1. I propose to focus on four aspects of the Parliamentary scrutiny of treaties: scrutiny during the negotiation of treaties; the enhancement of existing arrangements; scrutiny of treaties that enter into force upon signature; and scrutiny of treaties that are being provisionally applied.

2. I begin with four preliminary points:

(i) **Treaties come in all shapes and sizes.** Some are of central importance in international and national affairs, while others are of strictly limited interest. It is difficult to classify treaties in the abstract, though one important distinction is between those that require domestic legislation before they can be implemented and those that do not.

(ii) The **Withdrawal Agreement** experience is highly exceptional, and one should be cautious about seeking to draw general lessons from it. For example, notwithstanding the outcome of the recent demand to see the Government’s legal advice, the long-standing convention that such advice is not disclosed needs to be maintained if such advice is to be given in a full and frank manner.

(iii) It would not seem that arrangements currently applied within the **European Parliament**, a multinational parliamentary body that is an organ of a supranational organization, could have much relevance in the very different circumstances of national parliaments. While the European Parliament offers one example of enhanced Parliamentary engagement, it operates within the specific context of Union law, in which treaties of the Union have their own peculiar status. Its procedures are not directly transposable to national systems.

(iv) If **improvements to scrutiny arrangements** are to be considered, these should not be unduly influenced by Brexit issues or introduced in accordance with an artificial timetable related to Brexit. Changes need to address the future more generally. If the present inquiry is not to be lost opportunity, it would be worth taking as much time as it requires to come up with a carefully-reasoned report, and with appropriate conclusions. Any changes might then be introduced on a trial basis, subject to further refinement in light of experience.

**Scrutiny during negotiation**

3. There are obvious limits to Parliamentary scrutiny of the details of most treaty negotiations while they are ongoing. Negotiating in the glare of publicity is unlikely to be effective.
4. The negotiation of a treaty is often a sensitive process, with one or both or all parties demanding a high degree of confidentiality (sometimes extending even to the very fact that negotiations are taking place). Without confidentiality, the necessary trust cannot be built up between negotiators. Negotiating instructions, bottom lines, possible concessions and compromises generally need to be kept secret from the other party or parties. They are to be disclosed, if at all, as dictated by negotiating tactics. Indeed, if agreement is to be reached, a head of delegation may not even keep all the members of his or her negotiating team fully informed at all times.

5. Treaty negotiations are often conducted in highly informal and unpredictable ways. They are frequently time-sensitive. They cannot be micromanaged from the outside.

6. Having said that, there may be cases where there is scope for, and it would be helpful to have, a degree of Parliamentary involvement. This may particularly be the case where negotiations last a considerable time and/or take place in a more public forum. The fact that negotiations are taking place may well be public, and Parliament could be informed of the Government’s general objectives. This is often so when multilateral treaties are negotiated within the United Nations or other international or regional institutions. But even here it is usually only the main stages and draft texts that become public; much is done quietly in informal bilateral or other small meetings on the side.

7. It follows from the above that it would not be practical to lay down general requirements for Parliamentary scrutiny during the negotiation of a treaty. If such arrangements are considered desirable in any specific case, they may be designed *ad hoc*. No doubt experience would in due course enable best practices to develop.

*Enhancement of existing scrutiny arrangements*

8. Most aspects of the Parliamentary scrutiny of treaties are in my opinion adequately dealt with in existing arrangements, including sections 20 to 25 of the Constitutional Reform and Governance Act 2010. The current legislative framework seems to strike the right balance between the roles of Parliament and of the Executive. It leaves scope for improvements through incremental change in Parliamentary practices.

9. Whether present arrangements for Parliamentary scrutiny of treaties should be enhanced in some way raises obvious resource issues (both for Parliament and for Government). The human resource and other costs need to be weighed against the advantages.

10. Nevertheless, it might be considered desirable for there to be more scrutiny of treaties before ratification. That is, that Parliament should have more of a say leading up to the decision whether or not to ratify a treaty. It would ensure more democratic oversight if a Parliamentary committee were to look at all the more important treaties (filtered with the help of their staff) that were not to be subject to legislation. This could take the form
either of a more active role on the part of the relevant Select Committee, or the establishment of one or more committees specifically mandated to consider treaties.

11. If such further change is considered necessary, there are no doubt useful models and experience to be found in other countries, though in making comparisons a key distinction to be born in mind is whether treaties automatically become part of national law (as in some other countries) or not (as in the United Kingdom).

Treaties that enter into force upon signature

12. The 2010 Act applies to treaties that enter into force upon ratification (ratification being defined broadly in section 25). Treaties do not always provide for a ratification stage; they may enter into force upon signature or come into force upon an exchange of notes. These are usually (but not always) the less significant treaties (though this is of course a subjective matter), or those not requiring implementing legislation.

13. Apart from the obvious issues in terms of resources, there may be practical difficulties with scrutiny of such treaties. In particular, the text may not in fact be finalized prior to signature. And it may be important, in order to clinch a deal, to move immediately to signature once the negotiations are completed and while the negotiators are still face-to-face.

Provisional application of treaties

14. A State may undertake to apply a treaty or a part thereof before the treaty enters into force and even before ratification. While the terminology varies, this is often referred to as ‘provisional application’. It is the subject of article 25 of the Vienna Convention on the Law of Treaties and of draft guidelines currently under consideration within the International Law Commission.

15. Provisional application may serve a very useful function by enabling a treaty or a part thereof to be applied swiftly, without waiting for domestic requirements to be fulfilled by both or all the negotiating States. As the International Law Commission has explained, “[p]rovisional application serves a practical purpose, and thus a useful one, for example, when the subject matter entails a certain degree of urgency or when the negotiating States or international organizations want to build trust in advance of entry into force, among

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1 Article 25 of the 1969 Vienna Convention on the Law of Treaties reads:

1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:
(a) The treaty itself so provides; or
(b) The negotiating States have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

other objectives. More generally, provisional application serves the overall purpose of preparing for or facilitating the entry into force of the treaty.” Many examples have been given in the course of the International Law Commission’s current work, including the prevention of legal gaps between successive treaty regimes, and in the case of urgent trade and customs treaties, treaties concluded in the wake of natural disasters, and treaties ending hostilities.

16. The provisional application of a treaty or a part of a treaty produces a legally binding obligation to apply the treaty as if the treaty were in force between the States concerned, unless the treaty provides otherwise, or it is otherwise agreed. It follows that to the extent that provisional application requires a change in United Kingdom law, such change needs to be in place before the United Kingdom agrees to apply the treaty provisionally.

17. Importantly, States may terminate provisional application easily, and often with immediate effect. In particular, unless the treaty otherwise provides, or it is otherwise agreed, the provisional application of a treaty or a part of a treaty is terminated if a State notifies the other States of its intention not to become a party.

18. While it might seem to be contrary to the raison d’être of provisional application to require Parliamentary scrutiny at this stage, consideration might be given to instituting a practice whereby Parliament is informed as soon as possible of treaties that are being provisionally applied. This could give an opportunity for any negative views to be expressed at an early stage.

6 December 2018

3 Ibid., p. 205, general commentary, para. (3) (footnotes omitted).
4 Ibid., draft guideline 6.
5 Ibid., draft guideline 9.