We submit this evidence in our personal capacities. Our evidence draws on the outcomes of a conference on Treaties, Brexit and the Constitution\(^1\) that three of us convened; written and oral evidence we have variously submitted to a number of parliamentary committees over the past year; and a draft journal article (which is currently under review). For all this we are indebted to the academics, practitioners and parliamentary staff who contributed to the conference, as well as other colleagues, but we bear full responsibility for any errors or omissions our submission might contain.

**Summary**

- The UK Parliament is less involved in treaty oversight than some comparable Parliaments. This is a constitutional problem that is serious enough to require reform.
- Many treaties include politically controversial matters. If Parliament is not sufficiently involved, one risk is that it may reject legislation needed to implement long-negotiated treaties, resulting in non-ratification, which could undermine future negotiations.
- After Brexit a greater number of treaties will require more exacting scrutiny. If the status quo continues, however, post-Brexit treaties will receive less input and scrutiny from Parliament than EU treaties receive at present.
- The creation of a dedicated Parliamentary Treaty Committee, supported by an expert secretariat, would be a good first step to address these limitations.
- International experience shows that it is possible to combine accountability with flexibility and suggests a variety of ways in which legislatures can be involved in scrutinising treaties. In those jurisdictions, greater parliamentary scrutiny can help rather than impede the Government in negotiating treaties.
- The goal is not for Parliament to place obstacles in the path of Government treaty policy, but to foster a constructive working relationship where Parliament and Government work together to achieve effective treaty actions.

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\(^1\) Conference on Treaties, Brexit and the Constitution, Jesus College, Oxford, 23 March 2018.
**Current UK treaty oversight**

1. In the UK, the Government negotiates, signs, ratifies, amends and withdraws from treaties under its prerogative power. These treaty actions affect the UK’s binding international obligations and may also have effects in domestic law. In general, treaty actions take effect in domestic law only through domestic legislation, and the *Miller* case\(^2\) reaffirmed the principle that only Parliament may authorise treaty actions that bear on existing legal rights.\(^3\) However, some treaty actions affect the rights and duties of UK citizens, regardless of whether Parliament implements them in legislation. Where possible, judges interpret legislation and develop the common law so as to make it consistent with the UK’s international treaty obligations.\(^4\)

2. Yet Parliament has few structures or processes for scrutinising the Government’s treaty actions, and no statutory or procedural right to a debate or vote on any treaties. For most non-EU treaties, its formal involvement comes only when the Government wishes to ratify a treaty – such treaties must be laid before Parliament under the *Constitutional Reform and Governance Act* 2010 (CRAG Act), and Parliament has a statutory opportunity to object to their ratification. Parliament also has the power to refuse to pass any legislation needed to implement a treaty, though many treaties need none. There is no requirement for select committee involvement, which rarely happens. The main exception is EU treaty actions, which are subject to Parliament’s EU scrutiny system and some of which require Parliament’s approval (for example s2 of the *European Union Act 2011*), as well as having democratic scrutiny through the European Parliament and its UK MEPs.

3. This means, for most non-EU treaties, that Parliament decides only on the ‘how’, not the ‘why’ or the ‘what’, of treaty obligations. The new statutory treaty procedures in the CRAG Act changed this only minimally, and Parliament has, in any event, never used those powers.

4. The debate concerning the terms of a Withdrawal Agreement is an object lesson in how the politics of treaty-making, amplified by our current constitutional arrangements, can undermine the government’s ability to negotiate treaties. Unless the UK’s international partners

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\(^2\) *Miller v Secretary of State for Exiting the European Union* [2017] UKSC 5


\(^4\) See *AF v. SSHD* [2004] UKHL 56
know the Government has the full faith and confidence of Parliament when it negotiates agreements, and unless that confidence is reasonably durable, our international negotiations are likely to get harder. This is not an ephemeral problem, caused by present politics: it is an institutional problem caused by constitutional procedures.

5. Future controversies have already been prefigured in debates about chlorinated chicken or the need to grant visas in return for market access or foreign direct investment. And the politics of treaty-making are not confined to negotiation. They can continue long after the treaty has come into force, as the example of the UK-US Extradition Treaty below shows.

6. As international relations are reserved matters, devolved executives and legislatures currently have very limited direct involvement in the negotiation of international treaties, even when the duty to implement those treaties is devolved and when devolved interests might diverge from or even conflict with UK interests. At present, the Joint Ministerial Committee (JMC) on EU Negotiations and JMC on Europe provide some scope for the devolved executives to influence UK treaty matters. But there are good reasons to question their effectiveness. For example, the UK Government decides when the JMCs meet (and the meetings of the JMC on EU Negotiations have been both infrequent and irregular, even at important junctures); the JMCs are consultative rather than executive bodies, so their decisions do not bind participants; and the JMCs’ lack of transparency limit the scope for genuine scrutiny of their business. Moreover, there is no parliamentary parallel whereby devolved legislatures can have any input into this process.

7. The current parliamentary oversight procedures are based on a 1920s constitutional convention called the Ponsonby Rule, parts of which were then given effect by the CRAG Act. The treaty provisions of the CRAG Bill did not attract widespread or acute interest. There were 11 responses to the Public Consultation on the Bill, of which several were former FCO legal advisers. Debates on this part were poorly attended: between 12 and 24 Members were present at any one time. The Bill then went into wash-up before the 2010 general election, and most of its clauses were never properly debated.

8. The final form of the CRAG Act reflects that contemporary lack of interest. Section 20 gives limited statutory effect to specified Parliamentary resolutions that a treaty should not be ratified. The

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5 The Institute for Government set out these challenges and others in a briefing paper on Devolution and the Joint Ministerial Committee at [https://www.instituteforgovernment.org.uk/printpdf/5559](https://www.instituteforgovernment.org.uk/printpdf/5559)
CRAG Act does not, however, contain the power to table a motion against ratifying a treaty nor the right to a debate on treaty provisions, and the Government has no obligation to provide parliamentary time. No qualifying resolution has ever been tabled under the CRAG Act, and as far as we are aware no meaningful debate or vote on a treaty has ever taken place during the s.20 period. Even if a motion could be secured, this would give Parliament the choice of taking the treaty or leaving it – no amendments can be made. And even then, the CRAG Act does not apply to all treaties or all treaty actions: perhaps most significantly, it does not apply to derogating or withdrawing from treaties.

9. The Government’s only formal obligation to inform Parliament about treaty-making is to lay treaties subject to ratification, along with an Explanatory Memorandum, before Parliament. Parliament has not provided any guidelines or template for what these memorandums should cover, and they can be very brief. The Government has no obligation to inform Parliament or the public about proposed, ongoing or abortive treaty negotiations.

Examples of the limitations of these procedures

UK–Colombia Bilateral Agreement for the Promotion and Protection of Investments of 2014

10. This treaty was laid in accordance with the CRAG Act. Following a House of Lords Secondary Legislation Scrutiny Committee report, Lord Stevenson of Balmacara tabled a Motion to Take Note of the Treaty, which was debated on 30 July 2014. The debate reflected the input of civil society groups. But because the wording of the motion did not say that the treaty should not be ratified, it had no statutory effect. The treaty was ratified, in compliance with CRAG, on 10 July 2014, three weeks before it could be debated. At that debate Lord Stevenson noted ‘we are in a situation that is slightly perverse in the sense that the treaty has already been enacted and we are not in the position of asking the Government to reconsider it’.

Protocol 15 to the European Convention on Human Rights

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6 See s.23, which exempts treaties under certain statutory regimes.
7 https://publications.parliament.uk/pa/ld201415/ldhansrd/text/140730-gc0001.htm HL GC 631
8 http://www.colombiancaravana.org.uk/uk-colombia-bilateral-investment-treaty-was-ratified-by-the-house-of-commons-on-thursday-10-july-2014/
9 Note 7 above at GC644.
11. In this case, the Joint Committee on Human Rights received the explanatory memorandum for the treaty in good time and prepared a report. The report recommended that the UK should ratify the treaty, and commended the Government on a negotiation, which successfully amended the Preamble to the Convention. Nevertheless, it stressed that, in view of the importance of the Protocol, Parliament ought to debate the matter. The Government refused to have a debate, apparently on the grounds that it was not willing to use its own time for Treaty business.

**UK–US Extradition Treaty of 2003**

12. The UK–US Extradition Treaty was signed on 31 March 2003 and came into force in April 2007, following ratification by the US Senate. It was laid before Parliament under the Ponsonby Rule, and the domestic implementing legislation was debated and enacted. But it was only when extraditions began that Parliament seriously responded to arguments that the treaty created asymmetrical obligations. For example, the treaty made it possible for Britons to be extradited in cases where UK authorities had decided, on the same evidence, not to bring charges.\(^\text{10}\) Four years after the treaty came into force, and more than seven years after signature, the Home Secretary commissioned an independent inquiry into the Treaty’s provisions.\(^\text{11}\) Thereafter, the Joint Committee on Human Rights recommended that the Government urgently renegotiate aspects of the treaty.

**Selected international experience**

13. The UK has less parliamentary involvement with treaties than many other comparable countries.\(^\text{12}\) Legislatures such as the Australian, New Zealand and European parliaments have demonstrated that it is possible to combine a greater degree of democratic accountability with sufficient flexibility to allow the Government to strike deals. They show that it is possible to put Parliament–Executive relations in this field on a footing where the working relationship between the two is constructive, to the benefit of both institutions.

14. In 1996 Australia established the Joint Standing Committee on Treaties (JSCOT) of the Commonwealth Parliament.\(^\text{13}\) All treaty actions

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\(^{10}\) [https://publications.parliament.uk/pa/jt201012/jtselect/jtrights/156/15602.htm para 198.](https://publications.parliament.uk/pa/jt201012/jtselect/jtrights/156/15602.htm para 198.)


\(^{12}\) We are grateful to Professor Joanna Harrington for drawing our attention to these examples.

\(^{13}\) Australia. Parliament. Senate. Legal and Constitutional References Committee. *Trick or Treaty?*
are referred to JSCOT, which must report on them, but with multi-track procedures for major or minor treaty actions (and JSCOT can ask for a treaty to move to a different ‘track’). As JSCOT has the power to investigate ‘any question relating to a treaty or other international instrument, whether or not negotiated to completion,’ it can for example scrutinise the decision not to participate in a major multilateral trade treaty – or any other treaty-related matter referred to it by a Government Minister or either House of Parliament. It has recommended against ratification for only about 1% of the 40 or so treaties it examines every year and sees its main strength as testing whether a treaty action is in the national interest, including whether the Government has consulted properly and done a full National Interest Analysis.

15. In New Zealand, although there is no specialised treaty committee, all major treaties receive a committee inquiry and report before the Government takes binding treaty action. Moreover, if any implementing legislation is required, the committee report will be debated in government time, in place of the first debate on the implementing legislation.

16. Until the Single European Act 1986 (SEA), the European Parliament (EP) had almost no treaty powers and there was no duty to consult it. The SEA introduced a requirement that the EP consent to any treaty that creates a framework for cooperation between the EU and another state, including accession to the EU. More categories have been added since then. Since the Lisbon Treaty, most treaties that do not have a bearing on the Common Foreign and Security Policy have required the EP’s consent. The EP has also gradually acquired the right to be informed about European Foreign Policy, including about treaty negotiations. Most of the detailed work is carried out through the EP’s committees, such as International Trade, Fisheries, or Constitutional Affairs.

Arguments against reform?


Standing Orders of the House of Representatives, 2017, New Zealand Parliament, 26 October 2017, Standing Orders 250(2)(a) and 285(4)(c)
17. There are three main groups of arguments against reform of current procedures. First, that by nature Parliament lacks the flexibility necessary for treaty negotiations. Next, a connected but more moderate view that the constitution ought to grant the greatest possible latitude to the Government in treaty negotiations. Third, that the defects of the current system are not serious enough to require reform.

18. Many commentators believe legislatures are inherently ill-suited to detailed engagement in treaty negotiation, ratification and revision, since each participant government must negotiate a single text on which they agree, and post-negotiation amendment is difficult. For example, Professor Vernon Bogdanor recently wrote: “In international affairs, Britain must be represented by the government, not by parliament, which has never, in all our history, negotiated a treaty. Only those directly involved in the negotiation can judge what is attainable and what is not. They cannot make these judgments if they lack the authority to decide.”

19. However, the international examples set out above show us that there is no need to choose between the Government and Parliament. In many states Government and Parliament work together. The Australian Parliament helps the government to decide what is attainable and what is not. The European Commission does not have unfettered “authority to decide” what to do in trade treaty negotiations: it ultimately needs the consent of the European Parliament. Both Australia and the EU have been successful in concluding international agreements.

20. A more moderate argument would concede that it is possible for Parliament to be consulted during treaty negotiations, but that this is undesirable, because the Government needs latitude to negotiate effectively and in confidence.

21. However, many treaties take time to negotiate, some require politically controversial concessions, and others need to be implemented in legislation. Without Parliamentary scrutiny, there is a risk that Parliament could refuse to pass implementing legislation that would enable the government to ratify a long-negotiated treaty, especially if negotiations straddle the electoral cycle. On average, US trade treaties take 45 months to implement. In the UK, it is not

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16 Vernon Bogdanor, ‘One Brexit Amendment that puts the Government’s Survival at Risk’, The Observer, 10 June 2018

17 See e.g. https://piie.com/blogs/trade-investment-policy-watch/how-long-does-it-take-conclude-
unlikely that the political complexion of both Parliament and the Government will change while a trade treaty is being negotiated.

22. Some commentators believe the current system is not broken and does not need to be fixed. Because Parliament ultimately decides whether to embody treaty obligations in legislation, perhaps it does not need to engage with the front-end of that process. Treaties requiring new implementing legislation will be debated, even if the debate is focused on the *Bill* and not on the treaty itself. And there is nothing to stop committees inquiring into the Government’s treaty actions. For these reasons, and others too, there is a sense that Parliament has already been able to engage with treaties when it wishes to do so.

23. However, Brexit has rapidly increased the pressure on Parliament’s treaty procedures, as the countless hours of debate on access to information and what votes should happen when shows. If there is a Withdrawal Agreement, Parliament will doubtless wish to scrutinise how it is implemented, and in particular any decisions taken by the Joint Committee established under it (for instance to extend the transition period). After 29 March 2019 the UK will regain competence in a wide range of treaty areas such as trade, agriculture, fisheries, security, data protection, transport, whether there is a Withdrawal Agreement or not. Negotiations are due to take place on a wide-ranging future relations agreement or agreements with the EU and ‘rolling over’ hundreds of EU treaties with third countries. A greater number of treaties will require scrutiny, and those treaties will include politically controversial matters. At the very least, new procedures for scrutinising new treaties should be no less than those currently applying to EU treaties.

24. The UK’s long-established treaty procedures were, moreover, devised before the devolution settlements. The devolved administrations and legislatures are currently demanding a more formal and substantive role in shaping international agreements that affect them.

**Recommendations for action**

25. We suggest that the best way to address these challenges would be for Parliament to create new mechanisms to enable more effective scrutiny of the Government’s proposed treaty actions, with clear
information and consultation requirements. The main considerations are: (1) timing – when can it make a difference? (2) what kind of treaty actions should be considered? (3) How could it be flexible enough to deal with anything from minor updates to major new trade treaties? (4) How could the views of devolved legislatures be taken into account?

26. Parliamentary Committees could play a vital role in scrutinising trade treaty negotiations and could act as a focal point for interested parties to contribute to that scrutiny. Although there is nothing to stop them doing so currently (as the Joint Committee on Human Rights has shown), there is very little expectation or institutional support for it.

27. In our view, an essential element of this would be a new Treaty Committee in either House or as a Joint Committee. A Commons Committee would have greater perceived democratic legitimacy; a Lords Committee might be better able to find time on the floor of the House and might contain greater expertise. A Joint Committee might be able to combine these respective advantages, although the practical and cultural challenges should not be underestimated.

28. A Treaty Committee could build up expertise on treaty processes, sift treaties, take a view on what level of scrutiny they would need, and send them to specialist Committees such as the International Trade Committee for scrutiny. Alternatively, such a committee could conduct inquiries and make recommendations itself. The former would take advantage of specialist subject knowledge and help make treaties part of the mainstream business of the House. The latter would build up general expertise in and awareness of treaties. Or there could be a hybrid model, in which a Treaty Committee sifts treaties and sends as many as possible to specialist Committees, but handles some treaties itself, such as those with cross-cutting effects and those without a clearly responsible Committee. The hybrid model seems to us the most appropriate and effective.

29. Alternatively – or additionally – Parliament could give existing Committees new powers or duties in relation to treaties, or establish ad hoc committees, sub-committees or joint committees for particularly important or controversial treaties. It could also use the new procedures to invite Members of other committees to join a committee for the scrutiny of a particular treaty.

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18 As the European Statutory Instruments Committee does for Brexit-related Statutory Instruments.
30. Whatever decision was taken on treaty committee structures, there could be a requirement for some or all treaty actions to stand referred to a committee and to have some kind of committee report before binding action is taken (as in Australia and New Zealand).

31. A specialised Treaty Secretariat could support a new Treaty Committee and/or existing Committees by monitoring, analysing and advising on proposed treaties. Experience from other countries, such as Australia, shows that secretariats of this kind build up knowledge and expertise over time, as well as constructive relations with government officials.

32. One option for involving Parliament in the early stages of treaty action is to have a post-Brexit replacement for the current EU scrutiny reserve. At present, UK ministers in the EU Council are not supposed to agree to the EU opening negotiations on, or signing, an international agreement unless the scrutiny committees in both Houses have released the relevant documents from the scrutiny reserve. This could be adapted to apply to new UK international agreements.

33. The right to be informed about treaty actions is a vital component of this process. Although there is clearly a need for some confidentiality in treaty-making, and asking for every document relating to a treaty and its negotiations could be counter-productively overwhelming, there should be a presumption of disclosure which it is up to the owner of that information to rebut if they wish it to remain confidential.

34. At its simplest, a new information requirement might include a government list of proposed treaty negotiations (as in Australia, New Zealand and the Netherlands). The FCO’s monthly Treaty Bulletin could be expanded to cover this sort of information. Or the Government could go further and agree to release updates on negotiations, with specified information say every six months or after each negotiating round, either publicly or to Parliament or a parliamentary committee. A comprehensive UK treaty database would be helpful in gathering all this information together in one place, and could extend to including parliamentary and devolved actions and to showing which domestic legislation implements which treaty obligations.

35. Analysis is also essential. Currently, the Government provides an Explanatory Memorandum on all signed treaties subject to ratification, but these are often short and unilluminating. They do not amount to a full National Interest Analysis along the Australian or New Zealand model, whose requirements are set out in detail. Parliament could
similarly set out what analysis of proposed treaty actions it expects the Government to provide and when, and whether it expects an independent element to this.

36. The European Parliament, for example, has gradually increased the requirement for the other EU institutions to provide it with timely information throughout the treaty-making process, and this is what makes its democratic scrutiny possible. If scrutiny would require access to confidential documents, a prospective treaty committee could use existing procedures to handle them, such as the model of the Intelligence and Security Committee. Negotiating, approving, enacting and implementing treaty obligations could all be taken into account, as well as making reservations and derogations and withdrawing from treaties.

37. One way for the views of the devolved legislatures on treaties to be taken into account would be for them to have a channel of communication with a new UK Treaty Committee. A UK Treaty Committee could promote dialogue on treaty matters with devolved assemblies, for example by consulting them or their appropriate committees on any treaty action with an impact on devolved competences, keeping them informed of the UK Parliament’s scrutiny, and possibly facilitating regular interparliamentary discussions on treaties.

Conclusions

38. We have confined our evidence largely to issues of transparency and committee scrutiny, and to what might change rather than how changes might be made. If there is a Withdrawal Agreement it seems likely that Parliament will wish to insert specific measures in the EU Withdrawal Agreement Bill, for example, to deal with parliamentary scrutiny of how the agreement is implemented, overseen and potentially amended. But as we have shown above, the treaty implications of Brexit go wider and deeper than the Brexit agreements themselves.

39. Most of the changes suggested above require at least some government involvement, but very few require legislation and could instead be implemented through policy, parliamentary rules and procedures, and internal administrative arrangements.

40. But if a review of the CRAG Act were to be undertaken, there are various areas on which amendments could be considered, for example to:
• cover further categories of treaties;
• cover other treaty actions such as reservations, declarations, derogations and withdrawal;
• include a requirement for debate on certain categories of treaties prior to ratification, perhaps on the request of the reporting committee;
• include rules about who decides whether any implementing legislation is required, and about how to choreograph any legislation with committee reports and debates;
• require an affirmative vote by the House of Commons before certain categories of treaties could be ratified
• allow the House of Commons to make its approval conditional – for example it could recommend that a treaty be ratified but with reservations or interpretative declarations

41. Parliamentary scrutiny could also cover post-ratification issues such as the implementation of treaties and any decisions made under them, reviewing and renewing treaties, and/or reporting to treaty-monitoring bodies.

42. Some of these issues – in particular the controversial and constitutionally significant issue of whether the assent of the House of Commons should ever be needed before ratifying treaties – would benefit from further detailed consideration, for example by a new UK Treaty Committee.

43. Lastly, we note that many changes could be made quickly without legislation, and examples for many of them already exist in other scrutiny procedures or other countries. Parliament could do much more to hold the Government’s treaty actions to account and help it to achieve its foreign policy goals. That could then if desired lead to more formal and wide-ranging reforms in the future.