I am a Visiting Reader in the School of Law, Queen Mary University of London; 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. I propose to focus on the effectiveness of Parliament’s current treaty role; the strengths and weaknesses of Part 2 of the Constitutional Reform and Governance Act 2010 (CRaG Act); and ways in which the effectiveness of scrutiny could be improved within that statutory regime. This evidence is complementary to that submitted jointly with E. Bjorge, A. Lang and E Smith which addresses a broader range of issues.

How effective is Parliament’s current scrutiny of treaties in both holding the Government to account and helping it get the best agreements possible?

2. Parliament’s current scrutiny of treaties is not as effective as it could or should be. Most treaties receive no scrutiny at all. Few select committees have undertaken serious treaty scrutiny, a notable exception being the Joint Committee on Human Rights (JCHR). Treaties other than EU treaties are rarely debated in either House, and when they are it is at Government initiative, usually in the context of the legislative process when new implementing legislation is needed.

3. Treaty scrutiny occurs only after the treaty has been concluded and the Government is ready to ratify it. The Government can be called to account for its conduct of the negotiations, but it will be too late to renegotiate the treaty. Parliament may object to the ratification, on a take it or leave it basis. The Government naturally takes this risk into account during the negotiations, if it is aware of the views of Parliament in advance. However there is no mechanism for consultation with Parliament during negotiations. In my experience of negotiating treaties, delegations from other countries sometimes say their hands are tied by a mandate from their legislature or anticipated
difficulties in obtaining parliamentary approval, and give this as a reason for insisting on certain provisions. It may be that in some instances, greater Parliamentary involvement could help the UK to achieve better outcomes in its treaty negotiations, or at least to avoid outcomes that Parliament ultimately rejects or declines to pass implementing legislation for.

How useful are the processes and powers under the Constitutional Reform and Governance Act 2010 and do they strike the right balance between Parliament and government?

4. Part 2 of the CRaG Act was modest in its aims. It codified the long-standing practice known as the ‘Ponsonby Rule’ whereby, when the Government proposes to ratify a treaty, it lays the treaty before Parliament for 21 sitting days and waits until the expiry of that period. This is now mandatory. The Act also gives legal effect to a resolution by either House to object to ratification, if passed within the scrutiny period.

5. Putting the Ponsonby Rule onto a statutory footing has several advantages: the rule is now clearer and more widely understood by officials, ministers and parliamentarians; it is secured against erosion or the ad hoc creation of new exceptions; and any use of the statutory exceptional circumstances provision (section 22) would now be on the face of the record, whereas in the past exceptions made to the Ponsonby Rule could go unnoticed. Giving legal force to a resolution against ratification is also potentially useful, especially in the case of the House of Commons as it would amount to a veto; but the power has not yet been used.

6. The Act did not address the deficiencies in parliamentary procedures and institutional arrangements for treaty scrutiny, but left scope for Parliament to do so within its provisions. Five areas in particular lend themselves to reform:
   (a) Parliamentary procedures for debating and voting on a treaty;
   (b) Parliamentary time for treaty debates and votes;
   (c) Flow of information from Government to Parliament;
   (d) Provision of information by Parliament to the public; and
   (e) Institutional mechanisms: a treaty committee and treaty secretariat
Parliamentary procedures for forcing a debate and a vote on a treaty

7. The CRaG Act gives legal effect to a negative vote, but does not provide any mechanism to ensure that if a debate and vote is requested by a sufficient number of members, that it will take place. The point was made by Lord Norton of Louth during the Joint Committee on the Draft Bill’s questioning of Ministers: ‘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 best solution might be to make provision in the Standing Orders of each House, 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.¹ That eminently reasonable suggestion has unfortunately not been followed up.

8. A rule change of this nature could work very well within the terms of the CRaG Act. Section 21 gives the Government power to extend the laying period within which a vote against ratification would have legal effect. The discretion is legally within the hands of Government, but this does not preclude Parliament adopting procedural rules or practices that in certain circumstances would require the Government to exercise that power.

Parliamentary time for debating and voting on treaties

9. A related issue is that of the allocation of parliamentary time. Debates on a treaty (other than EU treaties) are rarely offered in government time. The Government usually only tables one when it requires legislation, and then the debate is focussed on the legislation rather than the treaty. This may be inadequate because the legislation commonly implements only part of the treaty, and because it will not reveal the obligations undertaken by other States parties to the treaty. For example, the obligations in the UK-USA Extradition Agreement 2003 are asymmetric, but this is not apparent from the UK’s implementing legislation. Multilateral treaties sometimes contain

differentiated obligations for different categories of parties, in fields such as climate change, environmental protection or nuclear non-proliferation. When new legislation is introduced to enable a treaty to be ratified, there should normally be a separate debate on the treaty itself prior to or in conjunction with debates on the legislation.

10. The difficulty of securing time for a treaty debate is illustrated by the Government’s response to the request from the JCHR in 2014 for more scrutiny time for the Protocol 15 amending the European Convention on Human Rights and a debate in both Houses. The scrutiny period was increased by 8 days but the Minister replied: ‘It would however be for your Committee to propose a motion to take note of your report, and to secure time for this to be debated in either or both House during the extended scrutiny period.’ If in practice committees are not able to secure time for a treaty debate within the scrutiny period, the balance is stacked against Parliament. This issue needs to be addressed in conjunction with new procedural rules.

Flow of information from Government to Parliament: Explanatory Memoranda

11. The CRaG Act did nothing to improve the flow of information. Section 24 codified the practice that the Government had observed since 1997 of laying an Explanatory Memorandum (EM) with each treaty laid under the Ponsonby Rule. Section 24 did not address two deficiencies of this practice: (a) Parliament has not specified the required contents of an EM; and (b) The requirement to lay an EM has resulted in the later laying of treaties after signature.

12. Parliament has never specified the content it requires in an EM other than the minimal section 24 requirement. Many EMs are very short and uninformative. This is in notable contrast to the EMs submitted with Statutory Instruments. The House of Lords Secondary Legislation Scrutiny Committee has provided detailed guidance to Government on the contents it expects to see in an EM and it comments on the quality of EMs tabled.

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13. The requirement to lay an EM with a treaty before ratification has had the unintended consequence that treaties tend to be laid later than they used to be. Before 1997, when the Government signed a treaty, it published and laid it reasonably soon afterwards, even if ratification was not imminent. Since 1997, laying is delayed until the Government has decided to ratify and the EM is ready. The EM is not ready until the end of the Whitehall preparation process, which includes considering means of implementation, reservations, declarations and consultations, and can take months or years. Laying is typically now done at the last moment, such that Parliament may be kept in the dark about the Government’s plans to ratify the treaty, or the absence of any such plan, for a long time.

14. Both these deficiencies are illustrated by a recently laid treaty: Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse. The UK signed it on 5 May 2008; it was laid before Parliament with an EM on 12 April 2018 (a delay of 10 years); and ratified on 20 June 2018. The EM consists of 2 pages with scant information beyond a summary of the aims of the Convention. For example, on implementation, it merely states: ‘In order to ratify the Convention the UK has taken the necessary legislative and administrative steps to implement the Convention in UK law (including the devolved administrations).’

15. Both deficiencies could be remedied without new legislation. The requirements of section 24 with respect to the contents of an EM could be supplemented by guidance from a parliamentary committee. With respect to timing, a procedural means could surely be devised for the Government to lay a treaty without an EM at an early stage after signing it; and then, if and when the Government proposes to ratify it, lay an EM and ‘re-lay’ the treaty with it, thus triggering the CRaG Act section 20 scrutiny period. This would provide Parliament with earlier information about signed treaties, enabling better scrutiny as well as holding the Government to account in respect of treaties that it has signed but not laid for ratification.

Flow of information from Government to Parliament: treaty actions other than ratification

16. The Call for Evidence asks what role Parliament should have in the future in scrutinising other treaty actions, from potentially requiring approval for the negotiating mandate through negotiations themselves to treaty agreement, as well as in subsequent treaty actions like amendments, derogations, enforcement and withdrawal. Democratic arguments in favour of a scrutinising role in respect of more treaty actions are strong, but practical considerations of time, resources and staffing, on the part of Parliament as well as Government, need also to be taken into account. The volume of work entailed in scrutinizing the substance of all these treaty actions would be significant. Not all treaties are of interest to Parliament or the general public, and still less would all treaty actions merit the time of a committee. There needs to be a mechanism for sifting and prioritising. Prior to deciding which other treaty actions it wishes to scrutinize, a useful first step would be for Parliament to request Government to provide a systematic flow of information on these other acts so that the size of the potential task can be scoped.

17. Information about some other treaty acts is already routinely provided by the FCO Treaty Section in its ‘United Kingdom treaty action bulletins’ posted on the Government’s website. It covers UK actions on multilateral treaties and changes to the status of the treaties for which the UK is depositary. If Parliament were to request such information to be transmitted formally together with any other kind of ‘after the event’ notifications of treaty actions, it ought not be difficult to arrange.

18. Some of the other matters mentioned would pose greater challenges for Government, in particular an obligation to get a negotiating mandate approved by Parliament would often be impractical. It may be feasible in some cases, for example where there are long-running major treaty negotiations, but it would be difficult to lay down a general rule. However, Government could be asked to provide regular information to Parliament about treaties under negotiation, with a general indication of negotiating aims. This would raise more complex issues than post-treaty action reporting, as there is currently no central Government repository of information about all international dealings by all Government departments that might result in a treaty. Flexible guidelines for such reporting would need to be

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worked out collaboratively between a parliamentary committee and the Government.

Provision of information by Parliament to the public

19. There is also scope for Parliament to improve its provision of treaty information to the public. The only information on Parliament’s website about treaties laid before Parliament under the CRaG Act is listed under ‘Statutory Instruments’. It is very difficult to find it, even if you know it is there. There is nothing there to attract the public’s interest in Parliament’s work on treaties. By contrast, the Secondary Legislation Scrutiny Committee’s web pages contain much useful information including guidance for the public on ‘Writing to us about an instrument’.

Institutional mechanisms for treaty scrutiny

20. The statutory framework allows scope for a new Treaty Committee to be established or for an existing committee to be charged with responsibility for ensuring the effectiveness of treaty scrutiny arrangements across all subjects. It could facilitate timely scrutiny taking place within the section 20 period, and establish practice with regard to extensions under section 21 when needed. Such a committee may wish to propose amendments to the CRaG Act, but it does not need to wait for new legislation to make a difference. It could initiate important improvements in the areas outlined above, and steer their evolution through a process of dialogue between Parliament and Government, supported by an expert treaties secretariat.

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