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Ripe for reform: UK scrutiny of international trade agreements

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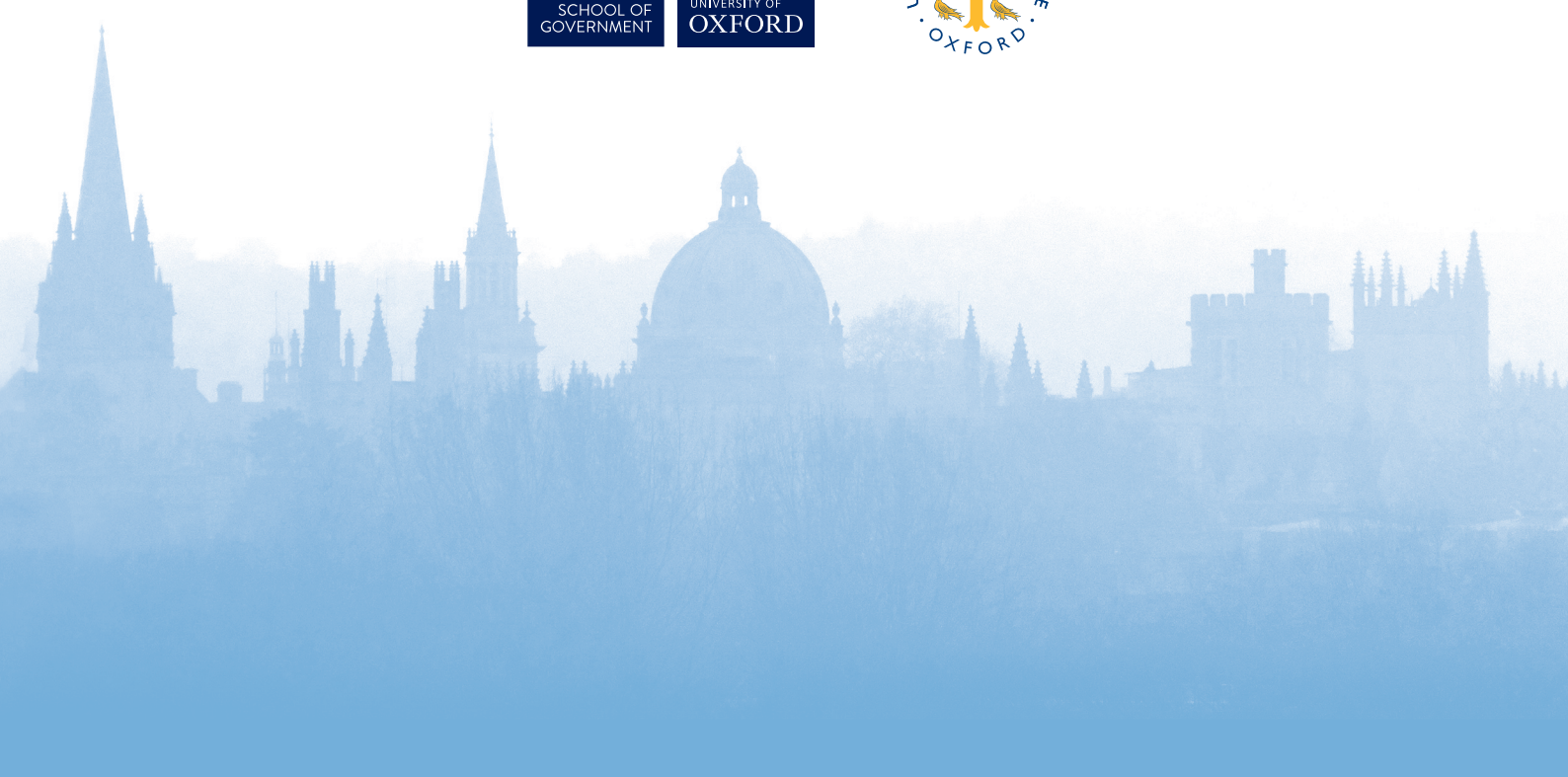
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Ripe for reform: UK scrutiny of international trade agreements

Emily Jones and Anna Sands



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Emily Jones¹ and Anna Sands²

Abstract

Now that the UK has left the EU, the Government is negotiating trade agreements for the first time in almost 50 years. What role should Parliament play in scrutinising trade deals?

This paper compares current processes of parliamentary scrutiny in the UK, United States, European Union, Australia, and Canada. It shows how parliaments in the US and EU have extensive powers of scrutiny, including oversight of the negotiations, and a debate and vote on the trade agreement before it is ratified. In contrast, in the UK, Australia, and Canada, the negotiation and ratification of trade agreements is an executive power, and parliaments are not guaranteed a debate or vote on trade agreements before ratification. Their main role is to enact any legislation that is needed for the trade agreement to come into effect, but only some parts of an agreement may require implementing legislation, and this may be secondary legislation which is not subject to parliamentary debate. Unless changes are made, the UK's future trade deals will receive less scrutiny than the trade deals it entered as part of the EU.

There are compelling reasons for strengthening Parliament's scrutiny role. Contemporary trade agreements involve policy decisions that affect the everyday lives of citizens. Effective scrutiny would improve the quality of decision-making, provide leverage in negotiations, and reassure negotiating partners any treaty they negotiate with the UK will be ratified and implemented. Properly engaging devolved administrations and legislatures would respect devolution and ensure that all parts of the UK support negotiated outcomes. For scrutiny to be effective, Parliament needs access to much more information throughout negotiations and more time to scrutinise final agreements, and there are strong grounds for guaranteeing Parliament the opportunity to shape the negotiating mandate, and to debate and vote on treaties before they are ratified. This paper identifies practices in other countries that the UK can learn from.

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Table of contents

Introduction: the rationale for parliamentary scrutiny	3
Comparing the UK with other countries: how does the UK measure up?	6
United Kingdom: treaty scrutiny and ratification	11
United States: treaty scrutiny and ratification	14
European Union: treaty scrutiny and ratification	15
Australia: treaty scrutiny and ratification	17
Canada: treaty scrutiny and ratification	19
Recent reform proposals in the UK	21
Recommendations	25

Introduction: the rationale for parliamentary scrutiny

For the first time in nearly fifty years, the UK Government has responsibility for negotiating international trade agreements, having repatriated this power from Brussels following the UK's exit from the EU. Forging new trade agreements is a major priority for the current Government and central to its Global Britain strategy.

The UK has an opportunity to reflect on the role that Parliament plays in scrutinising international trade agreements, and whether and to what extent to reform the existing processes. This decision matters, as trade deals have changed radically since the Government last had competency in this area. Until the late 1980s, trade deals focused on removing tariffs and other border measures, attracted little public attention, and were subject to very little debate or scrutiny in national parliaments. Recent trade deals touch on a vast array of economic and social policy areas. Rather than just remove border taxes, contemporary trade agreements seek to align regulation between countries, so they have substantial implications for the way that different areas of the economy are regulated – from farming and food standards, to manufacturing, financial services and accounting, to the regulation of the digital economy, and healthcare. As contemporary trade agreements involve policy decisions that are increasingly akin to domestic policy in terms of their impact on the everyday lives of citizens, there are strong arguments for subjecting them to equivalent democratic scrutiny.

The European Union's processes for negotiating and ratifying trade agreements have evolved, responding to the changing nature of trade agreements, and as part of a wider constitutional trend in the EU towards the institutionalization of representative democracy.³ The European Parliament now has access to timely information about the negotiations, including access to classified negotiating texts, and can vote on the final outcome. Meanwhile, the UK's processes have changed little. As we discuss in detail below, although most treaties must be laid before Parliament before they are ratified, Parliament is not guaranteed a debate or vote on them, and can only delay ratification. Unless the role of the UK Parliament is strengthened, the UK's future trade deals will receive less scrutiny than the trade deals it entered as part of the EU.

The reason that the UK Parliament has few scrutiny powers is that the negotiation and ratification of international trade agreements falls under the Royal Prerogative; alongside the deployment of armed forces, the making of international treaties is one of the few actions that Ministers can take without the approval of Parliament.⁴ Concerns about the lack of parliamentary scrutiny of international treaties are not new. As Walter Bagehot stated as far back as in 1867, "Treaties are quite as important as most laws, and to require the elaborate assent of representative assemblies to every word of the law, and not to consult them even as to the essence of the treaty, is *prima facie* ludicrous."⁵

Parliament's main role in the treaty process is to scrutinise any implementing legislation. The UK is a dualist system, so domestic legislation is often needed to give effect to treaty-based rights and to make sure that the Government will not be immediately in breach of any new

³ Berthold Rittberger, 'Institutionalizing Representative Democracy in the European Union: The Case of the European Parliament: Institutionalizing Representative Democracy in the European Union', *JCMS: Journal of Common Market Studies* 50 (March 2012): 18–37, <https://doi.org/10.1111/j.1468-5965.2011.02225.x>.

⁴ Gail Bartlett and Michael Everett, 'The Royal Prerogative', 17 August 2017, <https://commonslibrary.parliament.uk/research-briefings/sn03861/>.

⁵ Cited in European Union Committee, House of Lords, 'Treaty Scrutiny: Working Practices', 10 July 2020, 6, <https://publications.parliament.uk/pa/ld5801/ldselect/ldeucom/97/97.pdf>.

treaty obligations under international law. This gives Parliament an opportunity to consider how treaty rights and obligations will be implemented in domestic law, but does not give Parliament the power to approve, reject or amend the treaty itself.⁶ As Parliament's role only starts towards the end of the treaty-making process, scrutiny comes too late to influence the text of the treaty: amending the treaty text would require reopening negotiations with other governments, and this deters Parliament from proposing changes.⁷

Moreover, legislative changes may only be required for some aspects of a trade agreement, and if these changes can be made through secondary legislation, they will not be subject to parliamentary debate. As we explain in more detail below, changes in food standards are a good example – Ministers and regulatory bodies have a high level of delegated powers and can make direct changes to legislation, so changes that the Government commits to in a trade agreement are unlikely to involve parliamentary approval.⁸

In addition, many of the commitments that governments make in trade agreements involve an obligation not to change legislation in *future*, (or an obligation not to change it in particular ways) in order to provide certainty for trading partners and foreign investors. Entering into such commitments does not require changes to existing legislation, but does limit the scope of future legislative actions, as legislative changes could breach international legal obligations. For example, in its recent negotiations, the United States has sought commitments that governments will not impose restrictions on cross border data flows, a request it has also made to the UK.⁹ Entering into such a commitment would limit the scope of future UK legislation on data regulation. While the legislative implications of such commitments may be substantial, without changes to the UK's scrutiny processes, they are unlikely to receive detailed examination by parliament.

Scrutiny of Ministerial decisions is a core function of Parliament, and for agreements of such wide scope, it is reasonable to expect that Parliament will have the opportunity to question and challenge Ministers to assess whether they have made appropriate trade-offs and sound judgements. As we discuss below, effective scrutiny requires that Parliament has guaranteed access to a much higher level of information than it has at present, more time to scrutinise agreements, and greater powers. In particular, there are strong grounds for guaranteeing Parliament a debate and vote on major trade agreements prior to ratification, rather than only a debate and vote on those parts of trade agreements where primary legislation is needed.

There have been concerns that providing Parliament with an affirmative vote on trade agreements would undermine the Royal Prerogative. It is instructive that since 2003 Parliament has been asked on several occasions to debate and vote on whether to deploy armed forces (another prerogative power), and in 2011 the Government suggested a convention had emerged which provided the House of Commons with a debate before deployment.¹⁰ Others argue that the convention goes further and stipulates that the

⁶ Arabella Lang, 'Parliament's Role in Ratifying Treaties' (House of Commons Library, 17 February 2017), 8, <https://commonslibrary.parliament.uk/research-briefings/sn05855/>.

⁷ It is extremely rare for treaties to be renegotiated this late in the process. See Lang, 22.

⁸ Emily Lydgate, Chloe Anthony, and Erik Millstone, 'Brexit Food Safety Legislation and Potential Implications for UK Trade: The Devil in the Details' « UK Trade Policy Observatory', *UK Trade Policy Observatory* (blog), November 2019, <https://blogs.sussex.ac.uk/uktpo/publications/brexit-food-safety-legislation-and-potential-implications-for-uk-trade-the-devil-in-the-details/>.

⁹ Office of the US Trade Representative, 'United States-United Kingdom Negotiations. Summary of Specific Negotiating Objectives.', February 2019, 6, https://ustr.gov/sites/default/files/Summary_of_U.S.-UK_Negotiating_Objectives.pdf.

¹⁰ Claire Mills, 'Parliamentary Approval for Military Action', 17 April 2018, <https://commonslibrary.parliament.uk/research-briefings/cbp-7166/>.

Government would not commit the armed forces to military action without the authorization of the House of Commons.¹¹ A similar practice could be legislated for trade agreements with, for instance, Government committing to a debate on a substantive motion prior to ratification.

Greater parliamentary scrutiny could improve the quality of decision-making. Contemporary trade agreements cover so many policy issues that they confront Ministers and officials with difficult policy trade-offs and judgement calls. Knowing that their decisions will be robustly examined by Parliament would provide additional impetus for Ministers and senior officials to ensure that their decisions can withstand scrutiny. Strengthening Parliament's role may also help ensure that the public remains supportive of free trade agreements. While opinion surveys suggest that the UK public is generally supportive of free trade agreements, they also suggest that on some issues, including food standards, there is a very high level of public concern.¹² Creating a robust system of scrutiny will enhance the legitimacy of the outcome and may help assuage public concerns.

A common objection is that increased Parliamentary involvement and scrutiny would reduce the Government's flexibility in the negotiating room and its ability to strike agreements. Yet, there is substantial evidence that having one's hands tied domestically, including through an inflexible negotiating mandate, can confer strength in international negotiations.¹³ US negotiators are renowned for invoking their mandate from Congress as the reason why they cannot make concessions in the negotiating room, while the EU negotiators frequently invoke recalcitrant member states, who set their mandate and must approve the final outcome.¹⁴ Requiring Parliament to approve a negotiating mandate empowering Parliament to debate and vote on the outcome of trade negotiations, would provide credible constraints and could provide the UK Government with significant leverage.

Consulting with Parliament during the negotiations would also increase the UK's credibility as a negotiating partner. As the Brexit negotiations have shown, when a treaty has major, controversial implications Parliament is likely to find a way to make its voice heard. As Parliament's only opportunity to engage comes at the end of the process, activism at this stage can derail years of treaty negotiations. Creating processes for Parliament to be properly consulted throughout the negotiating process would reassure negotiating partners that any treaty they conclude with the Government will be ratified and implemented.

These discussions need to extend beyond Westminster. The UK also needs to decide what role the devolved administrations of Scotland, Wales and Northern Ireland should play in trade negotiations. Although treaty-making is a reserved competence, devolved administrations are responsible for implementing treaty obligations in areas of devolved competence, such as agriculture.¹⁵ Proper consultation during trade negotiations is important to ensure the outcomes reflect their interests and that there are no problems during implementation. Yet, as

¹¹ Gavin Phillipson, 'Gavin Phillipson: "Historic" Commons' Syria Vote: The Constitutional Significance. Part I', *UK Constitutional Law Association* (blog), 19 September 2013, <https://ukconstitutionallaw.org/2013/09/19/gavin-phillipson-historic-commons-syria-vote-the-constitutional-significance-part-i/>.

¹² Department for International Trade, 'Public Attitudes to Trade Tracker: Wave 2 Report (Web Version)', 10 August 2020, <https://www.gov.uk/government/publications/public-attitudes-to-trade-tracker-patt-wave-2/public-attitudes-to-trade-tracker-wave-2-report-web-version>; and see e.g. Connor Ibbetson, 'Can Britain Stomach Chlorinated Chicken?', YouGov, 16 June 2020, <https://yougov.co.uk/topics/food/articles-reports/2020/06/16/britain-chlorinated-chicken-US-trade-deal>. Chlorinated Chicken?', YouGov, 16 June 2020, <https://yougov.co.uk/topics/food/articles-reports/2020/06/16/britain-chlorinated-chicken-US-trade-deal>.

¹³ Schelling, *The Strategy of Conflict*, 19.

¹⁴ Meunier, 'What Single Voice?', 106.

¹⁵ Select Committee on the Constitution, House of Lords, 'Parliamentary Scrutiny of Treaties', 30 April 2019, 31, <https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/345/345.pdf>.

we explain, the UK is yet to develop an effective framework for working with the devolved administrations in trade negotiations.

Comparing the UK with other countries: How does the UK measure up?

There is striking variation across the UK, US, European Union, Australia and Canada with regards to the engagement of parliaments during trade negotiations (see Table 1). While the US Congress has the most extensive scrutiny powers, followed by the European Parliament, parliaments in UK, Australia and Canada have relatively few. The role of Parliaments is not static and, as we discuss below, there has been a trend in the European Union to give Parliament more scrutiny powers, and in the UK and Australia there are active discussions on whether parliaments should be given a greater scrutiny role.

In this section we provide a summary comparing the processes across the five jurisdictions. Subsequent sections look at each jurisdiction in detail.

Pre-negotiations (when the negotiating objectives and mandate are decided): The US is unique among the five jurisdictions in that Congress stipulates in domestic legislation (the Trade Promotion Authority) precise negotiating objectives that the Government must follow whenever it negotiates a trade deal. Before the Government can initiate formal negotiations towards a new agreement, it must give Congress 90 days' notice and consult Congress on the mandate for that specific set of negotiations. In the European Union, Parliament has no formal right to shape the negotiating mandate but it does have the right to be informed, and it has become routine for the European Commission to share the draft negotiating mandate with the Parliament, and for the Parliament to issue advisory motions so that its preferences are known and can be taken into consideration. In the UK, Australia, and Canada, parliaments have no formal right to shape negotiating mandates and the government is not under a legal duty to share them. In practice, the UK Government has started to publish its high-level negotiating objectives, although it has yet to properly consult Parliament on them.

During negotiations: The US Congress and European Union have the legal right to be informed regularly and extensively by government at all stages of negotiations. In both jurisdictions, parliamentary representatives have a high level of access to negotiating documents, including classified negotiating texts. In the US, designated Congressional representatives have the right to join the government's negotiating teams. Practice is very different in the UK, Australia, and Canada where Parliaments have no right to information during the negotiations and are not provided with access to negotiating texts. As we discuss below, scrutiny committees in the UK and Australia have raised concerns that they receive too little information to effectively discharge their duties of scrutiny and have asked for more.

Signature and ratification: In the US, trade agreements negotiated under the Trade Promotion Authority must be approved by both the House and Senate as part of the ratification process, and the Government must give Congress 90 days' notice and make the treaty text public prior to signature. Similarly, in the EU, trade agreements must be approved by the European Parliament and, in some cases, are also subject to domestic ratification procedures in EU Member States. In the UK, Australia and Canada, Parliaments do not formally approve trade agreements, as ratification is the prerogative of the Government. Canada and Australia have a policy (but no legal obligation) to table treaties for scrutiny by parliamentary committees, but the committee reports are advisory, and neither parliament has the power to prevent ratification. In the UK the Government lays treaties before Parliament under the CRAG Act, but parliamentary approval is not required for ratification (although the UK Parliament can

repeatedly delay ratification). While parliaments play an important role at the implementation stage, this is only for aspects of trade agreements where changes to primary legislation are required to give effect to treaty obligations.

Table 1: Parliamentary scrutiny of trade negotiations agreements in the US, EU, UK, Australia, and Canada

	Negotiating Mandate	Negotiating Process	Ratification and Implementation
US	<p>Congress defines negotiating objectives for all trade agreements in legislation (TPA)</p> <p>Ahead of starting new negotiations, government must notify Congress (90 days in advance) and consult on negotiating objectives</p>	<p>Legal right to be informed regularly and extensively by government</p> <p>Legal right to access documents including classified negotiating texts (all members of Congress and some security-cleared staff)</p> <p>Congress has accredited members on US negotiating teams</p> <p>Government required by Congress to extensively consult business and other stakeholders</p>	<p>Government must notify Congress and publish treaty before signature</p> <p>Parliamentary approval <u>is</u> required for treaty ratification: both House and Senate must approve treaty for it to come into effect, by simple majority vote</p> <p>Government must publish impact assessment and other reports prior to vote</p>
EU	<p>Legal right to be informed of negotiating mandate, but no legal right to set negotiating objectives or be consulted on mandate</p> <p>Informal practice of consulting Parliament on draft mandate; Parliament issues non-binding advisory motions to communicate its preferences</p> <p>Impact assessment published before negotiations begin</p>	<p>Legal right to be informed regularly and extensively during negotiations</p> <p>Informal practice of sharing classified negotiating texts with all MEPs via secure reading room</p> <p>Parliament regularly updates Commission on its preferences via non-binding resolutions (to avoid problems at ratification stage)</p> <p>Sustainability impact assessment published during negotiations</p>	<p>Parliamentary approval <u>is</u> required for treaty ratification: European Parliament must approve treaty by simple majority vote</p> <p>Member States need to ratify treaty domestically when it is a “mixed” agreement (one that involves competences shared with or belonging to Member States)</p>
UK	<p>No legal right to be informed of negotiating mandate</p> <p>No legal right to set negotiating objectives or be consulted on mandate; in practice the</p>	<p>No legal right to be informed; no legal right to access documents</p> <p>Informal commitment by Government to regularly brief relevant committees, but no practice of providing access to negotiating texts or other classified documents</p>	<p>Treaties must be laid before Parliament for 21 sitting days before ratification</p> <p>Parliamentary approval <u>is not</u> required for treaty ratification, although Commons can delay ratification.</p>

	Government has begun to give statements with short debates on negotiating objectives	In practice, Government has started to publish some preliminary impact assessments and negotiating proposals, but on an ad hoc basis	Parliament's main role is to scrutinise any implementing legislation needed to give effect to treaties in domestic law Legal requirement to provide an Explanatory Memorandum when treaty is laid before Parliament, but this does not include impact assessment
Australia	No legal right to be informed of negotiating mandate No legal right to set negotiating objectives or be consulted on mandate	No legal right to be informed; no legal right to access documents Informal commitment by government to biannual briefing to relevant committees on FTA negotiations; no practice of providing access to negotiating texts or other classified documents	Government has the policy, but <u>no formal obligation</u> , to table a signed treaty before Parliament for 15 sitting days prior to ratification (20 days for major treaties) Parliamentary approval is <u>not</u> required for treaty ratification. Treaty is scrutinised by committee and report is advisory (non-binding). Parliament's main role is to scrutinise any implementing legislation needed to give effect to treaties in domestic law Government provides a National Interest Analysis to inform the Parliament's scrutiny work
Canada	No legal right to be informed of negotiating mandate No legal right to set negotiating objectives or be consulted on mandate	Committees responsible for trade can be briefed, but no legal right Committees can request briefing meetings, but this is less regular than in the EU	Government has the policy, but <u>no formal obligation</u> , to table a signed treaty before Parliament for 21 sitting days prior to ratification Parliamentary approval is <u>not</u> required for treaty ratification. Treaty is scrutinised by

			<p>committee. Parliament may debate and vote but outcome is advisory (non-binding).</p> <p>Parliament's main role is to scrutinise any implementing legislation needed to give effect to treaties in domestic law</p> <p>Treaties are tabled with brief explanatory memorandum outlining the main commitments and rationale for ratification, but does not include full impact assessment</p>
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United Kingdom: treaty scrutiny and ratification

In the UK, Parliament plays a limited role in scrutinising international trade agreements. The Government has the authority to sign and ratify international treaties under the Royal Prerogative. Treaties must be laid before Parliament before they are ratified, but Parliament does not have the power to prevent ratification, only to delay it. Parliament's main role is to scrutinise any implementing legislation that is needed to give effect to treaties in domestic law.¹⁶ As the UK is a dualist system, international treaties do not have direct effect in domestic law: they take effect only if there is domestic legislation.¹⁷

Treaties in the UK are ratified in accordance with the Constitutional Reform and Governance (CRAG) Act of 2010. The CRAG Act applies something akin to 'negative procedure' to treaties—the ratification of the treaty does not require Parliament's approval, although the House of Commons does have the power to delay ratification.

The CRAG Act codified an existing convention (the 'Ponsonby Rule') which required that a treaty be laid before Parliament for 21 sitting days prior to ratification (s 20 CRAG Act). Once in Parliament, a treaty is scrutinised by the relevant committees (for a trade agreement these are the International Trade Committee in the House of Commons and the International Agreements Sub-Committee of the European Union Committee in the House of Lords).

The International Agreements Sub-Committee was established in 2020 with the goal of addressing deficiencies in the scrutiny process.¹⁸ It is responsible for the scrutiny of all treaties tabled in the CRAG Act process and considers Government's negotiation of international agreements more generally. It is to decide, based on a set of criteria, which treaties should be debated further in the House of Lords.¹⁹ Currently, the House of Commons does not have an equivalent dedicated committee, so scrutiny for trade agreements is carried out by the International Trade Committee.

The CRAG Act stipulates that a treaty may be ratified only if a Minister has laid before Parliament a copy of the treaty and within 21 sitting days neither House has resolved to reject it (s 20(1-2) CRAG). If the House of Commons resolves against ratification then it can delay ratification for another 21 sitting-days (and in theory it can pass further such resolutions).²⁰ However, since the process was established neither House has decided against ratification.²¹ The procedure in s 20 also does not apply to a treaty if the Minister of the Crown is of the opinion that, exceptionally, it should be ratified outside those requirements (s 22 CRAG). The cases where such exceptions are possible are not defined in the Act.

Moreover, while the CRAG Act sets out the legal effect of a negative vote, it does not provide any mechanism to ensure that, if a debate and vote are requested by a sufficient number of members, they will take place.²² Practically it is hard for backbench MPs to secure time to debate CRAG motions as Parliament's Standing Orders stipulate that government business

¹⁶ Select Committee on the Constitution, House of Lords, 7.

¹⁷ Paul Craig, 'The Ratifications', in *The Law & Politics of Brexit: Volume II: The Withdrawal Agreement*, ed. Federico Fabbrini (Oxford, New York: Oxford University Press, 2020), 3.

¹⁸ European Union Committee, House of Lords, 'Treaty Scrutiny: Working Practices', 19.

¹⁹ European Union Committee, House of Lords, 8.

²⁰ Lang, 'Parliament's Role in Ratifying Treaties', 11.

Select Committee on the Constitution, House of Lords, 'Parliamentary Scrutiny of Treaties', 8.

²¹ Select Committee on the Constitution, House of Lords, 'Parliamentary Scrutiny of Treaties', 8.

²² European Union Committee, House of Lords, 'Scrutiny of International Agreements: Lessons Learned', 27 June 2019, 7, <https://publications.parliament.uk/pa/ld201719/ldselect/ldcom/387/387.pdf>.

takes precedent in the parliamentary timetable, with certain exceptions.²³ Indeed, it is very rare for treaties to be debated in Government time, and it is possible for the 21 sitting days to pass without an Opposition Day debate.²⁴ Parliamentarians could use mechanisms such as adjournment debates and topical questions to attempt a debate, but these would not allow for a resolution against ratification.²⁵ Considering all of these factors together, it is unsurprising that neither House has ever rejected ratification under the CRAG Act.²⁶

The House of Lords does not have the powers to significantly delay ratification: if it resolves against ratification but the Commons does not, the Government may lay a statement before Parliament setting out its reasons why the treaty should nonetheless be ratified and then may proceed to ratify it (S 20 (7-8) CRAG).

Under the CRAG Act, Parliament's engagement starts when a treaty has been signed: there is no requirement for the Government to consult or obtain the consent of Parliament on its negotiating mandate, or even to alert Parliament that it is opening treaty negotiations.²⁷ The Act does not place any obligation on government to provide information, or otherwise involve Parliament, while negotiations are on-going. When the treaty is laid before Parliament, the CRAG Act stipulates that it must be accompanied by an explanatory memorandum that explains treaty contents, the rationale for ratification, and "such other matters as the Minister considers appropriate" (s 24 CRAG). This is the only information that the Government is required to provide at any point in the treaty-making process.²⁸

Parliament's main role is to scrutinise implementing legislation. As the UK operates a dualist legal system, Parliament must legislate to give domestic legal effect to any treaty that creates new legal obligations.²⁹ This gives Parliament an opportunity to consider how treaty rights and obligations will be implemented in domestic law. But it does not necessarily mean that the whole treaty will be incorporated into domestic law, and does not give Parliament the power to approve, reject or amend the treaty itself. Implementing legislation can take the form of a stand-alone Bill, some clauses in a wider Bill, or secondary legislation such as a Statutory Instrument. Sometimes a treaty-related Bill will include the text of the treaty in its Schedules, but it does not have to. Indeed, there might be no reference at all to the treaty in the Bill.³⁰ The Government has the legal right to ratify a treaty before any required changes to domestic law have been made, but government guidance is that any necessary UK legislation should be in place before a treaty is ratified.³¹ This means that Parliament usually makes the required legislative changes before the treaty is ratified, but after it has been finalised and signed.³²

Whether this provides sufficient scrutiny is questionable, as changing the treaty at the implementation stage would require renegotiating the international agreement, which means

²³ Compared with other countries, the UK Government has a higher level of control over the Parliamentary timetable. Alice Lilly, 'Who Should Control the Parliamentary Timetable?' (London: Institute for Government, 28 January 2019), <https://www.instituteforgovernment.org.uk/blog/who-should-control-parliamentary-timetable>.

²⁴ Arabella Lang, 'Parliament's Role in Ratifying Treaties' (House of Commons Library, 17 February 2017), <https://commonslibrary.parliament.uk/research-briefings/sn05855/>, p. 18

²⁵ Arabella Lang, 'Parliament and International Treaties', in *Parliament: Legislation and Accountability* (Hart Publishing, 2016), <https://doi.org/10.5040/9781509906468>.

²⁶ Ewan Smith, Erik Borge, and Arabella Lang, 'Treaties, Parliament and the Constitution', *Public Law*, 2020, 508–28 para 3.3.

²⁷ Select Committee on the Constitution, House of Lords, 'Parliamentary Scrutiny of Treaties', 19.

²⁸ Select Committee on the Constitution, House of Lords, 11. Select Committee on the Constitution, House of Lords, 8.

²⁹ European Union Committee, House of Lords, 'Scrutiny of International Agreements: Lessons Learned', 6.

³⁰ Lang, 'Parliament's Role in Ratifying Treaties', 8.

³¹ Foreign and Commonwealth Office and Foreign Commonwealth and Development Office, 'Treaties and MOUs: Guidance on Practice and Procedures', GOV.UK, 19 March 2013, 6, <https://www.gov.uk/government/publications/treaties-and-mous-guidance-on-practice-and-procedures>.

³² Lang, 'Parliament's Role in Ratifying Treaties', 5.

that in practice Parliament can only debate the details of implementation, rather than the treaty itself. Furthermore, only some parts of an international trade agreement are likely to require implementing legislation, and this may be secondary legislation which is not subject to debate. Many treaties — even some with major policy implications — require only minor adjustments to domestic law, or none at all.³³ In the context of trade agreements, food standards are a good example. There is an intense public debate about whether the UK should stay broadly aligned with the EU approach to regulating food or move towards a US approach. Until recently, food standards were an EU competence. As the UK left the EU, it transferred the entire *acquis* of EU law into UK law through the EU Withdrawal Act (2018).³⁴ In so doing, substantial decision-making powers were conferred on UK Ministers to amend related legislation. In the area of food standards for instance, UK Ministers are now empowered to amend laws directly, including on genetically modified organisms, food additives, and pesticides.³⁵ The implication is that if the Government commits in a trade agreement to making changes to the way it regulates food, this is unlikely to be scrutinized by Parliament at any stage, as primary legislation is unlikely to be required.

A pressing question for the UK is how, and to what extent to involve the UK's devolved administrations and assemblies. The CRAG Act does not provide any role for the devolved administrations, even where treaties engage areas of devolved policy. Yet where trade agreements touch on areas of devolved competence, legislation may need to be passed by the devolved legislatures – or at Westminster with their consent – to reflect any new international obligations.³⁶ In 2013, the Governments agreed guidelines on how devolved administrations will be involved in treaty agreements.³⁷ In these guidelines, the Governments committed to exchanging information during the negotiation of treaties and the implementation of treaty obligations, and for devolved ministers to form part of the UK treaty negotiating team when invited by the UK Government.³⁸ However, as discussed below, devolved administrations have expressed concern that existing consultation mechanisms are not working effectively, and called for involvement in trade negotiations. At present the informal Interparliamentary Forum on Brexit is the only forum in which the Scottish Parliament, National Assembly for Wales, and Northern Ireland Assembly can engage in scrutiny of inter-governmental policy of any sort.³⁹

In sum, the UK has weak processes of parliamentary scrutiny. Although the aim of the Governance of Britain proposals that led to the 2010 CRAG Act was 'to hold power more accountable', the Act does little to help Parliament actually scrutinise treaties effectively. 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

³³ Lang, 9.

³⁴ Paul Craig, 'Constitutional Principle, the Rule of Law and Political Reality: The European Union (Withdrawal) Act 2018', *The Modern Law Review* 82, no. 2 (2019): 319–50, <https://doi.org/10.1111/1468-2230.12403>.

³⁵ Lydgate, Anthony, and Millstone, 'Brexit Food Safety Legislation and Potential Implications for UK Trade'; Pesticide Action Network UK, Sustain, and Emily Lydgate, 'Toxic Trade: How Trade Deals Threaten to Weaken UK Pesticide Standards', June 2020, https://www.sustainweb.org/resources/files/other_docs/toxic_trade_final_lowres.pdf.

³⁶ Institute for Government, 'Institute for Government-Written Evidence', 5 June 2020, <https://committees.parliament.uk/writtenevidence/6552/html/>.

³⁷ UK Government, Scottish Ministers, Welsh Ministers, Northern Ireland Executive Committee, 'Memorandum of Understanding and Supplementary Agreements', October 2013, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/316157/MoU_between_the_UK_and_the_Devolved_Administrations.pdf.

³⁸ House of Commons Scottish Affairs Committee, 'Scotland, Trade and Brexit', 10 March 2019, <https://publications.parliament.uk/pa/cm201719/cmselect/cmsscota/903/903.pdf>.

³⁹ Smith, Borge, and Lang, 'Treaties, Parliament and the Constitution', 5.

a point where it could make a difference. Nor does the 2010 Act give Parliament the power to amend a treaty – it can only oppose (or tacitly accept) ratification of the whole treaty.⁴⁰

United States: treaty scrutiny and ratification

The US Congress is extensively involved in the oversight and ratification of trade agreements, and has far more powers than parliaments in the UK, EU, Canada, and Australia. This largely stems from a stipulation in the US constitution which grants Congress the constitutional authority to regulate international trade (US Constitution art. 1 para 8). Congress delegates negotiation authority to the President but requires congressional approval of trade agreements and retains a high level of influence throughout the negotiating process.

The US Congress delegates negotiating authority to the Government for a specific period of time (typically five years) through primary legislation - the Trade Promotion Authority (TPA).⁴¹ In the TPA, Congress sets out quite an extensive and precise negotiating mandate for the Government to follow in its trade negotiations. This constrains what the President can and can't agree to in trade negotiations, a constraint that can be frustrating for Government officials, but also provides the US with leverage as it can credibly argue that it is unable to make concessions in areas that are proscribed by Congress.

The TPA also sets out the process that the Government must follow during trade negotiations. Congress must have a 90-day advance notice of the President's intent to start negotiations, and the President must consult the two Congressional Advisory Groups on Negotiations (one in the House and one in the Senate) on the nature of the intended agreement, and the negotiating objectives (19 USC 4204 (a)(1)).⁴² The Government must provide timely briefings to these committees and any member of Congress that requests a briefing, and must provide Members and their appropriate staff, as well as appropriate committee staff, access to pertinent documents relating to trade negotiations, including classified materials (19 USC 4203(a)). In practice, Members are able to view draft negotiating texts in secure reading rooms, accompanied by a member of their staff. Members of Congress and staffers can also join the Government's negotiating teams as "designated Congressional advisers" (19 USC 4203(b)).⁴³

Once negotiations have concluded, the Government is required to give Congress 90 days' notice before signing a treaty, to release the agreed text of the treaty to the public at least 60 days prior to signature, and consider reports by various advisory committees (19 USC 4205(a)). Once the treaty has been signed, it is brought to Congress for approval. The Government is required to release the final, signed treaty text at least 30 days before the legislation is introduced to Congress, and to make public a full impact assessment carried out by the US International Trade Commission (19 USC 4204(c)).⁴⁴ Under the TPA, ratification requires a simple majority in both the House and Senate and the treaty may not be amended. In each chamber, the committees have 45 session days to report back to the floor (19 USC 2191(e)(1)), where debate is limited to 20 hours (19 USC 2191(f)) (this limit on debate is

⁴⁰ Lang, 'Parliament's Role in Ratifying Treaties', 21.

⁴¹ Bipartisan Congressional Trade Priorities and Accountability Act of 2015 – often referred to as Trade Promotion Authority (TPA)

⁴² Ian F Fergusson, 'Trade Promotion Authority (TPA) and the Role of Congress in Trade Policy' (Congressional Research Service, 21 June 2019), 17, <https://fas.org/sgp/crs/misc/R43491.pdf>.

⁴³ Fergusson, 15–17.

⁴⁴ Fergusson, 16.

important in the Senate as it means that no super-majority vote will be needed to overcome a filibuster).⁴⁵

Through the TPA, Congress also requires the Government to consult industry and other stakeholder groups, as well as the wider public, and stipulates a fairly elaborate structure for doing so. Under the TPA, the President is required to submit to Congress reports from the various stakeholder advisory committees no later than 30 days after notifying Congress of his intent to sign the trade agreement.⁴⁶ The TPA requires Government to engage in public consultation, providing detailed information and regulator consultation events during the negotiations, and to publish a series of impact assessments including on the environment, employment, and labour rights (19 USC 4204(d)).⁴⁷ However, Congress does not require the publication of draft texts, and the Government follows a practice of strict confidentiality, so the level of publicly available information during negotiations is far lower than in the EU (see below).

Although the US is a federal system, states have no formal competence in trade policy although they have been increasingly active in influencing trade policy, mainly through the Governors' offices. State legislatures have less influence but have also acted on trade agreements, for example through the creation of citizen trade policy commissions, which consult citizens on their views on trade agreements.⁴⁸

European Union: treaty scrutiny and ratification

Until 2009, the European Parliament had very little oversight of EU trade policy. The negotiation of trade deals was led by the European Commission working closely with the Council, consisting of the heads of state or government of Member States (Art. 133 Treaty Establishing the European Community (TEC)). Prior to 2009, the European Parliament did not play a significant role, as its agreement was only required in specific circumstances, such as when the agreements had budgetary implications or when they created new institutional arrangements.⁴⁹

This changed with the Lisbon Treaty (TFEU) in 2009, and the ratification of trade agreements now needs the formal approval of both the European Council and European Parliament. Currently, for a trade treaty to be ratified, the European Parliament needs to approve it by simple majority (Art. 218(6) TFEU). For some agreements, domestic ratification by each Member State is also required. Trade agreements are part of the EU's exclusive competence in common commercial policy, and thus do not require ratification by Member States unless they also touch upon other areas which belong to shared or national competence (Art. 3 TFEU). In the latter case, such 'mixed agreements' also require ratification by all Member States, according to their domestic procedures (Art. 4 TFEU).⁵⁰ As trade agreements cover an increasing range of topics (including rules the treatment of services, non-direct investment

⁴⁵ Fergusson, '22.

⁴⁶ Fergusson, 18–19.

⁴⁷ Fergusson, 21.

⁴⁸ Bart Kerremans et al., 'Parliamentary Scrutiny of Trade Policies across the Western World', March 2019, 24.

⁴⁹ Rafael Leal-Arcas, 'The European Union's Trade and Investment Policy after the Treaty of Lisbon', *The Journal of World Investment & Trade* 11, no. 4 (1 January 2010): 475, <https://doi.org/10.1163/221190010X00220>.

⁵⁰ Eur-Lex, 'International Agreements and the EU's External Competences' (Summaries of EU law, 8 April 2020), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:ai0034>.

etc.) more agreements are likely to fall within this mixed category and require national ratification.⁵¹

The European Parliament, unlike the US Congress, has no formal role in shaping the negotiating objectives or overseeing the negotiating process. However, since the Lisbon Treaty, the European Commission is formally required to keep the European Parliament “immediately and fully informed at all stages of the procedure” (Art. 218(10) of the TFEU).⁵²

While the formal rights of the European Parliament are limited, it has proven very capable of using them to leverage its influence across the entire negotiating process. During the negotiation of Anti-Counterfeiting Trade Agreement (ACTA) Parliament had little information about the process and the lack of transparency created significant public discontent. This led to the European Parliament rejecting the controversial agreement in 2012 at the ratification stage, its first exercise of veto power. The rejection was clearly linked to the lack of transparency; in this way, the European Parliament used its veto power to set a standard of information sharing for future negotiations.⁵³

Following the rejection of ACTA and increased public debate over trade negotiations, the European Commission improved the frequency and quality of information provided to the European Parliament and wider public. For example, initially the European Parliament had access to the draft recommendations for the directives for opening negotiations, but not to their final version with the amendments from the Council.⁵⁴ From 2012, access to the final texts of negotiating directives was provided to security-cleared MEPs and staff, in a secured reading room (codified in the 2014 Interinstitutional Agreement).⁵⁵ During the TTIP negotiations, continued requests for earlier availability of negotiating directives led to them being publicly released early in the negotiating rounds.⁵⁶

In its “Trade for All” strategy, published in 2015, the European Commission committed to increased levels of transparency. It would “extend TTIP practices of publishing EU texts online for all trade and investment negotiations” and “after finalising negotiations, publish the text of the agreement immediately, as it stands, without waiting for the legal revision to be completed.”⁵⁷ Thus for example, the EU declassified its negotiating directives for negotiations with Australia before commencing negotiations in July 2018, and published its initial text-based proposals.⁵⁸ For documents that remain confidential, including consolidated negotiating texts, which show the position of the different parties on the draft text, a new system was put in place to facilitate access to all MEPs. Further, publicly available information was supplemented by an exceptionally high number of meetings between the Committee on International Trade and the and European Commission representatives.⁵⁹ Effective scrutiny

⁵¹ Valerie J. D’Erman, ‘Mixed Competences and “Second Generation” Trade Agreements: A Consideration of EU Disintegration’, *Political Research Exchange* 2, no. 1 (1 January 2020): 1806003, <https://doi.org/10.1080/2474736X.2020.1806003>.

⁵² Roberto Bendini, ‘Comparative Study on Access to Documents (and Confidentiality Rules) in International Trade Negotiations’, 2015, 24.

⁵³ Kerremans et al., ‘Parliamentary Scrutiny of Trade Policies across the Western World’, 17.

⁵⁴ Evelyn Coremans and Katharina Luise Meissner, ‘Putting Power into Practice: Administrative and Political Capacity Building in the European Parliament’s Committee for International Trade’, *Public Administration* 96, no. 3 (1 September 2018): 561–77, <https://doi.org/10.1111/padm.12400>.

⁵⁵ Kerremans et al., ‘Parliamentary Scrutiny of Trade Policies across the Western World’, 11; Bendini, ‘Comparative Study on Access to Documents (and Confidentiality Rules) in International Trade Negotiations’, 33.

⁵⁶ Kerremans et al., ‘Parliamentary Scrutiny of Trade Policies across the Western World’, 11.

⁵⁷ European Commission and Directorate-General for Trade, *Trade for All: Towards a More Responsible Trade and Investment Policy*. (Luxembourg: Publications Office, 2015).

⁵⁸ Available here: <https://trade.ec.europa.eu/doclib/press/index.cfm?id=1865>

⁵⁹ Coremans and Meissner, ‘Putting Power into Practice’.

has required a rapid increase in the expertise of the Committee on International Trade of the European Parliament. The Committee has become much more active in exchanges with other institutions and has gained significant expertise.⁶⁰

The European Commission publishes impact assessments before, during and after negotiations. During the pre-negotiation phase, the Commission publishes an impact assessment which accompanies its request to the European Council to authorize the start of negotiations. This is followed by a more detailed sustainability impact assessment which is conducted by external consultants and published during the negotiations. The sustainability impact assessment analyses the potential economic, social, human rights and environmental impacts of the trade agreement under negotiation, and is released in draft form for feedback from stakeholders before being finalised. The European Commission then publishes its views on the sustainability impact assessment, but is under no formal obligation to follow the report's recommendations and not clear if the findings actually influence the Commission's approach.⁶¹ Following the end of negotiations, the EU publishes a further impact assessment based on the actual treaty text.⁶²

Australia: treaty scrutiny and ratification

The Australian system is similar to that of the UK. The power to enter into treaties is a prerogative power of the executive, exercised under within Section 61 of the Australian Constitution. While the Executive alone has the constitutional power to conclude treaties, Parliament legislates to implement treaties in domestic law (s51(xxix) of the Constitution). In addition, government practice since 1996 has provided Parliament with an active role in treaty scrutiny.⁶³

In the Australian system, Parliament only becomes active after a treaty has been signed. The Parliament has no formal right to influence the negotiating mandate and no formal right to information while negotiations are on-going. Once a treaty has been signed, it is laid before Parliament for at least 15 joint sitting days before binding treaty action is taken (20 days for major treaties), and Government provides a National Interest Analysis to inform the Committee's scrutiny work.⁶⁴ Parliament examines proposed treaties via the Joint Standing Committee on Treaties (JSCOT).⁶⁵ JSCOT was established in 1996 to make the treaty-making

⁶⁰ Coremans and Meissner.

⁶¹ Nicolás Brando et al., 'The Impact of EU Trade and Development Policies on Human Rights', Large-Scale FP7 Collaborative Project GA No. 320000, 30 June 2015, <https://repository.gchumanrights.org/bitstream/handle/20.500.11825/95/Deliverable-9.2.pdf?sequence=1&isAllowed=y>. and James Harrison, 'The Use of Impact Assessments by Governments and Businesses: Questioning Purpose and Utility', in *Handbook on Human Rights Impact Assessments*, ed. Nora Götzmann (Edward Elgar Publishing, 2019), 424–439.

⁶² On the EU-Japan negotiations for instance, see the impact assessment in 2012 before negotiations started, European Commission, 'Impact Assessment Report on EU-Japan Relations', Commission Staff Working Document (Brussels, 18 July 2012), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012SC0209&from=en>; the sustainability impact assessment in 2016 European Commission, 'Trade Sustainability Impact Assessment of the Free Trade Agreement between the European Union and Japan', Final Report (Brussels, 2016), https://trade.ec.europa.eu/doclib/docs/2016/may/tradoc_154522.pdf; and, following the conclusion of negotiations in at the end of 2017, a final impact assessment was published in mid-2018 ahead of the vote in the European Parliament European Commission, 'The Economic Impact of the EU-Japan Economic Partnership Agreement' (Brussels, June 2018), https://trade.ec.europa.eu/doclib/docs/2018/july/tradoc_157115.pdf.

⁶³ DFAT submission to this inquiry: Australian Government, Department of Foreign Affairs and Trade, 'Joint Standing Committee on Treaties Inquiry into Certain Aspects of the Treaty-Making Process in Australia: Submission of the Department of Foreign Affairs and Trade', July 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/Treaty-makingProcess/Submissions.

⁶⁴ This practice is not enshrined in legislation or standing orders. See Campbell McLachlan, *Foreign Relations Law* (Cambridge: Cambridge University Press, 2014), <https://doi.org/10.1017/CBO9781139034937>, p163

⁶⁵ 'Resolution of Appointment of the Joint Standing Committee on Treaties', 2019, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/Resolution.

process more open and transparent, and to increase Parliament's involvement. The Committee enquires into whether the proposed treaty action is in Australia's national interest, and reports to Parliament. In its report, JSCOT makes recommendations to the Government on whether it should take binding treaty action but its own reports are non-binding. JSCOT advertises its inquiries, including on its website, and invites interested persons and organisations to make submissions. JSCOT routinely takes evidence at public hearings from Government agencies and may invite people who have made written submissions to appear. As in the UK, Parliament's main role is to implement any legislation needed to give effect to the treaty obligations.

An inquiry into the treaty-making process by the Foreign Affairs, Defence and Trade References Committee in 2015 found the treaty-making process deficient in many ways. It concluded that Parliament was left to "rubber-stamp agreements that have been negotiated behind closed doors".⁶⁶ It further argued that "the current system, under which parliamentarians only see draft text after an agreement has been authorised for signature and it is too late for the agreement to be changed, does not allow for meaningful parliamentary scrutiny".⁶⁷

The Foreign Affairs, Defence and Trade References Committee recommended substantial reforms including that parliamentarians and advisers be granted access to draft treaty text throughout the negotiating process, under conditions of confidentiality. It recommended ongoing oversight of negotiations by JSCOT, as its practice of only engaging once a treaty had been concluded meant its recommendations arrived too late in the day to be acted upon, undermining its ability to hold government to account. The Committee criticised the Government for a lack of overall trade strategy and weak consultation with industry and other stakeholders, calling on it to publish cost-benefit evaluations at the start of negotiations not just at the end; for National Impact Assessments to be conducted by an independent research body, rather than the Department responsible for negotiating the treaty.⁶⁸

Several of these recommendations were taken up by JSCOT in its report on the TPP in 2016. It recommended changes to the negotiating process to improve consultation with business and civil society, including to permit security cleared representatives from business and civil society to see the Government's negotiating positions.⁶⁹ The Committee also recommended greater transparency, including the publication of independent modelling and analysis of proposed agreements, to improve the quality of information in the public domain, a recommendation which has been repeated in more recent reports.⁷⁰

During 2020, the Australian government has started to make some changes. It established a Ministerial Advisory Council, which is expected to convene at least twice a year, and brings together a broad cross-section of business, industry and community representatives to help inform Australia's negotiations and policies. Meanwhile, the Department of Foreign Affairs and

⁶⁶ Foreign Affairs, Defence and Trade References Committee, The Senate, 'Blind Agreement: Reforming Australia's Treaty-Making Process' (Canberra: Commonwealth of Australia, 2015), ix, https://www.apf.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Treaty-making_process/Report.

⁶⁷ Foreign Affairs, Defence and Trade References Committee, The Senate, 30.

⁶⁸ Foreign Affairs, Defence and Trade References Committee, The Senate, 'Blind Agreement'.

⁶⁹ Joint Standing Committee on Treaties, Parliament, 'Report 165: Trans-Pacific Partnership Agreement', 2016, 44, https://parlinfo.apf.gov.au/parlInfo/download/committees/reportjnt/024012/toc_pdf/Report165.pdf;fileType=application%2Fpdf.

⁷⁰ Joint Standing Committee on Treaties, Parliament, 47; Joint Standing Committee on Treaties, Parliament, 'Report 186: IA-CEPA and A-HKFTA', 2019, https://parlinfo.apf.gov.au/parlInfo/download/committees/reportjnt/024355/toc_pdf/Report186.pdf;fileType=application%2Fpdf.

Trade started a new system of biannual briefings on FTA negotiations for the Trade Sub-Committee of the Joint Standing Committee on Foreign Affairs, Defence and Trade. The Government has also agreed to make the Australia-EU text available to interested Members of Parliament, but only “around the time of conclusion, under strict confidentiality conditions”.⁷¹ However, even with these changes, the level of parliamentary scrutiny of trade negotiations remains far more limited than in the EU and US. In June 2020, JSCOT opened a new inquiry on the role of Parliament in trade negotiations, a review which covers all stages of the negotiations.⁷²

Sub-federal authorities are consulted on trade negotiations but in practice they are not very influential. State governments are consulted during the negotiations through a committee that meets twice a year, however this has been judged a “box-checking exercise” in a report by JSCOT.⁷³ State parliaments are consulted at the ratification stage of the negotiations when they receive the final text of the agreement from JSCOT but due to lack of adequate procedure, expertise and resources, few parliaments respond to this. Queensland is an exception to this trend, as the state Parliament has procedures for dealing with the tabled treaty and impact assessment in a timely manner.⁷⁴

Canada: treaty scrutiny and ratification

The Canadian process for treaty negotiation and ratification is similar to that of Australia and the UK, as treaties fall entirely under the competencies of the executive. The Parliament’s main role is at the implementation stage when Parliament has to pass legislation for those aspects of the agreement requiring amendments to domestic law.⁷⁵

In 2008, the Federal Government announced a new policy committing to table all treaties in the House of Commons before ratification.⁷⁶ The full text of the treaty distributed to parliamentarians alongside an explanatory memorandum that outlines the main commitments and rationale for ratification, but does not include a full impact assessment. The House of Commons has 21 sitting days to consider the treaty and has the power to debate the treaty and to pass a motion recommending action, including ratification. However, such a vote has no legal force - tabling treaties in the House of Commons remains a courtesy on the part of the executive, which retains full authority to decide whether to ratify the treaty after the parliamentary review.⁷⁷ The policy also provides for exceptions to the process, such as where ratification is urgently required.⁷⁸

⁷¹ Australian Government, Department of Foreign Affairs and Trade, ‘Joint Standing Committee on Treaties Inquiry into Certain Aspects of the Treaty-Making Process in Australia: Submission of the Department of Foreign Affairs and Trade’.

⁷² Canberra Parliament of Australia, ‘Certain Aspects of the Treaty-Making Process in Australia’, text, Australia, accessed 4 September 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/Treaty-makingProcess.

⁷³ Joint Standing Committee on Treaties, Parliament, ‘Report 78: Treaty Scrutiny: A Ten Year Review’ (Canberra: Parliament of the Commonwealth of Australia, 2006), 78, https://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=jsct/treatyscrutiny/report.htm.

⁷⁴ Kerremans et al., ‘Parliamentary Scrutiny of Trade Policies across the Western World’, 41.

⁷⁵ Kerremans et al., 32–33; Laura Barnett, ‘Canada’s Approach to the Treaty-Making Process’, Background Paper (Ottawa: Library of Parliament, May 2018), <https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/BackgroundPapers/PDF/2008-45-e.pdf>. Barnett, ‘Canada’s Approach to the Treaty-Making Process’.

⁷⁶ Government of Canada, ‘Canada Announces Policy to Table International Treaties in House of Commons’, News Release (Ottawa, 25 January 2008), <https://www.canada.ca/en/news/archive/2008/01/canada-announces-policy-table-international-treaties-house-commons.html>. Government of Canada.

⁷⁷ Barnett, ‘Canada’s Approach to the Treaty-Making Process’. Barnett.

⁷⁸ Global Affairs Canada, ‘Policy on Tabling of Treaties in Parliament’, 5 June 2014, <https://www.treaty-agreement.gc.ca/procedures.aspx> para 6.3.

At the beginning of the twentieth century, the Canadian Parliament had more extensive powers, but these declined significantly over the course of the century. While parliamentary approval of important treaties in the first half of the twentieth century was standard, this came to an end in the Cold War. There was also a decline in government's reporting obligations to Parliament during this period, and the obligation to provide an annual report on trade treaties which had been in place throughout most of the twentieth century was abolished in 1995.⁷⁹

Scrutiny is led by parliamentary committees, particularly the Standing Committee on International Trade (CIIT) in the House of Commons and the Standing Committee on International Affairs and International Trade (AEFA) in the Senate. Committees may initiate studies on international treaties, or be tasked by the plenary to do so, and they can invite witnesses. Committees can ask government for a formal response to their reports, and can request briefings from government, although such briefings are not a formal right.⁸⁰ As in the UK and Australia, committee reports are advisory.

As Canada, like the UK and Australia, has a dualist system, a treaty that has been signed and ratified by the executive branch still requires incorporation through domestic law to be enforceable at the national level. Where domestic legislation must be put in place in order to implement the terms of an international treaty a bill is drafted and goes through the parliamentary legislative process. However, Canada has traditionally considered that many treaties and agreements, particularly international human rights treaties and foreign investment promotion and protection agreements, do not require implementing legislation. In such cases, the Government will state that domestic legislation is already consistent with Canada's international obligations or that the object of the treaty does not require new statutory provisions. Thus, ratification can proceed without specific implementing legislation.⁸¹

There have been calls for reforms to increase the level of parliamentary scrutiny. A 2017 report by the Senate's Standing Committee on International Affairs and International Trade noted that "the lack of transparency of trade negotiations risks contributing to a perception that trade deals are not necessarily negotiated for the public good".⁸² The Committee recommended that the Government provide more timely information to Parliament, by reporting to the relevant committees throughout the negotiation process, with strict adherence to in camera rules when information is sensitive. They also asked the Government to create a formal process for consulting on the negotiating mandate, and to consult during negotiations, to provide timely updates that are open to all relevant stakeholders, including the public.⁸³ In 2017 a private member's bill was tabled, which proposed that the Government be required to obtain the approval of Parliament before expressing its consent to be bound by a trade treaty, but it didn't pass.⁸⁴

In Canada, competency in some areas of policy and legislation lies with the provinces, including local procurement and tax, while competency in areas like agriculture is shared between the federal and provincial governments. Although the Federal Government has sole

⁷⁹ Kerremans et al., 'Parliamentary Scrutiny of Trade Policies across the Western World', 34–35.

⁸⁰ Kerremans et al., 32–33.

⁸¹ Barnett, 'Canada's Approach to the Treaty-Making Process'. Barnett.

⁸² Standing Senate Committee on Foreign Affairs and International Trade, 'Free Trade Agreements: A Tool for Economic Prosperity', February 2017, 33, https://sencanada.ca/content/sen/committee/421/AEFA/Reports/FreeTradeReport_e.pdf. Standing Senate Committee on Foreign Affairs and International Trade, 33.

⁸³ Standing Senate Committee on Foreign Affairs and International Trade, 'Free Trade Agreements: A Tool for Economic Prosperity', 34. Standing Senate Committee on Foreign Affairs and International Trade, 34.

⁸⁴ 'Bill C-358 (Historical)', [openparliament.ca](https://openparliament.ca/bills/42-1/C-358/), accessed 4 September 2020, <https://openparliament.ca/bills/42-1/C-358/>.

authority to negotiate, sign and ratify international treaties, provincial legislative assemblies may pass legislation in areas where they have jurisdiction. Thus, although the Federal Government is the only level of government responsible to the international community for compliance with the treaties that it signs, and provincial consent is not required for ratification, the Federal Government cannot enforce compliance with international treaties in areas beyond its jurisdiction.⁸⁵

To address this tension, the Federal Government has a policy of consulting with provinces before signing treaties that touch on matters of provincial jurisdiction. Federal, provincial, and territorial governments meet quarterly to discuss trade negotiations and are regularly consulted, particularly in areas where they have responsibility for proper implementation.⁸⁶ During negotiations with the EU for example, they were consulted on the mandate and were represented at the negotiating table for the first time.⁸⁷ In some treaties the Government includes a “federal state clause” in the treaty itself that allows the Government to consent to be bound by only those international obligations that come within federal jurisdiction, and to make best efforts to get provincial compliance.⁸⁸ The only sub-national parliament with power at the ratification stage is the National Assembly of Quebec: if the Assembly rejects the treaty, the agreement is not annulled, but the parts touching on provincial competences are not applicable to Quebec.⁸⁹

Recent reform proposals in the UK

While the UK was an EU Member State, trade and other international treaties within EU competence were scrutinised in detail by the European Parliament and by national parliaments. In the UK Parliament, the European Scrutiny Committee in the House of Commons and the European Union Committee in the House of Lords scrutinised the decisions made by UK Ministers at the main EU decision-making body, the Council, which approved negotiating mandates as well as the final treaty text.⁹⁰ These mechanisms have now come to an end following the UK’s exit from the European Union on 31 January 2020, leaving UK citizens with less direct representation in the process of trade negotiations than they had when the UK was in the EU.

Since 2016, there have been a series of parliamentary inquiries and reports on the role that Parliament should play in the scrutiny of treaties, particularly of trade agreements. All concluded that improvements are urgently needed. The House of Lords Committee on the Constitution, for instance, concluded that the existing mechanisms for treaty ratification are “limited and flawed”. It noted that the CRAG Act was enacted in a time where leaving the EU had not been seriously contemplated.⁹¹ Meanwhile, the International Trade Committee in the House of Commons concluded that the existing processes are “insufficient” because although Parliament can theoretically block indefinitely the ratification of a treaty, or decline to legislate

⁸⁵ Barnett, ‘Canada’s Approach to the Treaty-Making Process’.

⁸⁶ Stéphane Paquin, ‘Fédéralisme et négociations commerciales au Canada : l’Alé, l’aecg et le ptp comparés’, *Études internationales* 48, no. 3–4 (16 April 2018): 347–69, <https://doi.org/10.7202/1044624ar>.

⁸⁷ Kerremans et al., ‘Parliamentary Scrutiny of Trade Policies across the Western World’, 37.

⁸⁸ Barnett, ‘Canada’s Approach to the Treaty-Making Process’. Barnett.

⁸⁹ Kerremans et al., ‘Parliamentary Scrutiny of Trade Policies across the Western World’, 33. Kerremans et al., 33.

⁹⁰ European Union Committee, House of Lords, ‘Treaty Scrutiny: Working Practices’, 8.

⁹¹ Select Committee on the Constitution, House of Lords, ‘Parliamentary Scrutiny of Treaties’.

its provisions into domestic law, doing so in practice would be a difficult and unsatisfactory means of rejecting a trade agreement which does not have the support of Parliament.⁹²

Several Committees proposed that Parliament's engagement should start long before a treaty is signed, and that Parliament should be consulted on draft negotiating mandates.⁹³ The International Trade Committee called on the Government to provide at least as much information as the EU provides in its mandates, and for Parliament to be given the opportunity to debate the Government's negotiating objectives on a substantive motion before the mandate is set and negotiations commence.⁹⁴

There have been calls for Parliament to be given the right to vote on negotiating mandates, and to enshrine high level objectives for trade policy into primary legislation, such as upholding food standards, and protecting the National Health Service. However, as the experience of the European Parliament shows, if Parliament is guaranteed a debate and vote at the end of the process, then legislating on the objectives of trade policy may not be necessary, as the Government has an incentive to heed Parliament's views from the outset. The European Parliament has issued resolutions setting out what it wishes to see in trade deals, including in areas of environment and sustainable development.⁹⁵ While not binding, these recommendations are taken into account by negotiators, cognisant that the final treaty text will need Parliament's approval. Finding a way for Parliament to articulate its views publicly at early stages in negotiations would help ensure public confidence in the outcomes and could provide leverage in the negotiating room.

In the past year, the Government has started to publish its 'Outline Approach' before embarking on a new set of trade negotiations, in most cases, these have been accompanied by a preliminary impact assessment. Alongside the EU, the UK is now one of the few jurisdictions to publish impact assessments at the outset of negotiations. The Government has also given statements to Parliament when the Outline Approach is published, providing Parliament the opportunity for a short debate on its negotiating objectives.⁹⁶ However, the Government does not yet provide Parliament with the opportunity to see and give input on draft negotiating objectives, so it is not consulted in a meaningful way at the pre-negotiation stage. Furthermore, the Outline Approach only provides a high-level summary of the Government's negotiating objectives, a less granular level of detail than is typically found in negotiating mandates published by the US and EU. The UK's Outline Approach for US

⁹² House of Commons International Trade Committee, 'UK Trade Policy Transparency and Scrutiny', accessed 4 September 2020, <https://publications.parliament.uk/pa/cm201719/cmselect/cmtrade/1043/1043.pdf>. House of Commons International Trade Committee.

⁹³ House of Commons International Trade Committee; European Union Committee, House of Lords, 'Scrutiny of International Agreements: Lessons Learned'; Select Committee on the Constitution, House of Lords, 'Parliamentary Scrutiny of Treaties'; Joint Committee on Human Rights, House of Commons and House of Lords, 'Human Rights Protections in International Agreements', 12 March 2019, <https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/1833/1833.pdf>; European Union Committee, House of Lords, 'Treaty Scrutiny: Working Practices', 7.

⁹⁴ House of Commons International Trade Committee, 'UK Trade Policy Transparency and Scrutiny'. House of Commons International Trade Committee.

⁹⁵ See for example: European Parliament, 'Texts Adopted - Social and Environmental Standards, Human Rights and Corporate Responsibility - Tuesday, 5 July 2016', accessed 14 September 2020, https://www.europarl.europa.eu/doceo/document/TA-8-2016-0298_EN.html. See for example European Parliament, 'European Parliament Resolution of 5 July 2016 on Implementation of the 2010 Recommendations of Parliament on Social and Environmental Standards, Human Rights and Corporate Responsibility', Resolution (Strasbourg, 5 July 2016), https://www.europarl.europa.eu/doceo/document/TA-8-2016-0298_EN.html?redirect.

⁹⁶ See for instance the statement and short debate on the UK's approach to US negotiations House of Commons, 'UK-US Trade Deal - Hansard' (2020), <https://hansard.parliament.uk/Commons/2020-03-02/debates/09E16FFE-C5F3-4AD9-A7F6-770D1E903F55/UK-USTradeDeal>. See for instance House of Commons, 'Debate: UK-US Trade Deal', *Hansard* 672 (2 March 2020), <https://hansard.parliament.uk/Commons/2020-03-02/debates/09E16FFE-C5F3-4AD9-A7F6-770D1E903F55/UK-USTradeDeal>.

negotiations for instance is only 4 pages long while the US's summary of its UK negotiating objectives runs to 15 pages.⁹⁷

The UK has no formal mechanism for the Government to brief or consult with Parliament during negotiations, and MPs have much less access to information than their counterparts in the US Congress and European Parliament. As the EU Committee of the House of Lords concluded, Parliament currently receives too little information to perform its scrutiny role effectively.⁹⁸ During the UK-EU negotiations over the Withdrawal Agreement for instance, the Committee was unable to gain access to timely or detailed information on the progress of negotiations. Requests for meetings with Ministers were turned down, and Government responses to letters and reports were delayed and often of poor quality. The report notes that although relations with the Department for International Trade are cordial, officials feel unable to provide substantive information while negotiations are on-going.⁹⁹

Moreover, the provision of information is patchy. The Government has published preliminary impact assessments for trade negotiations with the US, Japan, Australia, and New Zealand, but not the EU, even though it is the UK's most important trading partner.¹⁰⁰ Following the EU's lead, the Government has started to publish draft negotiating texts that it is proposing in negotiations with the EU, but it has yet to publish any information about the proposals it is tabling in negotiations with the US, and has not indicated that it will do so.¹⁰¹

The International Trade Committee recommended that it be granted "full access to all negotiating documents, on a confidential basis when required, and should receive regular updates, in private, from ministers and civil servants who are involved in ongoing trade negotiations". In addition, regularly briefings should be given to the House.¹⁰² The adoption of such practices would bring the UK closer that of the US and EU, where legislators have full access to classified documents, including negotiating texts. More generally, there is agreement that the Government should operate on a principle of transparency, and publish documents related to trade negotiations unless there is a compelling reason not to.¹⁰³ This is the approach that the EU has taken in recent years, declassifying and publishing many more documents.

All Committee reports recommend substantial changes at the ratification stage. There are concerns that the 21 sitting days stipulated under the CRAG Act is insufficient to scrutinise

⁹⁷ UK Department for International Trade, 'UK-US Free Trade Agreement', accessed 4 September 2020, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/869592/UK_US_FTA_negotiations.pdf; Office of the US Trade Representative, 'United States-United Kingdom Negotiations. Summary of Specific Negotiating Objectives.'

⁹⁸ European Union Committee, House of Lords, 'Scrutiny of International Agreements: Lessons Learned'.

⁹⁹ European Union Committee, House of Lords.

¹⁰⁰ See for example the preliminary impact assessment for the US: <https://www.gov.uk/government/publications/the-uks-approach-to-trade-negotiations-with-the-us>

¹⁰¹ For UK proposals on negotiations with the EU, see: Department for International Trade, 'The UK's Approach to Trade Negotiations with the US', GOV.UK, 2 March 2020, <https://www.gov.uk/government/publications/the-uks-approach-to-trade-negotiations-with-the-us>. For EU proposals see: European Commission, 'Documents Related to the Work of the Task Force for Relations with the United Kingdom', Text, European Commission - European Commission, accessed 11 September 2020, https://ec.europa.eu/info/european-union-and-united-kingdom-forging-new-partnership/publications-and-news/documents-related-work-task-force-relations-united-kingdom_en.

¹⁰² House of Commons International Trade Committee, 'UK Trade Policy Transparency and Scrutiny'. House of Commons International Trade Committee.

¹⁰³ House of Commons International Trade Committee, 'UK Trade Policy Transparency and Scrutiny'; European Union Committee, House of Lords, 'Scrutiny of International Agreements: Lessons Learned'. House of Commons International Trade Committee, 'UK Trade Policy Transparency and Scrutiny'; European Union Committee, House of Lords, 'Scrutiny of International Agreements: Lessons Learned'.

more complex treaties, including international trade agreements.¹⁰⁴ To increase the time available, one proposal is for the Government to provide access to the treaty text after it has been initialed and before it has been signed (this would be akin to the system in the US).¹⁰⁵ Although the CRAG Act provides for the 21-day period to be extended, this is at the discretion of the Minister. This practice could be changed so that the Government is obliged to extend the scrutiny period if requested to do so by the scrutiny committee.

Proposals to create a dedicated committee to scrutinise treaties under the CRAG Act have been responded to in the House of Lords, which recently set up the International Agreements Sub-Committee.¹⁰⁶ However the House of Commons does not yet have a committee that is charged with the detailed scrutiny of trade agreements, a role that the International Trade Committee suggested it could take on.¹⁰⁷ There have also been proposals of creating a joint Commons and Lords committee (with enhanced powers for scrutiny).¹⁰⁸ A scrutiny committee could, like the JSCOT in Australia, have responsibility for sifting through all treaties and treaty actions taken by government, to decide which should receive a detailed inquiry and report.¹⁰⁹ Given the complexity of trade agreements, it would be appropriate for inquiries and reports to draw on the expertise of the treaty scrutiny as well as those with subject matter expertise.

There are also calls for more substantive information to be provided to Parliament at the ratification stage. While the CRAG Act stipulates that the Government must provide an explanatory memorandum with the treaty text, it does not specify what this memorandum should contain. In practice Committees report that the quality has been highly variable and many are of poor quality.¹¹⁰ Parliament could provide guidance on the contents of the explanatory memorandum, as is done in Australia.

Several reports recommended that Parliament should be guaranteed a substantive debate on any treaty that a scrutiny committee deems significant, but reached different conclusions on whether Parliament should have an affirmative vote. The EU Committee of the House of Lords notes that without a vote on the final treaty, “Parliament has no effective veto power to prevent the Government from ratifying agreements that it does not feel are in the national interest”.¹¹¹ However, in its most recent report it stopped short of recommending a legislative change at present, seeking first to try and make treaty scrutiny work within the existing framework.¹¹² In contrast, the International Trade Committee was unequivocal in its recommendation that “[t]he House of Commons should have a final yes/no vote on the ratification of trade agreements”.¹¹³ As discussed above, given the scope of many contemporary trade agreements and high levels of delegated powers in many areas of legislation, there are strong grounds for providing Parliament with an affirmative vote.

¹⁰⁴ European Union Committee, House of Lords, ‘Scrutiny of International Agreements: Lessons Learned’; Select Committee on the Constitution, House of Lords, ‘Parliamentary Scrutiny of Treaties’.

¹⁰⁵ European Union Committee, House of Lords, ‘Scrutiny of International Agreements: Lessons Learned’.

¹⁰⁶ European Union Committee, House of Lords, ‘Treaty Scrutiny: Working Practices’.

¹⁰⁷ House of Commons International Trade Committee, ‘UK Trade Policy Transparency and Scrutiny’, 20. House of Commons International Trade Committee, 20.

¹⁰⁸ Select Committee on the Constitution, House of Lords, ‘Parliamentary Scrutiny of Treaties’, 19.

¹⁰⁹ European Union Committee, House of Lords, ‘Treaty Scrutiny: Working Practices’, 26.

¹¹⁰ Select Committee on the Constitution, House of Lords, ‘Parliamentary Scrutiny of Treaties’; European Union Committee, House of Lords, ‘Scrutiny of International Agreements: Lessons Learned’.

¹¹¹ European Union Committee, House of Lords, ‘Treaty Scrutiny: Working Practices’, 6.

¹¹² European Union Committee, House of Lords, 27.

¹¹³ House of Commons International Trade Committee, ‘UK Trade Policy Transparency and Scrutiny’. House of Commons International Trade Committee.

There is widespread agreement among the Committees that devolved administrations and legislatures should play a greater role, to ensure that devolved competences are respected and that the devolved legislatures are able to undertake meaningful scrutiny of the treaty actions that will affect them.¹¹⁴ Recommendations include the Government committing to more regular consultation with the devolved administrations during negotiations, and the inclusion of representatives from the devolved administrations in the UK negotiating teams, especially where commitments are being sought that will impact on devolved competencies.¹¹⁵

Here there are lessons to be learned from Canada, where there is a system for regular consultation with provincial governments, and representatives have been included in trade negotiating teams. There are also proposals for more effective inter-parliamentary coordination, with the scrutiny committees in Westminster engaging closely with the Welsh and Scottish Parliaments and the Northern Ireland Assembly in scrutinising the negotiation and agreement of treaties.¹¹⁶

Outside of Parliament, there have also been calls for improved scrutiny. In a rare show of unity, the UK's leading business organizations, trade unions, consumer groups, and civil society organizations issued a joint report in 2018 calling for greater transparency and increased democratic oversight of trade negotiations. Their recommendations included a presumption of transparency for all negotiating texts, the creation of a scrutiny committee in Parliament, a guaranteed debate and vote on trade agreements, and the full involvement of devolved administrations and legislatures.¹¹⁷

Recommendations

Reviewing practices in the UK and other jurisdictions highlights a number of steps that could be taken to strengthen Parliament's scrutiny of trade agreements:

1. Create a dedicated treaty scrutiny committee in the House of Commons, or a joint committee for both Houses, with the mandate to sift treaties and treaty actions to identify those which are important and merit an inquiry and report. *In setting up such a committee, the UK could learn from the Australian Joint Standing Committee on Treaties, which has an established process for sifting treaties.*
2. Provide Parliament with a statutory right to a debate on the draft negotiating objectives for any treaty or treaty action the scrutiny committee identifies as important and meriting such action. *This would bring the UK in line with the EU and US where parliaments are fully consulted on the negotiating mandate, could provide Government with leverage in the negotiating room, and could strengthen the credibility of the Government as a negotiating partner by reassuring other governments that Parliament is on board with the Government's approach.*
3. Provide Parliament with a statutory right to timely and substantive information, including regular public and private briefings to relevant scrutiny and subject-specific committees, and access to draft negotiating texts and related documents for all MPs and security-cleared staff, on a confidential basis. *This would bring the Parliament in line with the US*

¹¹⁴ Select Committee on the Constitution, House of Lords, 'Parliamentary Scrutiny of Treaties'.

¹¹⁵ House of Commons Scottish Affairs Committee, 'Scotland, Trade and Brexit'.

¹¹⁶ European Union Committee, House of Lords, 'Treaty Scrutiny: Working Practices'.

¹¹⁷ Trade Justice Movement, 'A Trade Governance Model That Works for Everyone', 28 June 2018, <https://www.tjm.org.uk/resources/briefings/a-trade-governance-model-that-works-for-everyone>.

and the EU, where parliamentarians have a high level of access to information, including to confidential negotiating texts.

4. Require Government to make the treaty text public well before the treaty is tabled in Parliament, to allow sufficient time for examination and scrutiny, and oblige Government to extend the 21 sitting-day period for scrutiny if requested to do so by the relevant scrutiny committee. *In the US for example, Congress has access to the agreed text 60 days before signature, and access to the final text for 30 days before the treaty is laid before Congress for ratification.*
5. Require Government to publish preliminary impact assessments at the outset of negotiations and full impact assessments when the treaty is laid in Parliament, which evaluate the economic, social, and environmental impacts of a proposed agreement. *The UK Government has started to publish preliminary impact assessments at the outset of negotiations; this recommendation would formalise and systematise an emerging practice.*
6. Provide that trade agreements shall not be ratified unless Parliament has debated and authorized ratification of the agreement, in cases where the scrutiny committee so decides. *This would bring the UK in line with the EU and US, where parliaments must approve treaty texts as part of the ratification process. It also reflects the nature of contemporary trade agreements, which have implications for a wide range of public policy areas; would strengthen the quality of decision-making; and could provide the Government with greater leverage to during negotiations.*
7. Provide devolved administrations with the statutory right to co-determine the negotiating mandate in areas of devolved competence, and fully participate in negotiations on issues of devolved competence; provide devolved administrations and legislatures with the same level of information as the UK Parliament; and create an interparliamentary mechanism to involve devolved legislatures in treaty scrutiny. *There are valuable lessons to be learned from Canada, where the Government has found ways to involve Provincial administrations in areas where they have competence, whilst retaining control over the treaty-making process.*

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