
Centre for International
Governance Innovation

Canada in International Law at 150 and Beyond | Paper No. 18 – March 2018

A Historical Survey of Canadian International Treaty Diplomacy

Gary Luton



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About the Series

Marking 150 years since Confederation provides an opportunity for Canadian international law practitioners and scholars to reflect on Canada's past, present and future in international law and governance. "Canada in International Law at 150 and Beyond/Canada et droit international : 150 ans d'histoire et perspectives d'avenir" is a series of essays, written in the official language chosen by the authors, that provides a critical perspective on Canada's past and present in international law, surveys the challenges that lie before us and offers renewed focus for Canada's pursuit of global justice and the rule of law.

Topics explored in this series include the history and practice of international law (including sources of international law, Indigenous treaties, international treaty diplomacy, subnational treaty making, domestic reception of international law and Parliament's role in international law), as well as Canada's role in international law, governance and innovation in the broad fields of international economic, environmental and intellectual property law. Topics with an economic law focus include international trade, dispute settlement, international taxation and private international law. Environmental law topics include the international climate change regime and international treaties on chemicals and waste, transboundary water governance and the law of the sea. Intellectual property law topics explore the development of international IP protection and the integration of IP law into the body of international trade law. Finally, the series presents Canadian perspectives on developments in international human rights and humanitarian law, including judicial implementation of these obligations, international labour law, business and human rights, international criminal law, war crimes, and international legal issues related to child soldiers. This series allows a reflection on Canada's role in the community of nations and its potential to advance the progressive development of global rule of law.

"Canada in International Law at 150 and Beyond/Canada et droit international : 150 ans d'histoire et perspectives d'avenir" demonstrates the pivotal role that Canada has played in the development of international law and signals the essential contributions it is poised to make in the future. The project leaders are Oonagh Fitzgerald, director of the International Law Research Program at the Centre for International Governance Innovation (CIGI); Valerie Hughes, CIGI senior fellow, adjunct assistant professor of law at Queen's University and former director at the World Trade Organization; and Mark Jewett, CIGI senior fellow, counsel to the law firm Bennett Jones, and former general counsel and corporate secretary of the Bank of Canada. The series will be published as a book entitled *Reflections on Canada's Past, Present and Future in International Law/Réflexions sur le passé, le présent et l'avenir du Canada en matière de droit international* in spring 2018.

About the International Law Research Program

The International Law Research Program (ILRP) at CIGI is an integrated multidisciplinary research program that provides leading academics, government and private sector legal experts, as well as students from Canada and abroad, with the opportunity to contribute to advancements in international law.

The ILRP strives to be the world's leading international law research program, with recognized impact on how international law is brought to bear on significant global issues. The program's mission is to connect knowledge, policy and practice to build the international law framework — the globalized rule of law — to support international governance of the future. Its founding belief is that better international governance, including a strengthened international law framework, can improve the lives of people everywhere, increase prosperity, ensure global sustainability, address inequality, safeguard human rights and promote a more secure world.

The ILRP focuses on the areas of international law that are most important to global innovation, prosperity and sustainability: international economic law, international intellectual property law and international environmental law. In its research, the ILRP is attentive to the emerging interactions among international and transnational law, Indigenous law and constitutional law.

About the Author

Gary Luton is currently director of the Treaty Law Division at Global Affairs Canada. A career diplomat, he has had several postings abroad: in Kuwait and Iraq, covering the Gulf States; in Paris; and at Canada's Mission to the European Union in Brussels, where he was head of the Economic, Trade and Investment Section. His last two foreign postings, to Mumbai covering Western India and to Doha, Qatar, were as head of mission. In Ottawa he has worked on a variety of legal, economic and policy roles, both as a negotiator and senior adviser. He is also a member of Global Affairs' Standing Rapid Deployment Team (SRDT). He has a B.A. (Hons.) from Queen's University, an M.A. from Dalhousie University and an LL.B. (Common Law) from the University of Ottawa. Following legal studies, he articulated with the Ottawa office of a major Canadian law firm.

Acronyms and Abbreviations

CETA	Comprehensive Economic and Trade Agreement
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
GAC	Global Affairs Canada
ILC	International Law Commission
ILO	International Labour Organization
NAFTA	North American Free Trade Agreement
NATO	North Atlantic Treaty Organization
PJBD	Permanent Joint Board of Defence
PRC	People's Republic of China
SPA	Strategic Partnership Agreement
TPP	Trans-Pacific Partnership
UPU	Universal Postal Union
WHO	World Health Organization
WTO	World Trade Organization

Introduction

The history of Canada is intertwined with international treaties and treaty making. This paper provides a brief historical survey of Canada's international treaty diplomacy. It traces how treaties helped shape Canada's evolution from colony to sovereign nation and determine Canada's borders, how they ensure peace and security and how they continue to help Canada to express its sovereignty and protect its economic well-being. Treaties remain vital to a modern middle power, such as Canada, that relies on international cooperation and the rule of law in the conduct of its international relations.

The first part of this survey examines the period from 1700 to 1900. In the eighteenth and nineteenth centuries, international treaties reflected various military conflicts around the globe. These treaties, along with treaties between the Crown and Indigenous peoples who predated Britain's imperial presence in North America, are fundamental to understanding Canada's early treaty history and how treaties continue to shape Canada's evolution.¹

The second part of this survey traces Canada's treaty relations from 1900 to 1936, a period in which Canada sought greater autonomy over foreign policy and independent treaty-making power. The paper then examines the period from 1937 to 1966 with the rapid post-World War II expansion of Canada's bilateral and multilateral relations, and continues with descriptive statistics and analysis of the 50 years of Canadian treaty making since 1967, Canada's centennial year. The data is divided into thematic elements covering Canada's bilateral and multilateral treaties in force, the types of bilateral treaties by lead government departments,

1 See e.g. the recent release: Department of Justice Canada, *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples* (14 February 2018), online: <www.justice.gc.ca/eng/cs/sjc/principles.html>. The principles outlined are guided and informed by the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)* (GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, 46 ILM 1013 (2007) [UNDRIP]). The evolving impact of UNDRIP, a non-binding declaration, on Aboriginal affairs in Canada is evidenced by the government's call for a review of Canadian laws and policies to align with the declaration. See also *UNDRIP Implementation: Braiding International, Domestic and Indigenous Law* (Waterloo, ON: CIGI, 2017).

as well as an overview of new mega-regional agreements, and ends with brief conclusions.²

As this is a brief historical survey of Canada's treaty diplomacy, many treaty-related policy and legal issues are not addressed, such as the domestic process for giving effect to treaties within Canada; the role of Parliament or the provinces and territories in negotiating, approving or implementing treaties;³ or of the courts in interpreting treaties;⁴ the use of non-legally binding soft-law alternatives to international treaties;⁵ or the role of non-state actors in treaty making. Several of these topics are addressed in other papers within this series.⁶

The Background to Treaties and Treaty Making

International treaties are important because they help create a rules-based international order and institutions and are central to the concept of diplomacy and public international law. They also affect many aspects of modern life, covering areas such as human rights, international trade and development, environmental protection, nuclear disarmament, transport, education and cultural matters, to name a few. Moreover,

international treaties influence how states cooperate diplomatically and settle their disputes.

Treaties also have their limitations. Fundamental questions are being asked by the media, politicians, and theorists in both international relations and international law as to how treaties, and the institutions that rely on them, may evolve and be reshaped or abandoned in the years ahead. This has been reflected most recently by the high-profile and rancorous debate over the North American Free Trade Agreement⁷ (NAFTA) during and following the 2016 presidential election in the United States, and over the United Kingdom's conduct with respect to its referendum on withdrawing from the European Union.

Under public international law, a treaty concluded between sovereign states, or between states and international organizations, constitutes a legally binding agreement.⁸ The term "treaty" used here refers to an international agreement governed by international law and concluded in writing.⁹ Legally binding international instruments go by a variety of names (i.e., treaty, protocol, agreement). Those negotiated under the auspices of an international organization are frequently entitled "conventions," as are instruments adopted by the organizations' specialized agencies. Treaties can be bilateral (between two parties), multilateral (between three or more parties) or plurilateral.¹⁰ A plurilateral treaty is a type of multilateral

2 The periodization, in 10-year increments from 1967 to 2016, begins with Canada's centennial year. This periodization also coincides with the last comprehensive statistical and historical survey of Canadian treaties by Allan Gotlieb, published in 1968. See Allan Gotlieb, *Canadian Treaty-Making* (Toronto, ON: Butterworths, 1968).

3 For a discussion on these topics, see Joanna Harrington, "Scrutiny and Approval: The Role for Westminster-Style Parliaments in Treaty-Making" (2006) 55:1.1 ICLQ 121 [Harrington, "Scrutiny and Approval"]; Joanna Harrington, "Redressing the Democratic Deficit in Treaty Law Making: (Re-)Establishing a Role for Parliament" (2005) 50 McGill LJ 465; France Morrissette, "Provincial Involvement in International Treaty Making: The European Union as a Possible Model" (2011) 37 Queen's LJ 577; Ted L McDorman, "The Tabling of International Treaties in the Parliament of Canada: The First Four Years" (2012) 35:2 Dalhousie LJ 357.

4 See e.g. Gibran van Ert, "Canada" in David Sloss, ed, *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (Cambridge, UK: Cambridge University Press, 2009).

5 See e.g. Charles Lipson, "Why Are Some International Agreements Informal?" (1991) 45:4 Intl Organization 495.

6 See other papers in this series (CIGI, "Canada in International Law at 150 and Beyond") by Armand de Mestral and Hugo Cyr; Gib Van Ert; Stéphane Beaulac; and Charles-Emmanuel Côté.

7 *North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, 17 December 1992, Can TS 1994 No 2, 32 ILM 289, 605 (entered into force 1 January 1994) [NAFTA].

8 See generally United Nations, *Treaty Handbook* (Treaty Section of the Office of Legal Affairs, United Nations, 2012), online: <<https://treaties.un.org/doc/source/publications/thb/english.pdf>>.

9 See *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, 8 ILM 679, art 2 (entered into force 27 January 1980 after ratification by 35 nations). Canada acceded to the Vienna Convention in 1970. Article 2 defines a treaty as an international agreement "governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." See also *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations*, International Legal Materials 25, no 3 (May 1986).

10 For a general discussion on the law of treaties, see Anthony Aust, *Modern Treaty Law and Practice*, 3rd ed (Cambridge, UK: Cambridge University Press, 2013); Robert Kolb, *The Law of Treaties: An Introduction* (Cheltenham, UK: Edward Elgar Publishing, 2016). For a detailed discussion on Canadian treaty making, see Gotlieb, *supra* note 2; John H Currie, Craig Forcese & Valerie Oosterveld, eds, *International Law: Doctrine, Practice, and Theory*, 2nd ed (Toronto, ON: Irwin Law, 2014); Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto, ON: Carswell, 2007) at c 11.

treaty and, for the purposes of this discussion, is categorized under multilateral treaties. Bilateral treaties are considered contractual in nature as are “so-called law-making multilateral treaties.”¹¹ Treaties establish substantive and procedural obligations and frequently contain mechanisms to ensure compliance.¹² In essence, treaties are “promises about future national behaviour.”¹³

Aarie Glas, Matthew Hoffman and Clifton van der Linden analyzed more than 6,000 multilateral treaties, dating from 1595 to 1995 and for which there are signatory records.¹⁴ The authors have begun to analyze the history and evolution of the multilateral treaty system and its implications for global order and politics. Drawing from the data set, they conclude that “states are multilateral treaty-making entities to a significant degree and that enacting statehood means making multilateral treaties.”¹⁵ Contemporary multilateral treaties often deal with broad issues of global governance and are frequently negotiated under the auspices of an international organization, such as the United Nations or one of its specialized agencies (for example, the World Health Organization [WHO] and the Universal Postal Union [UPU]), or another intergovernmental organization (for example, the North Atlantic Treaty Organization [NATO] and the World Trade Organization [WTO]). International treaties, both bilateral and multilateral, are registered with the United Nations Secretariat in New York, as required by the Charter of the United Nations.¹⁶

11 Aust, *supra* note 10 at 11.

12 For articles on the effectiveness of international legal agreements and, in particular, issues of compliance and non-compliance, see Timothy Meyer, “How Compliance Understates Effectiveness” (2014) 108 AJIL 93; Omar M Dajani, “Contractualism in the Law of Treaties” (2012) 34 Mich J Intl L 1; Elisa Morgera, “All about Compliance” (2011) 41 Envtl Pol’y & L 189; Asher Alkoby, “Theories of Compliance with International Law and Challenge of Cultural Difference” (2008) 4 J Intl L & Intl Rel 151.

13 See Lipson, *supra* note 5.

14 See Aarie Glas, Matthew Hoffman & Clifton van der Linden, “Multilateral TreatyMaking as Constitutive Practice” (Paper presented at the Annual Meeting of the International Studies Association, 2014) at 1 (cited with the authors’ permission). See also Robert A Denmark & Matthew J Hoffman, “Not Just Scraps of Paper: The Dynamics of Multilateral TreatyMaking” (2008) 43:2 Cooperation & Conflict 185. See also Robert Denmark & Matthew J Hoffman, “Global Cooperation: Treaties and the Dynamics of Multilateralism” (Paper presented at the Annual Meeting of the International Studies Association, 2013).

15 See Glas, Hoffman & van der Linden, *supra* note 14 at 1.

16 26 June 1945, 1 UNTS XVI, Can TS 1945 No 7 (entered into force 24 October 1945).

Treaties entered into by Canada are maintained in an electronic treaty database and published in the *Canada Treaty Series*. An original copy is kept in a treaty archive at Global Affairs Canada (GAC) in Ottawa, Ontario. Each year, the Treaty Law Division at GAC submits a list of all treaty actions undertaken over the course of the year to the *Canadian Yearbook of International Law*.¹⁷ In addition to entry into force, signature and ratification, these actions can include accession, termination, partial termination, withdrawal, denunciation and provisional application¹⁸ of a treaty. In Canada, the treaty-making process is currently based on the 2008 *Policy on Tabling of Treaties in Parliament* and Canadian practice.¹⁹ The objective of the policy is to ensure that an instrument governed by public international law that is negotiated, signed and ratified by the Government of Canada is tabled in the House of Commons for 21 sitting days, following signature or adoption by other procedure, and prior to the instrument’s ratification.

North American Treaty Relations (1700–1900)

This section of the paper provides a brief overview of some of the significant pre-Confederation treaties and related instruments that helped lead to the creation of Canada. The section traces the evolution of British North America from a group of imperial possessions into the federated colony called the Dominion of Canada.

Pre-Confederation (1700–1867)

During the eighteenth and nineteenth centuries, international treaties, concluded mostly in Europe between European states, were frequently a response to the military conflicts between states

17 The statistics provided in this paper were obtained from a variety of sources, including the *Canadian Treaty Series*, the annual reports of the Department of External Affairs (1967–1982) and from submissions of GAC, published annually in the *Canadian Yearbook of International Law* (1983–2016).

18 The provisional application of a treaty is a specific situation in which a treaty, or certain articles of a treaty, are applied pending its entry into force.

19 *Policy on Tabling of Treaties in Parliament*, online: Global Affairs Canada <www.treaty-accord.gc.ca>; Foreign Affairs and International Trade Canada, News Release, “Canada Announces Policy on Tabling Treaties in House of Commons” (28 January 2008) [*Policy on Tabling*].

around the globe. During this period, diplomatic relations between Indigenous and non-Indigenous peoples in North America were also frequently governed by treaties.²⁰ Often the result of economic and military alliances against colonial competitors, distinct types of treaties evolved over three centuries, leading to some of today's comprehensive domestic land claims agreements.²¹

Treaties between the Crown and Indigenous peoples not only reflected imperial wars, but also re-established peaceful relations after more localized conflicts. Following the Treaty of Utrecht of 1713,²² which purported to transfer the mainland of what is now Maritime Canada from France to Great Britain, the British colonial authority negotiated a series of peace and friendship treaties between 1725 and 1779 to deal with France's remaining colonists and Indigenous allies.²³

The final French-British-Spanish military clash over North America between 1754 and 1763, also called the Seven Years' War, resulted in the Treaty of Paris of 1763.²⁴ The treaty not only marked an end to the hostilities, but also helped to create the territorial foundation of what is now Canada. The importance of treaty-based military and trade alliances with Indigenous peoples was made evident in the Royal

Proclamation of 1763,²⁵ issued by King George III, and the related Niagara Treaty,²⁶ agreed to with Indigenous leaders the following year.

The Royal Proclamation of 1763 provided details on how Britain's American colonies would be administered, established protocols governing relations with Indigenous peoples and set a boundary under which all the lands to the west of established colonies would become "Indian country."²⁷ The negotiation of and agreement to the Treaty of Niagara in 1764 by Sir William Johnson, the British monarch's personal envoy, and 24 Indigenous nations drew on Crown commitments found in the Royal Proclamation of 1763.²⁸

A second Treaty of Paris, signed in 1783 by the United States and Great Britain, ended the American Revolutionary War.²⁹ Among its various provisions, the Treaty of Paris of 1783 provided for mutual recognition of jurisdiction over waters on each side of the border between the British Empire in North America and the United States.³⁰ A number of issues remained unresolved, however, and it took the negotiation of the Treaty of Amity, Commerce and Navigation of 1794 (commonly

20 For a detailed discussion on these and other pre-Confederation treaties, see John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto, ON: University of Toronto Press, 2017); Colin G Calloway, *The Scratch of a Pen: 1763 and the Transformation of North America* (Oxford, UK: Oxford University Press, 2007); and Peter H Russell, *Canada's Odyssey: A Country Based on Incomplete Conquests* (Toronto, ON: University of Toronto Press, 2017).

21 See Martti Koskenniemi, Walter Rech & Manuel Jiménez Fonseca, eds, *International Law and Empire: Historical Explorations* (Oxford, UK: Oxford University Press, 2016).

22 *Treaty of Peace and Friendship, between the most Serene and most Potent Princess Anne, by the Grace of God, Queen of Great Britain, France, and Ireland, and the most Serene and most Potent Prince Lewis the XIVth, the most Christian King*, 11 March and 11 April 1713: Fred L Israel, ed, *Major Peace Treaties of Modern History, 1648–1967*, vol 1 (New York, NY: Chelsea House, 1967) at 177–239.

23 See Calloway, *supra* note 20. Calloway's study covers the period between the 1763 Peace of Paris and the "peace" negotiated two decades later. He highlights the breakdown of "forced alliances" between Indigenous populations and Europeans during the Seven Years' War. See also Russell, *supra* note 20, which covers the period one century prior to Confederation. Russell's thesis is that Britain's decision not to attempt a complete conquest of nations or peoples preceding Britain's imperial presence in Canada is crucial to understanding Canada's founding.

24 *The Definitive Treaty of Peace and Friendship between his Britannick Majesty, the Most Christian King, and the King of Spain*, 10 February 1763.

25 *Royal Proclamation, 1763* (3 Geo III), reprinted in RSC 1985, Appendix II, No 1.

26 See Calloway, *supra* note 21 at 97.

27 *Ibid* at 28–31, 33–36.

28 The substance and legacy of pre-Confederation treaties with Canada's Indigenous peoples is discussed in considerable detail in other papers in this series. See CIGI, "Canada in International Law at 150 and Beyond", papers by Joshua Nichols; Robert Hamilton; Brenda Gunn; and Ryan Beaton.

29 *Definitive Treaty of Peace between the United Kingdom and the United States*, 3 September 1783, UST 104 (entered into force 12 May 1784).

30 Other treaties concluded with provisions relating to the use of water include the *Treaty of Amity, Commerce and Navigation between the United Kingdom and the United States of America*, 19 November 1794, 1 BSP 784 (entered into force 28 October 1795) [*Jay Treaty*]; the *Exchange of Notes between the United Kingdom and the United States concerning the Naval Forces to be maintained on the Great Lakes*, 28 & 29 April 1817, 5 BSP 1200 (entered into force 29 April 1817) [*Rush-Bagot Agreement*]; the *Webster Ashburton Treaty* (1842); the *Northwest Boundary Treaty* (1846); the *Treaty between the United Kingdom and the United States of America relative to Fisheries, Commerce and Navigation*, 5 June 1854, 44 BSP 25 (entered into force 9 September 1854, terminated 17 March 1866) [*Reciprocity Treaty of 1854*, also known as the *Elgin Marcy Treaty*]; the *Treaty between the United Kingdom and the United States for the Amicable Settlement of All Causes of Differences Between the Two Countries*, 8 May 1871, 61 BSP 40 (entered into force 17 June 1871) [*Treaty of Washington*]; and the *Treaty between the United States and Great Britain relating to Boundary Waters between the United States and Canada*, 11 January 1909, 36 US Stat 2448; USTS 548 (entered into force 5 May 1910) [*Boundary Waters Treaty*].

known as the Jay Treaty) to avert further conflict.³¹ The Jay Treaty protected the rights of individuals with respect to property and repayment of debt, which allowed for 10 years of relatively peaceful relations between the United States and Great Britain. Article III of the Jay Treaty also referred to the movement of First Nations peoples across the newly established border.³²

The Treaty of Paris of 1763 and the Treaty of Paris of 1783, however, did not mark the end of military conflict between the United States and Great Britain. The War of 1812 involved Canada when the Americans invaded several parts of Upper and Lower Canada and took military action on the Great Lakes. The war was brought to an end only after months of negotiation in the neutral city of Ghent. Signed on Christmas Eve 1814, the Treaty of Ghent called for a return to pre-war borders, allowed for the release of all prisoners and restored the peace.³³

The Treaty of Ghent marked the beginning of peaceable bilateral relations between Great Britain and the United States and was followed by three other agreements that would help solidify peace and bring greater economic prosperity: the 1817 Rush-Bagot Agreement,³⁴ the Anglo-American Convention of 1818³⁵ and the Reciprocity Treaty of 1854.³⁶

The Rush-Bagot Agreement — in essence, a disarmament treaty — sought to limit British and American naval activity on the Great Lakes and Lake Champlain. The agreement was

immediately followed by the Anglo-American Convention of 1818, a treaty between the United Kingdom and the United States that, importantly for the future of Canada, resulted in the mutual acceptance of a straight, fixed boundary at the forty-ninth parallel, north. This boundary line was agreed to, in part, because a straight-line boundary would be easier to survey than the pre-existing boundaries based on watersheds.

The mid-1800s was a period of increased cross-border trade between the United States and the provinces of British North America. This surge in economic activity was due in part to the Reciprocity Treaty of 1854,³⁷ an agreement that lowered duties on Canadian raw materials and agricultural products. In exchange for ending a 21 percent tariff on natural resource imports, the United States obtained fishing rights off the East Coast. The Reciprocity Treaty of 1854 related to fisheries and commerce, as well as navigation. The treaty was ultimately opposed by protectionist elements following Britain's collaboration with Confederate forces in the American Civil War. The United States' termination of the treaty in 1866, combined with a potential expansionist threat following the American Civil War, helped bolster calls for unification of the British colonies and accelerated negotiations that led to Confederation and the creation of the Dominion of Canada.

Imperial Treaties Post-Confederation (1867–1900)

As a member of the British Empire, Canada remained under the sovereignty of the British Crown after Confederation. To ensure the diplomatic unity of the empire, treaties were negotiated, signed and ratified by the British Crown. The dominions then dutifully undertook any new obligations created by such imperial treaties.³⁸ In addition, lacking the capacity to enter into direct

31 *Jay Treaty*, *supra* note 30.

32 A 2016 report by the Standing Senate Committee on Aboriginal Peoples seeks a “practical solution” to border crossing issues. See Senate, Standing Committee on Aboriginal Peoples, *Border Crossing Issues and the Jay Treaty*, (June 2016), online: <www.senate-senat.ca>. For further discussion on this topic, see also Dan Lewerenz, “Historical Context and the Survival of the Jay Treaty Free Passage Right: A Response to Marcia Yablon-Zug” (2010) 27 *Ariz J Intl & Comp L* 193; Marcia Yablon-Zug, “Gone but Not Forgotten: The Strange Afterlife of the Jay Treaty’s Indian Free Passage Right” (2007) 33 *Queen’s LJ* 565.

33 *Treaty of Peace and Amity between the United Kingdom and the United States*, 24 December 1814, 2 BSP 357 (entered into force 17 February 1815).

34 *Rush-Bagot Agreement*, *supra* note 30.

35 *Convention between the United States and the United Kingdom respecting Fisheries, Boundary and the Restoration of Slaves*, 20 October 1818, 8 Stat 248, TS No 112 (entered into force 30 January 1819). Britain ceded all of Rupert’s Land south of the forty-ninth parallel and east of the Continental Divide, including all of the Red River Colony south of that latitude, while the United States ceded the northernmost edge of the Missouri Territory above the forty-ninth parallel. Several unsettled borders remained, some to this day.

36 *Reciprocity Treaty of 1854*, *supra* note 31.

37 For a discussion on the negotiation, ratification and termination of the Reciprocity Treaty of 1854, see Michael Hart, *A Trading Nation: Canadian Trade Policy from Colonialism to Globalization* (Vancouver, BC: UBC Press, 2002) at 49–53, 55–57, 114, 444.

38 See Carl Berger, *The Sense of Power: Studies in the Ideas of Canadian Imperialism, 1867–1914* (Toronto, ON: University of Toronto Press, 2013). Berger’s landmark study on Canadian imperialism between 1867 and 1914 analyzed the ideas of leading proponents of Canadian involvement in the British Empire and some of the empire’s most persistent critics. Berger focuses on the political scene of the period and suggests that Canadian imperialism was a form of Canadian nationalism. For the British perspective on this period, see Duncan Bell, *Reordering the World: Essay on Liberalism and Empire* (Princeton, NJ: Princeton University Press, 2016).

treaty relations with other countries, Canada could only engage in diplomatic relations through Britain. This was perhaps most challenging for Canada when dealing with the United States on immediate matters of common interest and concern.³⁹

Practical considerations allowed Canadian officials to participate in treaty negotiations with the United States, albeit under imperial authority. For example, in 1871, Canadian Prime Minister Sir John A. Macdonald was designated a junior member of the British delegation to negotiate the Treaty of Washington.⁴⁰ The negotiations concerned outstanding claims, including illegal fishing by American boats in Canadian waters, and British claims for compensation for losses of British citizens in the American Civil War.⁴¹ As one of five commissioners chosen to represent British interests, Macdonald helped to ensure that the new dominion would at least be at the table to discuss matters directly affecting Canada. While he was ultimately successful in securing the reluctant endorsement of the Canadian Parliament for the treaty, Macdonald was criticized for failing to ensure that Canada received compensation for the raids that occurred during the American Civil War or any significant trade advantages in the settlement, which required Canada to open its waters to American fishermen.⁴²

Evolving Treaty and Diplomatic Autonomy (1900–1936)

Following Canada's victories and losses in World War I, there was a greater awareness of Canadian interests as distinct from Britain's and the need for autonomy over foreign policy, including independent treaty-making power. This section of the paper traces treaty relations in the early part of what has been referred to as Canada's Century.⁴³ The section is divided into two parts: 1900 to 1916 and 1917 to 1936. The early years of the new century witnessed the negotiation of the Boundary Waters Treaty with the United States,⁴⁴ the creation of the Department of External Affairs and the appointment of the department's first legal adviser.

The debate over Canada's right to negotiate and conclude treaties continued into the twentieth century with calls for more independent diplomatic action. Such action was needed on a growing number of issues with the United States, in particular, on matters related to transboundary waters. As a result, in 1907, Prime Minister Sir Wilfrid Laurier appointed George Christie Gibbons⁴⁵ to lead negotiations with the United States on the Boundary Waters Treaty.⁴⁶ Gibbons, who was later knighted for his efforts, was the first Canadian "principal negotiator" of a major treaty affecting Canada. The final agreement was signed in 1909 by the British ambassador to Washington and was ratified by King Edward VII.⁴⁷

39 For a detailed account of Canada's desire for direct negotiations on treaty matters with foreign governments, see C Hibbert Tupper, "Treaty-Making Powers of the Dominions" (1917) 17 J Soc Comp Legis 5.

40 *Treaty of Washington*, *supra* note 30. Signed in May 1871, the treaty was ratified by the United Kingdom in June 1871 in the name of the British Empire.

41 See Joseph Pope, *Memoirs of the Right Honourable Sir John Alexander MacDonal*, GCB, *First Prime Minister of the Dominion of Canada* (Oxford, UK: Oxford University Press, 1930) at 442–500.

42 Tupper, *supra* note 39 at 6. Tupper notes that Macdonald's correspondence, published after his death, establishes the many difficulties he surmounted with his British colleagues to defend Canadian interests and that, but for Macdonald, the Treaty of Washington would have failed in securing the assent of the Canadian Parliament. It was not only Macdonald who realized Canadian interests were being sacrificed for Great Britain. See also *House of Commons Debates*, 7th Parl, 2nd Sess, No 34 (7 April 1892) at 1104 (Hon David Mills). For a discussion on the ratification of the Treaty of Washington by the Canadian Parliament, see Pope, *supra* note 41 at 500, 510.

43 This is a reference to Sir Wilfrid Laurier's speech at Toronto's Massey Hall on October 14, 1904, when he said that "the twentieth century shall be the century of Canada and Canadian development."

44 *Boundary Waters Treaty*, *supra* note 30.

45 See Alan O Gibbons, "Sir George Gibbons and the Boundary Waters Treaty of 1909" (1953) 34:2 Can Hist Rev 124; Katherine Hanson, "The Great Lakes Compact and Transboundary Water Agreements" (2016) 34:3 Wis Intl LJ 668; Gordon Walker, "The Boundary Waters Treaty 1909 – A Peace Treaty" (2015) 39 Can-USLJ 170; Peter V Neffenger, "Commemoration of the 100 Year Anniversary of the International Boundary Waters Treaty" (2008) 34:2 Can-USLJ 477; B Timothy Heinmiller, "The Boundary Waters Treaty and Canada-US Relations in Abundance and Scarcity" (2008) 54 Wayne L Rev 1499.

46 *Boundary Waters Treaty*, *supra* note 30.

47 For a detailed discussion on this agreement, see a paper in this series (CIGI, "Canada in International Law at 150 and Beyond") by Dean Sherratt & Marcus Davies.

Given that some Canadians, including Prime Minister Laurier, had previously attributed Canada's inability to properly defend its interests internationally to a lack of independent treaty-making power,⁴⁸ it came as no surprise that, in 1909, Laurier created the Department of External Affairs — a small but critical step toward more independent diplomatic actions.⁴⁹

Soon after creating the Department of External Affairs, Laurier went on to fight and lose an election over a proposed reciprocity agreement with the United States. While accepted by the US Congress, the deal was rejected by Canadians at the ballot box in September 1911, and Robert Borden was elected prime minister. Borden, also a strong supporter of greater Canadian autonomy, soon appointed Loring Christie as the first legal adviser to the nascent Department of External Affairs.⁵⁰ Christie's role was to improve the quality of legal advice available to the government and the Department of External Affairs on international treaties and other matters of international law and to attend international and imperial conferences in an advisory capacity.⁵¹ As Borden's assistant during World War I, Christie travelled with Borden to the 1917 and 1918 meetings of the Imperial War Cabinet and to the 1919 Paris Peace Conference.⁵²

As Canada's contribution to the war effort far outstripped its size, Borden insisted on distinct Dominion representation with a “new

assertiveness” at the 1919 Paris Peace Conference⁵³ and on separate signatures for Australia, Canada, New Zealand and South Africa on the Treaty of Versailles⁵⁴ — the final agreement that imposed the peace terms on Germany following the war. As a result, the British prime minister signed the subsequent treaties on behalf of the British Empire, while the dominions signed in a subordinate position below the British prime minister as autonomous members of the empire. Moreover, each dominion's Parliament separately signified its approval of the Treaty of Versailles before it was ratified by the king on behalf of the British Empire.⁵⁵ The Treaty of Versailles also included a covenant that created the League of Nations,⁵⁶ in which Canada gained separate representation. In light of these developments, Canada was increasingly recognized as both a separate nation and a unit of the British Empire. The concept of an independent Canada was finally beginning to emerge.

First elected prime minister in 1921, William Lyon Mackenzie King was determined to make good on Canadian aspirations for independent treaty-making power. The opportunity arose in 1923, when an agreement concerning fishing rights in the North Pacific Ocean, known as the Halibut Convention,⁵⁷ was negotiated with the United States. As the issue at hand was the sole concern of Canada and the United States, Mackenzie King decided that the convention should be signed by Canada alone. Prime Minister Mackenzie King threatened to break the diplomatic unity of the British Empire through separate Canadian representation in Washington, DC, if the British did not consent to his demand. In the end, the dominion not only negotiated the Canada-US Halibut Convention, but, on March 2, 1923, with the acceptance of London, was the

48 John Castell Hopkins, *Canada: An Encyclopedia of the Country; the Canadian Dominion Considered in its Historic Relations, its Natural Resources, its Material Progress and its National Development* (Toronto, ON: Linscott, 1900) at 233.

49 See James Eayrs, “The Origins of Canada's Department of External Affairs” (1959) 25:2 *Can J Econ & Poli Sci* 109. An additional, more administrative reason for creating the Department of External Affairs can be found in the department's official administrative history. As Canada had no designated repository for accumulated records and documents arising from international negotiations, or when dealing with specialized aspects of Canada-US relations, the new department would be responsible for administering and archiving such documents. See John Hilliker, *Canada's Department of External Affairs, Volume I: The Early Years, 1909–1946* (Montreal, QC: McGill-Queen's University Press, 1990) at 29.

50 John A Munro, “Loring Christie and Canadian External Relations, 1935–1939” (1972) 7:2 *J Can Stud* 28; Arthur Reginald Marsden Lower, “Loring Christie and the Genesis of the Washington Conference of 1921–1922” (1966) 47:1 *Can Hist Rev* 38.

51 See Hilliker, *supra* note 49 at 64–65.

52 See Alex I Inglis, “Loring C. Christie and the Imperial Idea, 1919–1926” (1972) 7:2 *J Can Stud* 19.

53 Margaret MacMillan, *Paris 1919: Six Months that Changed the World* (New York, NY: Random House, 2001) at 45.

54 *Treaty of Peace between the Allied and Associated Powers and Germany*, 28 June 1919, 1919 *BTS* 4 (entered into force 10 January 1920, terminated 10 September 1939) [*Treaty of Versailles*].

55 See generally Robert Laird Borden, ed, *Robert Laird Borden: His Memoirs* (Toronto, ON: Macmillan and Company, 1938); Robert Laird Borden, *Canadian Constitutional Studies: The Marfleet Lectures*, University of Toronto, October, 1921 (Clark, NJ: The Lawbook Exchange, 2005); Robert Laird Borden, *Canada in the Commonwealth: From Conflict to Co-operation* (Oxford, UK: Clarendon Press, 1929).

56 Part 1 of the *Treaty of Versailles*, *supra* note 54, was the Covenant of the League of Nations.

57 *Convention between Canada and the United States of America for the Preservation of the Halibut Fisheries of the Northern Pacific Ocean*, 2 March 1923, 32 *LNTS* 93 (entered into force 21 October 1924, terminated 9 May 1931).

sole signatory of the treaty on behalf of Canada, which soon became the accepted practice.⁵⁸

The precedent set by a Canadian minister signing the Halibut Convention was endorsed by the Imperial Conference of 1926 in the form of the Balfour Declaration, which confirmed all British dominions as “autonomous equal communities within the British Empire.”⁵⁹ This equality of status gave Canada the power to undertake foreign relations directly with Washington, DC, and other capitals, and to negotiate, sign and ratify treaties. The Balfour Declaration also opened the way to formal diplomatic relations between Canada and the United States, and, in 1927, Canada’s first envoy with full diplomatic status was appointed to Washington, DC.

More than six decades after Confederation, the Balfour Declaration allowed Canada to move a step further toward full sovereignty. Canada’s right to conclude treaties was later legally formalized in the United Kingdom under the Statute of Westminster,⁶⁰ passed on December 11, 1931. Under the statute, “Canada and a number of other British Dominions, acquired full independence, and with it, authority to act internationally with all the attributes of a sovereign state.”⁶¹

Following the Statute of Westminster, Canada assumed the British constitutional convention that international treaty negotiation is conducted by the executive under the royal prerogative.⁶² British legal and political conventions have since changed, with the United Kingdom adopting a statutory requirement for parliamentary involvement in treaty making by enactment of the Constitutional Reform and Governance Act, 2010. Through what

is known as the Ponsonby Rule, all UK treaties requiring domestic ratification must be presented to both houses of Parliament 21 days before ratification. This allows members of both houses to discuss the treaty and deliberate its implications before it becomes part of domestic law. This rule does not apply to treaties that explicitly require parliamentary approval before coming into force or treaties not subject to ratification.⁶³

Canada’s Treaty Diplomacy (1937–2016)

Canada’s treaty relations during and following World War II have in many ways helped to define the nation’s role in the modern world. This section covers the period from 1937 to 2016: first, the rapid expansion of Canada’s treaty partners from 1937 to 1966; second, a statistical analysis of the type and volume of Canadian treaties since 1967; and third, some observations and their implications for Canadian diplomacy.

Highlights from 1937 to 1966

In 1938, in the context of war looming in Europe, US President Theodore Roosevelt delivered a speech at Queen’s University in Kingston, Ontario (known as the Kingston Proclamation), in which he asserted that “the people of the United States would not stand by if the domination of Canadian soil is threatened by any other Empire.”⁶⁴ Two years later, almost to the day, Prime Minister Mackenzie King and President Roosevelt made a joint declaration calling for closer military cooperation, commonly referred to as the Ogdensburg Agreement.⁶⁵ The Ogdensburg Agreement led to the creation of the Permanent Joint Board of Defence

58 See Horace F Read, “Canada as a Treaty Maker” (1927) 5:5 Can B Rev 229; JJ Lador-Lederer, “Development of International Law Concerning Fisheries” (1958) 85 JDI 634.

59 Imperial Conference, 1926, *Inter-Imperial Relations Committee: Report*, The National Archive, Cabinet Office 32/56, Doc E 129 at 1.

60 *Statute of Westminster*, 1931 (UK), 22 Geo V, c 4.

61 Daniel Dupras, *International Treaties: Canadian Practice* (Ottawa, ON: Library of Parliament, 2000). Once full power over foreign affairs had been granted to Canada, section 132 of the Constitution Act, 1867 became obsolete. See also Hogg, *supra* note 10.

62 For a useful account on the exercise of these powers, see AE Gotlieb, “Canadian Practice in International Law during 1965 as Reflected Mainly in Public Correspondence and Statements of the Department of External Affairs” (1966) 4 Can YB Intl Law 260 at 271. See also Hogg, *supra* note 10. The role of the governor general in this process was later confirmed in the 1947 Letters Patent: *Letters Patent Constituting the Office of Governor General and Commander-in Chief of Canada*, (1 October 1947) C Gaz, 1.

63 See Harrington, “Scrutiny and Approval”, *supra* note 3 at 127. From 1926 to 1966, the practice in Canada was for all important treaties to be submitted to Parliament for approval prior to ratification, a practice that began with Prime Minister (and Secretary of State for External Affairs) William Lyon Mackenzie King (*ibid* at 137). A tabling of treaties in Parliament policy was reintroduced in Canada in 2008; *Policy on Tabling*, *supra* note 19. See also McDorman, *supra* note 3.

64 Franklin D Roosevelt, “Address” (Address delivered at Queen’s University, Kingston, Ontario, 18 August 1938), online: <www.presidency.ucsb.edu>.

65 *Declaration by the Prime Minister of Canada and the President of the United States of America regarding the establishing of a Permanent Joint Board of Defence*, 18 August 1940, 6 Bevans 189, Can TS 1940 No 14.

(PJBD), comprised of diplomatic and military representatives from both countries with the goal of protecting continental security. The PJBD continues to the present day as the senior joint advisory body on Canada-US security matters.⁶⁶

During and immediately following World War II, Canadian soldiers and diplomats worked with the United States and other partners to create a number of new and revolutionary treaties related to a broad spectrum of issues — from political, economic and security matters to human rights and the prevention of genocide. These included the Bretton Woods Agreements,⁶⁷ the UN Charter,⁶⁸ the Statute of the International Court of Justice,⁶⁹ the General Agreement on Tariffs and Trade,⁷⁰ the North Atlantic Treaty⁷¹ and the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.⁷² Although the Universal Declaration of Human Rights⁷³ is not a legally binding treaty, Canadians also played a significant role in drafting it.

By the end of World War II, Canada had almost 80 treaty partners, including a number of new international organizations.⁷⁴ In light of this rapid expansion, the Department of External Affairs consolidated its work on treaties and created a separate Treaty Division reporting to

the legal adviser in the spring of 1946.⁷⁵ Canada also took an active interest and role in a detailed review of the law of treaties between states carried out by the International Law Commission (ILC) of the United Nations. The review, which began in the 1950s, culminated almost 20 years later in the Vienna Convention on the Law of Treaties⁷⁶ (Vienna Convention), which provides common rules for the interpretation of treaties with the aim of ensuring greater coherence and legal certainty in their application.

In his book *Canadian Treaty-Making*,⁷⁷ Allan Gotlieb, who was legal adviser to the secretary of state for external affairs from 1967 to 1968, documents the Canadian treaty-making process and practice at the time of his writing. He describes the federal government's postwar treaty making as a move from a "formal, cumbersome approach" to one that was "informal and pragmatic."⁷⁸ Importantly, for the purposes of this survey, Gotlieb also provides an overview of bilateral and multilateral treaty-making activity from the creation of the Department of External Affairs in 1909 until 1967.

Figure 1 presents the number of treaties concluded by Canada between 1937 and 1966.⁷⁹ The totals provided by Gotlieb have been adjusted to ensure that the periodization coincides with more recent data for the years 1967–2016/2017, described in the following section.

66 *The Canada-US Defence Relationship*, National Defence and the Canadian Armed Forces (4 December 2014), project no 13.055, online: <www.forces.gc.ca>.

67 *Final Act of the United Nations Monetary and Financial Conference*, 1–22 July 1944, Can TS 1944 No 37 (entered into force 27 December 1945). The Final Act included separate conventions for the International Bank of Reconstruction and Development and the International Monetary Fund.

68 *Charter of the United Nations*, *supra* note 16.

69 26 June 1945, 3 Bevans 1179, 59 Stat 1031, TS 993, 39 AJIL Supp 215, Can TS 1945 No 7 (entered into force 24 October 1945).

70 30 October 1947, 55 UNTS 187, TIAS 1700 (entered into force 1 January 1948).

71 4 April 1949, Can TS 1949 No 7 (entered into force 24 August 1949).

72 *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951, entered into force for Canada 2 December 1952).

73 GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948), online: <www.un.org/en/universal-declaration-human-rights/>. John Humphrey, a Canadian lawyer, diplomat and human rights activist, was appointed director of the newly created Division of Human Rights within the UN Secretariat. He was a member of the commission that produced the declaration and is credited with drafting a list of rights that formed the basis of the declaration. See John Humphrey, *Human Rights & the United Nations: A Great Adventure* (Dobbs Ferry, NY: Transnational Publishers, 1984).

74 See Gotlieb, *supra* note 2 at 61.

75 The division registered and published international agreements of interest to Canada and became part of the Legal Division in 1947. See Hilliker, *supra* note 49 at 276.

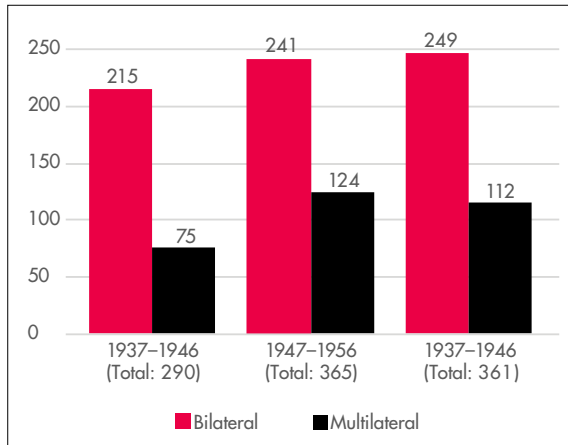
76 See *Canada and the United Nations, 1945–1975* (Ottawa, ON: Department of External Affairs, 1977) at 153. Marcel Cadieux, then legal adviser to the Department of External Affairs, was a member of the ILC from 1961 to 1966. The ILC prepared drafts on the Vienna Convention and on representation of states in their relations with international organizations.

77 See Gotlieb, *supra* note 2.

78 *Ibid* at 84.

79 As noted by Gotlieb, "a treaty is regarded as concluded in the year that it was entered into except that, where ratification or accession is necessary, the treaty is included in the year in which the act of ratification or accession took place. Where a treaty came into effect provisionally, prior to ratification, it is included in the year it took provisional effect." *Ibid* at 41.

Figure 1: Number of Treaties Concluded by Canada, 1937–1966



Source: Treaty Law Division, GAC.

During the decade following World War II (1947–1956), Canada concluded 365 treaties.⁸⁰ Not surprisingly, in light of early Canadian treaty-diplomacy, many of these agreements with the United States relate primarily to border issues, economic relations and defence. Other topics include air transport, taxation, consular matters, radio and television broadcasting and atomic energy.⁸¹

Gotlieb reported that, between 1946 and 1967, of the 555 bilateral treaties entered into by Canada, approximately one-third were with the United States.⁸² While the number of Canada’s treaty partners increased during this period, Canada still undertook five times as many agreements with the United States as it did with its next most significant treaty partners, the United Kingdom and France.

80 See *ibid* at 45–47. This contrasts with the 290 agreements entered into in the period leading up to and during World War II (1937–1946).

81 Gotlieb noted the following main recurring themes in the 555 bilateral treaties Canada concluded between 1946 and 1967: trade commerce (82) and defence/military cooperation (77); civil aviation (64); taxation (48); consular and immigration (45); economic cooperation (29); financial questions (29); boundary waters (29); radio, television and communications (23); atomic energy (22); maritime shipping (16); and war claims (14). See *ibid* at 63–64.

82 This was followed by treaties with states including the United Kingdom (34); France (23); South Africa (22); Venezuela (19); India (15); Denmark, Netherlands and Norway (15 each); and Belgium, the Federal Republic of Germany, Japan and the Soviet Union (12 each). The number of treaties with Venezuela and South Africa resulted from agreements entered into annually to renew privileged trading arrangements. Gotlieb, *supra* note 2 at 60.

Canadian Treaty Making Since 1967

Like the post-World War II period, the last 50 years (1967–2016) have also witnessed a flourishing of international treaty making by Canada, both bilaterally and multilaterally. Canada’s treaty diplomacy during this period reflects significant changes in Canada’s economy and population and its relationship with the world. The number of Canada’s potential treaty partners expanded from 80 at the close of World War II to almost 200 by the late 1960s. Not surprisingly, by 1967, Canada’s Department of External Affairs was more than twice the size it had been only 20 years earlier.

Canada’s approach to multilateralism continues to be a topic of debate by historians, political scientists and legal scholars.⁸³ One consistent marker of Canadian activity in this area over the decades has been Canada’s role in the negotiation of multilateral treaties to deal with regional issues or broader concerns of global governance — frequently, but not exclusively, within the UN system. Participation in these treaties, which require broad international collaboration and cooperation, helps to ensure that Canadian interests in transnational issues or problems are taken into account.

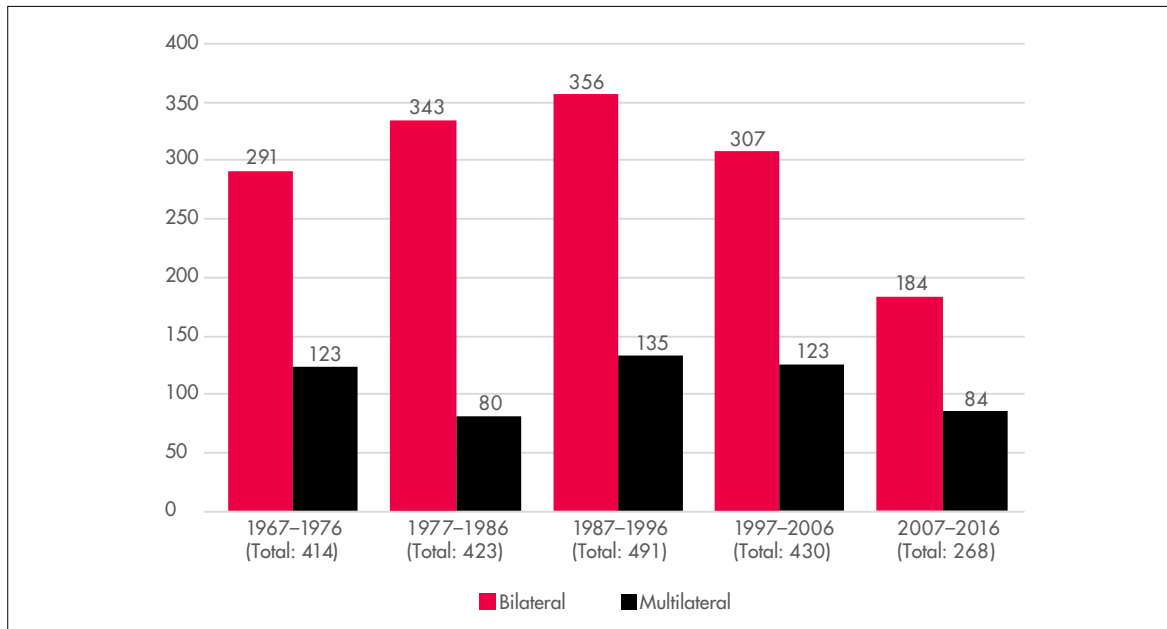
Multilateral treaties also include what have been referred to as mega-regional agreements, such as NAFTA,⁸⁴ the Comprehensive Economic and Trade Agreement between Canada and the European Union (CETA),⁸⁵ the Strategic Partnership Agreement

83 See e.g. David Black & Greg Donaghy, “Manifestations of Canadian Multilateralism” (2010) 16:2 *Can Foreign Pol’y J* 1; Keith H Christie, “Looking Ahead: Setting a New High-Water Mark for Canadian Multilateralism: Canada’s 2010 G8 and G20 Summits” (2010) 16:2 *Can Foreign Pol’y J* 143; Tom Keating, “Multilateralism: Past Imperfect, Future Conditional” (2010) 16:2 *Can Foreign Pol’y J* 9.

84 NAFTA, *supra* note 7.

85 *Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union [and its Member States...]*, 30 October 2016 (provisionally applied 21 September 2017; not yet in force), online: <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/aqr-acc/ceta-aecg/text/texte/toc-tdm.aspx?lang=eng>.

Figure 2: Number of Treaties Entered into Force for Canada, 1967–2016



Source: Treaty Law Division, GAC.

between Canada and the European Union (SPA)⁸⁶ and the Trans-Pacific Partnership (TPP).⁸⁷

Bilateral and Multilateral Treaty Activity (1967–2016)

Recent survey data noted 2,000 treaties that entered into force from 1967 to 2016 (see Figure 2). Approximately three-quarters of these treaties were bilateral, with the remainder being multilateral agreements.

The relative consistency in the total number of treaties entered into force for each 10-year period between 1967 and 2006 is noteworthy (414, 423, 491 and 430). The peak period was from 1987 to 1996, when 491 treaties entered into force.

These numbers contrast with the 268 treaties entered into by Canada from 2007 to 2016.⁸⁸

A decline in multilateral treaty activity toward the end of the Cold War (1977–1986) was followed by an increase in the late 1980s and early 1990s. This increase coincided with an era of rapid geopolitical change, which included the eventual breakup of the Soviet Union and the Warsaw Pact and the reunification of Germany in 1990. The creation of the WTO and the entry into force of the Canada–US Free Trade Agreement⁸⁹ and NAFTA are also reflected in this period.

The period between 2007 and 2016 witnessed a significant slowdown in both bilateral and multilateral Canadian treaty making. It is impossible to pinpoint with certainty the cause of this relative decline. The 2008 financial crisis led to the worst global economic downturn since the Great Depression and was followed by the European debt crisis. In Canada, more rigorous oversight of the treaty-approval process was introduced in 2008, with the

⁸⁶ *Strategic Partnership Agreement between Canada, of the one part, and the European Union and its Member States, of the other part*, 30 October 2016 (provisionally applied on 1 April 2017), online: <http://international.gc.ca/world-monde/international_relations-reactions_internationales/can-eu_spa-sps_can-ue.aspx?lang=eng>.

⁸⁷ 4 February 2016 (not in force and recently renegotiated without the United States, as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership [CPTPP]), online: <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/toc-tdm.aspx?lang=eng>.

⁸⁸ This was during a period of minority Conservative government, following the 2006 federal election. During such periods, there is often little international travel by ministers, and thus fewer agreements are signed and concluded.

⁸⁹ *Free Trade Agreement between the Government of Canada and the Government of the United States of America*, 2 January 1988, Can TS 1989 No 3 (entered into force 1 January 1989, suspended 1 January 1994).

Table 1: Bilateral Treaties Entered into Force for Canada, 2006–2017

Number of Treaties	Lead Department	Type of Treaty
49	Finance	double taxation, tax information sharing
30	International Trade	investment protection and free trade
17	Foreign Affairs	consular, headquarters agreements, youth mobility, science and technology
17	Human Resources	labour, social security
11	Transport Canada	air transport
11	Innovation, Science and Economic Development	atomic energy, space, telecommunications
10	Fisheries and Ocean	Great Lakes/icebreaking, safety of life at sea
8	Canadian Border Services Agency	customs/preclearance/confiscated assets
7	Natural Resources Canada	atomic/nuclear energy
6	Environment Canada	Great Lakes/water quality
5	Justice	extradition, mutual legal assistance
4	Canadian Heritage	audio-visual, copyright, sports (Olympics, anti-doping)
3	National Defence	defence cooperation
3	Agriculture Canada	tariff agreements
2	Public Safety	civil emergency preparedness
1	Citizenship and Immigration	sharing of visa and immigration information

Source: Treaty Law Division, GAC.

current *Policy on Tabling of Treaties in Parliament*. During this period, there was also a consolidation of gains from previous treaty activity, an increased use of non-legally binding instruments and the development of private law solutions to treaty matters.⁹⁰ As well, negotiation of CETA and the TPP absorbed considerable diplomatic energy. The significance of these agreements is discussed in greater detail in the section below on multilateral treaties.

Bilateral Treaty Activity (2007–2016)

During the last decade, Canada entered into 184 bilateral agreements. The subject matter of some

of the agreements is familiar from the previous discussion, while others reflect new issues, priorities and partners. Table 1 above provides a list of the main types of bilateral treaties entered into between 2007 and 2016. Also indicated is the lead federal government department. Many agreements cover double taxation and tax-information sharing, foreign investment protection and free trade, social security and air transport. Other topics range from atomic energy, space, telecommunications, fisheries and safety at sea, to customs and the environment.

Of the 184 bilateral treaties entered into by Canada between 2007 and 2016, 23 agreements were with the United States, which continues to be Canada's principal bilateral treaty partner. Of these 23 treaties, most involved familiar subjects: fisheries (salmon and tuna), taxation,

⁹⁰ See e.g. Lawrence L Herman, *The New Multilateralism: The Shift to Private Global Regulation* (Toronto, ON: CD Howe Institute, 2012).

trade, and security and defence. Canada's next most important bilateral treaty partner was the United Kingdom (10 agreements), followed by the People's Republic of China (PRC) (8 agreements). All treaties with the United Kingdom during this period were related to tax-information sharing, while those with the PRC were primarily on trade and investment, transport, nuclear cooperation, and science and technology. It is noteworthy that while Canada entered into 27 treaties with its NAFTA partners, the United States and Mexico, in the last decade almost double that number were entered into bilaterally with the European Union (4) and its individual member states (53). This represented over 30 percent of all bilateral treaties entered into force for Canada during this period.

Multilateral Treaty Activity (2006–2016)

Table 2 provides a list of select UN agreements in which Canada has engaged in negotiations with the international community over the past 50 years. These agreements were selected because they are among the most ratified of all UN treaties concluded during this period. As a result, they reflect the highest levels of international collaboration and cooperation, and they exemplify the breadth of subject matters covered by modern multilateral agreements. Topics include, *inter alia*, the prohibition of the development and stockpiling of chemical weapons, the nonproliferation of nuclear weapons, the conservation of endangered species, the protection of the earth's ozone layer, the codification of the law of the sea, the establishment of an International Criminal Court and, more recently, climate change.

The negotiation of new high-profile multilateral agreements has slowed in recent years. A survey of GAC's annual submissions of treaty actions to the *Canadian Yearbook of International Law* for the past decade revealed that there appear to be more amendments made to consolidate and improve existing agreements than to launch major new initiatives. A recent notable exception is the adoption of the Paris Agreement on Climate Change in 2015.⁹¹ In addition, Canada has recently acceded to, or sought to accede to, several existing treaties and conventions such as the UN

⁹¹ *Ibid.*

Arms Trade Treaty⁹² and various International Labour Organization (ILO) conventions.⁹³

Despite the slowdown in high-profile multilateral treaty making relative to previous periods, 84 multilateral agreements entered into force for Canada during the past decade. Topics ranged from bribery, culture, customs, the environment, fisheries and fiscal matters to human rights, navigation, labour and drug control. These agreements were most frequently negotiated under the auspices of the United Nations (for example, the ILO, the United Nations Educational, Scientific and Cultural Organization, the WHO, the International Civil Aviation Organization, the International Maritime Organization, the UPU and the International Telecommunications Union) and, to a lesser degree, with other intergovernmental organizations (such as NATO and the WTO).

Mega-regional Agreements

The development of transatlantic and trans-Pacific partnerships is central to contemporary Canadian treaty making. The scale, scope and complexity of these mega-regional agreements place them at the leading edge of Canada's treaty diplomacy.⁹⁴

CETA and the SPA, as well as the TPP, were all signed by Canada in 2016. Together, CETA and the TPP (now the CPTPP) include almost 40

⁹² 2 April 2013, ATS 42 (entered into force 24 December 2014).

⁹³ See e.g. *Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively*, 1 July 1949, C98, 96 UNTS 258 (entered into force 18 July 1951, not yet in force for Canada); *Convention concerning Minimum Age for Admission to Employment*, 25 June 1973, C138, Can TS 2017 No 19 (entered into force 19 June 1976, entered into force for Canada 8 June 2017); *Convention concerning the Promotional Framework for Occupational Safety and Health*, 15 June 2006, C187, Can TS 2012 No 17 (entered into force 20 February 2009, entered into force for Canada 13 June 2012).

⁹⁴ CETA is Canada's largest treaty initiative since NAFTA, comprising 30 chapters, several protocols and annexes and reservations, and totaling approximately 2,250 pages in English. CETA was signed by Canada, the European Union and the European Union's 28 member states and is authentic in 23 languages. As a result, the complete CETA text in all languages is 51,000 pages in length. Similarly, the TPP/CPTPP is comprised of 30 chapters along with several appendices and annexes and is approximately 2,700 pages in English. The final text, available in English, French and Spanish, is approximately 9,700 pages in length. In comparison, the 22 chapters of NAFTA, including annexes and tariff schedules, in Spanish, English and French are approximately 2,500 pages in length.

Table 2: Select Most-ratified Multilateral Agreements Concluded between 1967 and 2016

Type of Treaty	Treaty
Non-proliferation	1968 Treaty on the Non-Proliferation of Nuclear Weapons ⁹⁵
Conservation	1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora ⁹⁶
Human Rights	1979 Convention on the Elimination of all Forms of Discrimination against Women ⁹⁷
Maritime matters	1982 United Nations Convention on the Law of the Sea ⁹⁸
Environment	1985 Vienna Convention for the Protection of the Ozone Layer ⁹⁹
Environment	1987 Montreal Protocol on Substances that Deplete the Ozone Layer ¹⁰⁰
Human Rights	1989 Convention on the Rights of the Child ¹⁰¹
Arms control	1992 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction ¹⁰²
Fisheries	1993 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas ¹⁰³
Disarmament	1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction ¹⁰⁴
Environment Justice	1997 Kyoto Protocol ¹⁰⁵
Criminal Law	1998 Rome Statute of the International Criminal Court ¹⁰⁶
Criminal Law	2000 United Nations Convention against Transnational Organized Crime ¹⁰⁷
Sport	2003 United Nations Convention against Corruption ¹⁰⁸
Human Rights	2005 International Convention against Doping in Sport ¹⁰⁹
Weapons	2006 Convention on the Rights of Persons with Disabilities ¹¹⁰
Environment	2008 Convention on Cluster Munitions ¹¹¹
	2015 Paris Agreement under the United Nations Framework Convention on Climate Change ¹¹²

Source: Treaty Law Division, GAC.

95 1 July 1968, Can TS 1970 No 7 (entered into force 5 March 1970).

96 3 March 1973, Can TS 1975 No 32 (entered into force 1 July 1975).

97 18 December 1979, Can TS 1982 No 31 (entered into force 3 September 1981; entered into force for Canada 9 January 1982).

98 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994).

99 22 March 1985, Can TS 1988 No 23 (entered into force 22 September 1988; entered into force for Canada 22 September 1988).

100 16 September 1987, Can TS 1989 No 42 (entered into force 1 January 1989).

101 20 November 1989, Can TS 1992 No 3 (entered into force 2 September 1990; entered into force for Canada 12 December 1992).

102 3 September 1992, Can TS 1997 No 44 (entered into force 29 April 1997).

103 24 November 1993, 2221 UNTS 91 (entered into force 24 April 2003).

104 18 September 1997, Can TS 1999 No 4 (entered into force 1 March 1999).

105 *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 11 December 1997, 2303 UNTS 148, 37 ILM 22 (entered into force 16 February 2005, withdrawn by Canada 15 December 2012).

106 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002).

107 15 November 2000, Can TS 2003 No 28 (entered into force 29 September 2003; entered into force for Canada 29 September 2003).

108 31 October 2003, Can TS 2007 No 7 (entered into force 14 December 2005; entered into force for Canada 1 November 2007).

109 19 October 2005, Can TS 2007 No 14 (entered into force 1 February 2007; entered into force for Canada 1 February 2007).

110 13 December 2006, Can TS 2010 No 8 (entered into force 3 May 2008; entered into force for Canada 10 April 2010).

111 30 May 2008, Can TS 2015 No 15 (entered into force 1 August 2010).

112 12 December 2015, Can TS 2016 No 9 (entered into force 4 November 2016).

signatories.¹¹³ In February 2017, the European Parliament voted to ratify CETA, which allowed for provisional application of the agreement on September 21, 2017. Less than two months later, following negotiations in Da Nang, Vietnam, the TPP was renamed the CPTPP, when the 11 remaining countries of the TPP¹¹⁴ agreed on the core elements of a new agreement. On January 23, 2018, CPTPP negotiations concluded with a new international treaty that incorporates the provisions of the TPP, with the exception of a number of provisions to be suspended on entry into force.¹¹⁵ The CPTPP was signed by trade ministers on March 8, 2018, in Santiago, Chile. Two months after six of the 11 members ratify the agreement, it will come into force. The possibility of CPTPP expansion offers further opportunities to enhance Canada's economic partnerships with other countries that have expressed interest in joining the CPTPP. These countries include those with which Canada already has a free trade agreement (for example, Korea and Colombia), as well as potential new partners such as Indonesia or the Philippines.

These mega-regional treaties provide new challenges for Canadian negotiators and treaty makers. And, much like NAFTA, these agreements have become the topic of debate among specialists in international relations and international economic law.¹¹⁶ Questions remain on the relationship between CETA, the TPP/CPTPP and NAFTA. Will CETA and the CPTPP serve as models to reinvigorate the world trading system, or will they encourage other mega-regional agreements? What will be the impact of CETA and the CPTPP parties on the relationship

between the United States and other traditional key partners? And, finally, how might these developments be offset by the United Kingdom's recent decision to exit the European Union?

Conclusions

Early international treaties, mostly concluded in Europe by European states and between the Crown and Indigenous peoples, are part of Canada's neglected history, which all Canadians need to understand more deeply for the purpose of truth and reconciliation.¹¹⁷ Canada's rather unusual evolution from a colony and dominion to a nation-state was not a smooth one, and treaty-related developments continue to shape Canada's story. By beginning to track, measure and analyze all Canadian bilateral and multilateral treaty activity over time, it is possible to identify areas of continuity and change, the implications of those areas for Canadian foreign policy and possible areas for future research.

Canada's treaty relations during and following World War II have, in many ways, defined its role in the modern world. While novel approaches to foreign policy are frequently looked at or considered by new governments, the main topics of Canada's treaty diplomacy have remained surprisingly consistent over the past 100 years. These broad themes include support for international institutions, promoting economic prosperity and well-being, security and defence and, more recently, human rights and the international environment. The survey results show that the total number of bilateral and multilateral treaties concluded by Canada has declined over the past decade. While it is too early to tell whether this trend will continue, it will be worth monitoring this development, along with its possible causes and implications going forward.

113 CETA provides Canada market access to 28 countries. The TPP was an agreement between 12 countries, now 11 following the withdrawal of the United States.

114 Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam.

115 The 22 suspensions cover a wide range of areas, with a focus on intellectual property provisions.

116 See e.g. Stefan Grillier, Erich Vranes & Walter Obwexer, eds, *Mega-Regional Trade Agreements: CETA, TTIP, and TiSA: New Orientations for EU External Economic Relations* (Oxford, UK: Oxford University Press, 2017). This collection addresses some of the legal complexities of these treaties from an economic, political science and legal perspective. See also Clifford Sosnow, Alexandra Logvin & Kevin Massicotte, "The Brexit Vote: Its Impact on the Canada-EU Comprehensive Economic and Trade Agreement and UK's Obligations under Comprehensive Trade and Economic Trade Agreement" (2017) 12:3 *Global Trade & Customs J* 125; Paul Kellogg, "Rejoinder: Canadian Political Economy in the Era of BREXIT and Trump" (2017) 12:1 *J Soc'y Socialist Stud* 155; Phuong Tran, "Brexit: How a Weakened European Union Affects NAFTA" (2016) 22 *Law & Bus Rev Americas* 281.

117 Truth and Reconciliation Commission of Canada, "Calls to Action" (Winnipeg, MB: Truth and Reconciliation Commission of Canada, 2015) at Calls for Action 27, 45–48, online: <www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf>. See also relevant papers in this paper series (CIGI, "Canada in International Law at 150 and Beyond"), *supra* note 28.

Author's Note

This paper was developed from a presentation at the Centre for International Governance Innovation in Waterloo, Ontario, in April 2017, and is part of a larger research project currently under way on the relationship between international law, Canadian treaty diplomacy and Canadian foreign policy. The author would like to thank colleagues Aleksandra Koziorska, Christopher Marcellus and Beth Utting for their assistance and review of various drafts. Special thanks to Ioana Corrigan for her research assistance. The views expressed are the author's own, and do not reflect the policies of the Government of Canada or Global Affairs Canada.


ON CANADA'S PAST, PRESENT AND FUTURE
IN INTERNATIONAL LAW

REFLECTIONS

RÉFLEXIONS

SUR LE PASSÉ, LE PRÉSENT ET L'AVENIR DU CANADA
EN MATIÈRE DE DROIT INTERNATIONAL

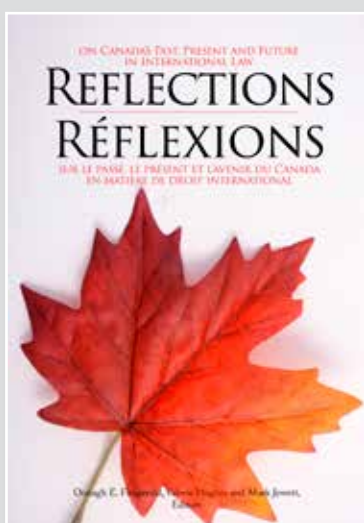
Oonagh E. Fitzgerald, Valerie Hughes and Mark Jewett,
Editors



Marking 150 years since Confederation provides an opportunity for Canadian international law practitioners and scholars to reflect on Canada's rich history in international law and governance, where we find ourselves today in the community of nations, and how we might help shape a future in which Canada's rules-based and progressive approach to international law gains ascendancy. These essays, each written in the official language chosen by the authors, provide a critical perspective on Canada's past and present in international law, survey the challenges that lie before us and offer renewed focus for Canada's pursuit of global justice and the rule of law.

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