A Historical Survey of Canadian International Treaty Diplomacy

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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 articled with the Ottawa office of a major Canadian law firm.
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,
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

Under public international law, a treaty concluded between sovereign states, or between states and international organizations, constitutes a legally binding agreement.⁷ The term “treaty” used here refers to an international agreement governed by international law and concluded in writing.⁸ 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

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 Agreement (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.

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).


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.


treaty and, for the purposes of this discussion, is categorized under multilateral treaties. Bilateral treaties are considered contractual in nature and are “so-called law-making multilateral treaties.”

Treaties establish substantive and procedural obligations and frequently contain mechanisms to ensure compliance. In essence, treaties are “promises about future national behaviour.”

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. 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.”

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.

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. In addition to entry into force, signature and ratification, these actions can include accession, termination, partial termination, withdrawal, denunciation and provisional application 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. 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.

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11 Aust, supra note 10 at 11.
13 See Lipson, supra note 5.
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).

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around the globe. During this period, diplomatic relations between Indigenous and non-Indigenous peoples in North America were also frequently governed by treaties. 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.

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, 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.

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. 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, issued by King George III, and the related Niagara Treaty, 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.” 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.

A second Treaty of Paris, signed in 1783 by the United States and Great Britain, ended the American Revolutionary War. 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. A number of issues remained unresolved, however, and it took the negotiation of the Treaty of Amity, Commerce and Navigation of 1794 (commonly


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 XIXth, the most Christian King, 11 March and 11 April 1753; Fred L Israel, ed, Major Peace Treaties of Modern History, 1648–1962, 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.
known as the Jay Treaty) to avert further conflict.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{34} the Anglo-American Convention of 1818\textsuperscript{35} and the Reciprocity Treaty of 1854.\textsuperscript{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,\textsuperscript{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.\textsuperscript{38} In addition, lacking the capacity to enter into direct

\textsuperscript{31} Jay Treaty, supra note 30.


\textsuperscript{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).

\textsuperscript{34} Rush-Bagot Agreement, supra note 30.

\textsuperscript{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.

\textsuperscript{36} Reciprocity Treaty of 1854, supra note 31.

\textsuperscript{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.

\textsuperscript{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


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.


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.


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, 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.

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. 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. 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.

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 Conference and on separate signatures for Australia, Canada, New Zealand and South Africa on the Treaty of Versailles — 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. The Treaty of Versailles also included a covenant that created the League of Nations, 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, 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...
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 JDH 634.


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 Con 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 127). 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 General Agreement on Tariffs and Trade,69 the North Atlantic Treaty70 and the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.71 Although the Universal Declaration of Human Rights72 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.73 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 1946.74 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 Treaties75 (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,76 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.”77 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 1966.78 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>.


68 Charter of the United Nations, supra note 16.


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


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.
During the decade following World War II (1947–1956), Canada concluded 365 treaties. 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.

Gotlieb reported that, between 1946 and 1967, of the 555 bilateral treaties entered into by Canada, approximately one-third were with the United States. 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.

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. 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, the Comprehensive Economic and Trade Agreement between Canada and the European Union (CETA), the Strategic Partnership Agreement...
A Historical Survey of Canadian International Treaty Diplomacy

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. 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 Agreement 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

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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-relations_internationales/can-eu_spa-aps_can-ue.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.


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,
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. In addition, Canada has recently acceded to, or sought to accede to, several existing treaties and conventions such as the UN Arms Trade Treaty and various International Labour Organization (ILO) conventions.

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.

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

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


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 11,000 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

<table>
<thead>
<tr>
<th>Type of Treaty</th>
<th>Treaty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Non-proliferation</td>
<td>1968 Treaty on the Non-Proliferation of Nuclear Weapons95</td>
</tr>
<tr>
<td>Human Rights</td>
<td>1979 Convention on the Elimination of all Forms of Discrimination against Women97</td>
</tr>
<tr>
<td>Environment</td>
<td>1987 Montreal Protocol on Substances that Deplete the Ozone Layer100</td>
</tr>
<tr>
<td>Fisheries</td>
<td>1993 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas103</td>
</tr>
<tr>
<td>Disarmament</td>
<td>1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction104</td>
</tr>
<tr>
<td>Environment Justice</td>
<td>1997 Kyoto Protocol105</td>
</tr>
<tr>
<td>Criminal Law</td>
<td>1998 Rome Statute of the International Criminal Court106</td>
</tr>
<tr>
<td>Sport</td>
<td>2003 United Nations Convention against Corruption108</td>
</tr>
<tr>
<td>Human Rights</td>
<td>2005 International Convention against Doping in Sport109</td>
</tr>
<tr>
<td>Weapons</td>
<td>2006 Convention on the Rights of Persons with Disabilities110</td>
</tr>
<tr>
<td>Environment</td>
<td>2008 Convention on Cluster Munitions111</td>
</tr>
<tr>
<td></td>
<td>2015 Paris Agreement under the United Nations Framework Convention on Climate Change112</td>
</tr>
</tbody>
</table>

Source: Treaty Law Division, GAC.

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 TPP 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. 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. 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. 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.


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 Koziorowska, 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.
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.

Part I explores the history and practice of international law, including sources of international law, Indigenous treaties, international treaty diplomacy, domestic reception of international law and Parliament’s role in international law. Part II explores Canada’s role in international law, governance and innovation in the broad fields of international economic, environmental and intellectual property law. Economic law topics include international trade and investment, dispute settlement, subnational treaty making, 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. Part III explores 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, child soldiers and gender.

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 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.
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