1. The House of Lords Constitution Committee has invited written evidence on the parliamentary scrutiny of treaties. The importance of ensuring the correct balance in the scrutiny of treaties is an important constitutional subject and the Government welcomes the Committee’s attention to it. This memorandum provides the Government’s response.

2. The Government agrees with the Committee that the UK’s departure from the European Union (EU) makes it timely to consider whether the current arrangements for the scrutiny of treaties remain fit for purpose and has given careful consideration to the questions set out in the Committee’s call for evidence. Each of these questions gives rise to a number of significant issues which the Government believes would be approached most appropriately through a considered dialogue between the executive and Parliament (always recognising that the conduct of parliamentary business is a matter for Parliament itself). Whether in the longer term our departure from the EU will result in more treaties being presented to Parliament is not clear. There are areas - for example political cooperation with third countries - where the EU’s approach is often treaty-based, but the UK’s arrangements have hitherto been different. The Government is also of the view that although Parliament will need to consider in the near-term how to deal with a marked increase in the number of treaties in the context of EU exit, the aim of the dialogue should be to look beyond the immediate prism of EU exit to a lasting constitutional solution which meets the needs of the UK outside of the EU. The Government therefore submits this memorandum as, it is hoped, the first stage in this dialogue and welcomes the opportunity to engage further with the Committee in the coming months.

3. In laying the ground for that dialogue, it is important to recall the fundamental constitutional principles that Brexit does not change. As confirmed by the Supreme Court in the case of Miller¹, making, amending and withdrawing from treaties are all functions of the executive which are carried out in the exercise of the Royal

¹ See, for example, R (oao Miller and another) v Secretary of State for Exiting the European Union [2017] UKSC 5 at para. 54.
Prerogative. Insofar as a treaty needs to be given effect in domestic law, however, it is Parliament which dictates how this happens. Further, it has long been recognised that Parliament should be given the opportunity directly to scrutinise treaties which are subject to ratification prior to the UK indicating its consent to be bound by them as a matter of international law.²

4. Furthermore, under the devolution settlements, the UK Government is responsible for international relations and has overall responsibility for concluding treaties and other international agreements on behalf of the UK. However, the UK Government recognises that the devolved administrations have an interest in international policy making in relation to devolved matters and also in obligations touching on devolved matters that the UK may agree as a result of concluding international agreements. The Concordat on international relations between the UK Government and devolved administrations acknowledges a mutual determination to ensure that there is close co-operation on areas of interaction between international relations and devolved matters, including during the negotiation and conclusion of treaties.

5. The Government has always been and continues to be committed to the principle of effective parliamentary scrutiny. The principal statutory framework providing for the scrutiny of treaties is the Constitutional Reform and Governance Act 2010 (CRaG). It was the product of lengthy and relatively recent consultation and dialogue.³ The Government will continue to support and facilitate parliamentary scrutiny of treaties under CRaG.

6. CRaG itself provides sufficient flexibility to permit Parliament to undertake scrutiny in the manner of its choosing. Indeed, the degree of scrutiny Parliament wishes to give to treaties is primarily a matter for both Houses to determine. In particular, it is for Parliament to determine the desirability of establishing new mechanisms for scrutiny of the UK’s treaties subject to CRaG when current parliamentary arrangements for EU instruments fall away. The Government stands ready to engage in discussions and consider arrangements to

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³ See: The Governance of Britain (CM 7170), War Powers and Treaties: Limiting Executive power (CM 7239) and The Governance of Britain – Constitutional Renewal (CM 7342).
strengthen parliamentary scrutiny of treaties within the framework of CRaG, should there be the requisite appetite and capacity in each House.

7. However, the Government does not believe that the current arrangements (be it at the EU level or UK level) for parliamentary involvement in EU treaties with third countries can or should be the model for treaties that the UK may in future enter into in its own capacity. Those arrangements have evolved over time alongside the evolution of the EU’s external action powers and are rooted in the EU’s essential nature as a product of the sovereign will of its Member States. The fact that the European Parliament and national parliaments have a particular role within the confines of a supra-national structure, for example at the outset of EU negotiations, does not lead ineluctably to the conclusion that, under the specific and quite different conditions of the UK constitution, Parliament should assume a similar role in the conduct of UK treaty negotiations.

8. Finally, the Government acknowledges that comparative analysis of parliamentary scrutiny of treaties in other national systems may well assist in reflecting on the UK’s own system. However, just as the system of scrutiny of EU treaties cannot be transplanted into the UK, no single system of another State will hold the answer for the UK. Each system has its advantages and disadvantages. In addition, each system is a product of the constitutional make-up of the particular State in which it sits, including whether the State has a monist or dualist system of incorporation of treaties and whether or not the State is a federal or unitary system.

Conclusion

9. The Government thanks the House of Lords Constitution Committee for its attention to this important topic. The Government believes that, should the ultimate view be that changes are needed to the present arrangements for parliamentary scrutiny of treaties, then these should be bespoke for the UK on leaving the EU. They should be the product of full and considered debate and of dialogue between Parliament and Government, and not the narrow product of the UK’s withdrawal from the EU itself. And they should establish appropriate and long-lasting arrangements which respect our constitutional traditions. The Government looks forward to future engagement with the Committee in shaping those arrangements.