1. This submission is made by the Secondary Legislation Scrutiny Committee (SLSC) in response to the Constitution Committee’s inquiry into scrutiny of treaties. The SLSC’s interest in the inquiry arises from its role in scrutinising treaties laid under the Constitutional Reform and Governance Act 2010 (CRAG Act).

2. Since October 2018, the Committee has split into two sub-committees, Sub-Committees A and B, in order to meet the additional workload as a result of the decision to withdraw from the European Union.

**CRAG Act treaties**

3. Under Part 2 of the CRAG Act, the Government have to lay before Parliament any treaty (subject to exemptions) requiring ratification (or its equivalent), along with an Explanatory Memorandum. The treaty cannot be ratified for 21 sitting days after it is laid. If the Lords resolves against ratification but the Government wish to proceed nonetheless, the Government have to lay a statement explaining why they want to ratify. If the Commons resolves against ratification, a further 21 sitting days’ period is triggered starting on the date of laying of the statement.

4. These provisions arise only when a treaty has been negotiated and signed. So far, neither House has resolved against ratification under these provisions.

**SLSC terms of reference**

5. CRAG Act treaties fall within the SLSC terms of reference because:
   - the SLSC is required to scrutinise “every instrument (whether or not a statutory instrument) … upon which proceedings may be, or might have been, taken in either House of Parliament under an Act of Parliament”;
   - treaties are “instruments” which (unless exempted) might be subject to a parliamentary proceeding.

6. The role of the SLSC is to scrutinise an instrument “with a view to determining whether or not the special attention of the House should be drawn to it” on one or more of the seven grounds listed in its terms of reference. These grounds are set out in an appendix (Appendix 1) to this submission. If the Committee formally reports an instrument, this appears in the Minutes of

---

1 Certain EU treaties are excluded because they are subject to a higher level of parliamentary scrutiny. For example, treaties adopted under the Ordinary Revision Procedure that amend the Euratom Treaty are excluded because they have to be approved by Act of Parliament.

2 The Committee has recently been given an additional role of sifting Proposed Negative instruments laid under the European Union (Withdrawal) Act 2018. It is not described further in this submission because it is not relevant to scrutiny of treaties.
proceedings of the House and an italicised tag identifying the relevant Committee report is set out alongside the instrument in House of Lords Business.

7. Where the Committee takes the view that an instrument does not warrant special attention but may be of interest to members of the House, it may decide to publish an information paragraph about the instrument. If this happens, a paragraph about the instrument is included in the Committee’s report but the name of the instrument does not appear in the minute entry and no italicised tag is added.

8. Where the Committee does not wish to say anything about an instrument, the instrument is listed at the back of the Committee’s reports to indicate that it has been before the Committee.

**SLSC scrutiny of treaties**

9. Treaties make up only a small part of the Committee’s work:

- In session 2015-16, the Committee considered a total of 721 instruments (in 35 reports) of which 18 were treaties. Of those 18, information paragraphs were written about four of the treaties. The remaining 14 were reported without comment. None was drawn to special attention.

- In session 2016-17, the Committee considered a total of 659 instruments (in 33 reports) of which 17 were treaties. Of those 17, information paragraphs were written about four of the treaties. The remaining 13 were reported without comment. None was drawn to special attention.

- In the current session up to 15 October 2018, the Committee considered a total of 973 instruments (in 41 reports) of which 34 were treaties. Of those 34, information paragraphs were written about 10 of the treaties. The two most recent examples are set out in Appendix 2 to this submission. The remaining 24 were reported without comment. None was drawn to the special attention.

10. The Committee did not begin scrutinising treaties until session 2014-15 when, prompted by an external submission in relation to a treaty between the UK and Columbia, it was recognised that treaties laid under the CRAG Act fell within the terms of reference of the SLSC. The Committee’s report on that treaty is the only occasion on which the SLSC has drawn special attention to a treaty.

11. Recently, in October, the Committee wrote to the Foreign and Commonwealth Office (FCO) about an apparent implementation backlog for international agreements and an increase in the volume of treaties being laid. The Minister, Lord Ahmad of Wimbledon, said: “As you noted, 2018 has seen a relative uptick in activity on international agreements after a lull during the

---

3 When the Committee split into two sub-committees.

previous years”. He said that the FCO Treaty Section were aware of 32 non-EU Exit-related agreements at various stage of the treaty process.5

Impact of Brexit on the volume of treaties

12. With numbers at these low levels, the scrutiny of treaties has not presented the Committee with any difficulty.

13. The impact of Brexit on the Committee’s treaty scrutiny role is however uncertain. In a recent letter, dated 19 November, from the Rt Hon. Andrea Leadsom MP, Leader of the House of Commons, and Chris Heaton-Harris MP, Parliamentary Under Secretary of State for Exiting the European Union, to the Chairmen of the SLSC and its sub-committees, the House of Commons Procedure Committee and House of Commons European Statutory Instruments Committee, the Government stated that the number of CRAG Act treaties “will be determined by the wider EU exit scenario”:

“In the unlikely event of no deal, we will seek to put a number of successor international agreements with third countries in place by the end of March 2019 to replace EU international treaties and ensure continuity. In a deal scenario, our existing EU international agreements would continue to apply and so we would seek to bring successor treaties into force for the end of the Implementation Period.”

14. Lord Ahmad, in his letter mentioned in paragraph 11 above, said:

“… you will be aware that in the context of the UK’s withdrawal from the European Union the Government is planning to conclude new international agreements with third countries, where necessary, to replicate provisions of existing EU agreements, to apply either after the implementation period or in the event of no deal. This is likely to result in an increased number of agreements being laid before Parliament under [the CRAG Act] in the period from November onwards.”

15. An article in the Financial Times in May 2017 suggested that the UK was party to over 750 international agreements by virtue of its EU membership.6

16. A significant increase in the number of treaties laid under the CRAG Act, particularly if compressed into the narrow timeframe available in the event of “no deal”, would be challenging for the members and staff of the two sub-committees of the SLSC. That said, the SLSC is accustomed to dealing with an uneven flow of instruments, even in circumstances which might be described as “business as usual”, and the Committee would, if called upon, strive to meet any challenge with which it is presented.

17. Of greater concern is the effectiveness of parliamentary scrutiny of treaties given the late stage, under the CRAG Act, at which Parliament has an opportunity to intervene. Arguably,

6 Financial Times, After Brexit: the UK will need to renegotiate at 759 treaties (30 May 2017):
https://www.ft.com/content/f1435a8e-372b-11e7-bce4-9023f8c0fd2e.
any increase in numbers will serve only to compromise further, to a greater or lesser extent, an already largely ineffective scrutiny mechanism.

Effectiveness of parliamentary scrutiny of treaties

18. At present, negotiation of many international agreements to which the UK is a party is undertaken under European Union law, normally Article 218 of the Treaty on the Functioning of the European Union. Parliamentary scrutiny of treaties negotiated under Article 218 is far more rigorous than the CRAG Act procedure. Article 218(1) states: “… agreements between the Union and third countries or international organisations shall be negotiated and concluded in accordance with” the provisions of the Article. This includes the requirement, under Article 218(10), that the European Parliament should be “immediately and fully informed at all stages of the procedure”. More detailed provisions about the relationship between the European Parliament and the Commission are set out in a binding 2010 Framework Agreement which states, for example, that the information provided to the European Parliament should be provided “in sufficient time for it to be able to express its point of view if appropriate, and for the Commission to be able to take Parliament’s views as far as possible into account” (point 24).

19. In written evidence to the House of Lords Liaison Committee, Lord Boswell of Aynho, as Chairman of the Lords European Union Committee, drew attention to the contrast between scrutiny of treaties by the European Parliament and that by the UK Parliament: “An elaborate system of parliamentary oversight of the conduct of negotiations on international agreements now exists in Brussels – and UK MEPs play an important part. There is thus a risk that this layer of democratic oversight and accountability could be lost post-Brexit.” The evidence went on: “There is an argument that Parliament should have much earlier input, scrutinising and commenting on negotiating objectives and guidelines, so as to bring a measure of democratic accountability and transparency to the whole process”.7

20. The Trade White Paper: preparing for our future UK trade policy – Government response (January 2018) states: “We will continue to work to ensure that the process of negotiating and implementing new trade deals is transparent, efficient and effective, making provision for a legislative framework that will enable future trade agreements to move quickly from agreement to ratification and implementation, whilst supporting the due processes for full parliamentary scrutiny”.8 Recent debates, however, in the House of Commons and in the House of Lords on the Trade Bill which, along with the Taxation (Cross-border Trade) Act 2018, is intended to enable the UK to continue its existing trade policy as far as possible immediately after Brexit, have drawn attention to the scrutiny deficit identified by Lord Boswell.9

9 The issue was also raised in a debate in the House of Lords on an amendment to an approval motion concerning the European Union (Definition of Treaties) (Economic Partnership Agreements and Trade Agreement) (Eastern and
Conclusion

21. There are opportunities and compelling arguments for more effective parliamentary scrutiny of treaties. But it is a matter for the House to decide what form this might take, and which committee or committees should undertake it. Given the role of the SLSC – essentially, policy scrutiny of secondary legislation – the SLSC, in our view, would not be the natural home for this “upstream” treaty scrutiny function.

22. Our more immediate concern is the possibility of large numbers of treaties being laid before Parliament in the near future. The SLSC has managed to date and would take on the challenge of any surge in treaty activity if necessary. The Constitution Committee may however wish to consider whether a committee dedicated to the scrutiny of treaties might be welcomed by the House. If so, we would urge that this step be taken as a priority.

6 December 2018

Southern African States, Southern African Development Community States, Ghana and Ecuador) Order 2018. The amendment, in the name of Lord Stevenson of Balmacara, included, amongst other things, that “this House … expresses serious concern at the fundamental lack of accountability and parliamentary scrutiny available at present for treaties and trade agreements …”. See HL Hansard, 27 November 2018, cols 601 to 618.
Appendix 1

Terms of reference

The following terms of reference were agreed by the House on 11 July 2018:

That a Select Committee be appointed to scrutinise secondary legislation.

(1) The Committee shall report on draft instruments and memoranda laid before Parliament under sections 8, 9 and 23(1) of the European Union (Withdrawal) Act 2018.

(2) Paragraph (1) shall lapse upon the expiry of the power to make instruments under sections 8, 9 and 23(1) of the European Union (Withdrawal) Act 2018.

(3) The Committee shall, with the exception of those instruments in paragraphs (5) and (6), scrutinise—

(a) every instrument (whether or not a statutory instrument), or draft of an instrument, which is laid before each House of Parliament and upon which proceedings may be, or might have been, taken in either House of Parliament under an Act of Parliament;

(b) every proposal which is in the form of a draft of such an instrument and is laid before each House of Parliament under an Act of Parliament,

with a view to determining whether or not the special attention of the House should be drawn to it on any of the grounds specified in paragraph (4).

(4) The grounds on which an instrument, draft or proposal may be drawn to the special attention of the House are—

(a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;

(b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act;

(c) that it may inappropriately implement European Union legislation;

(d) that it may imperfectly achieve its policy objectives;

(e) that the explanatory material laid in support provides insufficient information to gain a clear understanding about the instrument’s policy objective and intended implementation;

(f) that there appear to be inadequacies in the consultation process which relates to the instrument;

(g) that the instrument appears to deal inappropriately with deficiencies in retained EU law.

(5) The exceptions are—

(a) remedial orders, and draft remedial orders, under section 10 of the Human Rights Act 1998;
(b) draft orders under sections 14 and 18 of the Legislative and Regulatory Reform Act 2006, and subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001;

(c) measures under the Church of England Assembly (Powers) Act 1919 and instruments made, and drafts of instruments to be made, under them.

(6) The Committee shall report on draft orders and documents laid before Parliament under section 11(1) of the Public Bodies Act 2011 in accordance with the procedures set out in sections 11(5) and (6). The Committee may also consider and report on any material changes in a draft order laid under section 11(8) of the Act.

(7) The Committee shall also consider such other general matters relating to the effective scrutiny of secondary legislation and arising from the performance of its functions under paragraphs (1) to (6) as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

That the Committee have power to appoint sub-committees and to refer to them any matters within its terms of reference; that the Committee have power to appoint the Chairmen of sub-committees; that the quorum of each sub-committee be two;

The Committee’s power to appoint sub-committees shall lapse upon the expiry of the power to make new instruments under sections 8, 9 and 23(1) of the European Union (Withdrawal) Act 2018 and shall lapse entirely upon expiry of the last such remaining power;

That the Committee have power to co-opt any member to serve on a sub-committee;

That the Committee and its sub-committees have power to send for persons, papers and records;

That the Committee and its sub-committees have power to appoint specialist advisers;

That the Committee and its sub-committees have leave to report from time to time;

That the reports of the Committee and its sub-committees be printed, regardless of any adjournment of the House;

That the evidence taken by the Committee or its sub-committees in the last session of Parliament be referred to the Committee or its sub-committees;

That the evidence taken by the Committee or its sub-committees be published, if the Committee or its sub-committees so wish.
Appendix 2

Recent information paragraphs on treaties

40th Report, Session 2017-19, HL Paper 185

Framework Agreement on the establishment of the International Solar Alliance (Cm 9672)

12. The International Solar Alliance (ISA) is a UN treaty organisation sponsored by India which aims to mobilise $1,000 billion of private finance to increase the use of solar energy to combat the effects of climate change. It aims to support the installation of 1,000 Giga watts of solar power (roughly 15 times the UK’s electricity supply) which should reduce global CO2 emissions from fossil fuels by approximately three Giga tonnes per year or roughly 10%. Although ISA membership is only open to countries located between the Tropics of Capricorn and Cancer, the UK qualifies due to the location of certain of its Overseas Territories, who have agreed to UK membership of ISA.

13. ISA is the first significant climate initiative to be promoted by a developing country. The Department for International Development states that it is important for the UK to support this new initiative, which puts the emphasis on addressing the shared global problem of climate change collectively. India’s Prime Minister Modi has made ISA his flagship international initiative and UK support for ISA is important in the evolution of the UK’s relationship with India.

41st Report, Session 2017-19, HL Paper 190

Protocol to the agreement on the international occasional carriage of passengers by coach and bus (Interbus Agreement) regarding the international regular and special regular carriage of passengers by coach and bus (Cm 9699)

12. There is currently a multilateral treaty between the European Union and seven other contracting parties (the Interbus Agreement). It allows for occasional coach travel (for example, coach holidays and tours) between the parties. A Protocol to the Agreement, which was opened for signature in Brussels on 16 July 2018, extends the Interbus Agreement to allow ‘regular’ (that is, scheduled) coach services to take place between the parties and ‘special regular’ services (for example, cross-border services taking specific passengers to school or workplaces). The Interbus Agreement requires contracting parties to apply EU standards (that is, operator licensing, technical vehicle standards, and driving hours etc). The UK is bound by the Interbus Agreement as an EU Member State but continued membership once the UK leaves the EU would require the UK to join in its own right. Whilst the Interbus Agreement largely mirrors the provision that provides for international coach travel within the EU, there are differences. For example, the Agreement does not permit “cabotage” (operation of domestic journeys in one contracting party by an
operator based in another). That said, the Explanatory Memorandum accompanying the instrument suggests that “Interbus would … be a contingency option for coach travel between the UK and the EU in the event that we left the EU without a negotiated arrangement that provided for international coach travel.”