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CANADA'S APPROACH TO THE TREATY-MAKING PROCESS

Publication No. 2008-45-E

1 April 2021

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Parliamentary Information, Education and Research Services

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This publication was prepared as part of the Library of Parliament's research publications program, which includes a set of publications, introduced in March 2020, addressing the COVID-19 pandemic.

Canada's Approach to the Treaty-Making Process
(HillStudies)

Publication No. 2008-45-E

Ce document est également publié en français.

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EXECUTIVE SUMMARY

In Canada, the treaty-making process is controlled by the executive branch of the federal government, while the Parliament of Canada ("Parliament") is often responsible for passing legislation to implement international treaties at the federal level. The treaty-making process is made up of five broad stages: negotiation, signature, ratification, implementation and coming into force.

The Minister of Foreign Affairs is technically responsible for negotiating international treaties on Canada's behalf. In practice, Global Affairs Canada plays a supervisory role during negotiations with foreign states and international organizations, along with other relevant government departments, depending on the subject matter. Treaty negotiations most often occur behind closed doors, although negotiations of multilateral treaties may sometimes be more transparent and open to civil society.

Once negotiators agree on the text of an agreement, Cabinet must give its approval before the treaty can be signed on Canada's behalf. Such a signature indicates that Canada agrees in principle with the treaty and intends to abide by its terms. After signature, the government must not take any actions that go against the object or purpose of the treaty.

Canada becomes bound by a treaty after ratification. Once all the formalities for the implementation and coming into force of the treaty are in place, Cabinet authorizes the Minister of Foreign Affairs to ratify the treaty. Although this entire process is controlled by the executive branch, the federal government does involve Parliament in this stage of the treaty-making process by tabling treaties and relevant explanatory documents for debate in the House of Commons.

As well, the executive branch cannot ratify an international treaty until measures are in place to ensure that the terms of the agreement are implemented in Canadian law. In some cases, this means that domestic laws must be passed by Parliament before ratification. In other cases, the federal government, after consultations with provinces and territories and other stakeholders, may consider that Canada's laws are already consistent with the international treaty obligations.

A treaty comes into force according to the terms of the treaty itself – this may mean that the treaty comes into force on a specific date or after it has been ratified by a certain number of countries.

A wide variety of international mechanisms exist for the enforcement of international treaties, from trade tribunals to United Nations treaty bodies and international courts. At the national level, however, there are few formal means of ensuring the government's compliance with the treaties it has ratified. Parliament has a role to play in oversight through the scrutiny of annual reports tabled before it and through committee studies. Non-governmental organizations and the Canadian Human Rights Commission may also hold the government to account, while Canada's courts generally interpret domestic laws based on a presumption that they are consistent with the country's international obligations.

Finally, it is important to note that many international treaties deal with issues under provincial jurisdiction, even if the federal government is ultimately responsible for the treaty-making process and for respecting its international commitments. Because of this, the federal government often involves the provinces and territories in the negotiating process to ensure collaboration for implementation and compliance.

CANADA'S APPROACH TO THE TREATY-MAKING PROCESS

1 INTRODUCTION

In Canada, the negotiation, signature and ratification of international treaties are controlled by the executive branch of the federal government, while the Parliament of Canada ("Parliament") is often responsible for passing legislation to implement such treaties at the federal level. This HillStudy explores Canada's approach to the negotiation, signature, ratification, implementation and coming into force of international treaties at the federal level, and includes a description of power over international affairs, the treaty-making process itself, various compliance mechanisms, and the federal–provincial/territorial relationship with respect to international treaties.

2 AUTHORITY RESPECTING INTERNATIONAL TREATIES

The *Constitution Act, 1867*[1] does not explicitly delineate federal or provincial authority with respect to the conduct of international affairs. In 1867, Canada was still a colony of the British Empire, and the British Parliament delegated the power to represent the Dominion of Canada internationally to the British Crown. However, although the British Crown had the authority to enter into treaties with foreign countries on Canada's behalf, the Canadian Parliament was granted responsibility for implementing those treaties in Canada under section 132 of the *Constitution Act, 1867*.

Over the years, Canada began to take increasingly independent action in its external affairs,[2] with the federal government gradually intervening on its own initiative in discussions relating to the negotiation of international treaties and conventions.[3] In 1926, Canada acquired the power to establish foreign relations and to negotiate and conclude its own treaties through the Balfour Declaration,[4] although some treaties still needed formal ratification by the British government. This power was incorporated into the 1931 *Statute of Westminster* and later confirmed in the 1947 Letters Patent Constituting the Office of Governor General of Canada.[5] As the federal government gained full powers over foreign affairs, section 132 of the *Constitution Act, 1867* became obsolete.[6]

Although authority over international relations is not explicitly conferred on the executive branch of the federal government under any constitutional provision, it is broadly recognized that this power has devolved upon it.[7] In countries like Canada that have inherited the British tradition, international relations are a prerogative of the Crown, which, in Canada, is exercised by the federal executive branch of government as the Crown's representative. As such, the executive branch is the only

branch of government with the authority to negotiate, sign and ratify international conventions and treaties.[8]

3 THE TREATY-MAKING PROCESS

3.1 NEGOTIATIONS

The *Department of Foreign Affairs, Trade and Development Act* states that the Minister of Foreign Affairs is responsible for negotiating international treaties on Canada's behalf.[9] In practice, however, Global Affairs Canada does not have a monopoly on negotiations with foreign states and international organizations, but rather plays a supervisory role, depending on the subject matter. For example, negotiations on the environment are generally conducted by Environment and Climate Change Canada; those on tax matters are led by the Canada Revenue Agency, etc. The people involved in negotiations can include ministers, deputy ministers, diplomatic representatives or other negotiators.

While multilateral treaty negotiations may have become more transparent and open to civil society input, bilateral and plurilateral[10] treaty negotiations are often conducted behind closed doors. Little may be revealed of the contents of treaties until the parties have reached an agreement in principle on content or wording.[11] Nevertheless, in recent years, the Government of Canada has initiated consultations with stakeholders and the public during the negotiation of some treaties.[12] Civil society and Parliament can also ensure that their perspectives are heard during the negotiating process by issuing reports with specific recommendations.[13]

3.2 SIGNATURE

Once treaty negotiators have agreed on the terms or text of an agreement, the lead department, working with Global Affairs Canada, requests Cabinet's approval, submitting an explanatory Memorandum to Cabinet setting out the details of the agreement. The treaty can be signed when approval is granted.[14] A signing order (Instrument of Full Powers) will designate one or more persons who have the authority to sign the treaty on behalf of Canada.[15]

It is important to recognize that the signature of an international treaty is not the last step in the treaty-making process; it only signifies a country's agreement in principle with the terms of the treaty and an intent to become bound by it. Upon signing a treaty, Canada must refrain from actions that would defeat the object and purpose of the treaty but is not officially bound by the treaty until ratification.[16]

3.3 RATIFICATION AND IMPLEMENTATION

3.3.1 Ratification

Once Canada is ready to be bound by an international treaty it has signed, a document is prepared establishing that the formalities for the coming into force and implementation of the treaty have been completed and that Canada agrees to be bound by the treaty. More formally, Cabinet prepares an order in council authorizing the Minister of Foreign Affairs to sign an Instrument of Ratification or Accession.[17] Once this instrument is deposited with the appropriate authority, the treaty is officially ratified. At this point, Canada is bound by the treaty as soon as it comes into force (if it is not already in force).[18] The ratification process is thus wholly controlled by the executive branch, although Parliament has had an ad hoc involvement in that process over the past 90 years. For example, between 1926 and 1966, only treaties of sufficient importance were submitted by the executive to Parliament for approval prior to ratification.[19] Examples of the executive branch tabling treaties in Parliament *following* ratification were also relatively common until 1999.[20]

In January 2008, the federal government announced a new policy, later updated in November 2020, to enhance parliamentary involvement in the process by tabling all treaties between Canada and other states or entities in the House of Commons before ratification.[21] The Clerk of the House of Commons distributes the full text of the agreement, accompanied by a memorandum explaining the primary issues at stake, including subject matter, primary obligations, national interests, policy considerations, federal–provincial/territorial considerations, implementation issues, a description of any intended reservations or declarations, and a description of consultations undertaken. The House of Commons then has 21 sitting days to consider the treaty before the executive branch may take action to bring the treaty into effect through ratification at the international level or via preliminary domestic measures, such as by introducing legislation. The House of Commons has the power to debate the treaty and to pass a motion recommending action, including ratification; however, such a vote has no legal force.

Tabling treaties in the House of Commons remains a courtesy on the part of the executive, which retains full authority to decide whether to ratify the treaty after the parliamentary review. The policy states clearly that in exceptional cases, the executive branch may have to ratify treaties before they can be tabled in Parliament. To do this, the executive will seek approval from the prime minister for an exemption and will inform the House of Commons of the treaty as soon as possible upon ratification.[22]

Update to the Policy on Tabling of Treaties in Parliament: Focus on Free Trade Agreements

In November 2020, the federal government updated its policy on tabling treaties in Parliament to allow for enhanced information sharing during the negotiation of free trade agreements. Before commencing such negotiations, the government must now table in the House of Commons the following:

- a **Notice of Intent** to enter into negotiations at least 90 days before those negotiations begin;
- a description of the **objectives** of those negotiations at least 30 days before the negotiations begin; and
- an **economic impact assessment** that will accompany implementing legislation when it is tabled in the House.

3.3.2 Implementation

Any discussion of ratification in Canada is incomplete without a discussion of implementation. Canada cannot ratify an international treaty until measures are in place to ensure that the terms of the treaty are enforceable in Canadian law. Unlike some countries that operate according to a monist model (for example, in France, once Parliament approves ratification of a treaty it is, in principle, enforceable in French law), Canada operates according to a dualist model: a treaty that has been signed and ratified by the executive branch still requires incorporation through domestic law to be enforceable at the national level. Jurisprudence underscores that turning international law into domestic law is not a self-executing process in Canada.[23] International law is entirely separate from domestic law and sometimes the two can conflict.

There are two ways for this task to be accomplished. In some cases, it is abundantly clear that domestic legislation must be put in place to implement the terms of an international treaty. If so, the minister concerned gives instructions for an implementation bill to be drafted. After receiving Cabinet approval, the bill is tabled in Parliament and goes through the parliamentary legislative process. The treaty itself may be included as a schedule to the bill in some cases.[24] Although neither the treaty itself (in the schedule) nor its principle or scope can be amended during the legislative process, other amendments that are not inconsistent with obligations arising from the treaty may be made to the implementing bill.[25] For example, the bill implementing the *Canada–Colombia Free Trade Agreement* was amended by the House of Commons Standing Committee on International Trade to include new provisions obligating the Minister for International Trade to table an annual report in Parliament with respect to the impact of the agreement on human rights in both countries. Implementing legislation also often contains a provision by which the treaty is approved. In most cases, this

approval is stated very simply, for example, by the expression "the agreement is approved" (or a variation thereof).[26] In addition to (or in lieu of) stand-alone implementing legislation, existing legislation may need to be amended. For example, trade treaties are generally implemented through amendments to the *Customs Tariff*, among other statutes.[27]

Examples of federal stand-alone legislation implementing an international treaty include the following:

- the *Crimes Against Humanity and War Crimes Act*,[28] implementing the *Rome Statute of the International Criminal Court*;
- the *Geneva Conventions Act*, implementing the *Geneva Conventions for the Protection of War Victims*;
- the *Canada–United States–Mexico Agreement Implementation Act*, implementing the *Agreement between Canada, the United States of America and the United Mexican States* (CUSMA); and
- the *Canada–European Union Comprehensive Economic and Trade Agreement Implementation Act*,[29] implementing the *Canada–European Union Comprehensive Economic and Trade Agreement*.

Although it is rare for an implementing bill not to be passed by Parliament, this can happen. For example, in 1988 the Senate refused to pass the proposed Canada–United States Free Trade Agreement Implementation Act,[30] thereby triggering an election. A similar bill was passed shortly afterwards by a new Parliament.

Nevertheless, Canada has traditionally considered that many treaties and agreements, particularly international human rights treaties and foreign investment promotion and protection agreements, do not necessarily require specific legislation for implementation. In such cases, the government will state that domestic legislation is already consistent with Canada's international obligations or that the object of the treaty does not require new statutory provisions. Thus, ratification can proceed without specific implementing legislation. In this case, prior to ratification, government officials will conduct a review of existing legislation to determine whether any amendments are needed or new legislation is required to comply with the treaty. In doing so, officials from the Department of Justice consult with other federal departments and agencies, the provinces and territories, and non-governmental organizations to determine whether existing legislation is in conformity with the international treaty and whether the government may have to enter a reservation[31] or statement of understanding to the treaty to clarify Canada's position on certain issues. Where provincial or territorial legislation is implicated, as a matter of policy, the executive branch does not ratify the treaty until all Canadian jurisdictions have indicated that they support ratification.[32]

3.4 COMING INTO FORCE

Although Canada may have signed and ratified a treaty, this does not necessarily mean that the treaty is in force. The date that a treaty comes into force, or the terms and conditions necessary for the treaty to come into force, are established in the treaty itself or in an agreement between the parties, and is usually the date on which the ratification instruments are exchanged or tabled. Sometimes, the treaty will establish a deadline for ratification. For example, the *North American Free Trade Agreement* (NAFTA) required the three signatory countries to complete their ratification procedures and exchange ratification instruments by 1 January 1994.[33] In other cases, the effective date is not a specified calendar date; rather, it depends on the accomplishment of formalities specified in the treaty. For example, a treaty may provide that it will come into force once it has been ratified by a specific number of signatories. The *United Nations Convention on the Law of the Sea*[34] had to be ratified by 60 signatory states in order to enter into force. Although it had been signed by 119 states in 1982, it did not enter into force until 16 November 1994, 12 months after the 60th state had ratified it.[35] More recently, CUSMA came into force on 1 July 2020, the first day of the third month after the last of the three signatory countries notified the others that it had completed its internal procedures required for entry into force.[36]

It should be noted that the effective coming-into-force date for a specific country may differ from the coming-into-force date of the treaty itself. In some cases, a state may accede to a treaty after the treaty has come into force. In this situation, the effective coming-into-force date for that country follows the state's ratification of the instrument.

4 COMPLIANCE AND ENFORCEMENT MECHANISMS

4.1 ENFORCEMENT ON AN INTERNATIONAL SCALE

Compliance with and the enforceability of international treaties is a broad topic that cannot be covered comprehensively in a few paragraphs. Ultimately, there are multiple forms of international treaties, multiple levels of enforceability and multiple mechanisms for enforcement.

Various bodies may be involved in the enforcement of international treaties and conventions at the international and regional levels. For example, trade treaties may be subject to enforcement through the World Trade Organization,[37] which has various levels of tribunals to ensure compliance with its trade rules, or through bilateral or regional trade agreements that provide for the creation of ad hoc arbitral panels.

By contrast, human rights treaties are often subject to some form of oversight through the United Nations (UN) treaty bodies.[38] The concluding observations[39] issued with

respect to country compliance under these UN treaty bodies are not legally binding, but they do carry significant moral suasion.

Breaches of humanitarian law, such as war crimes and crimes against humanity, are dealt with by the International Criminal Court,[40] which has the power to sentence individuals to imprisonment. The International Court of Justice[41] is also charged with settling legal disputes submitted to it by states in accordance with international law generally, and with giving advisory opinions on legal questions referred to it by UN organs and specialized agencies.

4.2 FEDERAL ACCOUNTABILITY

At the federal level, there are few formal mechanisms to ensure the government's compliance with the international treaties that it has signed. Between 1915 and 1995, the Department of External Affairs was required by statute to report annually to Parliament with an account of Canada's treaty-making activities, including a list of agreements concluded in that year. This practice ended when legislation was passed in 1995 to change the department's name and mandate.

Today, statutory provisions implementing treaties occasionally require the government to table certain reports or documents in Parliament. For example, section 42 of the *Old Age Security Act*[42] requires that orders in council implementing social security agreements that Canada enters into with foreign countries be tabled in Parliament. These documents may subsequently be reviewed by parliamentary committees, which may comment or make recommendations on Canada's compliance with its international treaty obligations.[43] Even without such provisions, parliamentary committees have a monitoring role to play and can choose to study and make recommendations with respect to federal government compliance with international obligations under specific treaties. For example, the April 2007 report of the Standing Senate Committee on Human Rights entitled *Children: The Silenced Citizens* reviewed the government's compliance with the UN *Convention on the Rights of the Child*.

Various non-governmental organizations across the country, from human rights advocacy groups to organizations monitoring Canada's trade with other countries, also regularly comment on government compliance with international obligations. International human rights law itself is evolving in a manner that encourages the creation of monitoring and accountability mechanisms under national law.[44] While no body with a formal mandate to monitor compliance with international treaty obligations has been established in Canada to date, a number of institutions, such as the Canadian Human Rights Commission, do play an important role in holding the government to account.[45]

Finally, Canada's courts are beginning to play a more significant role in terms of ensuring that the federal government respects the terms of the treaties that it has

ratified. Courts increasingly rely on the common law interpretive presumption that any legislation adopted in Canada is consistent with Canada's international legal obligations, even if the international obligation has not been explicitly implemented in domestic law. The presumption is that Parliament intended to legislate in a manner consistent with its international obligations.[46]

Cases such as *Baker v. Canada (Minister of Citizenship and Immigration)*[47] are a significant example of this interpretive presumption in action. In *Baker*, an illegal immigrant was ordered deported from Canada. She appealed the decision on humanitarian and compassionate grounds, arguing in part that deporting her would effectively abandon her Canadian-born children in Canada. Citizenship and Immigration Canada then affirmed the deportation decision without providing reasons, and the issue was ultimately appealed to the Supreme Court of Canada. The majority of the Supreme Court ruled that although Canada had not incorporated the *Convention on the Rights of the Child* into domestic law, the convention's guiding principle making the best interests of the child a primary consideration in decision-making concerning children should have played a role in the government's decision-making process in this particular instance. The Court cited the important role of international human rights law as a critical influence on the interpretation of the scope of domestic legislation such as the *Canadian Charter of Rights and Freedoms*.[48]

4.3 COOPERATION WITH THE PROVINCES

No discussion of Canada's compliance with its international treaty obligations is complete without an examination of the role of the provinces. Although the federal government has sole authority to negotiate, sign and ratify international treaties, many treaties nonetheless deal with matters that fall under provincial jurisdiction. In Canada, Parliament and the provincial legislative assemblies may pass legislation in areas where they have jurisdiction under the Constitution of Canada. This division of legislative powers is provided for mainly in sections 91 and 92 of the *Constitution Act, 1867*. While provincial consent is not required for ratification, the federal government nonetheless has a policy of consulting with the provinces before signing treaties that touch on matters of provincial jurisdiction.[49]

As well, although the federal government is the only level of government responsible to the international community for compliance with the treaties that it signs, it cannot enforce compliance with international treaties in areas beyond its jurisdiction. In the 1937 Labour Conventions case,[50] the British Judicial Committee of the Privy Council held that the federal government cannot use the need to comply with international treaties as justification for encroaching on areas of provincial jurisdiction. Whenever a treaty concerns an area of provincial jurisdiction, the relevant provisions may be implemented only by the provincial legislative assemblies. Thus, treaty implementation and compliance are an area of federal, provincial and territorial responsibility.

Yet, despite Canada's constitutional arrangement, articles 26 and 27 of the *Vienna Convention on the Law of Treaties* still hold the federal government accountable to the international community for implementing international treaties in Canada.[51] Once a treaty has been ratified, there is a presumption that Canada will comply with it in good faith. One example of the federal government's ongoing obligation to comply with its international obligations arose in *Arieh Hollis Waldman v. Canada*.[52] In this case, a UN treaty body criticized Ontario's funding of a separate Catholic school system but dealt with the federal government for this violation of the equality provision of the *International Covenant on Civil and Political Rights*[53] – even though this preferential treatment is entrenched in section 93 of the *Constitution Act, 1867*.[54] Another more recent example involves NAFTA and the federal government's settlement agreement to pay compensation to AbitibiBowater, a forest products company, due to actions taken by the Government of Newfoundland and Labrador.[55]

In order to limit Canada's liability where a treaty concerns an area of provincial legislative jurisdiction, Canada may negotiate with other states to include a "federal state clause" in the treaty itself. To varying degrees, depending on the purpose of the treaty and the wording of its articles, the clause informs all the parties that the Government of Canada may have certain difficulties in implementing the treaty because to do so it will have to secure the cooperation of the Canadian provinces. Treaties that include this clause allow the government to consent to be bound by only those international obligations that come within federal jurisdiction and to make best efforts to get provincial compliance. Alternatively, such clauses can be used for the government to declare that the treaty only applies to those provinces that have accepted it.[56]

By contrast, some provinces have implemented legislation specifically intended to give some international treaties effect in provincial law.[57] Another approach has seen international agreements set province- and territory-specific obligations. For example, the *Canada–European Union Comprehensive Economic and Trade Agreement* requires certain provincial and territorial government entities not to discriminate against European suppliers in the public procurement process under certain conditions.[58]

5 CONCLUSION

The way in which Canada negotiates, signs, ratifies and implements international treaties is a constantly evolving process. Very little authority is explicitly set out in the law or the Constitution – much relies on royal prerogative, tradition and policy. Today, the House of Commons has been granted a louder voice prior to official ratification. This enhanced role for Parliament is an important one, although it must be remembered that this is a policy, not law, and can be easily revoked or bypassed when necessary. Parliamentary committees can also play a role when it comes to

monitoring compliance with the international treaties and conventions signed by Canada. This role may be carried out by listening to civil society, business, academic, government and international voices, and issuing recommendations to help Canada live up to its international obligations.

NOTES

1. Since 1982, the *British North America Act, 1867*, 30 & 31 Vict., c. 3 (U.K.), passed by the British Parliament, has been entitled *Constitution Act, 1867*, 30 & 31 Vict., c. 3 (U.K.).

2. Prior to the early 1990s, Canada traditionally used the term "external affairs" in reference to its foreign affairs. Out of respect for the British Crown, which, within the Empire, reserved the use of the term "foreign affairs" for itself, Canada refrained from using the term "foreign" or its French-language translation ("étranger/étrangère"). See Peter W. Hogg, "Chapter 11: Treaties," *Constitutional Law of Canada*, 5th ed., 2016, pp. 290–291; and J.-C. Bonenfant, "Le développement du statut international du Canada," in Paul Painchaud, ed., *Le Canada et le Québec sur la scène internationale*, Centre québécois de relations internationales, 1977, p. 43, note 25.

3. For more information on the development of Canada's international personality, see J.-C. Bonenfant, "Le développement du statut international du Canada," in Paul Painchaud, ed., *Le Canada et le Québec sur la scène internationale*, Centre québécois de relations internationales, 1977, pp. 31–49. See also René Morin, *Le Canada et les traités : notes sur le développement constitutionnel du Canada*, 1926.

4. The Balfour Declaration was the result of the 1926 Imperial Conference of British Empire leaders in London, which essentially recognized that the United Kingdom and the Dominions are autonomous, equal communities within the British Empire. The Declaration stated that the nations were united by a common allegiance to the Crown and were members of the British Commonwealth. See *Imperial Conference 1926: Inter-Imperial Relations Committee – Report, Proceedings and Memoranda*, p. 3.

5. United Kingdom, *Statute of Westminster, 1931*, 22 Geo. 5, Ch. 4; and *Letters Patent Constituting the Office of Governor General and Commander-in-Chief of Canada*, in *Canada Gazette*, 1 October 1947.

6. John H. Currie, *Public International Law*, 2nd ed., 2008, pp. 239–240; and Joanna Harrington, "Scrutiny and Approval: The Role for Westminster-Style Parliaments in Treaty-Making," *International & Comparative Law Quarterly*, Vol. 55, No. 1, January 2006, pp. 136–137.

7. Anne-Marie Jacomy-Millette, *L'introduction et l'application des traités internationaux au Canada*, 1971, p. 102; A. E. Gotlieb, *Canadian Treaty-Making*, 1968, p. 4; and Peter W. Hogg, "Chapter 11: Treaties," *Constitutional Law of Canada*, 5th ed., 2016.

8. See *Capital Cities Comm. v. C.R.T.C.*, [1978] 2 S.C.R. 141; *Canada (Attorney General) / Ontario (Attorney General)*, 1937 CanLII 362 (UK JCPC); Joanna Harrington, "Scrutiny and Approval: The Role for Westminster-Style Parliaments in Treaty-Making," *International & Comparative Law Quarterly*, Vol. 55, No. 1, January 2006, p. 125; and Laura Barnett and Sebastian Spano, *Parliamentary Involvement in Foreign Policy*, Publication no. 2008-60-E, Library of Parliament, 28 August 2013.

9. *Department of Foreign Affairs, Trade and Development Act*, S.C. 2013, c. 33, s. 174, s. 10(2)(c).

10. Plurilateral treaties are those signed between more than two states (such as the World Trade Organization's *Agreement on Government Procurement*), whereas a multilateral treaty involves a great number of states. See World Trade Organization, *Agreement on Government Procurement (as amended on 30 March 2012)*.

11. For further information, see Government of Canada, "Annex A: The Treaty-Making Process – Departmental Guidelines: 4. Negotiating a Treaty," *Policy on Tabling of Treaties in Parliament*.

12. For example, in 2017, the Government of Canada conducted public consultations with respect to a potential Canada–China free trade agreement. See Government of Canada, *What we heard: Public Consultations on a possible Canada–China free trade agreement*.

13. For example, see House of Commons, Standing Committee on International Trade (CIIT), *Human Rights, the Environment and Free Trade with Colombia*, Fifth report, June 2008; and CIIT, *Canada–Europe Comprehensive and Economic Trade Agreement*, Second report, June 2014. See also François-Philippe Champagne, Minister of International Trade, *Government Response to the Seventh Report of the Senate Standing Committee on Foreign Affairs and International Trade: Free Trade Agreements: A Tool for Economic Prosperity*, 2017, pp. 6–7. The government response highlights the various ways that parliamentary committees can remain engaged during the negotiation process.

14. Government of Canada, "Annex A: The Treaty-Making Process – Departmental Guidelines: 5. Signature," *Policy on Tabling of Treaties in Parliament*.

15. The importance of a treaty directly affects who is authorized to sign it. Although the treaty may be signed by an official who has received authorization, this is usually the duty of a minister. The most important treaties are signed personally by the Prime Minister. Only the Governor General, the Prime Minister and the Minister of Foreign Affairs have the power to sign a treaty without an Instrument of Full Powers. See Ibid.

16. John H. Currie, *Public International Law*, 2nd ed., 2008, p. 589; and United Nations (UN), *Vienna Convention on the Law of Treaties*, 1969, art. 18.

17. Accession is essentially the same as ratification. The main difference is that accession does not require prior signature of the treaty; instead, accession is a one-step process. Canada generally accedes to treaties that are already in force rather than undertaking the two-step ratification process.

18. For more information, see Government of Canada, "Annex A: The Treaty-Making Process – Departmental Guidelines: 8. Ratification," *Policy on Tabling of Treaties in Parliament*.

19. See A. E. Gotlieb, *Canadian Treaty-Making*, 1968, pp. 15–17; Anne-Marie Jacomy-Millette, *L'introduction et l'application des traités internationaux au Canada*, 1971, pp. 118–128; and Joanna Harrington, "Scrutiny and Approval: The Role for Westminster-Style Parliaments in Treaty-Making," *International & Comparative Law Quarterly*, Vol. 55, No. 1, January 2006, p. 137. Important treaties included peace treaties; defence treaties (including those imposing military sanctions); treaties on the imposition of economic sanctions; treaties on Canada's territorial jurisdiction (land and maritime frontiers, air space and near-Earth space); trade treaties; treaties resulting in public expenditures (economic and technical aid programs, food aid programs, developing country loan programs); and treaties pertaining to international organizations.

20. See Joanna Harrington, "Scrutiny and Approval: The Role for Westminster-Style Parliaments in Treaty-Making," *International & Comparative Law Quarterly*, Vol. 55, No. 1, January 2006, pp. 140–141; and A. E. Gotlieb, *Canadian Treaty-Making*, 1968, pp. 15-17.

21. See, respectively, Government of Canada, *Canada Announces Policy to Table International Treaties in House of Commons*, News release, 25 January 2008; and Government of Canada, *Policy on Tabling of Treaties in Parliament*. Details of the updated policy are highlighted in the text box in section 3.3.1 of this HillStudy.

22. For more information on the application of the Policy on Tabling of Treaties in Parliament, including the use of exemptions, see Charlie Feldman, "Parliamentary Practice and Treaties," *Journal of Parliamentary and Political Law*, Vol. 9, No. 3, December 2015, pp. 585–619; Silvina Lilian Danesi, "Tabling and waiting: a preliminary assessment of Canada's treaty-tabling policy," *Canadian Foreign Policy Journal*, Vol. 20, No. 2, 2014, pp. 189–208; and Ted L. McDorman, "The Tabling of International Treaties in the Parliament of Canada: The First Four Years," *Dalhousie Law Journal*, Vol. 35, No. 2, 2012, pp. 358–381.

23. See *Capital Cities Comm. v. C.R.T.C.*, [1978] 2 S.C.R. 141; *Canada (Attorney General) / Ontario (Attorney General)*, 1937 CanLII 362 (UK JCPC); and Joanna Harrington, "Scrutiny and Approval: The Role for Westminster-Style Parliaments in Treaty-Making," *International & Comparative Law Quarterly*, Vol. 55, No. 1, January 2006, p. 125.

24. See, for example, the schedules to the following Acts: *Civil International Space Station Agreement Implementation Act*, S.C. 1999, c. 35; *Anti-Personnel Mines Convention Implementation Act*, S.C. 1997, c. 33; and *Bretton Woods and Related Agreements Act*, R.S.C. 1985, c. B-7.

25. Marc Bosc and André Gagnon, eds., "Chapter 16: The Legislative Process – Structure of Bills" and "Chapter 16: The Legislative Process – Stages in the Legislative Process," *House of Commons Procedure and Practice*, 3rd ed., 2017; and Charlie Feldman, "Parliamentary Practice and Treaties," *Journal of Parliamentary and Political Law*, Vol. 9, No. 3, December 2015, p. 599.

26. See, for example, *Canada–United States–Mexico Agreement Implementation Act*, S.C. 2020, c. 1, s. 9; and *Geneva Conventions Act*, R.S.C. 1985, c. G-3, s. 2.

27. *Customs Tariff*, S.C. 1997, c. 36.

28. *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24.

29. *Canada–European Union Comprehensive Economic and Trade Agreement Implementation Act*, S.C. 2017, c. 6.

30. Library of Parliament, House of Commons Bills, 33rd Parliament, 2nd Session : C130 = Projets de loi de la Chambre des communes, 33e Législature, 2e Session : C130, Canadian Parliamentary Historical Resources, Database.

31. The *Vienna Convention on the Law of Treaties* sets out a definition of a "reservation" in article 2(1)(d):

> "reservation" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.

UN, *Vienna Convention on the Law of Treaties*, 1969, p. 3. See also the definition of "reservation" in Office of the United Nations High Commissioner for Human Rights (OHCHR), *Human Rights Treaty Bodies – Glossary of technical terms related to the treaty bodies*:

> A reservation is a statement, however phrased or named, made by a State by which it purports to exclude or alter the legal effect of certain provisions of a treaty in their application to that State. A reservation may enable a State to participate in a multilateral treaty in which it would otherwise be unable or unwilling to do so. States can make reservations to a treaty when they sign, ratify, accept, approve or accede to it. When a State makes a reservation upon signing, it must confirm the reservation upon ratification, acceptance or approval.
>
> Reservations are governed by the Vienna Convention on the Law of Treaties, and cannot be contrary to the object and purpose of the treaty. Consequently, when signing, ratifying, accepting, approving or acceding to a treaty, States may make a reservation unless (a) the reservation is prohibited by the treaty; or (b) the treaty provides that only certain reservations may be made and these do not include the reservation in question. Other State parties may lodge objections to a State party's reservations. Reservations may be withdrawn completely or partially by the State party at any time.

32. Senate, Standing Committee on Human Rights, *Children: The Silenced Citizens – Effective Implementation of Canada's International Obligations with Respect to the Rights of Children*, Final report, April 2007, pp. 9–15. For example, Canada was unable to ratify International Labour Organization's *Minimum Age Convention, 1973 (No. 138)* as Canada's Constitution gives each province jurisdiction over labour issues, and some provinces were unwilling to raise the minimum age in accordance with that specified in the convention. See International Labour Organization, NORMLEX, *C138 - Minimum Age Convention, 1973 (No. 138)*, 26 June 1973 (entered into force 19 June 1976). Canada finally ratified the convention in June 2016 with a minimum age of 16 specified.

33. Organization of American States, Foreign Trade Information System, "Chapter Twenty-Two: Final Provisions," *North American Free Trade Agreement* (NAFTA), art. 2203 (Entry into Force).

34. UN, *United Nations Convention on the Law of the Sea*, 10 December 1982 (entered into force 16 November 1994), art. 308, p. 140.

35. For the status of the convention, see United Nations Treaty Collection, "6. United Nations Convention on the Law of the Sea," *Chapter XXI: Law of the Sea*.

36. Government of Canada, *Canada–United States–Mexico Agreement (CUSMA) – Protocol replacing the North American Free Trade Agreement with the agreement between Canada, the United States of America, and the United Mexican States*, para. 2.

37. For more information, see World Trade Organization, *Dispute settlement*.

38. For more information, see OHCHR, *Human Rights Bodies*.

39. "Concluding observations" are the observations and recommendations issued by a UN treaty body after consideration of a state party's report. They refer both to positive aspects of a state's implementation of the treaty and to areas where the treaty body recommends that further action needs to be taken by the state. See OHCHR, *Human Rights Treaty Bodies – Glossary of technical terms related to the treaty bodies*.

40. For more information, see International Criminal Court, *About the Court*.

41. International Court of Justice, *The Court*.

42. *Old Age Security Act*, R.S.C. 1985, c. O-9, s. 42.

43. Joanna Harrington, "Scrutiny and Approval: The Role for Westminster-Style Parliaments in Treaty-Making," *International & Comparative Law Quarterly*, Vol. 55, No. 1, January 2006, p. 140.

44. For example, see UN, Department of Economic and Social Affairs, "Article 33 – National implementation and monitoring," *Convention on the Rights of Persons with Disabilities (CRPD)*.

45. For a discussion of the role of the Canadian Human Rights Commission as a national human rights institution and its call for enhanced accountability with respect to the implementation of international human rights commitments, see Canadian Human Rights Commission, *Submission to the United Nations Human Rights Council on the Occasion of its Review of Canada During the 3rd Cycle of the Universal Periodic Review*, October 2017.

46. See, for example, *R. v. Hape*, 2007 SCC 26, para. 39.

47. *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817.

48. Ibid., para. 70.

49. For example, federally negotiated trade agreements often entail a risk of financial liability stemming from provincial government actions. Provincial and territorial governments are regularly consulted during trade negotiations. An information-sharing forum, the Federal-Provincial-Territorial Committee on Trade (C-Trade) also serves as a vehicle for consultation between the various levels of government and other stakeholders. For further discussion, see Patrick Fafard and Patrick Leblond, "Twenty-First Century Trade Agreements: Challenges for Canadian Federalism," The Federal Idea, September 2012; and Christopher J. Kukucha, *The Provinces and Canadian Foreign Trade Policy*, 2009, pp. 53–58. For a brief discussion of C-Trade activities, see François-Philippe Champagne, Minister of International Trade, *Government Response to the Seventh Report of the Senate Standing Committee on Foreign Affairs and International Trade: Free Trade Agreements: A Tool for Economic Prosperity*, 2017, p. 4; and Global Affairs Canada, "Negotiating Canada's Trade Agreements: Process and Consultations," *International Trade Agreements and Local Government: A Guide for Canadian Municipalities*.

    Human rights also fall under both federal and provincial jurisdiction. A Continuing Committee of Officials on Human Rights has been established as a means of facilitating consultation among federal, provincial and territorial counterparts with respect to the implementation of and adherence to international human rights treaties. This body is overseen by a Senior Officials Committee Responsible for Human Rights, which is in turn given direction by the Forum of Federal-Provincial-Territorial Ministers Responsible for Human Rights. See Government of Canada, *About human rights*.

50. *Canada (Attorney General) / Ontario (Attorney General)*, 1937 CanLII 362 (UK JCPC) (known as the Labour Conventions case). In this case, the Government of Canada had approved three international conventions on labour relations and Parliament had passed statutes in order to implement the conventions in Canada. This legislation was disputed by, among others, some provinces that saw this as an intrusion into their areas of legislative jurisdiction. The British Privy Council ruled that Parliament could not pass such statutes, even to implement Canada's international obligations, because the labour relations field was the exclusive jurisdiction of the provinces.

51. Article 26 of the *Vienna Convention on the Law of Treaties* states: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." Article 27 provides that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." UN, *Vienna Convention on the Law of Treaties*, 1969, p. 11.

52. UN, Human Rights Committee, *Arieh Hollis Waldman v. Canada*, Communication No. 694/1996, UN Doc. CCPR/C/67/D/694/1996, 67th Session, 18 October to 5 November 1999.

53. OHCHR, *International Covenant on Civil and Political Rights*, 16 December 1966 (entered into force 23 March 1976).

54. See *Adler v. Ontario*, [1996] 3 S.C.R. 609.

55. Global Affairs Canada, "AbitibiBowater Inc. v. Government of Canada," *NAFTA – Chapter 11 – Investment*; and Patrick Fafard and Patrick Leblond, "Twenty-First Century Trade Agreements: Challenges for Canadian Federalism," The Federal Idea, September 2012, p. 6.

56. John H. Currie, *Public International Law*, 2nd ed., 2008, p. 244; and Peter H. Pfund, "F. The Federal State Clause," *Académie de droit international, Recueil des cours: collected courses of the Hague Academy of International Law 1994*, Vol. 249, 1996, p. 71.

57. See, for example, *International Conventions Implementation Act*, R.S.A. 2000, c. I-6 (Alberta); *Act respecting the implementation of international trade agreements*, c. M-35.2 (Quebec); and *Act respecting the Ministère des Relations internationales*, c. M-25.1.1 (Quebec).

58. Government of Canada, *Text of the Comprehensive Economic and Trade Agreement – Chapter nineteen: Government procurement*.