



**INTERNATIONAL TREATIES:
CANADIAN PRACTICE**

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INTERNATIONAL TREATIES: CANADIAN PRACTICE

INTRODUCTION

In Canada, debate on the negotiation and adoption of international trade liberalization agreements over the past 15 years has revealed that Parliament and Members of Parliament play only a small part in the negotiation and ratification of international treaties.

The executive branch of the federal government in fact controls all stages of the process. This control extends to the content of the negotiations, which are often conducted in secret. Moreover, this secrecy is a significant factor in the federal government's negotiating strategy. Nothing, or almost nothing, is made public before the parties have reached an agreement in principle on the content or even the wording of the treaty.

Parliament's role is restricted to amending statutes in effect or passing new legislation where necessary for the implementation of the treaty. Lastly, although the provinces are usually kept informed of negotiations on trade agreements, they are only minor participants and, except in rare instances, are completely excluded from the decision-making process.

In this paper, the main features of Canadian practice with respect to the negotiation and adoption of international treaties are described. Also discussed are Parliament's role in this field and the participation of the provinces in the implementation of treaties. A final section describes the process in place in Australia.

NEGOTIATION AND CONCLUSION OF INTERNATIONAL TREATIES: CANADIAN PRACTICE

A. Authority Respecting International Treaties

The division of legislative powers set out in the *Constitution Act, 1867*⁽¹⁾ does not specifically state whether the federal government or the provinces have jurisdiction to enter into a treaty with a foreign country. No provision of Canada's Constitution mentions any area of jurisdiction that might be related to foreign affairs or international relations. This is so because, when the *Constitution Act, 1867* was passed by Britain's Parliament, Canada was still a colony of the British Empire.

Although the *Constitution Act, 1867* resulted in the creation of a new country (the Dominion of Canada), this did not immediately acquire all the international attributes of sovereignty; its international personality was thus incomplete. In 1867, the British Parliament reserved for the British Crown the power to represent the Dominion of Canada internationally and to enter into treaties with foreign countries on its behalf. Under section 132 of the *Constitution Act, 1867*, however, the federal government was given responsibility for implementing in Canada treaties entered into by the British Crown where they were applicable to that country.

The Government of Canada gradually intervened on its own initiative in discussions relating to the negotiation of international treaties and conventions⁽²⁾ and over the years the country increasingly took independent action in its external affairs.⁽³⁾ After the First World War, the federal government acted on its own authority internationally and the British authorities merely ratified the treaties put before them. In 1931, under the *Statute of Westminster*, Canada and a number of other

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

(2) 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, *Le Canada et le Québec sur la scène internationale*, Centre québécois de relations internationales, Quebec City, 1977, p. 31-49. See also René Morin, *Le Canada et les traités : notes sur le développement constitutionnel du Canada*, Syndicat des imprimeurs du Saguenay, Chicoutimi, 1926.

(3) 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"); hence the use of the terms "external," "external affairs" and "external relations" ("extérieur," "affaires extérieures" and "relations extérieures"). P.W. Hogg, *Constitutional Law in Canada*, Carswell, Toronto, 1992, p. 290-291; J.-C. Bonenfant (1977), p. 43, note 25.

British dominions, acquired full independence⁽⁴⁾ and with it authority to act internationally with all the attributes of a sovereign state. Full power over foreign affairs was thus conferred on Canada and section 132 of the *Constitution Act, 1867* became obsolete.

Although authority over international relations is not conferred on the executive branch of the federal government under any constitutional provision, it is recognized that this power has devolved upon it.⁽⁵⁾ In countries like Canada that share 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.⁽⁶⁾ It should be noted that some authors believe that the provinces could also enter into international agreements, at least in their own areas of legislative jurisdiction.⁽⁷⁾ However, this issue exceeds the scope of this paper and will not be addressed here.

It is widely held that the head of state is the only person capable of representing Canada internationally and the only person who has the power to sign international conventions or treaties on its behalf. The reality is quite different, however. Although the Governor in Council (Cabinet) retains final effective control over the ratification of treaties, it may appoint any person it wishes to negotiate and sign them. Apart from the Prime Minister, these persons are usually the ministers, deputy ministers, diplomatic representatives or negotiators of the Canadian government. As soon as the Governor in Council approves a treaty entered into by Canada and a foreign country,

(4) Except with respect to amendments to Canada's Constitution, which remained under the British Parliament's jurisdiction until 1982.

(5) Anne-Marie Jacomy-Millette, *L'introduction et l'application des traités internationaux au Canada*, Librairie générale de droit et de jurisprudence, Paris, 1971, p. 102. A.E. Gotlieb, *Canadian Treaty-Making*, Butterworths, Toronto, 1968, p. 4. Peter Hogg, *Constitutional Law of Canada*, Loose Leaf Edition, Carswell, Toronto, 1997, Chapter 11.

(6) The *Statute of Westminster* did not determine whether the federal government held sole authority over external affairs or whether that jurisdiction was shared with the provinces. In this respect, it complied with the division of legislative authority provided for in the Constitution or as interpreted by the courts. This paper will not address the theory that the prerogative is shared between the Governor General and the lieutenant governors of the provinces (see Lorne Giroux, "La capacité internationale de provinces en droit constitutionnel canadien," *Les Cahiers de Droit*, 1967-1968, Vol. 9, p. 241). According to this theory, the provinces have a partial international personality that is related to their areas of legislative jurisdiction. Under the dominant doctrine, however, the provinces do not have such powers in the international arena. The agreements they may enter into with foreign governments are administrative agreements: P.W. Hogg, *Constitutional Law in Canada*, Carswell, Toronto, 1992, p. 298.

(7) See mainly J.-Y. Morin, "La conclusion d'accords internationaux par les provinces canadiennes à la lumière du droit comparé," *Canadian Yearbook of International Law*, Vol. 3, 1965, p. 126.

regardless of who has negotiated it, it becomes an international treaty, provided it is also ratified by the other signatory countries.

A treaty entered into and signed for and on behalf of Canada by a representative of the Government of Canada and subsequently approved by the Governor in Council is binding on Canada. Approval usually takes the form of an order in council. Furthermore, the Governor in Council may approve the text of an international treaty that has not yet been signed and designate a representative of the Government of Canada to sign it on behalf of Canada. The mandate of that representative must then be set out in the order in council.⁽⁸⁾

The ratification and signing of an international treaty must not be confused with its coming into force, which is 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. Thus, when all the necessary approvals for its coming into force had been given, the North American Free Trade Agreement (NAFTA) became effective on 1 January 1994, as provided for in Article 2203 of that agreement.

B. Negotiating a Treaty

In accordance with the *Department of Foreign Affairs Act*, the Minister of Foreign Affairs is responsible for conducting the international negotiations to which Canada is a party.⁽⁹⁾ In current practice, however, the Department of Foreign Affairs does not have a monopoly on negotiations with foreign states, but rather plays a supervisory role.⁽¹⁰⁾ Consequently, negotiations on the environment are conducted by the Department of the Environment, those on tax matters by the Department of Revenue, and so on. A number of departments thus took part in the negotiations on NAFTA and the WTO agreements,⁽¹¹⁾ playing a role in their respective

(8) For Canadian practice in this field, see Jean-Yves Grenon, "De la conclusion des traités et de leur mise en œuvre au Canada," *Canadian Bar Review*, Vol. 40, 1962, p. 151.

(9) *Department of Foreign Affairs Act*, R.S.C., c. E-22, paragraph 10(2)(c).

(10) This description of current practice with respect to treaties is based extensively on the main points in the testimony of Department of Foreign Affairs officials before the Sub-committee on Trade Disputes of the Standing Committee on Foreign Affairs and International Trade on 12 February 1997. See Issue 15 of the Sub-committee's evidence.

(11) Agreements resulting from the multilateral trade negotiations of the Uruguay Round establishing the World Trade Organization.

areas of responsibility. The participation of the Department of Foreign Affairs in international treaty negotiations, although constant, is more or less adapted to the needs of the other departments.

Within the departments, officials usually handle the discussions, with the ministers involved to varying degrees. On some occasions, ministers may take part in the negotiations, whereas on others they are merely informed periodically on the progress or outcome. However, they are solely responsible for the final decisions on the results of the negotiations and the content of international treaties. Prior to being concluded, signed, and ratified, a treaty must be approved by the Governor in Council.

In practice, where there is an agreement on the text of the treaty, the negotiators verify the wording of the agreement by initialling the various versions that exist at the time. A treaty is often a long and complex text and it cannot always be translated before the close of negotiations. While French was for a long time the language of diplomacy, treaties today are usually drafted in English, although they are commonly translated into other languages to meet the needs of the parties. The WTO Agreements, for example, were adopted in three languages (English, Spanish and French). In Canada, in accordance with the *Official Languages Act*, government documents, which include treaties, must be published in both official languages. Although a treaty is concluded in only one language, it is not signed until all versions have been finalized.

C. Making and Signing a Treaty

Under Canadian law, the fact that a treaty has been signed by Canada's representative is not sufficient for it to come into force or be implemented. It must go through other stages before it is approved by Cabinet. Once the negotiators have agreed on the terms or text of the agreement, a minister (usually the Minister of Foreign Affairs) requests the Governor in Council's approval and at the same time submits an explanatory document setting out the details of the agreement. Once approval is granted, the treaty can be signed and eventually ratified.

A signing order designates one or more persons who have a mandate to sign the treaty on behalf of Canada and authorizes them to do so.⁽¹²⁾ In exceptional circumstances, a person who is not a “representative” of the Government of Canada may be authorized to sign on Canada’s behalf.⁽¹³⁾ The signing of the treaty by Canada’s authorized representative does not mean that the treaty is in force or applicable to Canada but signifies the signatory country’s agreement in principle to the treaty. In cases requiring amendments to Canadian legislation, the treaty is not ratified until such amendments or new legislation have been passed.

D. Coming into Effect, Implementation and Ratification of a Treaty

Where amendments must be made to Canadian legislation in order for a treaty to be implemented, the ministers concerned give 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.

A distinction must be drawn between the treaty’s international effective date and its effective date for a signatory country such as Canada. As noted above, the treaty normally states the terms and conditions necessary for it to come into force. Before this can happen, the parties to the Agreement must have completed their internal ratification procedures. For example, technically, NAFTA could not have come into force if the three signatory countries had not completed their ratification procedures and exchanged ratification instruments by 1 January 1994.

In other cases, the effective date is not a specified calendar date, but 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*, for example, had to be ratified by 60 signatory states

(12) 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. See in Appendix A, orders in council 1994-537 and 1999-332.

(13) The person authorized to sign the treaty need not be a government official or representative. See in Appendix A order 1999-1490 authorizing the directors of Teleglobe Inc. to sign for and on behalf of the Government of Canada the Operating Agreement relating to the International Telecommunications Satellite Organization “INTELSAT.”

in order to enter into force.⁽¹⁴⁾ Although it had been signed by 119 states in 1982, it did not become effective until 1994, 12 months after the sixtieth state had ratified it.⁽¹⁵⁾

A treaty comes into force on the date on which it applies to all ratifying parties. The effective date for a specific country may differ. If the treaty permits accession, this may be subsequent to the effective date for all parties, but it may in no case be prior to that date. The effective date for a country will be identical to that on which the treaty comes into force for all parties if the country has by then completed its ratification procedures and served notice to that effect. Where the treaty is already in effect, the date of ratification or notification of ratification determines or may help determine the effective date for a country that subsequently accedes to it.⁽¹⁶⁾

Within Canada, ratification usually takes the form of a document 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, ratification takes the form of an exchange of memoranda between the signatory countries and the tabling of a ratification instrument when the treaty is deposited. The document may also specify the date on which the treaty comes into force for Canada.⁽¹⁷⁾

Where the treaty requires amendments to Canadian legislation, the implementing Act usually contains a provision under which the treaty is approved.⁽¹⁸⁾ In most cases, this approval is stated very simply, for example by the expression “the agreement is approved.”⁽¹⁹⁾

(14) *United Nations Convention on the Law of the Sea*, United Nations, Vol. 1833, p. 3; 21 I.L.M. 1245 (1982).

(15) Although it signed the *United Nations Convention on the Law of the Sea* in 1982, Canada has still not ratified it. It did, however, ratify the Agreement for the purposes of the implementation of the provisions of the *United Nations Convention on the Law of the Sea* (10 December 1982) respecting the preservation and management of fish stocks that travel both in and out of exclusive economic areas (straddling stocks) and high migratory fish stocks. See order in council 1999-1317.

(16) See order in council 1996-86 in Appendix A.

(17) See orders in council 1991-2442, 1994-2160 and 1995-2205 in Appendix A.

(18) See *Income Tax Conventions Implementation Act, 1996*, S.C. 1997, c. 27, ss. 4, 16 and 22; *Canada-Chile Free Trade Agreement Implementation Act*, S.C. 1997, c. 14, s. 9; *North American Free Trade Agreement Implementation Act*, S.C. 1993, c. 44, s. 10; *World Trade Organization Agreement Implementation Act*, S.C. 1994, c. 47, s. 8.

(19) See *North American Free Trade Agreement Implementation Act*, S.C. 1993, c. 44, s. 10.

Although it is rare for an implementing Act not to be passed by Parliament, this can happen. For example, in 1988, the Canadian Senate refused to pass the Canada-United States Free Trade Agreement Implementation Act,⁽²⁰⁾ thereby triggering an election. A similar bill was passed shortly afterwards by a new Parliament. Where a bill that must be passed in order to implement a treaty is not passed, Canada cannot ratify that treaty.

It should be noted, however, that a number of treaties requiring Canada to adopt specific standards are not tabled in Parliament for implementation. These are cases where the government feels that legislation is already consistent with Canada's international obligations or that the object of the treaty does not require new statutory provisions. Accordingly, no amendments are made to legislation in effect and no new legislation is passed by Parliament. For example, before ratification of the *Convention on the Rights of the Child*, Parliament did not pass legislation for its implementation and approval.⁽²¹⁾

PARLIAMENT'S MAIN ACTIONS WITH RESPECT TO TREATIES

As noted above, the legislative implementation of certain treaties gives Parliament its only opportunity to have decision-making power over the coming into force of a treaty in Canada. Parliament may, however, intervene at various times in the international relations of the Canadian state. A few such instances are cited below.

A. Review of Canadian Foreign Policy

Either directly or through the House of Commons Standing Committee on Foreign Affairs and International Trade and the Standing Senate Committee on Foreign Affairs, Parliament regularly considers various aspects of Canada's foreign policy. For example, during the thirty-fifth Parliament, the House of Commons Committee conducted studies on such subjects as circumpolar cooperation; Canada's strategy for International Business Development; the expansion of NATO; Canada's policy on nuclear non-proliferation and the control and

(20) Bill C-130: Canada-United States Free Trade Agreement Implementation Act, 2nd session, 33rd Parliament.

(21) Canada ratified the *Convention on the Rights of the Child* on 13 December 1991 (RTC 1992/3).

reduction of weapons; issues pertaining to relations between Canada and the United States; Bill C-81 (An Act to implement the Canada-Chile Free Trade Agreement and other related agreements); the report of the International Development Research and Policy Task Force (*Connecting with the World*); and the program of the Group of Seven Summit in Halifax (in particular the reform of international financial institutions). In a number of cases, detailed reports were submitted to Parliament, requiring the government to respond and to state its opinions on the subject.

Treaties are made in accordance with Canada's foreign policy. From the moment Parliament reviews that policy and makes recommendations, it can exercise a certain influence over the development and making of international treaties.

B. Oral Questions

Question periods and the various other times when parliamentarians can question the government are all opportunities for them to gather information on the status of negotiations being conducted by the Canadian government for the conclusion of international treaties. In this way, parliamentarians may learn what negotiations are being conducted and why and which foreign states are involved.

This procedure obviously has its limits. While it is possible to learn that negotiations are taking place, it is more difficult to obtain specific information on their actual content. The confidentiality or secrecy under which international treaty negotiations are conducted means that it is usually quite difficult to determine the content of negotiations and the terms of a possible treaty before it is concluded or signed.

C. Tabling of International Treaties

In his 1968 book *Canadian Treaty-Making*, A.E. Gotlieb stated that it appeared to be common in Canada for the government to table sporadically in Parliament copies of international treaties that had come into force for Canada. Mr. Gotlieb gives examples of this practice up to 1967; it seems to have been common until the early 1990s and, following a break of a few years, to have been resumed in 1999. Appendix B contains a list of treaties tabled in Parliament over the past 40 years.

In this way, parliamentarians can ascertain the treaties that have come into force for Canada since the last tabling but which they have not been required to implement themselves. This government practice is entirely voluntary; it was not required in the past, and is not required now by any statutory or constitutional provision. To make this practice official, in 1999 a Private Member's bill was introduced in the House of Commons which, if passed, would require the government to table in Parliament, at least 21 days prior to ratification, every treaty it intended to ratify.⁽²²⁾

Moreover, most treaties signed by Canada are published in the *Canada Treaty Series*. This collection does not appear to be tabled in Parliament. In addition, all tax treaties are published in schedules to the Acts that implement them, and parliamentarians can see them there.

D. Approval of “Important” Treaties by Resolution of Parliament

Mr. Gotlieb also describes a second practice, whereby certain, so-called “important”⁽²³⁾ treaties are approved by parliamentary resolution. This practice began in 1926, when Prime Minister Mackenzie King made a declaration on the subject, and ended in 1966, when the last resolution of approval was passed by Parliament.⁽²⁴⁾

Anne-Marie Jacomy-Millette, who considered this point in her 1971 book *L'introduction et l'application des traités internationaux au Canada*, elaborated further on the issue of “importance.”⁽²⁵⁾ In her examples of parliamentary resolutions that approved treaties, she included only one more resolution than Mr. Gotlieb.

Ms. Jacomy-Millette contended that “important” treaties may be divided into seven classes: peace treaties; defence treaties (including those imposing military sanctions); treaties on the imposition of economic sanctions; treaties on Canada's territorial jurisdiction (land and

(22) On 14 October 1999, Daniel Turp, the member for Salaberry, tabled in the House of Commons Bill C-214, an Act to provide for the participation of the House of Commons when treaties are concluded, which touches on a number of aspects of the conclusion and ratification of international treaties.

(23) A.E. Gotlieb, *Canadian Treaty-Making*, 1968, Butterworths, Toronto, p. 15-17.

(24) On 6 May 1966, the House of Commons approved by resolution the Agreement between the Government of Canada and the Government of the United States of America on automotive products; this had been signed on 16 January 1965. The Senate approved the treaty on 30 June 1966.

(25) Anne-Marie Jacomy-Millette, *L'introduction et l'application des traités internationaux au Canada*, LGDJ, Paris, 1971, p. 118-128.

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. She also noted that no written constitutional or legislative standard requires the government to submit treaties to Parliament, particularly during negotiations.⁽²⁶⁾

Ms. Jacomy-Millette also mentioned that, contrary to what some of her predecessors had said, the practice of approving treaties by resolution was no longer “very common.”⁽²⁷⁾ She emphasized that over the years authorities had relied less and less on approval by resolution. In fact, the practice has by now (2000) not merely declined, but can be said to have disappeared; there have apparently been no treaty approvals by resolution since 1966.⁽²⁸⁾

If adopted, the Private Member’s bill referred to above (C-214) would also re-establish and provide a legal basis for the practice of parliamentary approval of “important” treaties; it would prohibit such treaties from being ratified by the Government of Canada unless they had first been approved by resolution of the House of Commons.⁽²⁹⁾

(26) *Ibid.*, p. 110.

(27) *Ibid.*, p. 114.

(28) The difficulties involved in searching for treaty approval resolutions in the Debates of the House of Commons and Senate should be stressed. The index of the Debates does not necessarily show treaty approval resolutions under a single heading and indexing methods often change from session to session. Resolutions are at times found under “international agreements” or “international treaties,” but more often under the title of the international convention approved by resolution. In addition, no reference is usually made to this kind of convention under the headings “international agreement” or “international treaty.” To be sure that no parliamentary approval by resolution or any tabling of a treaty was overlooked would involve a detailed search of all the journals and debates of the House of Commons and the Senate.

(29) The bill defines “important treaty” as any treaty (a) whose implementation requires (1) the enactment of an Act of Parliament, (2) that Her Majesty the Queen in Right of Canada be invested with new powers, or (3) the imposition of a tax by Parliament; (b) imposing a substantial financial obligation, whether direct or conditional, on Canada; (c) concerning the transfer of a part of the territory of Canada or any change to the boundaries of Canada; (d) under which Canada undertakes to impose economic or military sanctions, whether direct or conditional, against a State; (e) concerning the territorial jurisdiction of Canada, including jurisdiction by Canada over any area of the sea or air; (f) concerning international trade or investment or Canada’s place in the world economy; or (g) concerning the participation of Canada in international institutions, including the transfer of jurisdiction to such institutions.

E. Tabling of Various Reports

Under certain international treaties, the signatory states have an obligation to produce periodic reports on relevant activities or on action they have taken to comply with the treaties. For example, Canada must produce a report each year describing the measures it has taken to comply with the *Convention on the Rights of the Child*. Copies of these reports are usually tabled in Parliament.

In some cases, statutory provisions require the government to table certain reports or documents in Parliament. These reports may subsequently be reviewed by parliamentary committees if one of the Chambers so decides. For example, section 42 of the *Old Age Security Act* requires that social security agreements entered into with foreign countries be tabled in Parliament.

PARTICIPATION BY THE PROVINCES

The conclusion of an international treaty is one thing, compliance with it another. The Government of Canada is the only Canadian government that has an international personality and it is accordingly the only one responsible for international treaties in effect in Canada. As it does not hold all the necessary powers to implement those treaties, however, there are serious weaknesses in its ability to discharge this responsibility.

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 power is provided for mainly in sections 91 and 92 of the *Constitution Act, 1867*. As specifically stated in the 1937 Privy Council decision in *Labour Conventions*, this power also extends to the implementation of international treaties concluded by the Canadian state.⁽³⁰⁾ Whenever a treaty or part of a treaty concerns an area of provincial jurisdiction, the relevant provisions may be implemented only by the provincial legislative assemblies.

(30) *A.-G. Canada v. A.-G. Ontario* (1937), A.C. 326 (P.C.). 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.

As noted above, a treaty is implemented when the signatory state adopts legislative or other measures enabling it to comply with the treaty's provisions. A state that is already in compliance with the provisions of a treaty will not have to adopt new measures in order to implement it. Where it wishes to become a party to the treaty, the state need only ratify it and issue the ratification instrument.

If Canada were to make undertakings that it could not implement because they fell within provincial jurisdiction, it would risk a loss of international credibility and being found in default of its international obligations. For nearly three decades now, since the Tokyo Round, the provinces have taken part in the process of negotiating international trade agreements and the federal government has consulted the provinces in this regard.⁽³¹⁾ At these meetings, discussion does not focus solely on matters under provincial jurisdiction, but also covers areas of federal jurisdiction.⁽³²⁾ This has not led to provincial participation in decision-making, however. Even though certain aspects of the negotiations focus on provincial jurisdiction, the federal government has always refused to include the provinces in the decision-making process.

To limit Canada's liability where a treaty, even partially, concerns an area of provincial legislative jurisdiction, that treaty usually contains a "federal clause." To varying degrees, depending on the purpose of the treaty and the wording of its articles, the federal 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. The inclusion of this clause limits the responsibility of the Government of Canada should even one province refuse to pass or amend its legislation in accordance with the provisions of a treaty.

The effect of the federal clause is ambiguous, however. On the one hand, it might be claimed that it constitutes an "obligation of means" for the Government of Canada, but, on the other hand, it might be claimed that it constitutes an "obligation of result." There is an enormous difference between these two types of obligation. Suppose the Government of Canada was unable to secure the cooperation of a single province for the implementation of an international treaty under

(31) David Cook, *The Millennium Round of Multilateral Trade Negotiations: The Provinces and Treaty Making - A Submission to the Standing Committee on Foreign Affairs and International Trade*, 25 April 1999, p. 26.

(32) *Ibid.*, p. 27.

domestic law. Under an obligation of result, the Government of Canada might still be liable under another portion of the treaty. Under an obligation of means, this would not be the case; to avoid its international responsibility, the Government of Canada would need to establish only that, despite all its efforts or negotiations, it had found it impossible to secure the cooperation of at least one province.

Paragraph XXIV(12) of the General Agreement on Tariffs and Trade (GATT) is considered a typical example of an obligation of means. This provision reads as follows:

XXIV:12 Each member shall take such reasonable measures as may be available to it to ensure observance of the provisions of this agreement by regional and local governments and authorities within its territory.

However, the text of article 105 of NAFTA is somewhat different:

105. The Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, by state and provincial governments.

Whereas the GATT Agreement states that members “shall take all reasonable measures available to it,” NAFTA states they “shall ensure that all necessary measures are taken in order to give effect,” which is more imperative.

Some authors see the text of NAFTA as imposing an obligation of result on the Government of Canada.⁽³³⁾ If this interpretation is correct, should the Government of Canada not implement every provision of NAFTA (because of lack of provincial agreement), it would be in default and could be subject to an application for dispute settlement and potential reprisals by the United States and Mexico. As the Government of Canada’s default would in fact be due to the country’s federal structure and not to its refusal to act or to comply with NAFTA, the inclusion of such a harsh condition in the treaty is somewhat surprising.

Thus, the Government of Canada should ensure that the provinces take part in the negotiation of international treaties in order to prevent the country from being in default

(33) I. Bernier, “L’Accord de libre-échange Canada-États-Unis et la Constitution,” *Trade-Offs on Free Trade - The Canada-U.S. Free Trade Agreement*, Marc Gold and David Leyton-Brown (ed.), Carswell, Toronto, 1988, p. 100; H. Scott Fairley, “Jurisdictional Limits on National Purpose: Ottawa, The Provinces and Free Trade with the United States,” *ibid.*, p. 109.

internationally as a result of difficulties caused by a lack of cooperation between the two levels of government. An agreement on a consultation and decision-making mechanism for the conclusion of international treaties would facilitate the treaty implementation process.

REFORM OF THE PROCESS IN AUSTRALIA

In recent years, Australia's Parliament has examined its role in the conclusion and implementation of international treaties to which Australia is a party. This review stemmed mainly from two legal decisions on the effect of treaties on the Australian state.⁽³⁴⁾ In the first decision, *Teoh*, an Australian court held that the ratification of an international convention created a legitimate expectation that the executive branch would act in accordance with that convention. In the second decision, *Toonen*, a United Nations human rights committee found that Australia was in default of its obligations under the *International Covenant on Civil and Political Rights*.

In December 1994, Australia's Senate asked its legal and constitutional affairs committee to study the issue. In its report, tabled in November 1995,⁽³⁵⁾ the committee described concerns that had been expressed about the treaty-making process⁽³⁶⁾ and offered 11 recommendations.⁽³⁷⁾ In its response to the report, the Government of Australia announced it

(34) For more information, see Australia, Department of the Parliamentary Library, *Treaty-Making Options For Australia*, Current Issues Brief No. 17, 1995-96, Parliamentary Research Service. (Accessible on the Web site of the Australian Parliamentary Research Service at <http://library.aph.gov.au/library/pubs/cib/1995-96/96cib17.htm>.)

(35) Australia, The Parliament of the Commonwealth of Australia, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, report of the Senate Legal and Constitutional References Committee, November 1995. (Accessible on the Web site of the Parliament of Australia at http://senate.aph.gov.au/senate/committee/legcon_ctte/treaty/index.htm.)

(36) These concerns were as follows: (1) the impact of treaties on the Australian federal system; (2) the sovereignty of the nation, the degree of consultation preceding the signing and ratification of treaties; and (3) the respective roles of Parliament, government and the executive branch in the treaty conclusion process.

(37) These recommendations were as follows: (1) provide the public with information on the treaties to which Australia is a party and on the means used to implement treaties; (2) require the government to report to Parliament annually on action taken to implement treaties; (3) prepare an information document on the treaties under review and provide access to that document in all public libraries; (4) finance a project whereby the government would provide, free of charge over the Internet, the full texts of certain multilateral international agreements, explanatory documents concerning those agreements and the decisions of the international bodies which interpret them; (5) finance a project for

intended to apply new treaty-making measures and to expand Parliament's role in this area.⁽³⁸⁾ The Australian government will no longer ratify treaties unless it is satisfied that ratification is in the national interest. In Australia's Parliament, the Joint Standing Committee on Treaties was established in May 1996 and from now on all treaties will be tabled in Australia's Parliament at least 15 sitting days prior to their ratification and referred back to the Committee for consideration.⁽³⁹⁾ With respect to relations between the Australian Commonwealth and States, the Treaties Council, also created in the context of these reforms, is the consultation body for all matters pertaining to international treaties.

As may be seen from the Web site of the Joint Standing Committee on Treaties of Australia's Parliament, the Committee has been very active since 1996⁽⁴⁰⁾ and appears to review all treaties tabled in Australia's Parliament.

In August 1999, the Committee published as a report the transcript of a seminar on the role of the parliaments of the Australian States in international treaty making.⁽⁴¹⁾ Mindful of the fact that the Australian States and Territories should participate in the adoption and implementation of international treaties, seminar participants drew a number of conclusions from their exchanges. For example:

(cont'd)

publishing information on the meaning and interpretation of treaties, including interpretative decisions and negotiation reports; (6) increase government efforts to identify and consult groups that may be affected by treaties and expert groups on the subject or on its application; (7) replace the Standing Committee on Treaties with a Treaties Council, which would be established preferably by legislation; (8) pass legislation requiring that treaties be tabled at least 15 sitting days prior to their coming into force; (9) establish, by legislation, a joint parliamentary committee on treaties with broad powers; (10) insert in that legislation an obligation to provide a study on the impact of the treaty; and (11) refer legislation requiring Parliament's approval back to the proposed committee on treaties for consideration and study.

(38) W. Taylor, Member of Parliament, President, Joint Standing Committee on Treaties, *Trick or Treaty - An Australian Perspective*, Speech to the Conference on the Internationalization of Communities at the University of Southern Queensland, Toowoomba, 28 November 1996.

(39) Australia, Department of Foreign Affairs and Trade, *Government Announces Reform of Treaty-Making*, Press Release, 2 May 1996. (Accessible on the Department's Web site at <http://www.dfat.gov.au/media/releases/foreign/1996/fa29.html>.) See also Taylor (1996).

(40) The Joint Committee's Web site is:
<http://www.aph.gov.au/house/committee/jsct/index.htm>.

(41) The Parliament of the Commonwealth of Australia, *Report 24 - A Seminar on the Role of Parliaments in Treaty Making*, Joint Standing Committee on Treaties, Canberra, August 1999.

- The States and Territories of Australia must be better informed and participate to a greater extent in the treaty adoption process.
- The parliaments of the States and Territories must ensure that their government provides them with relevant information on treaties and even establish treaty review committees.
- The work of the treaty committees of the States and Territories would complement that of the Joint Committee on Treaties, which could consult them as necessary.

As may be seen, the trend is toward greater participation in the process with respect to international treaties at all levels of Australia's government.⁽⁴²⁾

CONCLUSION

The new developments in Australia's procedure with respect to international treaties demonstrate one option for greater parliamentary participation in the treaty-making process in a federal system. Canada is currently facing the same dilemma that Australia faced a number of years ago, and study of the Australian experience may provide useful guidance should Canada choose to initiate reforms.

There is growing evidence that the Canadian people no longer want their government to negotiate agreements in secret so that they are faced with a *fait accompli*. The failure of the draft Multilateral Investment Agreement and the impossibility of starting new multilateral trade negotiations during the Seattle meeting proved that the people of the industrialized countries no longer intend to be silent on international treaties that might affect them. They want their opinions to be heard, and a closed door government process provides limited opportunities for such input.

(42) See also: Commonwealth of Australia, *Review of the Treaty-Making Process*, Canberra, August 1999. This is a review of the treaty adoption procedure which was developed by the Government of the Commonwealth of Australia and has been in place since 1996 (available at: http://www.austlii.edu.au/au/other/dfat/reports/review_treaty_making.html.)

Parliament has a traditional public consultation function and, by its very nature, a greater openness to public opinion. A redefined role for Parliament in negotiating, concluding, implementing and ratifying international treaties would seem to be an extremely important element of any reformed treaty-making process, in order to ensure that parliamentarians would no longer be excluded from an international law-making process that has significant effects on domestic law and state sovereignty in this era of globalization.

APPENDIX A

EXAMPLES OF ORDERS IN COUNCIL

P.C. 1991-2442



CANADA

PRIVY COUNCIL · CONSEIL PRIVÉ

HIS EXCELLENCY THE GOVERNOR GENERAL
 IN COUNCIL, on the recommendation of the
 Secretary of State for External Affairs, is
 pleased hereby to authorize the Right
 Honourable Martin Brian Mulroney, Prime
 Minister of Canada, or the Secretary of State
 for External Affairs, to execute and issue, on
 behalf of the Government of Canada, an
 Instrument of Ratification of the United
 Nations Convention on the Rights of the Child,
 done at New York on November 20, 1989, by the
 United Nations General Assembly, subject to
 certain reservations and a declaration.

Approved/Approuvé
 11 December/décembre 1991



P.C. 1994-937
April 8, 1994

LE GOUVERNEMENT DU CANADA

HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL, on the recommendation of the Secretary of State for External Affairs, is pleased hereby to authorize the Secretary of State for External Affairs to execute and issue an Instrument of Full Powers authorizing the Honourable Roy MacLaren, Minister for International Trade, or Gerald E. Shannon, Permanent Representative, Ambassador to the United Nations, to the Conference on Disarmament and to the Secretariat of the General Agreement on Tariffs and Trade, to sign, on behalf of the Government of Canada,

(a) the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations; and,

(b) if open for signature on an *ad referendum* basis,

(i) the Agreement establishing the World Trade Organization, and

(ii) the Agreement on Government Procurement.

RECEIVED TO THE ATTORNEY GENERAL - COMPTROLLER OF THE TREASURY

CLERK OF THE PRIVY COUNCIL / LE CLERK DU CONSEIL PRIVÉ



PRIVY COUNCIL • CONSEIL PRIVÉ

P.C. 1994-2161
December 22, 1994

HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL,
on the recommendation of the Secretary of State for
External Affairs, is pleased hereby to authorize the
Secretary of State for External Affairs to execute and
issue, on behalf of the Government of Canada:

(a) an Instrument of Ratification of the
Agreement Establishing the World Trade
Organization, done at Marrakesh on April 15,
1994; and

(b) an Instrument of Ratification of the
International Bovine Meat Agreement, done at
Marrakesh on April 15, 1994.

FORWARDED TO: A TRUE COPY - LE GOUVERNEMENT DU CANADA

A handwritten signature in black ink, appearing to be "D. J. ...", written over a horizontal line.

CLERK OF THE PRIVY COUNCIL • LE SECRÉTAIRE DU CONSEIL PRIVÉ



P.C. 1995-2205
December 20, 1995

HIS EXCELLENCY THE GOVERNOR GENERAL

IN COUNCIL, on the recommendation of the Minister of Foreign Affairs, is pleased hereby to authorize the Minister of Foreign Affairs to execute and issue, on behalf of the Government of Canada, an Instrument of Ratification of the Agreement on Government Procurement, done at Marrakesh on April 15, 1994.

A handwritten signature in black ink, appearing to be "J. G. ...", written over a faint, illegible stamp or background.



P.C. 1996-86
January 23, 1996

HIS EXCELLENCY THE GOVERNOR GENERAL
IN COUNCIL, on the recommendation of the Minister of Foreign
Affairs, is pleased hereby to authorize the Minister of Foreign Affairs
to execute and issue, on behalf of the Government of Canada, an
Instrument of Accession to Articles 1-12 (the "substantive"
provisions) of the Paris Convention for the Protection of Industrial
Property, done at Paris on March 20, 1883 and revised at Stockholm
on July 14, 1967.

A handwritten signature in ink, appearing to be 'S. G. ...'.

FROM: 0

FAX NO.: 9575826

20 10-99 80125 P.04

P.C. 1999-332
March 4, 1999

PRIVY COUNCIL • CONSEIL PRIVÉ

His Excellency the Governor General in Council, on the recommendation of the Minister of Foreign Affairs, hereby confirms the authority of the Secretary of State (Science, Research and Development) to sign, on behalf of the Government of Canada, the Agreement Among the Government of Canada, Governments of Member States of the European Space Agency, the Government of Japan, the Government of the Russian Federation, and the Government of the United States of America Concerning Cooperation on the Civil International Space Station, done at Washington, D.C. on January 29, 1998.

CERTIFIED TO BE A TRUE COPY - COME CERTIFIÉ ÊTRE CONFORME

FRON: 0

FRK NO.: 9575026

38-38-99 08:23 P.06



CANADA

PRIVY COUNCIL • CONSEIL PRIVE

P.C. 1999-1317
July 28, 1999

His Excellency the Governor General in Council, on the recommendation of the Minister of Foreign Affairs, hereby authorizes the Minister of Foreign Affairs to execute and issue, on behalf of the Government of Canada, an Instrument of Ratification of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, adopted in New York on August 4, 1995.

CERTIFIED TO BE A TRUE COPY. COPIÉ CERTIFIÉ CONFORMÉ.

G. FRK OF THE PRIVY COUNCIL / LE GREFFIER DU CONSEIL PRIVE



CANADA

PRIVY COUNCIL • CONSEIL PRIVE

P.C. 1999-1490
August 26, 1999

His Excellency the Governor General in Council, on the recommendation of the Minister of Foreign Affairs, hereby authorizes the Minister of Foreign Affairs to execute and issue an Instrument of Full Powers authorizing Claude Séguin, Executive Vice-President, Finance and Chief Finance Officer of Teleglobe Inc., or André Bourbonnais, Vice-President, Chief Legal Officer and Corporate Secretary of Teleglobe Inc., or Colleen Swords, Minister-Counsellor, Embassy of Canada to the United States of America, or John Hannaford, Third Secretary, Embassy of Canada to the United States of America, to sign, on behalf of the Government of Canada, the Operating Agreement relating to the International Telecommunications Satellite Organization "INTELSAT", done at Washington on August 20, 1971.

OCT 21 1998 08:10AM EST/OTL

11/22/98



I,
LLOYD AXWORTHY,

Je, soussigné,
LLOYD AXWORTHY,

Minister of Foreign Affairs in the
Government of Canada,

Ministre des Affaires étrangères
du Gouvernement du Canada.

do hereby certify that

certifie par les présentes que

the Government of Canada ratifies the
Comprehensive Nuclear Test Ban Treaty,
done at New York, September 10, 1996.

le Gouvernement du Canada ratifie le *Traité*
d'interdiction complète des essais nucléaires, fait
à New York, le 10 septembre 1996.

IN WITNESS WHEREOF,

EN FOI DE QUOI,

I have signed and sealed this Instrument of
Ratification.

J'ai apposé ma signature et mon sceau au présent
Instrument de ratification.

DONE at Ottawa, this 20th day
of November 1998.

FAIT à Ottawa, ce 20^{ème} jour
de novembre 1998.

Le ministre des Affaires étrangères

Minister of Foreign Affairs

APPENDIX B

LIST OF INTERNATIONAL AGREEMENTS TABLED IN THE HOUSE OF COMMONS SINCE 1966⁽⁴³⁾

23 February 1966: M. D. S. Macdonald: With the permission of the House, I would like to table English and French copies of a certain number of international agreements which the Government of Canada has recently concluded.

13 March 1968: Certain number of agreements recently concluded by the government.

29 October 1968: Certain number of agreements recently signed by Canada, subject to ratification, or which have come into force for Canada.

3 July 1969: Certain international agreements which Canada has recently signed, subject to ratification or which are already in force in Canada.

17 December 1970: Certain number of international agreements which Canada has concluded over the past 16 months.

16 December 1971: 26 international agreements which Canada has ratified over the past 14 months.

10 May 1973: Texts of 37 international agreements which Canada has signed since the last time I filed similar agreements.

21 March 1974: In accordance with tradition, texts of the international agreements which Canada has recently concluded.

13 February 1975: Text of certain international agreements currently in force for Canada.

22 October 1975: (1) Prior to its ratification, the new extradition treaty negotiated with the United States of America, which was signed in Washington on 3 December 1971, the text of which was subsequently amended through an exchange of memos on 28 June and 9 July 1974. The treaty essentially combines in a single text some six treaties dating back to 1842; (2) texts of 32 international agreements.

(43) The following international agreements tabled in the House of Commons are described in very general terms. We provide a few examples of the phraseology used. On very rare occasions, a list of the agreements tabled was produced with the notice of tabling and that list was reproduced in an appendix to the Debates (17 July 1980). There are very few indications as to the exact number of agreements tabled in this way in the House of Commons.

9 June 1976: Text of the new extradition treaty concluded with Sweden.

17 February 1977: Certain number of international agreements which recently came into force and which concern Canada.

1 June 1977: Certain number of international agreements concerning Canada which have come into force over the past 12 months.

24 November 1977: Documents concerning the Italy-Canada agreements on social security.⁽⁴⁴⁾

8 November 1978: Agreement on Social Security between Canada and Italy, signed at Toronto, 17 November 1977.

10 July 1980: Three extradition treaties (Federal Republic of Germany, Denmark and France).

17 July 1980: Texts of a certain number of international agreements now in force in Canada. Printing of the list of agreements in an annex to the *Debates of the House of Commons*.

15 March 1984: A supplementary agreement which the Government of Canada has concluded with that of the United States concerning social security.

5 February 1985: An agreement on social security between the Government of Canada and that of Belgium.

16 December 1988: Agreement on Social Security between Canada and Iceland (signed at Gimli, 25 June 1988, as well as order in council P.C. 198801760, dated 25 August 1988, declaring its coming into force) and Agreement on Social Security between Canada and Australia (signed at Canberra, 4 July 1988, as well as order in council P.C. 1988-2067, dated 15 September 1988, declaring its coming into force).

4 April 1989: Agreement on Social Security between Canada and Iceland (signed at Gimli, 25 June 1988, and order in council P.C. 198801760, dated 25 August 1988, declaring its coming into force) and Agreement on Social Security between Canada and Australia (signed at Canberra, 4 July 1988, as well as order in council P.C. 1988-2067, dated 15 September 1988, declaring its coming into force).

2 November 1989: Supplementary Agreement amending the Agreement on Social Security between Canada and the Kingdom of the Netherlands, signed at Ottawa, 26 July 1989, as well as order P.C. 1989-2123, dated 19 October 1989, declaring its coming into force.

24 May 1990: Certain number of international agreements already in force.

(44) The agreements on social security entered into by the government with foreign governments must be tabled in Parliament in accordance with section 41 of the *Old Age Security Act* (R.S.C., 1985, c. O-9).

12 June 1990: Agreement on Social Security between Canada and the Republic of Cyprus, signed at Ottawa, 24 January 1990, as well as order P.C. 1990-865, dated 10 May 1990, declaring its coming into force.

18 June 1990: Extradition Treaty between the Government of Canada and the Government of the Republic of France.

18 March 1991: Agreement on Social Security between Canada and Ireland, signed at Ottawa, 29 November 1990, and order P.C. 1991-442, dated 7 March 1991, declaring its coming into force.

23 May 1991: Agreement on Social Security between Canada and Ireland, signed at Ottawa, 29 November 1990 and order P.C. 1991-442, dated 7 March 1991, declaring its coming into force.

30 September 1991: Agreement on Social Security between Canada and Australia, signed at Ottawa, 11 October 1990, and order P.C. 1991-1497, dated 13 August 1991, declaring its coming into force and Agreement on Social Security between Canada and the Republic of Malta, signed at Toronto, 4 April 1991, as well as order P.C. 1991-1498, dated 13 August 1991, declaring its coming into force.

13 May 1992: Copy of order P.C. 1992-818, dated 30 April 1992, concerning the coming into force of the Protocol of Convention on Social Security between Canada and Luxembourg, signed at Ottawa, 6 February 1992.

26 March 1993: Copy of order P.C. 1993-546, dated 23 March 1993, concerning the coming into force of the Agreement on Social Security between Canada, Jersey and Guernsey.

4 May 1994: Copy of order P.C. 1994-679, dated 28 April 1994, concerning the coming into force of the Agreement on Social Security between Canada et the Confederation of Switzerland, signed at Ottawa, 24 February 1994.

14 February 1995: Copy of order P.C. 1995-137, dated 31 January 1995, concerning the Protocol amending the Agreement on Social Security between Canada and the Republic of Finland, signed at Ottawa, 2 November 1994, copy of order P.C. 1995-138, dated 31 January 1995, concerning the coming into force of the Agreement on Social Security between Canada and the Republic of the Philippines, signed at Winnipeg, 9 September 1994 and copy of order P.C. 1995-139, dated 31 January 1995, concerning the Codified Arrangements respecting Social Security between Canada and the United Kingdom.

29 September 1995: Copy of order P.C. 1995-1584, dated 19 September 1995, concerning the Arrangement on Social Security between Canada and the United States of Mexico.

26 October 1995: Copy of order P.C. 1995-1727, dated 17 October 1995, concerning the Agreement on Social Security between Canada and the Republic of Italy.

8 November 1995: Copy of order P.C. 1995-1829, dated 31 October 1995, concerning the Agreement on Social Security between Canada and the Republic of Austria.

13 April 1999: International treaties coming into force for Canada in 1996 and 1997, a list of which is also tabled.

12 May 1999: International treaties coming into force for Canada in 1995, a list of which is also tabled.

9 June 1999: International treaties coming into force for Canada in 1994, a list of which is also tabled.

10 June 1999: International treaties coming into force for Canada in 1993, a list of which is also tabled.

26 November 1999: International treaties coming into force for Canada in 1991 and 1992, a list of which is also tabled.

29 November 1999: International treaties coming into force for Canada in 1989 and 1990, a list of which is also tabled.