16] The fact that the Commons can in theory prevent the government ratifying a treaty laid under CRAG, which has never occurred nor to my knowledge has there been a vote on such a motion, did not incentivise parliamentary scrutiny much less effective parliamentary scrutiny. This is unsurprising given that CRAG formalised the long-standing Ponsonby Rule that had been operating in a parliamentary system where treaty-making scrutiny had long been neglected.

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[13] See the measured views of the Constitution Committee, 17th Report Session 2019-2021 (HL 151), chapters 4 and 6.

[14] The additional reference that this included international law and treaty obligations was controversially removed in 2015, but the Court of Appeal concluded that this did not involve any change in substance: *R. (on the application of Gulf Centre for Human Rights) v Prime Minister* [2018] EWCA Civ 1855.

[15] A. Lang, 'How Parliament treats treaties*'* (2021) HC Library Briefing Paper 9247, at 5.

[16] M. Mendez, 'Neglecting the treaty-making power in the UK: the case for change', (2020) 136 *Law Quarterly Review* 630.

10. The limitations of CRAG in terms of enabling effective parliamentary scrutiny were made especially obvious because of EU withdrawal.[17] Under CRAG even treaties as significant as the Withdrawal Agreement and the future relationship agreement would only at most have needed to be laid once finalized for 21 sitting days prior to ratification and with no actual requirement for any parliamentary vote to take place. 'Meaningful vote' constraints were imposed on the minority May government by the EU (Withdrawal) Act 2018. However, the revised Withdrawal Agreement was ultimately ratified following the passage of implementing legislation – the EU (Withdrawal Agreement) Act 2020 – that passed unamended within weeks of its introduction in Parliament and that repealed the meaningful vote requirements and disapplied CRAG. The parliamentary procedure for the over 1000 page TCA was even more disconcerting given that the implementing Bill that disapplied CRAG was passed unamended on the one day allocated for its passage and less than 48 hours before the intended provisional entry into force of the TCA.

11. It is true that the Lords EU Committee provided far more probing engagement relative to the SLSC when it took on the role of scrutinizing Brexit related agreements between January 2019 and February 2020. But this further evidenced CRAG's limitations for the 21 day sitting period was a clear obstacle to greater scrutiny and stakeholder consultation and this in a context where the EU Committee's reporting criteria focussed on whether replacement agreements differed from the precursor agreements, rather than their inherent merits.[18] Only a minority of the treaties it reported for the special attention of the House were actually debated, all replacement trade treaties. In any event, the Committee's work and any parliamentary debates that ensued was all ex post scrutiny of finalised albeit not yet ratified treaties, in short scrutiny that could not influence the treaty text. For the most part this same crucial point can be advanced of the scrutiny hitherto conducted by the International Agreements Committee (IAC) and its predecessor (a sub-committee to the EU Committee). This is not intended as criticism of their work, rather it is a product of the fact that they operate within the parameters of the CRAG framework. With rare exception (e.g. the Japan Trade Agreement and it would seem new trade agreements going forwards) the IAC is reporting on treaties once they are laid under CRAG and to the inadequate time frame provided therein of 21 sitting days. It is therefore unsurprising that many of its reports to date have been published very close to the culmination of the 21 sitting days which may help explain why only a minority of those referred to the special attention of the House (through to June 2021) were debated and in the case of one (the Turkey Trade Agreement) only after it had already entered into force.

12. I would suggest that CRAG is actually an impediment to effective parliamentary scrutiny because it is premised on parliamentary scrutiny only being possible in at best challenging, if not often unrealistic, time frames following the laying of a finalised treaty that cannot in

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[17] This is further discussed in A. Lang and M. Mendez, 'Parliament's Engagement with Treaties' in A. Horne, L. Thomson, and B. Yong (eds), *Parliament and the Law* (Hart, 3rd edn, forthcoming).

[18] Six months after it began this new role, the Committee itself concluded that the CRAG timetable was 'too short to allow proper consultation or engagement': EU Committee, 'Scrutiny of international agreements: lessons learned' (42nd Report of Session 2017-19; HL 387).

practice be changed and that has in over a decade never led to a vote in Parliament on whether the treaty should be ratified. CRAG thus arguably puts in place obstacles to meaningful scrutiny taking place. That the government has committed to new trade agreements being subject to more parliamentary scrutiny than the CRAG parameters would suggest confirms that CRAG is not an appropriate framework for ensuring effective parliamentary scrutiny.[19] And crucially there is no good reason why only new trade agreements should be deemed worthy of this greater scrutiny.

13. Moreover, despite CRAG being a 21st century development, it is wholly silent on all manner of issues that one would expect coverage of in a modern attempt at according parliament oversight over the treaty-making power. This includes addressing issues such as: information obligations relating to treaties prior to their signature; the provisional application of treaties; reservations and interpretative declarations; treaty amendments (beyond those requiring ratification which are caught by CRAG's laying requirement) and treaty termination.[20] CRAG is silent on these issues precisely because it is primarily simply converting a 1924 practice into a legal rule, while adding the legal consequences if a parliamentary vote were to take place against ratifying any treaties so laid. Back in 1924 the issues noted in this paragraph were not being regulated by states, but increasingly and especially so in recent decades they have been. And the clear trend beginning already before 1924 has been towards having parliamentary approval requirements for at least certain usually broadly defined categories of treaty.[21]

14. Parliamentary controls relating to the treaty-making power have been more common in so called monist systems, where treaties are said to automatically become part of domestic law. However, they are most certainly not so confined and have existed in a range of dualist states for decades including, for example, in Nordic countries,[22] in South Africa which has had a parliamentary approval requirement for nearly all treaties under its 1996 Constitution (s231), in Malta under its Ratification of Treaties Act 1983, and Antigua and Barbuda under its Ratification of Treaties Act 1987.

How effectively are constitutional conventions, such as remaining aspects of the Ponsonby rule on making time for treaty debates, and informing Parliament of non-treaty international agreements, operating alongside CRAG? Do these conventions need to be formalised?

15. I am not aware of time having being made available for treaty debates as a result specifically of the original Ponsonby announcement, nor that it led to Parliament being informed of any MOUs. So I do not believe any such convention exists. My view on the MOU front is bolstered by the International Agreement Sub-Committee working practices

[19] On the new commitments see Lang, supra n.15.
[20] I discuss these matters with comparative examples in Mendez supra n.16 at 648 et seq.
[21] M. Mendez, 'Constitutional Review of Treaties: Lessons for Comparative Constitutional Design and Practice', (2017) 14 ICON 84, at 89 et seq.
[22] On Denmark, Norway and Iceland; see D. Bjorgvinsson, *The Intersection of International Law and Domestic Law* (Edward Elgar, 2015), chapters 3–4; on Sweden, see I. Cameron, 'Swedish Parliamentary Participation in the Making and Implementation of Treaties' (2005) 74 Nord. J. Int'l L. 429.

report referencing this as the so-called 'third limb of the Ponsonby Rule' and inviting 'the Government to enter into a discussion about the extent to which this commitment covers politically important Memoranda of Understanding',[23] for the government simply responded that they 'are not published or laid before Parliament as a matter of Government practice.' A former FCO deputy legal adviser has written that from 1997 the FCO Treaties Section was keeping 'a copy of each MOU concluded either by the FCO or by other ministries',[24] but I have not seen further confirmation of that practice or whether it has continued.

16. MOUs are nonetheless an area in need of some measure of parliamentary oversight. The Joint Committee on the draft Constitutional Renewal Bill already raised this in 2008, the EU Committee in 2019 also highlighted a scrutiny gap in this respect,[25] and as noted above the International Agreements Sub-Committee report sought unsuccessfully to engage with government on this issue.

17. Given the potential importance of non-legally binding international agreements, including their capacity to be used instead of a treaty precisely to avoid the potential for parliamentary scrutiny that treaties can trigger, I would expect that they raise concerns in many democratic constitutional systems. In the United States where they also do not need to be reported to Congress, unlike legally binding agreements, leading foreign relations scholars have called for reform so that the public have access to 'important political commitments' in an organised and searchable fashion.[26] Growing recourse to political agreements in the EU is proving controversial as they do not go via the Article 218 TFEU framework applicable to legally binding agreements that accords the European Parliament a role.[27] Spain's Treaties and Other International Agreements Act of 2014 requires political agreements to be published in an official public registry,[28] though I have not been able to determine whether the registry has been set up. In sum, there appears to be scope for comparative learning to ensure at least some measure of transparency over significant non-legally binding agreements.

What role should Parliament, and the House of Commons in particular, have at different stages of the treaty making and implementation process? What role should Parliament, and the House of Commons in particular, have in relation to different types of treaties, and on what basis? Given that international agreements affect people's lives, how can the House of Commons increase the democratic accountability of international agreements?

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[23] See EU Committee, 11th Report of Session 2019-21, paras 105-106.
[24] A. Aust, *Modern Treaty Law and Practice* (CUP, 3rd ed, 2013), at 46.
[25] Supra n. X, at 69-75.
[26] C. Bradley, J. Goldsmith & O. Hathaway, 'The Failed Transparency Regime for Executive Agreements: An Empirical and Normative Analysis', (2020) 134 *Harv. L. Rev.* 629, at 708-709.
[27] P. García Andrade, 'The role of the European Parliament in the adoption of non-legally binding agreements with third countries', in J. Santos Vara and S. Sánchez Rodríguez-Tabernero (eds) *The Democratisation of EU International Relations through EU Law* (Routledge, 2018).
[28] See C. Esposito, 'Spanish Foreign Relations Law and the Process for Making Treaties and Other International Agreements' in C. Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (OUP, 2019), at 213-217.

18. Parliament's role should not be confined to the CRAG parameters supplemented by commitments relating to new trade agreements. This by definition would mean ineffective parliamentary scrutiny, as the scrutiny would come at best only after the laying of finalised treaties for all but new trade agreements. While I fully expect the IAC to continue doing invaluable work relating to a wide spectrum of treaty making that incentivises greater (but potentially ineffective) scrutiny in the Lords, my concern is that this will not carry over into the Commons where only trade agreements will ordinarily generate any significant attention.[29] I would also add that the commitments for new trade agreements in any event still fall well short of the scrutiny that occurs as a matter of course for trade agreements elsewhere, not least but certainly not exclusively as is the case in for example the United States and the EU where in addition express parliamentary approval of the finalised trade agreement is necessary.

19. I remain of the view that the best way forward would be via a Joint IAC so as to incentivise effective parliamentary scrutiny in the elected House as well as the Lords across the broader spectrum of treaty-making. This would ensure that over time some members of the Commons, and not just the Lords, develop a measure of expertise and are better placed to seek to give treaty-making scrutiny the prominence it also deserves in the elected house. This would ideally be combined with an overhaul of CRAG to ensure scope for pre-signature scrutiny and parliamentary control over the kinds of issues mentioned in paragraph 13 above.[30] Fundamentally a change in mind-set is needed in the elected House so that scrutiny of the treaty-making power more generally, and not just trade agreements, is perceived to be an important part of their role going forwards. A Joint IAC would have a central role to play in this endeavour while reducing duplication of work in both Houses.

20. As I noted earlier it is important that we move beyond focussing exclusively or at least primarily on trade treaty-making. There remains a very strong case for at least certain significant categories of treaty to be subject to a parliamentary approval hurdle at least in the Commons. It would certainly require MP's – and peers if the approval requirement applied in both houses – to take greater responsibility for scrutinizing the government's international law-making and would generate an incentive for Parliament to potentially influence the treaty text given that it would be required to vote on the finalized treaty.

21. Treaty approval requirements would generate definitional controversy. However, dozens of constitutional systems, including dualist states, have overcome this difficulty. The most common categories include treaties modifying domestic law, military treaties, treaties on joining international organisations, treaties affecting domestic spending, trade treaties and treaties affecting the rights and obligations of citizens.[31] This would be an obvious list of

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[29] The presence of the International Trade Committee will contribute to this, albeit thus far it has only produced a report specifically on the Japan Trade Agreement.

[30] I develop the argument for a Joint Committee and a statutory overhaul at more length in Mendez supra n.16 including briefly the need to recognize the transformed territorial constitution of the UK. Here I would simply reiterate that the treaty scrutiny practice since that article was submitted in 2019 reinforces my view that further reform of this nature is fully warranted.

[31] See for a comparative overview, P-H. Verdier and M. Versteeg, 'Separation of powers, Treaty-making, and

contenders for a parliamentary approval requirement. The categories are commonly expressly outlined in constitutions and thus ordinarily cannot change without a constitutional amendment. The UK could outline relevant categories in ordinary legislation, potentially amendable by statutory instrument, and therefore definitional controversy is less problematic than it would be for many other states. Even greater flexibility could be ensured by an exceptional cases exemption by analogy with the existing section 22 CRAG 2010.

22. I recognize that proposals for treaty approval requirements would currently be a non-starter given that the government was not even willing to countenance an approval requirement for trade agreements in the Trade Act 2021. Nonetheless, parliamentary approval requirements for certain significant categories of treaty are the obvious and well-established route to improving democratic accountability in relation to what is otherwise simply a form of executive law-making of profound significance that does in practice limit future legislative freedom. The downstream constraint of a parliamentary approval requirement increases the possibility that parliamentary concerns, including through relevant stakeholders, would be fed into the treaty-making process pre signature. This is of course already the case with other constitutional systems of which perhaps the United States and the EU are now the most commonly noted examples. In the absence of parliamentary approval requirements at the culmination of the treaty-making process it is difficult to see how effective parliamentary scrutiny, that is scrutiny that can actually affect treaty text, can emerge.

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Treaty Withdrawal: A Global Survey', in C. Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (OUP, 2019).