



## BRIEFING PAPER

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# Parliament's role in ratifying treaties

By Arabella Lang

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## Summary

### **The Government makes treaties, but Parliament has a role**

Although the UK Government is responsible for negotiating, signing and ratifying international treaties, Parliament has a statutory role in ratifying them, and can also be involved in other ways.

The starting point for treaty ratification in the UK is that the Government has the power to make international treaties under its prerogative powers, but this cannot automatically change domestic law.

If domestic law needs to be changed in order to implement a treaty, this must be done by Parliament (or a devolved legislature). But for the treaty itself Parliament usually has only a negative power to object to ratification, and it does not have to debate or vote on most treaties.

This is in contrast to some other countries, where parliaments are involved in treaty-making and may need to give their consent before ratification (often because treaties can automatically be part of domestic law that can be relied on in domestic courts).

### **The 2010 Act: new power for Parliament to object to ratification**

Part 2 of the [Constitutional Reform and Governance Act 2010](#) gave statutory form to a previous constitutional convention on parliamentary involvement with treaties (the Ponsonby Rule). It also introduced a new power for Parliament to object to ratification.

Under these provisions:

- The Government must lay before Parliament most treaties it wishes to ratify, along with an Explanatory Memorandum.
- Parliament then has 21 sitting days in which either the House of Commons or the House of Lords (or both) may pass a motion objecting to ratification.
- If neither House objects, the Government may ratify the treaty.
- If the Lords objects but the Commons does not, the Government can ratify the treaty. But it must first lay before Parliament a Ministerial statement explaining why the Government considers that the treaty should nevertheless be ratified.
- If the Commons objects (regardless of the Lords' position), the Government must lay such a statement before Parliament but the Commons then has another 21 sitting days in which it may object again. This process can be repeated indefinitely, in effect giving the Commons the power to block ratification.

Neither House has yet used the power to object to ratification.

And despite looking like a major change, the new provisions have several limitations, including:

- They do not require Parliament to debate or vote on a treaty (and it rarely does so).
- Parliament can only reject (or tacitly accept) a treaty in full – it cannot amend treaties.
- The devolved executives and legislatures have very limited involvement in treaties.
- Some types of treaty are excluded from the 2010 Act, although in some cases (EU treaties and 'double taxation' agreements) this is because they have specific procedures which give Parliament a greater role.

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### **More Parliamentary scrutiny of treaties?**

There have periodically been calls for Parliament to have a greater role in scrutinising treaties – something which the 2010 Act does little to assist.

Many countries give their legislatures more power than the UK does in relation to treaty scrutiny and/or ratification, including Australia which has a dedicated Joint Standing Committee on Treaties.

Parliament could for example:

- hold more debates and votes on treaties
- be given an affirmative resolution procedure for ratification
- create a dedicated treaty scrutiny committee, and/or
- take on some kind of role during treaty negotiations.

Brexit might reignite calls for more parliamentary scrutiny of treaties, as it is likely to lead to a greater volume of important treaties involving the UK. But the idea of introducing a system of parliamentary scrutiny of treaty negotiations before signature has not generally been popular in the UK.

# 1. The Government makes treaties

In the UK, international treaties are negotiated, signed and ratified by the Government, acting under the Royal Prerogative.<sup>1</sup>

**Signing** a treaty usually shows only that the State agrees with the text and puts it under an obligation to refrain from acts that would defeat the object and purpose of the treaty. Sometimes, however, a treaty itself provides that it enters into force on signature alone.

Difference between signing and ratifying treaties

**Ratifying** a treaty is when a State confirms that it is bound by a treaty that it had already signed.<sup>2</sup>

The treaty will then come into force for that State according to the provisions in the treaty – for example six months after ratification, or once the treaty has been ratified by 20 States.

The UK does not usually sign a treaty unless it has a reasonably firm intention of ratifying it. There is [detailed information about how the UK Government signs and ratifies treaties](#) on the gov.uk website.<sup>3</sup>

## Box 1: Outline of treaty-making in the UK

- The Government negotiates a treaty, which for multilateral treaties is often a lengthy process involving a series of inter-governmental meetings.
- The Government signs the finalised treaty.
- Parliament makes any necessary domestic legislative changes.
- The Government must lay most treaties it wishes to ratify, along with an Explanatory Memorandum, before Parliament for 21 sitting days.
- During that time either the House of Commons or the House of Lords (or both) may pass a motion objecting to ratification.
- If neither House objects, the Government may ratify the treaty.
- If the Lords objects but the Commons does not, the Government can ratify the treaty. But it must first lay before Parliament a Ministerial statement explaining why the Government considers that the treaty should nevertheless be ratified.
- If the Commons objects (regardless of the Lords' position), the Government must lay such a statement before Parliament but the Commons then has another 21 sitting days in which it may object again. This process can be repeated indefinitely, in effect giving the Commons the power to block ratification.
- If there is no outstanding objection from the Commons, the Government can ratify the treaty.
- The treaty enters into force for the UK according to the provisions in the treaty.

The Government's dominant role in making and ratifying treaties reflects the UK's position as a '**dualist**' state. This means that when the Government ratifies a treaty – even with Parliamentary involvement – this does not amount to legislating. Treaties are seen as automatically

Dualist and monist states

<sup>1</sup> Prerogative powers were once exercised by the reigning monarch but are now exercised largely by the Government on the monarch's behalf, without any parliamentary authority. For background information see Library Standard Note SN/PC/3681, [The Royal Prerogative](#), 30 December 2009

<sup>2</sup> Other procedures equivalent to ratification include accession, approval and acceptance. All indicate a State's agreement to be bound by a treaty.

<sup>3</sup> Foreign and Commonwealth Office, [Treaties and MOUs: Guidance on Practice and Procedures](#), updated March 2014

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creating rights and duties only for the Government (under international law). For a treaty provision to become part of domestic law, the relevant legislature must explicitly incorporate it into domestic law.

Before the Government ratifies a treaty, it always seeks to ensure that any domestic legislation needed to implement it is already in place (see below). Where this is done, private parties who are harmed by a violation of their treaty-based rights may be able to obtain a domestic legal remedy – but the courts are applying the domestic law, not the treaty directly.

Treaty provisions that are not incorporated into domestic law can however have indirect domestic legal effect. For example, where legislation is capable of two interpretations, one consistent with a treaty obligation and one inconsistent, then the courts will presume that Parliament intended to legislate in conformity with the treaty and not in conflict with it.<sup>4</sup> A recent post on the UK Human Rights blog gives more examples:

Customary international law is considered to form part of the common law (see [Keyu](#)). It has been established that an international convention may be used as an aid to statutory interpretation (see [Assange](#) at [122]), particularly when it comes to human rights (see [Stevens](#) at [55ff]), or be something to which the court can have regard in the exercise of judicial discretion (see [Morgan v. Hinton Organics](#), concerning the [Aarhus Convention](#) principle that costs in environmental litigation should not be prohibitively expensive). An international obligation may also have become part of EU law and thus have some direct effect in the UK via that route, although this is a path that will presumably be closed down following Brexit.<sup>5</sup>

By contrast, in '**monist**' countries (such as the Netherlands) the act of ratifying an international treaty automatically incorporates it into national law. International law is domestic law – or may even take precedence over it – and treaties may even be enforceable in the national courts as soon as they are ratified. This approach usually involves the legislature in the ratification of treaties (as treaties are another form of domestic law).

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<sup>4</sup> Lord Bingham of Cornhill, in his maiden speech in the House of Lords, set out this and five further ways in which treaties can have indirect effect in the UK: HL Deb 3 July 1996 c1465 ff

<sup>5</sup> Alasdair Henderson, '[War remains inside the court room – Part 2: the Torture Convention](#)', UK Human Rights Blog, 14 September 2016

## 2. Parliament makes any implementing legislation

Often UK domestic legislation is needed to implement a treaty before ratifying, so that the Government will not be immediately in breach of its proposed treaty obligations.

Treaties increasingly impose positive obligations on states, which can create room for debate in Parliament – and sometimes the devolved assemblies – about exactly what legislative change is needed to give effect to a new obligation. For example, the Joint Committee on Human Rights (JCHR) looked at whether Parliament should create a new criminal offence of coercive behaviour in order to allow the Government to ratify the Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention).<sup>6</sup>

The UK Government's practice is to try to make sure the new primary and/or secondary legislation is in place before it ratifies the treaty, so that the Government is not immediately breaching its new international obligations. Any such legislation must follow the usual parliamentary procedures for passing legislation, which often means there will be debates.

If Parliament rejected implementing legislation, the Government would be unable to ratify the treaty.

But in general, when asked to approve such legislation, Parliament looks at **how** the UK would implement (at least parts of) the treaty, rather than **whether** the UK should ratify it. Parliament can amend any Government Bill implementing a treaty, and as long as it does not hinder the Government from fulfilling its obligations under the treaty this will not block ratification. For example Parliament might insist that the Government report to Parliament on the implementation of the treaty, even if there is no such requirement in the treaty itself. This of course does not amend the treaty itself.

However, many treaties — even those with major policy implications — require only minor adjustments to domestic law, or none at all: for example, the 2013 Arms Trade Treaty needed only adjustments to secondary legislation.

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<sup>6</sup> Joint Committee on Human Rights, Violence against Women and Girls, HL 106, HC 594 2014-15, paras 130-40.

## 3. Parliament can object to ratification

### 3.1 Introduction

It is usually accepted nowadays that Parliament has a legitimate interest in treaties, whether or not implementing legislation is needed.

Even before 2010, Parliament debated treaties in several different circumstances. And under the informal 'Ponsonby Rule' (a 1924 government undertaking which crystallised into the constitutional practice for parliamentary scrutiny of treaties) the Government laid before Parliament most treaties that it wanted to ratify.

But Parliament previously had no statutory role in the ratification of treaties, and little power to overcome the will of the executive to ratify a particular treaty unless it required a change in UK legislation or the grant of public money. Parliament could only express disapproval and rely on political pressure to change the mind of ministers or, in extreme cases, withdraw its confidence from them.

Years of proposals in private members' Bills, a royal commission report, select committee reports, a consultation exercise and a draft Bill (whose proposals on treaties generally met with cross-party support) sought to increase Parliament's role on treaties.<sup>7</sup>

Then part 2 of the Constitutional Reform and Governance Act 2010, which came into force on 11 November 2010, gave Parliament some new statutory powers on treaties. What are these powers?

### 3.2 The Government must lay treaties before Parliament

Under the 2010 Act, the Government now has a general statutory requirement to lay before Parliament for 21 sitting days any treaty that is subject to ratification or its equivalent.

This simply put aspects of the Ponsonby Rule on a statutory footing.

The Government must also include an Explanatory Memorandum on the treaty. This will place on public record the name of the minister with primary responsibility for a treaty, its financial implications, the means required to implement it and the outcome of any discussions which have taken place within and outside government. It will also describe any reservations or declarations.<sup>8</sup> The Government had been producing Explanatory Memorandums on treaties as a matter of course for some years before the 2010 Act.

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<sup>7</sup> See *Parliamentary Scrutiny of Treaties: up to 2010*, Library Standard Note SN/IA/4693, 25 September 2009

<sup>8</sup> J Harrington, 'Scrutiny and Approval: The Role for Westminster-Style Parliaments in Treaty-Making', 55 *International and Comparative Law Quarterly* 121 (2006), pp131-32

Since November 2000, the FCO has ensured that a copy of each treaty laid before Parliament is sent to the relevant departmental Select Committee. The Joint Committee on Human Rights has been particularly active, scrutinising all treaties with a significant human rights aspect and often reporting on them to Parliament.

### 3.3 The Commons can block ratification

The 2010 Act also gave Parliament a new power to object to ratification of a treaty.

The procedure is as follows:

- During the 21 sitting days for which a treaty and Explanatory Memorandum must be laid before Parliament, either the House of Commons or the House of Lords (or both) may pass a motion objecting to ratification.
- If neither House objects during this time, the Government may ratify the treaty.
- If the Lords objects but the Commons does not, the Government can ratify the treaty. But it must first lay before Parliament a Ministerial statement explaining why the Government considers that the treaty should nevertheless be ratified.
- If the Commons objects (regardless of the Lords' position), the Government must lay such a statement before Parliament but the Commons then has another 21 sitting days in which it may object again. This process can be repeated indefinitely, in effect giving the Commons the power to block ratification.

'Sitting days' means days on which both Houses sit.

The 2010 Act provides that the Minister can extend the 21 sitting day period by up to 21 further sitting days (and votes against ratification will continue to have legal effect in this period).

Neither House has yet used this new power to object to ratification.

### 3.4 Limits of the 2010 Act

Although the 2010 Act's provisions on treaties look like a major change, in fact they are quite limited:

- The 2010 Act does not require Parliament to debate or vote on a treaty – and it rarely does so.
- Parliament does not have the power to amend a treaty – it can only reject (or tacitly accept) the treaty in full. This is because Parliament has no formal involvement before a treaty is signed.
- There is no legal requirement to consult the devolved executives and legislatures, who have very limited involvement in treaties.
- Some types of treaty are excluded from the 2010 Act, although in some cases (EU treaties and 'double taxation' agreements) this is because they have specific procedures which give Parliament a greater role.

Each of these issues is addressed below.

## 4. No requirement for a debate or vote

Although the 2010 Act puts on a statutory footing Parliament's opportunity to scrutinise a treaty, and gives it a new power to object to ratification, the Act does not require either House to debate or vote on the treaty or to scrutinise it in Committee.

Nor does it state how a debate and vote on ratification of a treaty would be triggered. What are the options?

- The Labour Government said that this would be left to the 'usual channels' (in other words the party whips) and for 'people to make a noise'.<sup>9</sup>
- A few treaties are debated under the Government's undertaking to submit 'important Treaties' to the House for discussion within the 21 sitting days for which they are laid. This was part of the Ponsonby Rule.
- The Government has also undertaken since 2000 to provide the opportunity for the debate of any treaty involving major political, military or diplomatic issues, if the relevant select committee and the Liaison Committee so request. As far as we are aware it has not received any requests for a debate under this procedure.<sup>10</sup>
- As mentioned above, if the UK needs to change its domestic legislation in order to ratify a treaty, debates on that legislation can provide another avenue for debating the treaty itself.
- Alternatively, Members can use any of the usual mechanisms for securing a debate, such as (in the Commons) adjournment debates, opposition day debates, Westminster Hall debates, topical questions, Backbench Business Committee debates, EDMs and ten-minute rule bills. However, these would not allow a binding vote on ratification.

There have been very few Parliamentary debates on non-EU treaties that did not require implementing legislation.

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<sup>9</sup> Jack Straw, Evidence to the Joint Committee on the Draft Constitutional Renewal Bill, 1 July 2008 (Q750)

<sup>10</sup> *The Governance of Britain - War Powers and Treaties: Limiting Executive Powers*, CM 7239, 25 October 2007, para 138

### **Box 2: Case study – the US-UK Mutual Defence Agreement**

A rare example of a Parliamentary debate on a non-EU treaty was the poorly-attended [Westminster Hall debate on the 2014 revision and renewal of the US-UK Mutual Defence Agreement](#), in Backbench Business Committee time.<sup>11</sup>

The revised Agreement extended the existing design cooperation to the nuclear reactors powering the UK's new Trident submarines, leading some to question whether the UK remained sufficiently independent of the US.<sup>12</sup>

The debate was secured by Jeremy Corbyn (then a backbench Labour MP) who opposes nuclear weapons and Dr Julian Lewis (a backbench Conservative MP) who supports the UK's nuclear deterrent. Despite their opposing views on the substance, the two Members were united in their desire for more debate and were disappointed by the 'struggle' to get more Members to participate.<sup>13</sup>

This debate had no legal significance as it was on a motion to adjourn.

An Early Day Motion that called for the amended Agreement not to be ratified was signed by 57 MPs,<sup>14</sup> but no motion materialised during the 21-sitting-day period, and there was no debate or vote on the floor of the House. The Government therefore went ahead and ratified the Agreement.

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<sup>11</sup> [HC Deb 6 November 2014, c291WH ff](#)

<sup>12</sup> J Doward, 'Trident Treaty May Be Renewed without Parliamentary Scrutiny', *Observer*, 25 October 2014

<sup>13</sup> Dr Julian Lewis MP, *HC Deb 6 November 2014 c300WH*

<sup>14</sup> EDM 459 2014-15, tabled 3 November 2014

## 5. Role of devolved executives and legislatures

There is no legal requirement to consult the devolved executives or legislatures on treaties, although the UK Government undertakes to cooperate with them on negotiating and implementing treaties.

Under devolution arrangements, international relations including treaty-making remain the exclusive responsibility of the UK Government. But it is recognised that the devolved administrations in Northern Ireland, Scotland and Wales need to be involved where a treaty might have implications for devolved areas of responsibility.

Rules governing the cooperation between Whitehall and the devolved administrations are set out in a Concordat on International Relations, which is one of five concordats supporting an MOU.<sup>15</sup> This Concordat is explicitly intended to be binding in honour only rather than in law, but promises cooperation on exchanging information, formulating UK foreign policy, negotiating treaties and implementing treaty obligations. It also provides for ministers and officials from the devolved administrations to form part of UK treaty-negotiating teams and for apportioning any quantitative treaty obligations, as well as imposing penalties should the devolved bodies default on any agreed liability.

A recent example is Protocol 15 to the European Convention on Human Rights, on which the UK Government consulted all three devolved administrations before ratifying.<sup>16</sup>

Nevertheless, as Joanna Harrington has pointed out:

It is both implicit and explicit in the nature of the devolved arrangements that Westminster retains the ability to override the actions of any devolved body and it could do so to ensure the State's compliance with its international commitments.<sup>17</sup>

The Scottish Parliament has a Committee on European and External Relations to monitor developments (though most of its work currently involves EU scrutiny). Scotland has even acted before Westminster in enacting legislation relating to a treaty: when ratifying the 2000 Hague Convention on the International Protection of Adults, the UK Government made a formal declaration that the Convention applied to Scotland alone until implementing legislation was passed for the rest of the UK.

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<sup>15</sup> *Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, Scottish Ministers and the Cabinet of the National Assembly for Wales* (Cm 4444, 1999), subsequently replaced by *Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, Scottish Ministers, the Cabinet of the National Assembly for Wales and the Northern Ireland Executive Committee* (Cm 4806, 2000).

<sup>16</sup> Ministry of Justice, *Explanatory Memorandum on Protocol No 15 Amending the Convention on the Protection of Human Rights and Fundamental Freedoms*, Cm 8951, 2014

<sup>17</sup> J Harrington, 'Scrutiny and Approval: The Role for Westminster-Style Parliaments in Treaty-Making', 55 *International and Comparative Law Quarterly* 121 (2006), p150

## 6. Different rules for specific types of treaty

The 2010 Act specifies certain exclusions from its rules on treaties.

### 6.1 Exceptional cases

In 'exceptional cases' the Government can ratify treaties without laying them before Parliament, as long as it then publishes the treaty and its reasons for not following the normal rules.<sup>18</sup>

There is no indication in the 2010 Act of what might constitute an exceptional case. Emergencies are likely to be the main examples, but the Government is free to designate anything an exceptional case.

### 6.2 Memorandums of Understanding

The 2010 Act covers only treaties that are 'binding under international law'<sup>19</sup> and subject to ratification (or equivalent).

Not all international commitments are 'binding under international law'. The UK has for example concluded many Memorandums of Understanding (MOUs) that include obligations but are not legally binding and so are not covered by the 2010 Act.

The Ponsonby Rule included a commitment to inform the House of Commons of all other binding agreements which involve serious international obligations, but this is not reflected in the 2010 Act.

Furthermore some treaties simply come into force when they are signed. Because they do not require ratification or equivalent, they are not subject to the provisions of the 2010 Act.

### 6.3 EU Treaties

#### Treaties that amend the EU Treaties

Certain types of EU Treaties are excluded from the 2010 Act because they have a higher degree of Parliament scrutiny and involvement.

EU Treaty amendments have always required implementing legislation in the form of an Act of Parliament. The UK joined the EEC by means of the European Communities Act 1972 (ECA) and all subsequent bills relating to Treaty change have amended the ECA.

Since 1978 the UK Parliament has had to give its explicit approval (by Act of Parliament) to any subsequent treaty or other international agreement which increases the powers of the European Parliament.

Legislation in 2008<sup>20</sup> and 2011<sup>21</sup> specified that EU Treaty amendments adopted under the Ordinary Revision Procedure could not be ratified 'unless approved by Act of Parliament'. The later Act also provided for a

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<sup>18</sup> 2010 Act s22

<sup>19</sup> 2010 Act s25(1)

<sup>20</sup> section 5 of the European Union (Amendment) Act 2008

<sup>21</sup> Part 1 of the European Union Act 2011

referendum in certain cases where sovereignty was transferred from the UK to the EU.

Of the six Bills linked to EC/EU Treaties, Parliament spent most time on the Maastricht Treaty (41 days), closely followed by the original membership process (39 days). Lisbon came third with 25 days. Lisbon gave rise to the largest number of divisions, although a number of these were not on the Bill itself but concerned government policy in various policy areas relevant to the Lisbon Treaty.

The Parliamentary process for treaties that amend the EU Treaties is discussed in more detail in another Commons Library briefing, [EU Treaty change: the parliamentary process of bills](#).<sup>22</sup>

### EU external agreements

Treaties concluded by the EU with third parties are subject to the normal procedures under the 2010 Act if they need to be ratified by the UK.

For those including provisions that need to have effect in UK law, the agreement must be 'designated' as an EU Treaty for the purposes of the ECA. This is done by secondary legislation: a draft Order in Council is laid before Parliament and may be debated and/or approved by both Houses by the affirmative procedure.

Designation means that the ECA applies to the agreement as if it were one of the EU Treaties. It enables UK courts to recognise any direct effect arising from provisions of the agreement and gives a Minister the power to adopt UK subordinate legislation to implement the agreement in the UK.

Proposals for an EU external agreement may be examined by the House of Commons European Scrutiny Committee, and may be debated in one of the European Committees or even on the Floor of the House, as well as by the House of Lords EU Select Committee or one of its sub-committees.

There is more information in another Commons Library briefing, [EU external agreements: EU and UK procedures](#).<sup>23</sup>

## 6.4 Double taxation agreements

Treaties with direct financial implications, which are most commonly bilateral agreements to avoid double taxation, require the assent of the House of Commons as they affect revenue.

Primary legislation states that a double taxation agreement has effect if the Commons has passed a resolution approving an Order in Council about the arrangements. A delegated legislation committee will scrutinise and debate the draft Order.<sup>24</sup>

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<sup>22</sup> CBP 3341, 15 June 2015

<sup>23</sup> CBP 7192, 29 March 2016

<sup>24</sup> Section 158 of the Inheritance Tax Act 1984 (double taxation conventions); section 2 of the Taxation (International and Other Provisions) Act 2010 (double taxation arrangements); section 173 of the Finance Act 2006 (international tax enforcement arrangements).

This effectively rolls together the amendment of domestic legislation required for the UK to meet its international obligations under the treaty, and parliamentary consent to ratification. It is a relatively attenuated procedure, like other delegated legislation. But it does at least mean that every UK tax treaty receives some Parliamentary scrutiny (though the effectiveness of that scrutiny may be questioned).

In December 2016 the House briefly debated [Roger Mullin's Private Members Bill](#) which seeks to require any double taxation agreement with a developing country to be aligned with the Government's priorities for overseas aid. On this occasion Treasury Minister Jane Ellison mentioned the procedure for Parliamentary scrutiny, saying:

We have a system whereby tax treaties are subject to parliamentary scrutiny and debate before they can enter into force. That means scrutiny through a Delegated Legislation Committee. There is a gap of several months between signature and debate, which gives hon. Members ample time to acquaint themselves with the contents of a treaty and to inform robust debate. There is also both the power and the precedent for referring treaties to the Floor of the House. That has not been done since 1984, but I would be delighted to discuss any of these on the Floor of the House if Members were moved to bring them forward.<sup>25</sup>

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<sup>25</sup> [HC Deb 16 December 2016 c1146](#). The reference would appear to be a debate held on the floor of the House in February 1984 approving an updated agreement with the Falkland Islands: [HC Deb 22 February 1984 cc925-38](#).

## 7. More parliamentary scrutiny of treaties?

### 7.1 Introduction

Although the aim of the Governance of Britain proposals that led to the 2010 Act was 'to hold power more accountable', the Act does little to help Parliament actually scrutinise treaties effectively.

In other words, there is nothing in the Act to help Parliament look at treaties in a systematic way, decide which are significant or controversial and present its democratic opinions on them to the Government at a point where it could make a difference.

Brexit might reignite calls for greater parliamentary scrutiny of treaties, as it is likely to lead to a greater volume of important treaties involving the UK. This could perhaps even go as far as a dedicated treaty scrutiny committee along the lines of Australia's. It would be for the Houses themselves to set up any new treaty procedures or committee(s), and they have so far been reluctant to do so.

### 7.2 Other countries

Many countries give their Parliaments a greater role in relation to treaties than the UK does.<sup>26</sup>

Often this is because they are 'monist' countries where treaties automatically become part of their domestic law.

But even some other 'dualist' countries do so. For example, Australia's large all-party [Joint Standing Committee on Treaties](#) (JSCOT) can inquire into treaties even during the negotiation stage and recommend against ratification (although this does not bind the Government).

### 7.3 More debates and votes?

#### Affirmative resolution procedure

At one stage, it had seemed as if the 'affirmative resolution' procedure might be introduced for at least some treaties (as in several other countries), meaning that the Government could not ratify a treaty until it had a resolution from both Houses.<sup>27</sup>

This stronger procedure tends to produce more debates and votes than the 'negative resolution' procedure in the 2010 Act. Debates over which treaties should require active parliamentary approval could also in themselves have raised awareness.

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<sup>26</sup> See A Lang, 'Parliament and International Treaties', in A Horne and A Le Sueur (eds), *Parliament: Legislation and Accountability*, 2016

<sup>27</sup> Jack Straw introducing the draft Constitutional Renewal Bill, HC Deb 25 March 2008 c32. See also the report of David Cameron's Conservative Democracy Task Force, *Power to the People: Rebuilding Parliament* (6 June 2007), proposing the affirmative resolution procedure for 'significant' treaties.

But the procedure did not make it into the 2010 Act, so the Government can proceed with ratification unless Parliament is stirred to object.

### Other formal requirements for a debate

There have been calls for a formal requirement for a debate or vote if requested by a committee or a well-supported Early Day Motion.<sup>28</sup>

In 2008, Jack Straw (who was then Lord Chancellor and Minister for Justice) also suggested that an appropriate mechanism might be to make provision in the Standing Orders of each House that if a certain number of Members said they wanted a debate and vote, then this would have to happen.<sup>29</sup> He noted that the Government tends to resist fettering the discretion of the business managers.<sup>30</sup>

## 7.4 Before signature?

### No formal role for Parliament before signature

There is no general requirement or mechanism for parliamentary scrutiny of (non-EU) treaties while the Government is negotiating them. This means that Parliament is not usually involved at the stage when changes could still be made to the text of a treaty.

Debates do sometimes happen at this stage, but they have only political rather than legal significance.

#### Box 3: Case study – TTIP

In July 2013 the Commons Backbench Business Committee arranged an (over-subscribed) debate<sup>31</sup> on ‘the biggest bilateral trade agreement in the history of the world’: the EU-US trade and investment agreement, or TTIP.

This debate came just after the two parties had begun formal negotiations on the treaty.

It aired some information that had not previously come to light, and the European Scrutiny Committee and the House of Lords EU Committee then continued their investigations into negotiating the agreement.

Apparently Ministers will commonly ‘communicate with the relevant select committee’ before signing a treaty,<sup>32</sup> but the content and effect of this are not clear.

Public consultation has on occasion given parliamentarians the opportunity to contribute to negotiations on a treaty, but again this does not bind the Government.

<sup>28</sup> Joint Committee on the Draft Constitutional Renewal Bill, *Draft Constitutional Renewal Bill*, HL 166 HC 551 2008-09, para 237. See generally [Parliamentary scrutiny of treaties: up to 2010](#) (Standard Note 4693, 25 September 2009).

<sup>29</sup> Joint Committee on the Draft Constitutional Renewal, *Draft Constitutional Renewal Bill*, HL 166, HC 551 2007-08, para 331

<sup>30</sup> *Ibid*

<sup>31</sup> HC Deb 18 July 2013 c1342ff

<sup>32</sup> HL Deb 31 January 2008 c796

#### **Box 4: Case study – the Biological Weapons Convention**

Between April and September 2002, the UK carried out a public consultation on the position to be adopted during negotiations on amending the 1972 Biological and Toxin Weapons Convention. The consultation document expressly sought views from MPs, non-governmental organisations (NGOs) and other organisations and individuals with an interest in the subject.<sup>33</sup>

Multilateral treaties are usually negotiated and finalised by inter-governmental conferences. Once they have been concluded and opened for signature and ratification, neither individual governments nor parliaments can amend them.

A government can however submit declarations and/or reservations to treaties when it signs or ratifies them, stating for example its understanding of particular treaty provisions or that it does not consider itself bound by a certain provision.

Also treaties can usually be amended by a subsequent treaty.

### **Proposals**

Michael Bowman, Director of the University of Nottingham Treaty Centre, has suggested that where signature of a treaty is essentially a preliminary to ratification, parliamentary involvement before signature could minimise the risk of disagreements between Parliament and the Government over the desirability of ratification.<sup>34</sup>

Some commentators have called for a non-statutory 'soft mandating' mechanism, allowing Parliament to have some influence on the negotiation of a treaty or at least immediately before signature.<sup>35</sup> This would involve, say, the minister and officials meeting the relevant select committee before international negotiations on a treaty to agree a 'soft mandate' or general bargaining position and desirable outcome. The minister would then report back to the committee and explain any departures from the agreed position.

Joanna Harrington, in a 2006 article, considered that 'there should be a mechanism that enables Parliament to draw attention to a future treaty action that has strong opposition and this mechanism should not rest on executive goodwill or discretion'. She suggests that a negative resolution procedure could be invoked within the time period assigned for scrutiny, which would 'not overly tie the hands of the executive during treaty negotiation':

Such a procedure might also encourage greater cooperation between the levels and branches of government to avoid a lobby for triggering the negative resolution mechanism at a later stage. It is also a middle ground position that balances the various

<sup>33</sup> FCO, Strengthening the Biological and Toxin Weapons Convention: Countering the Threat from Biological Weapons, Cm 5484, 2002

<sup>34</sup> Joint Committee on the Draft Constitutional Renewal Bill, 341

<sup>35</sup> See Joint Committee on the Draft Constitutional Renewal Bill, [Draft Constitutional Renewal Bill](#), HL 166 HC 551 2007-08, para 236

interests at play, admittedly sacrificing some efficiency for some accountability.<sup>36</sup>

But the idea of introducing a system of parliamentary scrutiny of treaty negotiations before signature has not generally been popular in the UK.<sup>37</sup> For example:

- In early 2000, a Royal Commission on the Reform of the House of Lords agreed with the FCO that the large number and variety of treaties, and the political and diplomatic circumstances in which they are negotiated, would preclude a general commitment to compulsory pre-conclusion scrutiny.<sup>38</sup>
- Sir Michael Wood, former legal adviser to the FCO, argued in 2007 that this was not a matter to be dealt with by legislation. Moreover, he pointed out that treaty negotiations are often conducted in secret, making parliamentary scrutiny at that stage difficult if not impossible.<sup>39</sup>
- The Labour Government in 2008 considered that a formal mechanism for scrutinising treaties before signature was neither practical nor workable, 'given the diverse circumstances and timeframes in which treaty negotiations are conducted'.<sup>40</sup>

#### Box 5: The US example

In the US, the Senate Committee on Foreign Relations can propose amendments to a treaty. The President and the other countries involved must then decide whether to accept the conditions and renegotiate the treaty or to abandon it.

According to a 2001 US Congressional Research Service report,<sup>41</sup> it is rare for a treaty to be renegotiated after Senate consideration, and in the case of multilateral treaties renegotiation is 'usually considered infeasible because of the number of countries involved'.

But the report does identify some treaties, particularly bilateral treaties, that have been renegotiated, or negotiated further and amended by protocol, as a result of Senate consideration. One example is a UK-US tax treaty which had a protocol added to deal with reservations raised by the Committee on Foreign Relations.

Other treaties never entered into force because the Committee's reservations or amendments were not acceptable, either to the President or to the other country or countries that were party to the treaty.

<sup>36</sup> Joanna Harrington, 'Scrutiny and Approval: The Role for Westminster-Style Parliaments in Treaty-Making', 55 *International and Comparative Law Quarterly* 121, 2006, at 158

<sup>37</sup> See [Parliamentary scrutiny of treaties: up to 2010](#), Commons Library Standard Note 4693, 25 September 2009

<sup>38</sup> Royal Commission on the Reform of the House of Lords (the Wakeham Commission), *A House for the Future*, Cm 4534, 2000, paras 8.37–8.42

<sup>39</sup> Joint Committee on the Draft Constitutional Renewal Bill, [Draft Constitutional Renewal Bill](#), HL 166-II, HC 551-II 2007–08, 434

<sup>40</sup> Ministry of Justice, *The Governance of Britain – Constitutional Renewal*, Cm 7342-I, 2008, para 165

<sup>41</sup> US Congressional Research Service, ['Treaties and Other International Agreements: The Role of the United States Senate'](#), January 2001, 112

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