# Professor Joanna Harrington - Written Evidence (TWP0001)

1. This submission is by Professor Joanna Harrington of the Faculty of Law at the University of Alberta in Canada for the inquiry into 'Treaty scrutiny: working practices' being carried out by the EU Select Committee's International Agreements Sub-Committee.

2. I welcome the creation of a parliamentary treaty scrutiny committee for the United Kingdom, having written in favour of such a body back in 2006 (see 'Scrutiny and Approval: The Role for Westminster-style Parliaments in Treaty-Making' (2006) 55 ICLQ 121 at 158).

3. In my earlier evidence to the House of Lords Select Committee on the Constitution in its inquiry on the 'Parliamentary Scrutiny of Treaties', I had noted the importance of creating an easy-to-locate, visible 'home' within Parliament for both treaties and treaty scrutiny's inputs and outputs. To this end, I would have preferred to see a stand-alone international agreements committee established, rather than a sub-committee of the European Union Select Committee, but this development may serve as a first step towards fostering support for the former. I do worry that the sub-structure and the name of the parent committee may hide away, to some extent, the work of the International Agreements Sub-Committee, and there may arise the need to dispel any possible confusion that the committee's mandate is limited to treaties connected in some way to the European Union.

## Scope of the Sub-Committee's mandate

4. I also welcome the scope of the mandate provided to the International Agreements Sub-Committee. A broad interpretation of this mandate will serve the public interest in both transparency and accountabilty, and should capture both new treaties being proposed as well as changes to existing treaties by amendment or withdrawal. It remains important that the tasks of parliamentary treaty review, up to and including a report when an inquiry is undertaken, take place before the treaty action becomes binding on the United Kingdom.

5. For comparative reference, breadth also marks the approach taken in Australia, where the terms of reference for the Parliament of Australia's Joint Standing Committee on Treaties (JSCOT) covers 'matters arising from treaties', 'proposed treaty actions' and 'any question relating to a treaty or other international instrument, whether or not negotiated to completion', in addition to such matters as may be referred to the committee by the Minister for Foreign Affairs. This language of 'matters arising', 'treaty actions' and 'questions relating' is commendable, although there are jurisdictions such as New Zealand that focus the

terms of reference for their equivalent committee on 'treaties', ensuring the inclusion of 'any treaty that is to be subject to ratification, accession, acceptance, or approval' by the state within the scrutiny committee's mandate. However, the New Zealand Parliament's Standing Order 397 also expressly includes within the committee's mandate 'any treaty that has been subject to ratification, accession, acceptance, or approval and that is to be subject to withdrawal or denunciation'. By contrast, Canada's 'Policy on Tabling of Treaties in Parliament', (re)introduced in 2008 as a courtesy on the part of the executive and not a statutory obligation, did not cover the decision to withdraw as a party to the Kyoto Protocol to the United Nations Framework Convention on Climate Change in 2011. (Canada's tabling practice also lacks the institutional 'home' of a designated committee).

**Changes to existing treaties and treaty regimes**

6. The *Miller* litigation has highlighted the importance of parliamentary review for a UK treaty withdrawal. Amendments to treaties may, however, pose an additional problem. While it is often the case that an amendment to an existing treaty is accomplished by a separate treaty, which is then subject to its own conclusion, signature and ratification procedures, there are treaty regimes that embrace mechanisms to speed up the amendment process, whereby a proposed change to the terms of the treaty (or to an attached annex, schedule or appendix) can take effect for those states parties that do not issue an objection. These tacit acceptance processes serve to shorten the very timeframe needed for effective parliamentary review to take place before a new treaty action binds the state; a point discussed from a Canadian perspective in T.L. McDorman, 'The Tabling of International Treaties in the Parliament of Canada: The First Four Years' (2012) 35:2 *Dalhousie Law Journal* 357 at 365-366.

7. Operational measures pose a similar dilemma, as Professor McDorman notes in his 2012 article at page 366. He provides the example of treaties establishing regional fisheries management organizations with the authority to adopt quota and fisheries management measures which may give to the states parties the authority to adopt measures that take effect immediately or after a period of time during which no objection is made.

8. I note this since fisheries matters do attract public interest. Indeed, in the first few years of operation of Canada's reinstated treaty tabling practice, it was an amendment to a fisheries treaty -- and one which did not require the enactment of legislation to take effect -- that attracted significant attention from parliamentarians (and the equivalent of a devolved government, being a provincial government in Canada). The treaty action at issue was the 2007 Amendment to the 1978 Convention

on Future Multilateral Cooperation in the Northwest Atlantic Fisheries (the 'NAFO Convention') (discussed in McDorman, (2012) 35 *Dalhousie Law Journal* 357 at 371-373). This 'treaty to amend an existing treaty' prompted a recommendation against ratification from the House of Commons Standing Committee on Fisheries, and then the House of Commons as a whole by a vote of 147-142, but the executive opted to go ahead with ratification in any event, although delays by other parties meant that the Amendment Treaty did not enter into force until 2017. A number of European states have had fishing opportunities arise from within the NAFO framework, with the EU (as first the ECC, then the EC) having long been a NAFO member (see R. Churchill and D. Owen, *The EC Common Fisheries Policy* (Oxford University Press, 2010) at 363-364).

## Treaties under negotiation

9. The terms of reference for Australia's JSCOT include 'any question relating to a treaty or other international instrument, whether or not negotiated to completion', although a lack of political will has hampered use of the underlined aspect. The Sub-Committee's mandate builds upon this development with its express inclusion of 'the Government's conduct of negotiations with states and other international partners'; a development that I hope will encourage practices that show a way forward for other Westminster-style Parliaments. Options for having an impact on the terms of a legally-binding agreement are clearly limited when one is faced with a finalised text, with proposals for treaty scutiny after negotiations but before ratification having been compromise offerings in earlier efforts to secure change.

10. The desire for input at the negotiation stage often arises in the context of trade agreements, with Canada's House of Commons Standing Committee on Foreign Affairs and International Trade having long ago called for negotiations-stage consultation with MPs, drawing an analogy to EU practices (see, for example, its report on *Reinvigorating Economic Relations Between Canada and Asia-Pacific* (November 2003) at pages 23-24). More recently, in a review of Australia's treaty-making process undertaken in 2015, focussed to a large extent on trade treaties, one of the three key points raised in evidence was that 'there needs to be a significantly higher level of consultation in treaty-making *before* agreements are signed and that more information should be communicated to stakeholders and the public about how agreements will affect them': Senate Foreign Affairs, Defence and Trade References Committee, *Blind Agreement: Reforming Australia's Treaty Making Process* (June 2015) at paragraph 6.5. A majority of the committee went on to recommend, at paragraph 6.23, the provision by the government to JSCOT, before the commencement of negotiations, of a detailed explanatory memorandum setting out the government's priorities,

objectives and reasons for negotiations and a cost-benefit analysis prepared by an independent body.

11. Parliamentary engagement at the early stages of a treaty's negotiation might well have an impact on a state's decision to enter into negotiations with a particular partner or the inclusion in those negotiations of a particular subject matter, from supply management quotas to pharmaceuticals. The prospect, in itself, of parliamentary review for a text under negotiation may also encourage those negotiating new treaty texts on behalf of the state to consult more widely, and more often, on its potential impacts while the text is still in play, with such consultations to extend to the representatives of devolved executives and legislatures where their areas of jurisdiction may be affected by the text under negotiation. (I have, in the past, made note of the additional democratic deficit that arises in federal states with the absence of a legal obligation to consult with subnational legislatures and governments: J. Harrington, 'Redressing the Redressing the Democratic Deficit in Treaty Law Making: (Re-) Establishing a Role for Parliament' (2005) 50:3 *McGill Law Journal* 465-509.) Such consultations do take place for important treaties, as illustrated by the involvement of Canadian provinces in the negotiation stage of the Canada-European Union Comprehensive Economic and Trade Agreement (CETA); however, the prospect of parliamentary review for any treaty under negotiation may well encourage more rigorous attention to be paid within government to the development of across-the-board negotiation consultation protocols.

12. The Sub-Committee might also usefully engage in the review of any templates being developed by the government to guide the negotiation of new bilateral treaties, with those used to negotiate bilateral agreements for the promotion and protection of investments (also known as bilateral investment treaties, or BITs) likely to be of public interest. Engaging with the contents of a template can influence the future negotiations of several treaties.

**Memoranda of Understanding (MOUs) and other arrangements**

13. A line, however, can be drawn between proposed treaty actions that will legally bind the United Kingdom under international law and instruments containing political commitments, including non-legally binding memoranda of understanding (MOUs). Of course, labelling a document as a 'Memorandum of Understanding' is not in itself sufficient to indicate that it is a non-legally binding instrument, and one must always consider whether the terms of the instrument indicate an intent to create legally binding obligations under international law. Moreover, as noted by the Treaty Section of the Legal Directorate at the FCO, '[c]onfusingly some treaties are called memoranda of understanding':

*Treaties and Memoranda of Understanding (MOUs): Guidance on Practice and Procedures* (FCO, 2014) at page 1.

14. For comparative assistance, Canada's Tabling Policy does not cover non-legally binding instruments, such as (true) Memoranda of Understanding or other similar arrangements. It appears that this was done in an effort to avoid mistaken classifications by civil servants, parliamentarians and the public, and to ensure that the distinction between treaties and non-binding instruments is maintained. Canada does make use of Memoranda of Understanding to express moral or political commitments, and such instruments do require policy approval; however, as they are non-legally binding, they are not tabled in Parliament.

15. Workload alone might also favour the non-inclusion of non-legally binding MOUs. If they were included, a question might also arise as to why then not scrutinise declaratory texts adopted by states within such fora as the UN General Assembly, with the 2016 *New York Declaration for Refugees and Migrants* being a recent example attracing public interest.

**Sifting mechanisms**

16. Regardless of these questions of scope, the new Sub-Committee will need a means for managing its workload. A sifting mechanism needs to be established so as to determine which new treaty actions require study and inquiry by the committee, and which do not, and in keeping with the goal of strengthening accountability, such a mechanism should be established by the Sub-Committee itself rather than by a Minister or Foreign Office official. For some idea as to workload, in the first five years of Canada's 2008 policy, the government tabled 176 treaties, of which MPs opted to study and debate 21 of these, 15 of which were bilateral treaties. For a sense of yearly totals, Canada has engaged in 20-35 bilateral treaty actions and 15-20 multilateral treaty actions each year, for the past five years, according to the yearly listing of Canada's completed treaty actions later found in each volume of *The Canadian Yearbook of International Law* published by Cambridge University Press.

17. Some may argue for a rule that exempts bilateral treaties from parliamentary review, or exempts those bilateral treaties that are drafted in accordance with a template that serves to replicate the terms from one treaty to the next. Examples of the latter include treaties concerning social security, air transport, mutual legal assistance, and double taxation. In my view, however, one wants to avoid adopting a sifting rule that automatically excludes such treaties from being put before a parliamentary treaty scrutiny committee since some bilateral treaties do attract public interest, whether because of their terms or

because of views about the proposed treaty partner. The UK-US Extradition Treaty provides a past example, while a future UK-US free trade agreement provides another. For a comparative example, a signed extradition treaty between Australia and China was eventually withdrawn from consideration for ratification, with parliamentary review serving to shine a light on concerns from the Law Council of Australia (see JSCOT, Report 167, December 2016).

18. In jurisdictions comparable to the United Kingdom, the language of major and minor arises in categorizing treaties, with New Zealand's Standing Order 397, for example, designating 'any major bilateral treaty of significance' as being one that should come before a parliamentary committee, leaving it to the committee to then decide the extent of the review required. As to who decides that a bilateral treaty is a 'major' treaty 'of significance', the New Zealand practice is to assign that task to the Minister of Foreign Affairs and Trade.

19. In Australia, the practice of the Joint Standing Committee on Treaties (JSCOT) covers both bilateral and multilateral agreements, but the committee has developed a categorization approach, whereby 'Category 3 treaty actions' are 'minor treaty actions' that 'do not impact significantly on the national interest and are likely to have negligible financial or legal effect in Australia'. Many of these minor treaty actions are described as 'technical amendments to existing treaties'. However, they are presented to the committee, with a one-page explanatory statement, and the committee retains 'the discretion to inquire formally into minor treaty actions or indicate its acceptance of them without a formal inquiry'. In keeping with the ethos of openness and transparency, JSCOT also provides public access through its website to a regularly updated listing of minor treaty actions, dating back to 2007.

**Referrals to other committees**

20. In my view, it is for the Sub-Committee to decide the extent, form and modalities for its review of a particular treaty action, or a treaty negotiation, although it would be useful to retain the option of referral to a specialist committee for its review, and a report. In Canada, the House of Commons Standing Committee on International Trade has reviewed a number of free trade agreements tabled in Parliament, often at the same time as the legislation for implementation was introduced, and the regularity of this activity has generated a degree of expertise on bilateral free trade agreements within the committee. Commons scrutiny also led to the identification of human rights concerns with a proposed Canada-Colombia free trade agreement, which then prompted the executive to secure a separate Canada-Colombia Agreement Concerning Annual Reports on Human Rights and Free Trade in 2010.

## Information to accompany the treaty

21. 'Effective treaty scrutiny demands timely access to accurate information' (see Ewan Smith, Eirik Bjorge and Arabella Lang, 'Treaties, Parliament, and the Constitution' [2020] *Public Law* 508 at 523.) At an initial stage, this need for information is accomplished by the statutory obligation to accompany a treaty laid before Parliament with an explanatory memorandum 'explaining the provisions of the treaty, the reasons for Her Majesty's Government seeking ratification of the treaty, and such other matters as the Minister considers appropriate' (*Constitutional Reform and Governance Act 2010*, c 25, s 24). This provision was a late amendment to the Act and was not debated (see J. Barrett, 'The United Kingdom and Parliamentary Scrutiny of Treaties: Recent Reforms' (2011) 60 ICLQ 225 at 231-232).

22. Comparative practice elsewhere, however, suggests the need for a more detailed listing of the required contents of an explanatory memorandum, rather than 'such other matters as the Minister considers appropriate'. New Zealand's Standing Order 398, for example, requires the 'national interest analysis' (its term for an explanatory memorandum) to address both 'the advantages and disadvantages to New Zealand' of a proposed treaty action [emphasis added], with Australia's national interest analyses having been described by a committee majority as not adding much value to the process in the absence of a cost-benefit analysis (see Australia, Senate Foreign Affairs, Defence and Trade References Committee, *Blind Agreement: Reforming Australia's Treaty Making Process* (June 2015) at para 6.25). Canada, Australia and New Zealand also require the inclusion of information on the economic, environmental, social, health and cultural effects of a proposed treaty action.

23. In short, committee procedures, or standing orders, should spell out requirements with a sufficient level of detail for the provision of both positive and negative information on a proposed treaty action's law and policy implications, financial costs, implementation needs and timing considerations, and provide a record of what consultations have been taking place with devolved governments, industry groups, civil society organizations, overseas territories, and other interested parties. Canada's Tabling Policy also requires the explanatory memoranda to include a 'description of the consultations undertaken with the House of Commons' … and other government departments, 'as appropriate'. The explanatory memoranda should also describe any reservations or interpretive declarations that may need to be made with respect to the treaty, and how the treaty can be terminated.

24. A committee rule requiring the explanatory memorandum to be published as an appendix to the report resulting from the parliamentary

review of the treaty would also secure their public availability and accessibility over time. Some explanatory memoranda may be of use in the process of treaty interpretation before adjudicative bodies (see further Vid Prislan, 'Domestic Explanatory Documents and Treaty Interpretation' (2017) 66 ICLQ 923-962).

25. Treaty scrutiny committees also need to be kept apprised of the status of treaties under negotiation, with biannual reports from the FCO's Treaty Division to the Sub-Committee being a possible practice to encourage and establish. Smith, Bjorge and Lang also note in their article for *Public Law* at page 524, that a 'committee scrutinising treaty actions could sit in private for, say, hearing the more detailed evidence from negotiators themselves'.

**Technology aids to publicise treaty-related information**

26. Online access to treaty texts, explanatory memoranda, and other materials continues to be very important for enhancing the transparency of law-making by treaty, with the Sub-Committee best-placed to serve as a home or focal-point for this information. Technological developments also permit the creation of alert systems for which one can register so as to receive automatic notifications whenever information on a new treaty action is made available, and embedded links can be included in daily journals and orders of the day to send readers to website locations for new treaty actions and reports. Websites also enable wider public access to treaty scrutiny's outputs, including transcripts and submissions, with this technological access to treaty-related materials being one of the largely unsung benefits instigated by Australia's reforms to the treaty-making process in the mid-1990s.

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