1. I write what follows in my personal capacity as barrister and international arbitrator, visiting professor of international law, and author of the treaties chapters in Satow's *Diplomatic Practice* and the forthcoming new edition of Oppenheim’s *International Law*, but not with specific reference to my former capacity as Legal Adviser to the Foreign & Commonwealth Office in the 1990s, though what I say below is of course informed by my experience of the conclusion of treaties by the British Government and their implementation.

2. I welcome the Committee’s interest in the relationship between Parliament and the Executive (and vice versa) in the making and implementation of treaties. The topic is important, and I hope that it receives the thoughtful attention it deserves.

3. It seems to me that the terms of reference of the enquiry cover two subjects, which are to a large extent distinct from one another, and may even be in some senses not easily compatible with one another.

4. The one is - on the assumption that the United Kingdom does in the event leave the European Union (EU) - what arrangements are necessary to translate such already existing treaty commitments currently falling on the UK in virtue of EU membership as are to continue, into commitments falling on the UK in its own right. By ‘commitments’ I include of course rights as well as obligations. This is a special and wholly exceptional case. The task is likely to be enormous, and it is both imminent and urgent; it is moreover critically necessary that it be done by means that will be valid and effective under international law. The subject is touched on only glancingly in the draft Withdrawal Agreement, in Article 129 (and the footnote). The method of its achievement may be materially affected by whether individual treaties are mixed treaties (so that both individual Communities and some or all Member States are currently treaty parties), or alternatively treaties falling within exclusive Community competence.

5. The other subject is the future arrangements - of a general kind - for the conclusion by the UK of new treaty commitments, and where applicable their implementation within our domestic legal system. It would be a pity if the opportunity to look seriously at this question, one of enduring long-term importance, were to fall victim to an imperative need to devise urgent and special arrangements for the EU withdrawal case. A missed opportunity of just that kind is represented by Chapter 2, Part 2 of the Constitutional Reform and Governance Act 2010 (the 2010 Act), which does nothing useful that was not already part of routine practice or would readily have been
incorporated into standard practice upon request from Parliament. I attach copies of two submissions I made to the consultations that preceded the 2010 Act.

6. There is nothing inherently wrong with the current arrangements, which scrupulously respect the different prerogatives of the Executive and of Parliament. This is not, however, to say that they could not be developed or improved; they are not immutable, as recent developments in practice has shown.

7. What improvements should be made is a matter of policy choice, as well as practicality. I am sceptical of easy catch-phrases such as ‘democratic deficit’ which add little to the discussion. They not only obscure the radical differences between the status and structure of the EU and on the other hand the conduct of foreign policy by an individual State, but wrongly assume that, in the case of the UK, there is something undemocratic about the conduct of foreign policy by Ministers because it is ‘enabled’ (in a tenuously abstract sense) by taking place under the Royal Prerogative. Ministers are democratically elected representatives, and they are answerable to Parliament for the conduct of their departments, which is what democracy means in the specific foreign policy context. An analogy between this and the initiation of treaty negotiations by the EU and their eventual approval is unpersuasive.

8. On the UK national level, as has recently been pointed out by the Justices in *Miller*, both those concurring and those dissenting, the relationship between constitutional organs is not some zero-sum game but a balance, and moreover one into which the courts themselves might enter, as a third element, when statute becomes involved in treaty-making. In considering how that balance should best be conceived so as to fit in with contemporary expectations, it seems to me that there are some important distinctions that must be borne in mind.

9. The most fundamental of them, as also re-iterated in *Miller*, is between the actions of the Crown on the international plane, in the pursuit of foreign policy and international relations, and the creation or modification of domestic law, which is a matter for Parliament (or the exercise of delegated powers conferred by statute). But there are also significant distinctions between (i) the entry into a treaty negotiation, (ii) the national objectives being sought by it, (iii) the approval of the outcome, (iv) the ‘consent to be bound’ for the purposes of international law, and (v) the translation of the requirements of the treaty into law (so far as that may be necessary for its due application). Looking at those five items more closely: (v) is unambiguously within the responsibilities of and under the
control of Parliament; (i), (ii), and (iii) are plainly matters of policy
decision, subject to whatever control applies to policy decisions of the
same kind; and (iv) is a purely formal culmination, but one with legal
effects, and thus contingent on whatever preconditions may be
required in order to enable those legal effects properly to be brought
about.

10. Once these distinctions are accepted, it follows that they condition,
over and above the nature and importance of any individual treaty,
what role Parliament might usefully be envisaged as playing in the
treaty approval process.

11. One would hope that any development of Parliament/Executive
relations within such a framework could be conceived of not in a
negative sense, as in some of the published commentary, i.e. as a way
of placing obstacles in the path of the implementation of government
policy, but rather as facilitating the development of a constructive
working relationship between them, to the benefit of both sides. One
obvious - and significant - benefit to the government side would be the
creation of an easier and more reliable process for the passage into
law of such aspects of a treaty awaiting ratification as were properly
necessary to enable the treaty then to be faithfully implemented by the
UK after ratification (point (v) above).

12. There would clearly be no point in envisaging any new
arrangements for either treaty scrutiny or approval that would place an
unreasonable or unmanageable burden on Parliament. An essential
first step would therefore be to form an estimate (no doubt through
the FCO as co-ordinator) not of what the level and nature of the UK’s
treaty-making had been in the recent past, but a realistic forward
estimate of what it was likely to be in future after a UK departure from
the EU. It would also be necessary to be sure that any reallocation of
responsibilities within Parliament would be welcomed by whichever
organ or organs would have to make it work; past experience
suggests that abstract interest in a general system of treaty scrutiny
has exceeded any practical enthusiasm for carrying it out.

13. It may however be that whatever urgent arrangement have to be
put in place to deal with the inheritance of EU treaty commitments
(see above) could usefully serve as a trial experiment for more
permanent arrangements to be put in place later on.

29 November 2018