

Dr Mario Mendez – Written Evidence (TWP0013)

I make this submission in a personal capacity. I am a Reader in Law at Queen Mary University of London. I gave written and oral evidence to the Constitution Committee inquiry into parliamentary scrutiny of treaties and also written evidence to the Public Administration and Constitutional Affairs Committee inquiry into the scrutiny of international treaties and other agreements. My submission focuses, firstly, on some potential insights from treaty-making scrutiny in other constitutional systems and, secondly, on political agreements/memoranda of understanding.

Insights from treaty-making scrutiny in other constitutional systems

1. In terms of treaty scrutiny in Westminster systems, Australia is often the reference point as it modified its treaty scrutiny process nearly a quarter of a century ago through the creation of a dedicated parliamentary treaties scrutiny committee (the Joint Standing Committee on Treaties (JSCOT)).¹ JSCOT's remit has in practice, albeit not because of its express terms of reference, been confined to the post-signature phase when treaties can no longer realistically be changed. This limitation has rightly been criticized, including by JSCOT members themselves.² It is a limitation of such significance that today one could hardly consider the Australian treaty scrutiny process a manifestation of best practice in this respect, even if it does offer a great deal more than in other Westminster style systems such as Canada where there appear to have been no meaningful steps towards parliamentary scrutiny at the federal level beyond a new policy since 2008 of laying treaties post signature before the Parliament.³

2. In relation to free trade agreements the UK government has already committed to a role for parliament:

- at the beginning of negotiations in the form of the publication of an 'outline approach' that includes negotiating objectives
- during negotiations in the form of reporting on each substantive round of negotiations, an annual report, and engagement with specific parliamentary committees in each

¹ For detailed discussion of JSCOT and its work: see *A history of the Joint Standing Committee on Treaties: 20 years* (Report 160, 2016).

² *Ibid* (Melissa Parke MP and Kelvin Thomson MP). See also the critical report from the Senate Foreign Affairs, Defence and Trade References Committee: *Blind Agreement: reforming Australia's treaty-making process* (2015).

³ See C. McLachlan, *Foreign Relations Law* (CUP, 2014), chapter 5.

House including affording them access to sensitive information and potentially private briefings from negotiating teams.⁴

These proposals certainly go further than the practice in both Australia and Canada and of course under CRAAG, unlike in Australia and Canada, Parliament (at least the Commons) will retain a de facto veto over the end product.

3. If we are aspiring to 'best practices' in terms of parliamentary scrutiny, these proposals do not go as far as the emerging practice in the EU where the European Parliament has been able to use its treaty enshrined information rights and veto power to shape negotiating mandates and also the treaty text.⁵ Nor in relation to trade does it go anywhere near as far as the US where the fast-track trade promotion authority lays out substantive conditions for trade negotiations, time constraints, Congressional veto powers and ensures a prominent role for congressional committees and advisory groups composed of members of congress in the pre-negotiation stage and during negotiations. ⁶

4. The potentially invaluable opportunities for scrutiny at the beginning of, and during, negotiations that the government has recently proposed, even if falling short of EU and US best practices, appear however to be confined to trade agreements. While the overriding focus on trade is understandable given the repatriation of trade powers flowing from the UK's departure from the EU, treaties are put to all manner of important and controversial uses that have nothing to do with trade.⁷ The shortcomings of a model confined to parliamentary scrutiny post-signature, even with a dedicated treaties committee, are quite obvious and have been recently powerfully advanced by a parliamentary committee in the very country from which the system stems.⁸

5. For parliamentary scrutiny of treaty-making to be meaningful, it cannot wait until after signature. This is recognized by the UK government in relation to trade agreements, but there is no good

⁴ CP 63, February 2019.

⁵ See generally A. Ott, 'The European Parliament's role in EU treaty-making' (2016) 23 Maastricht Journal of European and Comparative Law 1009.

⁶ I. Fergusson, *Trade Promotion Authority (TPA) and the Role of Congress in Trade Policy*, CRS (2015) .

⁷ To give just two particularly controversial examples on which UK parliamentary committees have previously reported: *The US-UK Extradition Treaty* (Home Affairs Committee, 20th Report 2010-12, HC 644), *The EU/US Passenger Name Record (PNR) Agreement* (EU Committee, 21st Report 2006-07, HL 108).

⁸ See in particular *Blind Agreement*, *supra* n.2.

reason why this recognition should be confined to trade agreements. The European Parliament's growing role since the Lisbon Treaty in scrutinizing treaty-making pre-signature is certainly not confined to trade agreements. And reforms to accommodate pre-signature scrutiny of treaty-making in general, as contrasted with trade agreements specifically, had already emerged in other constitutional systems even before the Australian JSCOT model emerged in 1996.⁹ In short, the starting point should be that the international agreements committee, and potentially other relevant committees, should have a role pre-signature in relation to non-trade agreements for parliamentary scrutiny of treaty-making to have the potential to be meaningful.

6. I would also underscore that provisional application of treaties is an issue of importance that was not specifically highlighted in the prior call for evidence from the Constitution Committee (nor was it then mentioned in the report it produced: 2017-2019, HL 243), or the current call for evidence from the EU committee. It has been noted that provisional application can be used to circumvent CRAGA.¹⁰ A range of constitutional systems have sought to regulate this terrain including as to when it is permissible, notification and consultation obligations, and in the EU there is even an emerging practice of parliamentary approval.¹¹ In short, there are also lessons to be learned from other constitutional systems with a view to ensuring some oversight and potential control over provisional application of treaties.

Political Agreements/Memoranda of Understanding

7. Confidentiality and convenience are said to be the main reasons for use of political agreements ('MOUs') in preference to treaties including that they generally do not need to be published and are 'generally not subject to any constitutional procedures, such as presentation to parliament'.¹² I am unaware of any particular comparative trends in relation to the role of legislatures over

⁹ The Netherlands and Switzerland are two such examples: see respectively J. Brouwer, 'The Netherlands', in D. Hollis et al (eds), *National Treaty Law and Practice* (Nijhoff, 2005) and R. Kunz and A. Peters, 'Constitutionalisation and Democratisation of Foreign Affairs: The Case of Switzerland' in A. Albi and S. Bardutzky (eds), *National Constitutions in European and Global Governance* (Asser, 2019).

¹⁰ V. Miller, *Brexit: Parliamentary Scrutiny of Replacement Treaties*, House of Commons Library Briefing 8509, 2019.

¹¹ For examples in Council of Europe States, see *Treaty Making: Expression of Consent by States to Be Bound by a Treaty* (The Hague: Kluwer, 2001), for the EU see Ott, *supra* n. 5, 1025-27.

¹² A. Aust, *Modern Treaty Law and Practice* (CUP, 3rd ed, 2013).

political agreements, but given the potential importance of these agreements I suspect that oversight concerns will be present in many democratic constitutional systems.¹³ In the US, for example, where, in contrast to binding international agreements, they do not need to be reported to Congress, distinguished foreign relations scholars have recently called for reform so that 'important political commitments' are published.¹⁴ In the EU concerns are also being raised about increasing recourse to political agreements given they are not channeled through the Article 218 TFEU framework that applies to legally binding agreements.¹⁵ Spain is an example of a constitutional system in which the absence of transparency has recently been addressed via an obligation to publish political agreements in an official public registry.¹⁶

8. Given the current lack of access to political agreements in the UK,¹⁷ the new public register model of Spain could be an appropriate model to start. The public register model could be confined to the more important political agreements,¹⁸ so that Parliament and relevant committees (crucially including the international agreements committee) can at least access them and some form of ex post parliamentary accountability could emerge to begin with.

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¹³ I recognize that the EU Committee has also previously expressed concerns (2017-2019, HL 387).

¹⁴ C. Bradley and J. Goldsmith, 'Presidential Control Over International Law' (2018) 131 Harv. L. Rev. 1201.

¹⁵ 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).

¹⁶ 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), 213-217.

¹⁷ According to Aust, *supra* n.12, a copy of MOU's concluded by the FCO or other ministries has been kept by the Treaty Section of the FCO since 1997.

¹⁸ This of course raises definitional concerns as Bradley and Goldsmith also recognize in relation to their proposal for the US, *supra* n.14.