There are a number of elements at play in the definition. First, the international law framework recalls that the definition originates out of the international legal order, treaties being a central feature of that order. National legal systems may define a "treaty" differently—more widely or more narrowly—for their own purposes.[12] These definitions in and of themselves do not represent the position in and for international law. Of course, we should nevertheless expect the domestic concept of "treaty" to be reflected in a state's dealings on the international level. Internal considerations of a constitutional, legal, and political nature, will obviously constrain or restrain a state's conduct externally, and thus be projected onto the international plane.

Second, the parties must intend to create a legal obligation governed by international law. The circumstances of its negotiation and conclusion, and its terms, will determine whether an instrument demonstrates the necessary intention to create international obligations, and to be bound by them under international law. If the evidence is such to show no intention existed to create binding legal obligations, no treaty exists. The instrument may carry political, moral or other obligations, but are not otherwise legally binding (hence, *enforceable*) in international law. This means that intergovernmental agreements within a state are not treaties, not being international agreements. Nor do transnational agreements made subject to the national law of one of the states party to it, qualify as a treaty.[13]

Third, the parties to a treaty are states, signifying their consent by their respective heads of state, heads of government, or accredited representatives.[14] Transnational agreements between private parties, or between private and public parties, do not constitute treaties, at least for the purposes of the VCLT. Hence agreements granting concessions for oil exploration or mining ventures or other commercial investments entered into by states and corporations do not constitute treaties in this sense.[15] Nor are those agreements between governments and indigenous peoples treaties for the purposes of international law.[16] Nevertheless these types of compacts and agreements may be considered as treaties within and for the purposes of a particular national legal system.[17] By Article 3 VCLT, the exclusion of these types of agreement from coverage under the VCLT (and international law) does not affect their validity or legal force independent of the VCLT, whatever that may be. Moreover, despite the requirement for state parties, treaties can and do provide for

[12] As recognised in Article 2(2) VCLT. A good example of which is the US "executive agreement", to bypass the constitutional requirement of Senate approval for "treaties" (see further below). See generally, e.g., Krutz and Peake 2009.

[13] Such agreements may be made under cover of a prior, overarching treaty.

[14] See Article 7 (full powers to conclude treaties) and see also Article 4 VCLT and the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations (1986) for considerations pertaining to non-governmental entities. Aust 2007, pp. 58ff (capacity to conclude treaties), 75ff (full powers).

[15] See, e.g., *Buttes Oil v Occidental Oil and Hammer* [1982] AC 888.

[16] Relying on Aust 2007, p. 18 and works cited there.

[17] As in the US: see e.g., *Choctaw Nation of Indians v US* 318 US 423 (1943).

further public-private arrangements and agreements, and more generally confer benefits upon private, non-state third parties. Examples certainly include bilateral investment treaties, air services agreements, and individuals' claims settlement treaties, and may also go so far as to catch all human rights treaties.

If an international instrument does not satisfy, or does not even seek to attain, these criteria, the instrument may well then be a "memorandum of understanding", a gentleman's agreement, or "diplomatic assurance". In principle it is neither binding nor governed under international law.[18] Nor is such an instrument necessarily legally enforceable in a domestic legal system. While the nature and terms of the MOU will ultimately determine that answer, several factors ought to be taken into account.[19] First and foremost, the parties may have chosen an MOU format precisely because they did not intend or desire to enter into any legally binding commitments. Second, it is a recognised advantage of an MOU that its terms may remain unpublished and confidential. Not being a treaty for international or national purposes, it may escape the requirements for disclosure and scrutiny of its terms. Hence its implementation in the domestic legal order may be couched or buried in legislation without explicit parliamentary attention to its contents. Third and following, MOUs do not need to meet formalities in negotiation, form, drafting and implementation equivalent for treaties. This gives MOUs a certain flexibility and an ease of amendment. But it may also invite less than clear drafting and less concern to observe its terms.

3.1.2 Treaties as a Source of Law

Treaties are by definition simply contracts between states. In that sense, states (by their governments, of course) are exchanging mutual and reciprocal promises regarding specific matters.[20] Those commitments relate only to the subject matter, that particular relationship, between the contracting states. They do not bear the same general, anonymous, normative articulation that a statement of law conventionally has. The analogy to an ordinary contract between private parties is apt here. But the modern view also sees treaties as a potential source of law, establishing generally applicable rules of conduct.[21] The nature and terms of the treaty will determine in what measure the rights and benefits thereunder might be reasonably construed as establishing rules of law, or having general legal effect. It can be difficult to deny a law character to treaty provisions in which states bind

[18] See generally, Ahlstrom 2000, and Aust 2007, p. 32ff. Aust 2007, pp. 49–52 (and works cited there) fairly notes and rejects the position of Klabbers 1996 who would discount any distinction with legal effect between MOUs and treaties.

[19] Aust 2007, pp. 43–49.

[20] O'Connell 1970, vol. I, p. 54 ("A treaty is a contract, not law.") and see also p. 195.

[21] Aust 2007, pp. 13–14; Boyle and Chinkin 2007, pp. 233–259.

themselves generally to observe certain norms and standards, and in which there likely are enforcement mechanisms. Likewise, states may enter into multilateral treaty arrangements in which they bind themselves to enforce the decisions and rules issuing from a treaty-based transnational institution. Thus treaties begin very much to look like legislation, with far-reaching constitutional, sovereignty implications. Many examples come easily to hand: the VCLT, the ICCPR, the WTO Agreement (more precisely, the Final Act of the 1986–1994 Uruguay Round of trade negotiations), NAFTA, and of course the treaties constituting the European Union. Moreover, the degree to which treaty rights and obligations are seen to intrude on or correspond with established municipal laws and the law-making process will affect the perceived "legislative" character of a treaty as well. A treaty of peace or friendship which recognises or settles rights and obligations already acquired is in nature and substance different from a treaty which creates new, or broader, rights and obligations. The one acknowledges and works within the legal status quo; the other would refashion and revise the legal and political order. Hence the latter would tend to generate greater social, political, and legal opposition where its implementation would fall outside established constitutional law-making procedures and institutions.

As a possible source of law, treaties operate on the two levels of international and national legal orders. On one level, a law-making treaty would directly or indirectly establish rules of international law. Indirectly, it would serve as evidence of customary international law norms.[22] In other words, not only is the framework of customary law on treaties itself reiterated and reaffirmed, but the substance of the treaty itself, the mutual and reciprocal benefits and burdens it prescribes, would generate legal standards and norms of conduct. Directly, its terms would prescribe the rules themselves. On the other level, it would seek to create rules of national law, effective and enforceable directly in a domestic legal order. Thus in "monist" systems such as the Netherlands, or in the mixed system of the US, such a ratified treaty would be directly enforceable by national parties without further specific implementing legislation (as required in dualist systems); that is, it is "self-executing". This is of course providing that the treaty does confer such rights on private third parties by its terms. And it follows (a self-evident proposition) that the criteria for and evaluation whether a treaty makes law on the international level is a matter solely for the international legal system. Equally, whether a treaty makes law on the domestic level is a matter solely for a national legal system.

Where an international agreement among governments would provide for rights and duties recognised by and operational in their respective domestic legal systems, there exist two possible characterisations of those proposed legal rights and duties. Both lead directly to the issue of parliamentary authorisation. First, we could remain firmly within the grasp of a contractual analysis, and see them merely as benefits and burdens arising under contract.[23] The contract is one between

[22] On which relationship between treaties and customary international law, see, e.g., Villiger 1985.

states, and not one among states and their respective citizens. The contractual commitment is thus at most a promise to enact legal rules in the terms as specified. It is executory, contingent. It would imply a further step, a transformation into domestic law by specific legislation or express constitutional authorisation of the executive branch. Thus we come to the issue of parliamentary authorisation. On the other hand, we could simply accept that the treaty and its parties intended to create and establish enforceable rights and obligations within a national legal system, irrespective of the national system. The contractual character or otherwise of the treaty bears no relevance to the question of legal status of proposed legal rules. It is a legislative statement, and the issue becomes simply one of domestic implementation. It is the statement of the executive branch, in conjunction with other foreign governments. It goes without saying that, given the history of parliamentary government, democratic constitutionalism, such an express constitutional authorisation of executive branch law-making is extremely difficult. And so we come neatly again to that same issue of parliamentary authorisation.

3.1.3 Monism, Dualism and the Separation of Powers

The issue of parliamentary authorisation is not whether a parliamentary body must give its consent to a treaty, its negotiation, signing, ratification, contents, or what have you. The question instead asks what kind of parliamentary assent is necessary and sufficient for the underlying separation of powers assumption that the legislative branch, not the executive, controls the law-making power. At the risk of tendentious repetition, the separation of powers doctrine holds (at least in its pure form) that the government has no power to create any law, impose any burden or confer any right, absent parliamentary fiat and approval. This tenet is subject only to qualification under the constitution where express legislative powers may be granted to the executive branch, or where the legislative branch be allowed to delegate rule-making powers. A government and head of state whose existence and powers derive from the national constitution have no law-making powers independent and outside the constitution. Hence the separation of powers doctrine would seem to demand parliamentary scrutiny and approval of any international agreement purporting to confer domestic rights and duties. This would suggest that only dualism necessarily and sufficiently meets the requirements of the separation of powers.

Indeed, the effects of treaties and other international agreements in national legal systems have been generally and conventionally analysed in terms of

[23] A contracts approach may also carry a risk of subsuming the compact wholly under doctrines of domestic contracts law. This would be tempered because the contract is an international agreement, and courts will endeavour not to confine it to domestic precedents. This is the usual approach in the interpretation of treaties having due effect in domestic law: e.g., *Fothergill v Monarch Airlines* [1981] AC 251.

"monism" and "dualism".[24] Briefly, the dualist position holds that a further national legislative act is required to incorporate or transform that international instrument into domestic law. Its status as international law does not automatically give it validity and legitimacy as municipal law. Parliamentary consent for concluding or ratifying the agreement does not itself constitute that "further" legislative act. The two legal systems, national and international, are separate and apart. Underlying dualism is a concept of sovereignty. Granted that law is an expression of sovereign will, municipal law is addressed to the subjects of that will, whereas international law is the collective product of a number of sovereigns. The nature of the expression differs, the one being a vertical dictate; the other, a horizontal consensus. This view of the state is rather unappetising to modern democratic sympathies. Another way of conceiving the sovereignty argument more in line with those sympathies would be to differentiate the sovereign will at play. For domestic law, it is the will of the citizens; they hold law-making authority. For international law, it is the will of a composite institution, the state, in which individuals are generally discounted as law-making authorities in preference to states. On the other hand, the monist position in its purest form holds that once an international instrument or rule duly comes into force, namely it takes effect under international law, it likewise takes effect within a domestic legal system automatically according to its terms. No further specific legislative act is necessary to give that instrument legal force. Underlying the monist conception is the idea of the unity of law. We can speak of a supremacy of international law over national law, the latter being subsumed by, or derived from the latter, or simply a coordinate and overlapping set of systems.[25]

It would be difficult to find this ideal monist position in practice anywhere in the modern world, and certainly the four states examined here do not meet the pure criteria. Any practicable form of monism will incorporate of necessity some form of parliamentary approval, in consequence of modern constitutionalism. The executive branch, the head of state, does not normally exercise such law-making power unattended by some measure of parliamentary scrutiny. It is, for example, this type of "qualified monism" which obtains in the Netherlands and in France. Nonetheless "qualified monism" does not transfer any significant power to the legislative branch, in measure of being able to direct the nature and content of treaty obligations. Moreover, once Parliament has signalled its approval, the treaty will have domestic

[24] Among the extensive body of comment and opinion, see, e.g., Starke 1936, Morgenstern 1950, Feldman 1999, Amrhein–Hofmann 2003 (general survey), Gaja 2007, von Bogdandy 2008, and O'Connell 1970, vol I, pp. 8–46. The intellectual foundations for monism sit with Kant, and leading exponents of monistic conceptions are Kelsen, Verdross, and Scelle. The foundations for dualism rest with Hegel, and its exponents include Triepel, Anzilotti, and Oppenheim.

[25] O'Connell 1970, vol I, pp. 42–43 also records the intriguing "inverted monism" theory of Bergbohm, who postulated that international law derived from, and was subordinate to, municipal law: international law was the "'auto limitation' of the sovereign will". He further observes that this theory "… has never found favour in international tribunals, and is no more than an abstract possibility."

legal effect according to its terms without further legislation. Thus the essential feature of monism, that of direct application, is maintained.

Yet for all this, the monism and dualism framework has attracted considerable criticism as inaccurate and misguided, despite an ostensible and attractive simplicity. The arguments concentrate on the impossibility of pure monism and dualism in the democratic, rule of law systems of modern states. In reality, legal systems contain a mixture of both poles. For example, while the Netherlands is generally regarded as the most monistic of legal systems, treaties in principle require approval by the Estates General before they take force in the Netherlands.[26] In the dualist system of the UK, specific, fresh legislative acts are not always required to implement treaties and international agreements (but are nevertheless concluded under a general delegation of power from Parliament). And the mantra of "international law is part of the law of the UK" is often repeated, especially in matters invoking customary international law before the courts. The arguments also point out that states generally do acknowledge and do observe international law, both in foreign relations and domestic matters. So too do the courts, even if only on the principle of reconciling domestic legal precepts with international ones so as not to embarrass or bring discredit upon the government and the state. That most legal systems present aspects of both monism and dualism reinforces the position that international law and national law naturally commingle in modern legal orders. Accordingly, as the arguments conclude, the antimonies should be discarded. In their place should come a third option, that of "pluralism" or "harmonisation".[27] Rather than a concentration upon delimiting the boundaries of each system, the focus ought to be upon the interaction of norms classified according to their system of origin: national, European, international. The relevant question, they continue, does not concern the nature of international law as law (from a municipal law perspective), but rather the relevant rule to be deployed by the courts from their respective national legal systems based on the case before them. Providing the formalities for validity have been met, the rule's origins (international, national, transnational) are irrelevant. In effect this third option produces a rule of recognition mediated by a separation of powers which would leave aside national forms, and instead integrate the distribution of law-making powers on all three levels.

Despite the pragmatic attractiveness of the pluralist approach, we have not really advanced far beyond the liminal question of parliamentary authorisation. If anything, pluralism seems to bypass conveniently this difficult and focal issue for any (national) legal system by simply accepting the formal validity of legal rules. It prescinds from the basis of validity: there are valid international rules and national rules; the question is which one best applies to solve the dispute. But does

[26] Article 90, Constitution of the Netherlands, and, detailing those exceptions to the general rule of parliamentary approval, the *Approval and Publication of Treaties Act 1994* (Stb 542) (applicable to the entire continental and overseas Kingdom of the Netherlands).

[27] O'Connell 1970, vol. I, pp. 43–46 ("harmonisation"); Bogdandy 2008, pp. 399–401 (and the works on pluralism cited there at p. 400, n. 10).

the need for parliamentary authorisation not really count for anything more than just a formality? Does not legitimacy underlie it? How have we managed then to shelve the limits and constraints of constitutionalism and democratic legitimacy without much ado? Perhaps Hart was correct, that validity, the juridical rule of recognition, is just a formality, the substance of which (legitimacy) lies beyond the positivistic comprehension of law. To be clear, however, this is not to discount pluralism by way of a few rhetorical questions and with no analysis of its capacity to account for a constitutional locus of law-making power. My remarks here are intended to reiterate and emphasise the fundamental, essential significance of the separation of powers, the situs of law-making power in a polity, when considering the internal enforcement of rights and obligations created outside the institutions of that polity. Monism and dualism may have notorious weaknesses on a descriptive level, but at least they force us to ask the right questions. Whether we favour the one or the other, or prefer instead the middle way of pluralism, we still return to the essence of the matter, of what form of parliamentary authorisation is necessary and sufficient to implement treaty rights.

3.2 Treaties, Laws, and the Rule of Recognition

The general question of what form of parliamentary authorisation validates a treaty norm as domestically enforceable parses into a number of more specific problems before the courts. From a judicial perspective, the primary question is whether the treaty provision invoked in argument is to be recognised as law or not: does it have legal effect? Whether under a monist treatment or a dualist one, some domestic official act will serve as the necessary and sufficient rule of recognition. It is for the court to determine what the act is, such as publication in an official journal, a parliamentary resolution, a statute or some executive act on the national or international level. Moreover, the court may also have to answer whether, absent clear terms and directions, domestic enforceability is conditioned upon the international entry into force. In other words, is domestic legal force is dependent upon international bindingness, or are the rights and obligations contained in the international instrument already enforceable upon national acceptance, whatever that may be? Choosing for the latter would underscore a clear and definitive separation between the international and national legal orders. In all this, the court will have to take its cue from the constitutional order: the text of the constitution, the structure of the legal order, its perception of the separation of powers, and its reputation in the wider polity.

Answering the question also puts the court to determining what, if any, legal weight may be attributed to parliamentary input on the content and scope of domestic enforceability. Parliament is the principle legislative organ in a constitutional state. It articulates the substance and limits of social regulation in the form of legislation. To the extent its assent to treaties results in their internalisation into the municipal legal order, this represents an act of legislating. It might thus be expected

that Parliament would have some further say in the nature, scope and effects of internationally generated obligations being introduced into the domestic legal order, whether or not they could have any impact on the international plane. Whether Parliament can or should exercise control over the course and content of treaties only poses an actual problem in monistic systems. Dualist systems by definition place Parliament in control over the internal application of international rules. In monistic legal orders, it represents the intersection of the legislative and the executive in the *trias*, the former being responsible for law-making; the latter, for foreign affairs. If Parliament may adjust the internal extension of international rules, it may be treading upon executive prerogative, and the courts would not be enforcing specifically international rules. Yet if Parliament may not exercise its law-making power, it leaves the executive unchecked and without a balance to its own legislative power. Unless the courts are willing to step in. Complicating this situation is the attribution of the status of primary legislation (or higher) to treaties, which in turn may put their (constitutional) review outside the jurisdiction of the courts. Moreover, even if Parliament may have a say in content, the courts may consider the rule of recognition to mandate consideration only of those parliamentary instruments (or government ones, for that matter) which could be binding on an international level. Applying an international rule would leave the courts no option to account for matters not binding on the international level, such as interpretative declarations or conditions relevant only to the national legal system. Deciding on the domestic legal effect of a treaty provision leads the courts to considerations of admissibility and weight attributed to any parliamentary gloss on treaty obligations. This in turn inevitably draws the courts into separation of powers considerations.

Having decided that a provision in an international accord has legal effect (with or without a parliamentary gloss) the court faces two additional issues concerning interpretation. In the first instance, the court will have to situate the rights and obligations within the domestic legal hierarchy, of which there are three tiers. The first is to treat them as executive, administrative regulations and subordinate to legislation. On the second, they have the character of ordinary legislation, whether incorporated by reference through statute, or directly upon assent. The third level sets them in priority to ordinary legislation. The judicial cue here will be a constitutional provision (which invokes considerations of monism and dualism). The dualist nature of the UK legal system entails that all treaties internalised by statute are dependent upon the currency of that Act, and on the doctrine of the supremacy of Parliament. In the US, the Netherlands, and France, their respective constitutions settle the question with a supremacy clause. For the Netherlands and France, approved and ratified treaties are paramount to legislation.[28] In the US, they are paramount only to state legislation, but remain on par with federal statutes as ordinary legislation.[29] Supremacy aside, the courts bear the burden of reconciling

[28] France: Article 55, 1958 Constitution (subject to reciprocal effect); the Netherlands: Article 94, Constitution (as. amd.) (limited to "self-executing" treaty provisions and the rules and decisions of international organisations).

inconsistent legislation with treaties, even possibly reconciling incorporated treaties amongst themselves. Here too they face the separation of powers, and the tension between the legislative and the executive. On the one hand, the doctrine requires them to enforce the will of Parliament as expressed in legislation. On the other, they cannot divorce their decisions in matters touching upon international commitments from foreign policy implications, either strengthening or weakening the government's international position.

Supremacy clauses, for all their promise of certainty and clarity; however, bring their own interpretative and constitutional problems for resolution by the courts. For example (but for the case of the Netherlands), what legal effect by virtue of the supremacy clause might a treaty have whose terms convey no directly enforceable rights and obligations? Further, such clauses can be equivocal whether treaties supersede subsequent statutes directly inconsistent with them. In the Netherlands and France, they do; in the US, they do not on the federal level, given the interpretation of supremacy being oriented to state-federal relations. The problem arises because of the supremacy and will of Parliament. A fresh statute is the most current expression of Parliament's will. Yet the prior expression (approving the treaty) would trump this more recent exercise of jurisdiction. Having to reject or discount a recent statute in favour of an antecedent statute—or a mere resolution of treaty approval—without the clearest of constitutional direction does not represent most troublesome task of the court. Rather, it tends to draw the judicial branch into the balance of powers between the legislative and executive. In effect, the legislative branch has limited or constricted its constitutionally prescribed jurisdiction at the instance of the executive, but without having any residual power to revise or revoke its decision. Foreign affairs are the prerogative of the executive branch: denunciation and such like of treaties are fully within its jurisdiction. And this without the amending procedure in the constitution being given consideration. The problem becomes all the more acute where Parliament has only the power to assent or reject a treaty without any ability to make substantive changes to it, at least within the municipal domain. The executive branch exercises thereby significant law-making powers without any checks or balances of that organ specifically charged with legislative power under the separation of powers doctrine. Whether or not the court would seek to wield some checks or balancing power, it may nonetheless be put to enforcing rights and obligations which have no natural connection or place within the legal, social and political system.

The second aspect to the interpretative exercise, apart from the more customary issue of narrow or more liberal interpretations, requires the court to determine to what degree it will defer to the opinion of the government or other institutions on the meaning of unclear or disputed treaty terms. The question extends beyond simply placing the treaty on a footing similar to contracts rather than legislation. It requires the court to weigh the relevance and persuasiveness of foreign materials as they might bear upon domestic disputes and interpretations. As a party to the

[29] US: Article VI §1 ("Supremacy Clause").

treaty, the local government is perhaps best placed to indicate what it understood and intended when entering the treaty. But this would apply just as much to the other foreign government treaty parties, even though they would most likely not be before the domestic courts as parties. To the extent foreign courts construed this common international instrument, their decisions would *prima facie* have some persuasive weight, unless differences in domestic legal systems could be said to alter the nature of the legal obligations. In the same vein, the courts may seek recourse to the *travaux preparatoires*, even though they represent negotiating positions and understandings and further which might not carry any weight in a purely domestic contract dispute.

With these various issues in mind, let us now turn to an examination of treaties and law-making in the UK, US, French, and Netherlands legal orders.

3.3 The United Kingdom: The Parliamentary Optic

In many respects, the situation of the United Kingdom is straightforward. Foreign affairs is the prerogative of the Executive Branch, under the nominal control of the Crown, but in fact under the effective, day-to-day administration of the government. In particular, government department primarily responsible for the international relations of the UK is the Foreign and Commonwealth Office. The government has a wide discretion and generally unlimited powers to enter into any form of international agreement, binding or not in international law. But whatever the status of that compact in international law, the compact has in principle no legal force domestically within the UK legal system as such. And that extends not merely to a direct implementation of the treaty's provisions, but also to any indirect legal and constitutional consequences which the performance of the agreement may entail or require, such as budgetary resources, adjustment of rights and obligations, and so on. International compacts, treaties, and such like do not in principle have force of law within the UK without some form of statutory incorporation and implementation above and beyond any parliamentary approval given to entering the treaty in the first place.

The legislative incorporation of treaties can follow a number of different forms, reflecting the degree to which domestic legal and political considerations may modify or colour the commitments under the treaty. That is, incorporation ranges from the wholesale adoption of the text and its reproduction in the statute implementing it as law, to no explicit or express reference to any treaty obligations at all in the statutory scheme. For the courts, charged with interpreting the statute and enforcing its provisions, dealing with incorporation by reference is a relatively easy matter. Differences arise, however, when a statute charts its own course and language—even with obvious and express reference to the treaty backdrop. In attempting to give due and proper effect to a statute, the court is of course observing its roll under the separation of powers. The principal question is whether changes or differences from the original treaty language signal an intentional,

material deviation from or indifference to the original treaty commitments and scheme. In a separation of powers guise, this translates into questioning in what circumstances absent a specific statutory direction, the English courts will impute to Parliament an intention to observe international obligations. Put more crisply, when will the courts recognise unincorporated treaty commitments as having domestic legal force?

3.3.1 The Separation of Powers: Parliament

In general terms, Parliament has two roles in the treaty-making process. The first is a consultative role in advance of ratification or accession.[30] The second is the legislative role, consistent with the English dualist model, in bringing negotiated and agreed international obligations into the domestic legal system as domestic law.

Prior to 2010, no legal duty existed requiring treaties and international agreements to be submitted to Parliament for approval.[31] However, by convention standing from 1924, the "Ponsonby Rule", certain treaties were laid before Parliament for 21 sitting days before ratification.[32] Those treaties which would require or called for implementation in the domestic legal system, whether by primary legislation (statute) or secondary legislation (regulations, Orders), would come in any event before Parliament. Under the Ponsonby Rule the practice developed, and was confirmed by successive governments, that treaties and similar international instruments would be set before Parliament in some manner or other (or at least handed to various party representatives), as would any explanatory memoranda, and that copies of these materials would be transmitted to the relevant parliamentary committees. Over the course of time, the government did have occasion to announce various adjustments, broadening or limiting application of the Rule, as the case may be.

Under the Constitutional Reform and Governance Act 2010, ss.20 to 25, the core of the Ponsonby Rule has been set upon a statutory footing, for the first time since the practice of informing Parliament began in 1892. Ratification of a treaty may proceed after 21 sitting days only if no negative resolution has been passed. Notwithstanding a negative resolution in the Commons, ratification may proceed 21 days after a Ministerial statement indicating why the treaty ought nonetheless be ratified, has been laid before Parliament. There also exists the possibility of the government bypassing the notification procedure in certain exceptional cases (s.22) and for certain types of treaty (connected with the European Union, and tax matters: s.23). International instruments not having the character of a treaty in

[30] See generally Templeman 1991, and Harrington 2006.

[31] And drawing upon Templeman 1991, p. 465ff; Harrington 2006, p. 127ff, and Foreign and Commonwealth Office, United Kingdom 2001.

[32] The Ponsonby Rule did not apply to treaties in effect upon signing: Foreign and Commonwealth Office, United Kingdom 2001, p. 2.