

Jill Barrett – Written Evidence (TWP0014)

I am an Associate Member of 6 Pump Court Chambers and an independent consultant in public international law. I was Legal Counsellor at the Foreign and Commonwealth Office until 2010, having joined the FCO as an Assistant Legal Adviser in 1989. While at the FCO, I negotiated, drafted and advised on numerous treaties and supervised the FCO Treaty Section. During 2008-10 I led the Government's work on Part 2 of the Constitutional and Governance Act 2010 on Ratification of Treaties. The following reflects my personal views only.

1. This submission addresses the question "How can Parliament make its scrutiny of international agreements most effective given the current limitations on its formal powers?". It focuses first on ways in which the International Agreements Sub-Committee ('the Committee') could help to make scrutiny of treaties under Part 2 of the Constitutional Reform and Governance Act 2010 ('CRaG') more effective. It then considers scrutiny arrangements for ongoing treaty negotiations and non-binding agreements. It draws upon my previous evidence on treaty matters to other parliamentary committees¹ and published work on the reforms in CRaG and treaty practice.²

How could Parliament improve scrutiny of treaties under CRaG?

(a) *Formalise dialogue with Government at official and ministerial levels*

2. The Committee could **institutionalise regular dialogue** between Parliament and treaty-makers in Government, to develop new protocols and **standardise good practice on treaty scrutiny**, ~~whether by itself or~~ by other committees. This would build upon the

¹ Written evidence (SIT0009) to the House of Commons Public Administration and Constitutional Affairs Committee's Inquiry on 'The Role of Parliament in the UK Constitution: The Scrutiny of International Treaties and other Agreements inquiry', 8 October 2019; Written evidence (PST0021) to the House of Lords Constitution Committee's Inquiry on 'Parliamentary Scrutiny of Treaties', 10 January 2019; Oral evidence to the House of Commons Committee on Exiting the European Union's Inquiry on 'Parliamentary scrutiny and approval of the Withdrawal Agreement and negotiations on a future relationship', HC 372, 2 May 2018; Oral evidence to the House of Lords EU Committee's Inquiry on 'Brexit: Parliamentary Scrutiny' on 6 September 2016 (QQ 1-11).

² J Barrett, 'The United Kingdom and Parliamentary Scrutiny of Treaties: Recent Reforms', *International and Comparative Law Quarterly*, Vol 60, January 2011, 225-245; J Barrett and R Beckman, *Handbook on Good Treaty Practice*, Cambridge, 2020.

work started by the EU Committee and officials from the FCO and DIT. It is noteworthy that the FCO now has a designated minister responsible for 'treaty policy and practice', as a subject in its own right, distinct from the subject-matter of particular treaties. It would be useful for the Committee to establish a practice of regular meetings with that minister and the counterpart minister at DIT, to discuss issues of transparency and scrutiny procedure that apply to all treaties or categories of treaties such as trade agreements and to formalise government commitments to good practices.

(b) *Publish guidance on expected contents of Explanatory Memoranda*

3. The Committee could **issue guidance** on the expected contents of treaty Explanatory Memoranda (EM) required by section 24 of CRAg, and **review the adequacy of each EM as it is tabled**. Although it has been Government practice since 1997 to lay treaty EMs, Parliament has never set standards. Many are short and uninformative. By contrast, the House of Lords Secondary Legislation Scrutiny Committee has provided detailed guidance on the contents it expects to see in a Statutory Instrument EM and it comments publicly on the adequacy of EMs tabled. Recent dialogue at official level between the EU Committee and the FCO has resulted in improvements, but to ensure that these are sustained and consistent across Government, **a public process would be more effective**.
4. The National Interest Analysis statements that the Governments of Australia and New Zealand provide to their respective Parliaments with treaties merit consideration as a model. They are generally a lot more detailed and informative than the UK's EMs.
5. An issue on which there is an urgent need for clearer information in EMs is **treaty amendment mechanisms**. Parliament should require treaty EMs to identify any provision in a new treaty for future amendments. It should make clear whether amendments will have treaty status and be subject to CRAg scrutiny, or whether the Government considers CRAg not to apply, eg because amendments will bind the UK through an automatic or tacit approval procedure. The Committee may wish to draw any such provisions to the attention of Parliament. It may also wish to develop conditions for accepting treaty amendment provisions that would empower the Government to amend

the treaty without CRaG scrutiny in future. **This is especially important in relation to trade agreements.**

(c) Devise a mechanism for earlier information about signed treaties

6. CRaG does not require Government to publish or lay a treaty as soon as it has been signed, but only to do so at least 21 sitting days before ratification. Delays occur between signing and laying, sometimes long, and occasionally a signed treaty is not ratified for many years or at all. Thus Parliament may be kept in the dark about the Government's plans to ratify the treaty, *or the absence of any plans*, for a long time. The Committee could work out with the Government a mechanism for receiving **prompt information about treaties that have been signed, subject to ratification**. This would both enable the Committee to be aware of what is the pipeline for CRaG scrutiny, and to monitor treaties that have been signed but not laid, eg to enquire whether this is due to bureaucratic delay, a policy issue or a decision not to ratify.

(d) Sifting: establish priority level for each treaty as soon as it is laid

7. The Committee should devise a working method for 'sifting' all treaties, immediately they are laid. The Committee first needs to develop **criteria for prioritising treaties** to identify the level of attention each requires from Parliament. These criteria should be applied rapidly to each treaty, to determine whether it requires scrutiny, and if so what level and by which committee, and whether there is any issue to call to the attention of other committees and/or both Houses. Any manifest deficiency in the quality of the EM should be identified at this stage, with a request to Government to remedy it. The Committee would need to be assisted in this task by staff with relevant treaty expertise. At present, the Government takes responsibility for copying treaties to committees it deems relevant at the time of laying. Parliament should develop its own internal alert system independently of Government.
8. It would be ideal if the Committee could **persuade Government to apply the Committee's criteria** for priority levels to each treaty laid under CRaG. For example, the Government could indicate when it lays

a treaty which priority level it considers appropriate, on the basis of the Committee's criteria. The Committee would probably agree in most cases, but it would retain the right to re-prioritise. The purpose is to ensure that the Committee (and Parliament) concentrates its resources on important treaties or issues, and does not spend more time than necessary on routine treaties, of which there are many.

9. The Australian Parliament's Joint Standing Committee on Treaties ('JSCOT') operates a sifting mechanism. Treaties and treaty actions are categorised as 'major', 'minor' or 'technical'. The Government proposes the category but JSCOT can re-categorise if it disagrees. Major and minor treaties are referred for inquiry and report. JSCOT normally accepts 'Technical' treaty actions without an inquiry but it has discretion to hold one. When it lays treaties, the Government informs JSCOT of its priorities and may request JSCOT to expedite its inquiry into a particular treaty for explained reasons of urgency. The Committee may wish to consider developing a model of this kind for the UK.

(e) *Seek Government commitment to extend the CRaG scrutiny period whenever reasonably required*

10. The 21 sitting day period (which typically extends over several months) should normally be adequate for scrutinising most treaties. But it is obviously not adequate for inquiries into complex treaties especially where public interest is high. Section 21 of CRaG gives Ministers discretion to extend the laying period under section 20. The Committee might consider asking the Government to commit to using this power to extend the period whenever it so requests for the completion of an inquiry and/or to hold a debate and vote. The Committee could reassure the Government that it aims to complete its scrutiny within the initial laying period in most cases and will request extensions sparingly; and the **Government be asked to commit to a presumption in favour of a section 21 extension on request, unless there is an exceptional reason**, which should be explained (if necessary, in confidence to the Committee or its Chair).
11. In relation to future trade treaties, the Government acknowledged that the CRaG laying period might be insufficient for committee inquiries, by making the following commitment in its Command Paper of February 2019: 'The Government would commit to ensuring that

there was sufficient time between finalising a new FTA and laying it before Parliament under the CRaG procedure so that the committee could make such a report.’ It also promised to consider committee requests for a parliamentary debate *prior to* CRaG scrutiny.³ **The Committee might wish to seek reaffirmation of that commitment** and its extension to other treaties as a first step to addressing the problem. However, it is not an adequate substitute for extending the CRaG laying period, since for pre-ratification scrutiny to be effective an EM and full documentation is required at the outset.

(f) Parliamentary procedures for forcing a debate and a vote on a treaty

12. During pre-legislative scrutiny of the CRaG Bill, Lord Norton of Louth observed: ‘In constitutional terms it is a major change, giving Parliament powers it has never had before, but it could be meaningless if you do not have the mechanism to effect that change.’ In response, the then Secretary of State for Justice Jack Straw suggested that the **Standing Orders of each House could be amended** to provide that if X number said they wanted a debate and vote, there would have to be a debate and vote, and possibly also that the appropriate subject Select Committee should produce a report on it.⁴ The Committee might wish to consider making a recommendation of that kind. To be effective, such a rule change would need to be combined with a requirement for Government to extend the scrutiny period under section 21 of CRaG until after the vote.
13. If new implementing legislation is required, **there should be a debate on the treaty itself as well as on the legislation** (separately or in conjunction). There is not yet any established practice regarding the sequencing of the CRaG laying period and any related legislative process. When implementing legislation is debated, the focus is invariably on the legislation not the treaty, but this is inadequate as the treaty obligations may not be the same for all parties (eg the UK-USA Extradition Agreement is asymmetrical) or may contain important content that is outside the scope of the Bill or statutory instrument.

³ Department for International Trade, Processes for making free trade agreements after the United Kingdom has left the European Union, CP 63, February 2019, p7.

⁴ Evidence of Jack Straw, Lord Chancellor and Secretary of State for Justice, to the Joint Committee on the Draft Constitutional Renewal Bill, in response to Q751, Draft Constitutional Renewal Bill, Volume II: Evidence, 331.

(g) *Provide clearer and better treaty information to the public*

14. There is scope for **Parliament to improve its provision of treaty information to the public**. On Parliament's website, there is currently nothing to attract interest in Parliament's work on treaties. The new Treaties Service that lists treaties laid under CRaG is buried deep in a section on Statutory Instruments, which makes it very difficult to find even when you know it is there.⁵ By contrast, the Secondary Legislation Scrutiny Committee's web pages contain useful guidance for the public eg on 'Writing to us about an instrument', and it is signposted on the home page by a 'Bills & Legislation' tab.
15. The Committee could play a useful role in bringing together the existing information about treaties on Parliament's website, highlighting its own work, and ideally linking it all to a 'Treaties' tab on the home page. This would enhance the Committee's ability to engage with relevant stakeholders during inquiries.

How could Parliament best engage with the Government's conduct of treaty negotiations?

(a) *Transparency: the need for Government to provide regular information about proposed and ongoing treaty negotiations*

16. It would be reasonable to expect the Government to provide Parliament with **regular information about new and ongoing treaty negotiations**. In its February 2019 Command Paper, the Government made specific commitments on the before and during stages of negotiations on new trade agreements. This included publishing an Outline Approach with negotiating objectives and scoping assessment informed by economic modelling. Most importantly: 'We will ensure that Parliament has a role in scrutinising these documents so that we can take its views into account before commencing negotiations.'⁶ It also proposed access for committees to sensitive information on a confidential basis and private briefings. An important element was the commitment to publish and lay before Parliament a

⁵ <https://treaties.parliament.uk>.

⁶ Note 3 above, p6.

'Round Report' following each substantive round of negotiations and an annual report updating on all trade negotiations. **As a first step, the Committee might wish to ask the Government to reiterate these commitments.** In due course, consideration could be given to extending the commitments to other important treaties and developing them through a Parliament-Government framework agreement.

17. There are many useful examples from other countries. In the Netherlands, legislation requires the Government to 'periodically submit' to Parliament a list of draft treaties on which negotiations are proceeding on behalf of the Kingdom. The list must contain specified elements subject to discretion to exclude information in the national interest. In practice the information is provided every 3 months. The New Zealand Government has an established practice of public and parliamentary consultation on free trade agreements starting before negotiations begin.⁷ The Australian Government publishes a list of all multilateral treaties under negotiation or review and tables it in Parliament twice a year. But JSCOT has no formal role in scrutinising treaties before signature, unless the question is referred by either House of Parliament or a Minister. This has resulted in public and parliamentary dissatisfaction with their level of engagement during trade negotiations. The reflections and 10 recommendations of the Senate Standing Committee on Foreign Affairs, Defence and Trade in its 2015 report 'Blind agreement: reforming Australia's treaty-making process' are especially pertinent to the UK Parliament's current position.⁸

18. There is also a need for greater transparency regarding **important non-binding agreements**, such as memoranda of understanding. The Government indicated that after leaving the EU it may choose to 'effect political co-operation in other forms' to replace the numerous political co-operation agreements that the EU has signed with third countries⁹. These 'other forms' will presumably include non-binding instruments which may well be of interest to Parliament.

⁷ <https://www.mfat.govt.nz/en/trade/nz-trade-policy/how-do-we-consult-on-free-trade-agreements/#When>.

⁸ https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Treaty-making_process/Report.

⁹ Government Response to the Constitution Committee Report: Parliamentary Scrutiny of Treaties, July 2019, 3.

(b) *Parliament's engagement with stakeholders and the public*

19. The Committee could invite input to its inquiries from **stakeholders and the public**, by written submission and/or participation in an oral hearing. When it has early warning of negotiations or of a signed treaty to be laid under CRaG, it could announce its intention to open an inquiry and invite those interested to register their details with the Committee. This could be done through the website and by media releases. Committee officials and advisers could identify additional stakeholders and experts to be contacted. If treaty inquiries could be given a higher profile on Parliament's website as suggested above, this would also facilitate engagement.
20. The Committee could play an important role in developing channels of communication between Parliament and the **devolved legislatures**. There are already government-government consultations on treaties through the concordat on international relations, imperfect though that is. Parliament receives information from Government about those consultations, but the views of devolved administrations may not necessarily be shared by the corresponding legislature, whose actions may be critical if devolved implementing legislation is required. Parliament ought to have mechanisms for hearing views of devolved legislatures directly on treaties that concern them, and inviting their input to inquiries.
21. Parliament should also scrutinise the Government's policy on the participation of **Crown Dependencies and Overseas Territories** in relevant treaties, the extent of consultations and their outcomes, as well as technical and financial support offered for implementing complex treaty obligations. The Committee could play a useful role in developing standards both for CRaG scrutiny and inquiries on ongoing negotiations and for inviting input from the territories' representatives.

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