1. I make this submission in my individual capacity. I am a full-time law teacher and legal scholar, holding the rank of Professor, with the Faculty of Law at the University of Alberta in Canada. I earned my Ph.D. in law from the University of Cambridge, having focused my studies on matters of comparative constitutional law and international law. My research activities as a law professor continue to focus on topics arising at the intersection of these two fields.

2. Some time ago, I researched and published on the topic of the parliamentary scrutiny of treaties, undertaking a scholarly assessment of the comparable practices of several Westminster-style Parliaments with regards to the parliamentary review of new treaty actions. This work entailed an extensive review of the parliamentary practices and new developments, as well as the literature available at the time, and also involved research visits to Australia and New Zealand, the former with the goal of examining the work of Australia’s Joint Standing Committee on Treaties (JSCOT). The leading outcome of this research was my article on “Scrutiny and Approval: The Role for Westminster-style Parliaments in Treaty-Making” published in 2006, volume 55, issue 1, of the International and Comparative Law Quarterly, at pages 121-159. I have also considered the role for subnational legislatures in treaty-making, with this research reflected in Joanna Harrington, “Redressing the Democratic Deficit in Treaty Law Making: (Re-)Establishing a Role for Parliament” (2005) 50:3 McGill Law Journal 465-509. I will refrain from attaching copies as these works are already available within the public domain.

3. A treaty, by definition, is an international legal instrument, intended to create legal obligations, and I take as my starting point that it is desirable for Parliament, as the elected branch of government engaged in the making of law, to have some involvement in the making of treaties, whether through a practice that has developed over time, such as the Ponsonby Rule, or by way of a statutory obligation, such as that found in the Constitutional Reform and Governance Act, 2010. The executive branch clearly has a role in the making of treaties, from initiation to negotiation to
conclusion, and a review of comparable common law jurisdictions suggests a role, albeit to varying degrees, for the judicial branch through the use of treaties as interpretive guidance. The desire for greater parliamentary involvement in the making of treaties is often motivated by what may be called “democratic deficit” concerns, ranging from desires for greater transparency in the treaty-making process to calls for greater accountability for executive law-making by treaty. Some have also identified a need for improving public knowledge of treaty law-making and public understanding of its impact and consequences.

4. Having recognized that there is a need for parliamentary treaty scrutiny, there is also a practical need to consider at what stage of the treaty-making process should this be encouraged and facilitated. In my past writings on parliamentary treaty scrutiny, I embraced a position of pragmatism, focusing on the stage after negotiation, when one has a final treaty text to scrutinise, but before the stage of ratification or accession where a state gives its consent to be bound by the new treaty text. I embraced this approach, recognizing that Parliament remains able to provide its views to the executive branch at any time on matters of needs and policy, for example, a trade committee can put forward recommendations about trade policy, and that the executive branch can be asked by a parliamentary committee to report on on-going treaty negotiations. I also recognized the need for a state’s Parliament to have a role in treaty scrutiny before a treaty becomes binding on the state, and for treaties that permit reservations, at a time when there was still an opportunity for reservations to be lodged, were that to be a recommendation coming forth as a result of parliamentary treaty security. As to the most effective mechanism for encouraging the parliament scrutiny of a proposed treaty action, I have found that to be a designated treaty scrutiny committee. I take this position, having found that executive notification measures, on their own, are insufficient as they place the onus of initiating subsequent action on individual parliamentarians.

5. By executive notification mechanisms, I refer to mechanisms where Parliament is notified by the executive branch of the proposed ratification of a treaty, resulting in the inclusion of a notation in the official journal for either House of Parliament to this effect and the tabling or laying before Parliament of the text of a proposed treaty action for a certain number of sitting days before the executive branch takes action. This notification
approach may also be accomplished by the deposit of treaties in batches – such as all treaties in a first quarter and then a second quarter – and it can be accompanied by the deposit or tabling of an explanatory memorandum or national interest analysis, to use the Australian descriptor.

6. In practice, the effectiveness of the “heads up” executive notification approach is limited in that it expects or relies upon individual parliamentarians to take time to review the notifications or listings of proposed treaty actions on a regular basis, with the “batching” of proposed treaty actions leading to lengthy listings for review, as was the case with the House of Lords sub-committees that scrutinised EU developments. The laying before Parliament approach to treaty scrutiny relies upon interested parliamentarians to take steps to call attention to a particular proposed treaty action through available mechanisms, such as oral or written questions, early day motions, or the calling for an inquiry by a committee. However, for proposed treaty actions that have already attracted media and public attention, there is no need for such notifications, with parliamentarians unrestrained from proposing and passing resolutions calling on the government to support or ratify a future treaty action, or vice versa.

7. A more effective mechanism for encouraging parliamentary treaty scrutiny is the designation of an express “home” within Parliament to which the notifications can also be sent, such as a “Treaties Committee”, with Australia’s Joint Standing Committee on Treaties (JSCOT) being a prime example. A Treaties Committee provides a more visible location to where the texts of all proposed treaty actions can be sent, and kept, along with their explanatory memoranda. It relies on the collective resources of parliamentarians and Parliament for determining next steps and a Treaties Committee also assists the public by providing a focal point for information about treaties and their scrutiny by Parliament. A Treaties Committee serves as a means to give more attention to proposed treaty actions than a simpler notification and deposit approach, particularly if the Treaties Committee has a website. That website can be used as a means to share information widely, and to educate both parliamentarians and the public about treaties, including their impact and consequences. The website could also be used to provide information and status updates on
treaties under negotiation, especially multilateral treaties. A designated Treaties Committee can also serve to publicise the executive’s reasons for wanting to ratify a treaty, with committee members able to use the committee’s processes to seek further explanations or clarifications, to propose reservations and understandings, and were an inquiry to be warranted, to receive submissions and hear testimony from witnesses. A designated committee also enables members and staff to build relations, over time, with those working on treaties within Government, which can lead to a cooperative approach, and at the very least, a familiarity with each other’s roles and a systematizing of those roles. A designated Treaties Committee is also a means for parliamentarians to have access to staff with expertise in treaty law, and over time, the committee may gain the benefit of institutional knowledge.

8. Sifting mechanisms can be developed by a Treaties Committee to determine which treaties are deserving of more committee time, or more extensive scrutiny, than others. In some jurisdictions, there has developed what might be described as a two-track approach, with guidelines being prepared to determine which kinds of treaties are deserving of scrutiny by a parliamentary committee, (and in South Africa, approval), and which should be laid before Parliament. Some guidelines may also rely on the discretion of the Minister of Foreign Affairs to determine that a proposed treaty action is one that is important enough to be placed before a committee. I have found that this issue of sifting often arises in relation to template treaties and/or bilateral treaties, or treaties of a technical, administrative or executive nature, with these being the potential descriptions of categories of proposed treaty actions deserving of a lesser degree of parliamentary treaty scrutiny. I disagree with a categorical approach, preferring that all proposed treaty actions are directed to a Treaties Committee, and then leaving it to the Treaties Committee to determine the extent of scrutiny required for a proposed treaty action.

9. To explain further: Template treaties arise in fields such as taxation, extradition and social security, where a template is often developed through the negotiation of one treaty and then its terms are replicated with another treaty partner, and then another. Such treaties, it is argued, need not be scrutinised, or can be quickly scrutinised, by a parliamentary body. However, while template treaties often reflect the terms of an overarching legislative framework that has already been endorsed and
adopted by Parliament, there can still be concerns arising with respect to the proposed treaty partner. Extradition treaties provide an example, where the terms of the extradition treaty may be written to template, but the proposed treaty partner could raise public interest concerns, with reactions in Australia and Canada to the possibility of an extradition treaty with China providing a recent example.

10. As for bilateral treaties as a category of treaties identified by some as deserving of a lesser degree of parliamentary treaty scrutiny, while multilateral treaties may attract public interest, perhaps because of media attention over a longer period of time, it has been argued that the extended process (and the bargaining realities) for negotiating a multilateral treaty can lead to the watering down of the obligations. There is also no guarantee that bilateral treaties simply because they are bilateral are not controversial, with Australia, Canada, and New Zealand having engaged in the negotiation of bilateral trade agreements that have attracted parliamentary and public interest. Accepting bilateral treaties for parliamentary treaty scrutiny by a Treaties Committee could lead to a report with recommendations for the inclusion of additional safeguards and/or prompt the negotiation of a side-agreement to alleviate concerns.

11. As to the sub-question that is often raised as to which House should host such a committee, or whether having a joint committee is best, I lean towards the model offered by Australia of a joint committee. I can note that in Canada, it has been argued by at least one Senate Committee, that the Canadian Senate is a more appropriate host for a treaty scrutiny committee because it has more of a mandate for regional and minority representation than the House of Commons. It has also been argued that the Senate, being a body of appointed rather than elected members, can be more insulated from the effects of short-term public opinion. However, the “democratic deficit” rationale often given for having parliamentary treaty scrutiny pushes against the location of a Treaties Committee solely within an appointed House. A joint committee may also be one perceived as more open to the views of the devolved administrations and legislatures for proposed treaty actions that impact upon devolved areas.
12. A variation of the proposal to create a “home” for the deposit of the proposed treaty action and the accompanying explanatory memorandum is to create a mechanism whereby after the notification and laying before Parliament of a proposed treaty action, an alert is sent to the parliamentary select or standing committee, or committees plural, that would appear to deal with the subject matter(s) of the proposed treaty action. For example, the deposit of a proposed free trade agreement would lead to an alert being sent to the trade committee, while an environmental treaty would lead to an alert being sent to a committee focused on the environment. The alert system could be developed so as to allow for multiple committees being informed, for chairs of committees to meet to discuss allocation, or for joined committee considerations of treaties that cover both trade and the environment etc. I would argue that a designated Treaties Committee could perform this function, developing its own means for consulting with other committees, or by providing an initial review function before the more subject-specific committee engaged with the scrutiny of the proposed treaty action.

13. Lastly, I note that establishing a Treaties Committee to review and consider proposed treaty actions does not prevent existing standing and select committees from conducting inquiries into existing treaty arrangements, such as a stock-taking exercise of a treaty’s implementation, or a review of the performance of a state’s treaty obligations over a certain period of time. The Joint Committee on Human Rights, for example, has conducted inquiries into the state’s performance of its human rights treaty obligations, and the establishment of a Treaties Committee for proposed treaty actions is not intended to take away from these other opportunities for parliamentary engagement in the scrutiny of existing treaty regimes.

14. Thank you for the opportunity to provide these submissions.