

Dr Ruth Fox - Written evidence (RTS0019)

About the Hansard Society

1. The Hansard Society holds a distinctive position as the charity dedicated to Parliament itself. Established in 1944, with Clement Attlee and Winston Churchill as founding members, we have worked to develop ideas on a non-partisan basis to help improve the way Parliament works, and to support more informed public understanding of and debate about our parliamentary system.¹ Over the course of our 80-year history, the Hansard Society has earned a reputation as Parliament's constructive "critical friend".² The Speaker and Lord Speaker are our honorary Co-President. The current Chair of the Board of Trustees is the Rt Hon the Baroness Taylor of Bolton and Lord Dunlop and Lord Shamash are Trustees. However, they have had no involvement in the drafting of this evidence.
2. This evidence is informed by our ongoing work on parliamentary scrutiny of delegated legislation. Many of the concerns about the scrutiny of international agreements, such as the difficulty of securing debates on substantive motions, the mismatch between the level of scrutiny and significance of an instrument, and the often-limited period between an instrument being laid and its coming into force, are similar to those that affect delegated legislation.

The constitutional framework: the role of Government and Parliament

3. The Constitutional Reform and Governance Act 2010 (CRAG) established a statutory framework for parliamentary scrutiny of treaties based on the convention established by the Ponsonby Rule of 1924. However, they were developed in a different political era. In the post-Brexit environment – alongside a changing geo-political landscape – the number, range, complexity and impact of international agreements has grown significantly. The current Ponsonby/CRAG model is ill-suited to this new reality.
4. While constitutional sensitivities persist regarding Parliament's involvement in the exercise of the royal prerogative in treaty-making, the Government cannot act entirely independently. It must retain the confidence of the House of Commons. The Brexit process exposed the risks of disconnecting treaty-making from Parliament, showing that exclusive executive control can undermine democratic legitimacy and political coherence.
5. Today, treaty-making is no longer confined to foreign policy, if it ever was. International agreements are often instruments of domestic policymaking with wide-ranging impacts, particularly in areas such as trade, which can shape economic, regulatory and social outcomes.
6. Treaties may be a vehicle for the international promotion of human rights, labour and environmental standards, and advance anti-corruption, anti-

¹ <https://www.hansardsociety.org.uk/about/governance>

² See: Hansard Society, Eight decades of achievement: 1944-2024, <https://www.hansardsociety.org.uk/support/80th-appeal#eight-decades-of-achievement>

slavery, and climate change objectives. Trade agreements, in particular, may impose ongoing regulatory commitments which in effect become part of the governance of affected sectors of the UK economy. Such commitments and constraints may concern environmental protection, public health and product safety, data protection and intellectual property, animal welfare and food standards, access to public services, labour markets and professional status.

7. Such agreements can 'lock in' policy choices in domestic politics. Free trade agreements have distributional effects, creating relative 'winners' and 'losers', across regions, sectors and socio-economic groups. Though their macroeconomic effects may be modest, the localised consequences can be profound and cumulative.
8. Parliament thus has a direct constitutional interest in these issues, not least in respect of any financial implications in relation to the Budget and Estimates process, and MPs have a direct constitutional interest as representatives of their constituents.
9. Yet in this context, CRAG remains a weak and insufficient mechanism for securing meaningful parliamentary accountability.

Redressing the balance: a new scrutiny framework

10. A politically realistic solution must respond to several key challenges:

- I. Parliament should determine what treaties and international agreements it wishes to scrutinise;
- II. the focus should be on the substance of the agreement, not merely its legal form;
- III. Parliament's power depends on being informed and having time to consider the issues prior to ratification;
- IV. the lack of a clear mechanism for raising formal objections undermines CRAG's intent.

Numerous recommendations for reform have come from Select Committees³, academics (notably Alexander Horne and Holger Hestermeyer⁴), and others. Yet, successive Governments have been reluctant to act.

11. A pragmatic first step would be to pursue 'soft' measures – such as alterations to Standing Orders or the establishment of a Concordat – rather than immediate statutory reform. These approaches are more likely to gain political traction and could lay the groundwork for more robust, legislative reforms later on.

A Concordat between Government and Parliament

³ See, for example, the House of Lords Constitution Committee (2017-19), Parliamentary Scrutiny of Treaties, HL 345; the House of Lords International Agreements Committee (2021-22), Working practices: one year on, HL 75; the House of Commons International Trade Committee (2022-23), UK trade negotiations: Parliamentary scrutiny of free trade agreements, HC 815; and the House of Commons Public Administration and Constitutional Affairs Committee (2023-24), Parliamentary Scrutiny of International Agreements in the 21st century, HC 204;

⁴ Horne, A. and Hestermeyer, H. (2024), Treaty Scrutiny: The Role of Parliament in UK Trade Agreements, Centre for Inclusive Trade Policy. See, also: Jones, E. and Sands, A. (2020), Ripe for reform: UK scrutiny of international trade agreements, Global Economic Governance Programme, University of Oxford.

12. In 2022, a wide-ranging agreement between the Investment Minister Lord Grimstone and the International Agreements Committee Chair Baroness Hayter, outlined a series of non-legislative improvements to treaty scrutiny.⁵ While useful, such agreements are fragile, vulnerable to ministerial or committee turnover, institutional memory loss and machinery of government changes.
13. These commitments should be formally embedded in a Concordat between Government and Parliament and referenced in the Standing Orders of both Houses. Notably, the words 'treaty' and 'treaties' are entirely absent from the Standing Orders at present.

A Treaty Sifting Committee

14. CRAG applies only to treaties that are subject to ratification, leaving out many significant instruments, including treaties which enter into force upon signature and Memorandums of Understanding (MoUs). While often labelled non-binding, MoUs may carry binding commitments in practice and exert considerable political pressure on decision-making by Ministers and Parliament.⁶
15. To address this, we support proposals for a dedicated Sifting Committee, empowered to:
- I. examine all international agreements – not just those requiring ratification; and
 - II. decide which agreements merit debate, scrutiny by relevant select committees, or a consent vote.
- Most agreements may require no further action. But for others, this triaging process would ensure proper scrutiny of politically or legally salient issues.
16. The Australian Joint Standing Committee on Treaties (JSCOT) model offers a practical precedent, classifying treaties as major, minor, or technical. Ideally, a Joint Committee would offer efficiency and cross-House collaboration, ensuring that decisions on further scrutiny are informed by the different – but complementary – perspectives offered by Members of each House. But if this proves politically difficult, parallel committees could coordinate via a joint working arrangement. Decisions of the Sifting Committee should be binding, though the Government may retain a reserve power to override decisions via motions in both Houses. As well as looking at treaty-related activity, the committee could also work, in a similar way to the Secondary Legislation Scrutiny Committee, to drive up standards, particularly in relation to the quality of Explanatory Memoranda and other supporting documentation.

An earlier role for Parliament

17. Unless otherwise specified, the UK consents to be bound by an international agreement when it ratifies it.⁷ But the earlier signature stage creates

⁵ Letter from Baroness Hayter of Kentish Town, Chair of the House of Lords International Agreements Committee, to Lord Grimstone of Boscobel, Minister for Investment, 19 May 2022.

⁶ Horne, A. and Hestermeyer, H. (2024), Treaty Scrutiny: The Role of Parliament in UK Trade Agreements, Centre for Inclusive Trade Policy, p. 21

⁷ Section 25(3) of the Constitutional Reform and Governance Act 2010 (the CRaG Act) defines UK ratification as an act which “establishes

obligations and reflects a firm intention to ratify. When an international agreement is signed, it *may*, but does not have to be, the subject of a government statement to Parliament, press release and/or media event, or letter to a select committee.

18. In practice, Parliament has little opportunity to intervene effectively at either the signature or ratification stage without risking the UK's reputation as a negotiating partner. Earlier engagement with Parliament during the pre-signature stages, particularly when negotiating mandates are being developed, is crucial.

19. Parliamentary involvement at the mandate stage would:

- support legitimacy and potentially cross-party support;
- encourage public engagement; and
- enhance the UK's negotiating position.

20. This early-stage engagement – including what constitutes a 'major treaty' – should be explored in the proposed Concordat. And scrutiny of international agreements at all stages should be added to the core tasks of select committees, putting it on a par with other core tasks, such as legislative and financial scrutiny, throughout each parliamentary session.⁸

21. While such engagement may be perceived by officials – and some Ministers – as an irksome layer of work, in practice most other jurisdictions have found that their parliament's involvement in the mandate process strengthens rather than weakens their negotiating hand.

The 21-sitting day scrutiny period

22. The CRAG Act's 21-sitting day window is problematic in two ways:

- I. it is often too short for meaningful scrutiny; and
- II. there is no clear mechanism for debating or passing a resolution to block ratification.

23. Parliament's power under the Ponsonby Rule and now the CRAG Act arises primarily from it being given information and time prior to ratification. If this is not the case, then its power is diminished. The time constraint is particularly unhelpful for complex agreements, such as Free Trade Agreements (FTAs).⁹ In some cases, when there is little or no prior notice of an agreement being laid under the CRAG Act, Parliament and its committees are expected to analyse the text, consult experts, and engage stakeholders

as a matter of international law the United Kingdom's consent to be bound by the treaty". The act may take the form of "deposit or delivery of an instrument of ratification, accession, approval or acceptance" or "deposit or delivery of a notification of completion of domestic procedures".

⁸ Horne, A. and Hestermeyer, H. (2024), Treaty Scrutiny: The Role of Parliament in UK Trade Agreements, Centre for Inclusive Trade Policy, pp. 28; Lang, A., 'Stifled in the cradle: Commons treaty scrutiny delivered a new blow', Public Law Project, 23 March 2023.

⁹ House of Lords Constitution Committee (2017-19), Parliamentary Scrutiny of Treaties, HL 345, para. 28; House of Commons Public Administration and Constitutional Affairs Committee (2023-24), Parliamentary Scrutiny of International Agreements in the 21st century, HC 204, para. 57; House of Lords International Agreements Committee (2023-24), Scrutiny of international agreements: UK Rwanda Agreement on an Asylum Partnership, HL 43, para 4; Horne, A. and Hestermeyer, H. (2024), Treaty Scrutiny: The Role of Parliament in UK Trade Agreements, Centre for Inclusive Trade Policy, pp. 22.

within a very limited window. As the Public Administration and Constitutional Affairs Committee has acknowledged, the Government recognised this fact when it decided to provide the relevant select committees with copies of the New Zealand and Australia Free Trade Agreements in advance of the CRAG Act period.¹⁰ Where there is no urgency about UK ratification, why is it necessary to limit the default pre-ratification scrutiny period to 21 sitting days? This is particularly the case where there is a need to pass domestic implementing legislation and this process will extend beyond the end of the CRAG Act scrutiny period, rendering immediate ratification impossible anyway. Parliamentarians may rush to complete scrutiny work on a treaty within the 21-day period, only for nothing to happen at its conclusion.

24. While the Government has granted extensions to the 21-day period in some cases – as it did most recently in relation to the UK-Ukraine 100-Year Partnership agreement – this is discretionary. Instead, extensions should be determined by the Sifting Committee and/or the Liaison Committee. Ministers could set out what they think the scrutiny window should be and why, and the Sifting Committee or Liaison Committee could make the decision accordingly. The Government could retain a reserve power to seek the approval of one or both Houses to resist the Sifting Committee/Liaison Committee's recommendation and apply the standard 21-day period if necessary.

How to resolve against ratification: A consent vote?

25. Current procedures, particularly in the House of Commons, make it difficult for Parliament to pass a resolution to delay or prevent ratification. The Government controls parliamentary time and is under no obligation to table or make time for a motion against the ratification of its own treaty.

26. As far back as 2000, when the Government gave an undertaking on the provision of time for pre-ratification debates, the Government explicitly reserved to itself the decision as to the form of the motion and debate, and therefore that motion's potential as a vehicle for a CRAG Act resolution against ratification. The Government did not accept the Commons Procedure Committee's recommendation that if the relevant select committee and the Liaison Committee sought a debate on a substantive (*i.e.* amendable) motion, rather than a neutral motion, this request should be acceded to.¹¹

27. If a vehicle other than a Government motion is required, then there are at least three options: an Opposition Day motion (which may lack broad support), an Early Day Motion (similar to a prayer motion against a negative Statutory Instrument and which is not guaranteed a debate) or a substantive motion put before the House at the conclusion of a Backbench Business debate (which is time-limited and discretionary).

28. Even if a resolution is passed, it can only delay, not prevent, ratification. The Act assumes that Parliament could pass the same resolution every 21 days.

¹⁰ House of Commons Public Administration and Constitutional Affairs Committee (2023-24), Parliamentary Scrutiny of International Agreements in the 21st century, HC 204, para. 5

¹¹ House of Commons Procedure Committee (1999-2000), Government Response to the Second Report of the Committee: Parliamentary Scrutiny of Treaties, HC 990, <https://publications.parliament.uk/pa/cm199900/cmselect/cmproced/990/99003.htm>

Even if a fresh debate could be secured at that rate, procedural rules (that a "motion ... which is the same, in substance, as a question which has been decided during a session may not be brought forward again during that same session"¹²) might prevent two motions being brought within the same Session. In short, a determined Government could ratify regardless of parliamentary objection.

29. A growing consensus among experts supports the need for a statutory parliamentary consent vote, even if it is rarely used and limited to significant treaties. The mere possibility of such a vote would, they argue, incentivise earlier engagement and transparency from the Government.

Is scrutiny of implementing legislation sufficient to fulfil Parliament's scrutiny obligations?

30. A longstanding convention holds that if Parliament must pass implementing legislation, then the legislation must be enacted before the treaty is ratified.¹³ This avoids the risk that Parliament refuses to enact the necessary changes in domestic law and thereby places the UK in breach of its obligations under international law.

31. Assessing the nature of the treaty role which is afforded to Parliament by the need to legislate means considering not only *how much* but also *what sort* of legislation is involved: primary or delegated legislation; and, if delegated, what form of parliamentary procedure it is subject to.

32. Examples of the different legislative patterns used to implement treaties include:

- a dedicated piece of primary legislation, to give effect to those parts of a treaty that require domestic legislation;
- a piece of primary legislation which gives effect to treaty provisions, but among other purposes;
- multiple pieces of primary legislation;
- delegated legislation made using powers in a parent Act which was itself passed to implement a treaty, and where the delegated powers were granted expressly to enable the implementation of further treaties; and
- delegated legislation under a parent Act which, rather than implementing a specific treaty, is a framework Act granting delegated powers to facilitate the implementation of future treaties.

¹² Malcolm Jack, ed., *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 24th edition (LexisNexis, 2011), p. 397

¹³ Treaties and Memoranda of Understanding (MOUs): Guidance on Practice and Procedures (2013), Foreign, Commonwealth and

33. From the perspective of a parliamentary 'lock' over ratification, the type of legislation involved is significant. Where a treaty is being implemented through delegated legislation, this legislation cannot be used directly to try to alter the content of a treaty, because delegated legislation cannot be amended. However, the Hansard Society has long argued that the negative procedure for delegated legislation affords MPs in particular no meaningful route to blocking the legislation in question.¹⁴ If delegated legislation is allowing the UK to ratify a treaty, it becomes more important that it should at least require a positive vote, rather than being subject to the negative procedure.
34. From a constitutional standpoint, if legislation is required for implementation, it is better to establish parliamentary support before signing – thereby avoiding legal and political crises such as those seen in the Maastricht case in 1992 and 1993, when attempts were made to change the treaty by amending the implementing legislation before ratification.
35. The Government's argument that a treaty has been properly and comprehensively scrutinised by Parliament in advance of ratification because implementing legislation is required is flawed for a number of reasons.
- I. Scrutiny of the detail of a legal text is a distinct exercise from scrutiny of a public policy decision.
 - II. An obligation under international law may arise after a treaty is ratified, which may require further implementing legislation. For example, the interpretation of a treaty may change over time, or a treaty may make provision for dispute mechanisms and treaty bodies that are empowered to change a party's obligations.
 - III. Legislation is often needed only to implement parts of a treaty.
 - IV. Even if a treaty or part of a treaty is not incorporated through implementing legislation, it may still have a secondary impact on domestic law, since courts may interpret existing statutes, and the common law, in ways that avoid placing the UK in breach of its treaty obligations.
 - V. A treaty may contain optional future obligations which need not be immediately implemented in a particular way. The initial implementing legislation may simply grant delegated powers to Ministers which could be exercised in different ways in the future.
 - VI. A treaty constrains any future parliamentary action. If implementing legislation is agreed prior to ratification, Parliament could not later revoke, repeal or amend that legislation in the future without breaching its treaty obligations.

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