

Provincial Involvement in International Treaty Making: The European Union as a Possible Model

*France Morrisette**

Canadian foreign policy is typically the federal government's prerogative, but the subject matter of a treaty often involves areas of both federal and provincial jurisdiction. With a view to assessing the adequacy of provincial involvement in the Canadian treaty-making process, this paper compares the Canadian process with that of the European Union. The comparison is grounded in the reality that both the Canadian government and the European Union must negotiate treaties on two fronts: with foreign states and with their provinces or member states.

The author focuses on trade and environmental treaties because of their potentially significant impact on provincial governance. The analysis reveals shortcomings in Canada's basic treaty negotiation procedure, and suggests that historical attempts to create formal consultation mechanisms have been at best moderately successful. The result, the author argues, is that provincial involvement in the process depends largely on the benevolence of the federal government. She criticizes both levels of government for taking advantage of the ad hoc nature of past and current consultation mechanisms—the federal government for acting unilaterally, and the provinces for evading responsibility.

Unlike the Canadian provinces, EU member states have both a continual presence during negotiations and decision-making power in concluding treaties. This is largely because member-state involvement is embedded in the constitutive treaties of the Union. Drawing in part on EU procedure and experience, the author puts forward specific proposals for broader and more consistent provincial participation in Canadian treaty making. These proposals would build on existing consultation processes by instituting a permanent committee system to represent provincial interests throughout treaty negotiations, by giving provinces equitable voting rights in any decision taken during that process (including the ultimate decision to conclude the treaty), and by calling for legislative action to make the reforms legally binding.

Introduction

I. The Provincial Role in Canadian Treaty Making

- A. *Canada's Treaty-Making Process*
- B. *Provincial Consultation in Treaty Negotiations*
 - (i) *Trade Treaties*
 - (ii) *Environmental Treaties*
- C. *Provincial Consultation in Concluding Treaties*

* Professor, Faculty of Law, Civil Law Section, University of Ottawa.

- D. Critical Observations
 - (i) On Treaty Negotiations
 - (ii) On Concluding Treaties
 - II. The Member States' Role in European Union Treaty Making
 - A. The EU Treaty Negotiation Process
 - B. The Member States' Role in Treaty Negotiations
 - C. The EU Treaty Conclusion Process
 - D. The Member States' Role in Concluding Treaties
 - III. Proposals for Enhanced Provincial Participation in Canadian Treaty Making
 - A. Treaty Negotiations
 - B. Concluding the Treaty
 - C. A Formal Framework to Improve Provincial Consultation
- Conclusion

Introduction

The purpose of this study is to review and compare mechanisms that have been put in place in Canada and the European Union (EU) to facilitate the participation of Canadian provinces and territories¹ and EU member states in the treaty-making process. There are two parts to that process: *negotiation*, which includes all steps that lead to the adoption procedure (where parties agree on the content and form of the treaty) and *conclusion*, which includes authentication (where, by signing the treaty, parties indicate that they accept its text as definitive) and ratification (whereby they indicate their intention to be bound by it).²

There are good reasons to draw comparisons between a multi-state entity such as the EU and a federal state like Canada. Since the *Treaty of Maastricht*, the European Union has come to function in many ways like a federation. Stefan Oeter remarks that “[w]ith elements of supranationality becoming stronger during the evolution of the Community system, the Community is developing increasingly more

1. All references to the “provinces” include the territories.

2. See *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, arts 6–25 (entered into force 27 January 1980); “Report of the International Law Commission to the General Assembly on the Work of the Second Part of its Seventeenth Session” (UN Doc A/6309/Rev/.1) in *Yearbook of the International Law Commission* 1966, vol 2, part 2 (New York: UN, 1967) at 178–98 (UNDOC.A/CN.4/SER.A/1966/Add.1). The conclusion process also covers the signature of an agreement in simplified form or accession.

federal features”.³ As Peter Hogg notes, federal countries face distinctive issues such as the distribution of legislative, executive and judicial powers between the central and regional governments. This is due to “the fact that in a federal State the citizen is subject to two levels of government which are, to some degree at least, legally and politically independent of each other”.⁴ EU constitutive treaties⁵ also carefully divide jurisdiction between the Union and its member states and submit EU citizens to two levels of government.⁶ According to the principles of direct effect and supremacy of Union law,⁷ an EU law gives rise to a right that is enforceable by individuals in national courts, if certain criteria are satisfied, and any national laws must comply with EU law. Therefore, for “*private persons* and states alike, the Union competences co-exist, compete and interfere with the competences of its Member States”.⁸ As Bogdandy and Bast point out, “[w]hile the EU is not a state in terms of the bureaucratic, fiscal and ideological resources usually associated with statehood, there is hardly a chapter of [EU] law where its conceptual basis and its functioning are as close to that of a federal state, as in the area of competences”;⁹ and it is this area which defines the boundaries of the EU’s authority to make treaties on behalf of member states.

Before analyzing the current Canadian and EU mechanisms for provincial and member state participation in treaty making, I will

3. Stefan Oeter, “Federalism and Democracy” in Armin von Bogdandy & Jürgen Bast, eds, *Principles of European Constitutional Law*, 2d ed (Oxford: Hart Publishing, 2010) 55 at 59–60.

4. Peter W Hogg, *Constitutional Law of Canada*, loose-leaf (consulted on 15 February 2012), 5th ed (Toronto: Carswell, 2007) vol 1, ch 5 at 5–4.

5. EC, *Treaty on European Union*, [2010] OJ C 83/13 (consolidated text) [TEU]; EC, *Treaty on the Functioning of the European Union*, [2010] OJ C 83/47 (consolidated text) [TFEU].

6. See e.g. Alan Dashwood et al, *European Union Law*, 6th ed (Oxford: Hart Publishing, 2011) at 97–133 (on the system of union competencies) and 135–207 (on direct actions before Union courts).

7. For a detailed explanation of direct effect and supremacy see *ibid* at 235–85; Nigel Foster, *Foster on EU Law*, 3d ed (Oxford: Oxford University Press, 2011) at 149, 180 [Foster, *EU Law*].

8. Armin von Bogdandy & Jürgen Bast, “The Federal Order of Competences” in Bogdandy & Jürgen Bast, *supra* note 3, 275 at 275 [emphasis added].

9. *Ibid*.

review the legal frameworks within which they operate. Part I starts with an explanation of the Canadian treaty negotiation and conclusion processes, then describes the existing vehicles for provincial intervention and offers some critical observations. Part II follows a similar pattern for the EU. Part III makes several proposals to promote the federal principle in Canada by improving the degree and quality of provincial participation in treaty making. In doing so, I give particular but not exclusive attention to agreements that fall within the field of provincial constitutional competence. It is precisely with this idea in mind that I have studied EU practices, which I believe can be a source of inspiration for Canada's treaty-making process.

I. The Provincial Role in Canadian Treaty Making¹⁰

A. Canada's Treaty-Making Process

As soon as Canada and another state (or states) agree to regulate a matter by way of a treaty, the "exploratory phase" begins. On the Canadian side, the federal government initiates a consultation process which aims to identify the sectors and interests in play.¹¹ This phase is

10. For details on the provincial role in Canadian treaty making, see generally France Morrisette, *Les procédures canadienne et communautaire de conclusions des traités. Démocratie, équilibre institutionnel et principe fédéral : Leçons à tirer de la Communauté européenne* (Montréal: Wilson & Lafleur, 2008).

11. AE Gotlieb, *Canadian Treaty-Making* (Toronto: Butterworths, 1968) at 10; Canada, Department of Foreign Affairs and International Trade, *International Trade Agreements and Local Government: A Guide for Canadian Municipalities* (2005), Annex E, online: FAITC <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/AnnexE-en.pdf>> [DFAIT, Annex E]; House of Commons, Standing Committee on the Status of Women, "Evidence" in *Committee Meetings*, 38th Parl, 1st Sess, No 25 (22 March 2005) at 1545, 1555, 1645 (Joan Atkinson), online: Parliament of Canada <<http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=17115798&Mode=1&Parl=38&Ses=1&Language=E>> [Atkinson]; Dan Ciuriak, "Canadian Trade Policy Development: Stakeholder Consultations and Public Policy Research" in Dan Ciuriak & John M Curtis, eds, *Trade Policy Research* (Ottawa: Department of Foreign Affairs and International Trade, 2004) 213 at 217-19, online: Ciuriak Consulting <<http://www3.sympatico.ca/dciuriak/Publications.htm>>.

overseen by the Privy Council Office, which is essentially the Prime Minister's department. Based on the nature of the treaty, many government departments and agencies may be involved.¹² This exploratory phase may also include an environmental assessment of the proposed agreement.¹³

Once the exploratory phase has been completed, the Department of Foreign Affairs seeks the political endorsement of Cabinet.¹⁴ It does this by drafting a "Memorandum to Cabinet", under the watchful eye of the Privy Council Office in collaboration, when necessary, with other interested departments.¹⁵ This memorandum analyzes the issues and risks related to the proposed agreement, includes the results of any environmental assessments and suggests guidelines for the negotiations.¹⁶ With this information, Cabinet then finalizes and endorses the negotiation mandate.¹⁷

Next, the *Department of Foreign Affairs and International Trade Act*,¹⁸

12. For example, for the Agreement Establishing the World Trade Organization (WTO), the 1992 United Nations Conference on Environment and Development (Rio Conference), and the 2002 World Summit on Sustainable Development (WSSD), ten to twenty departments collaborated in the preparations. See Ciuriak, *supra* note 11 at 218–19; Stephanie Meakin, "The Rio Earth Summit: Summary of the United Nations Conference on Environment and Development" (Ottawa: Library of Parliament, 1992), online: Government of Canada Publications <<http://publications.gc.ca>>; Government of Canada, "Canada at the WSSD: National Report", online: Canada at the World Summit on Sustainable Development <http://www.wssd.gc.ca/index_e.cfm> ["WSSD: National Report"].

13. Canadian Environmental Assessment Agency, *The Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals* (Ottawa: Privy Council Office, 1990, revised in 1999 and in 2004), online: CEAA <http://www.ceaa.gc.ca/016/CEAA-StrategicFinal_e.pdf>.

14. DFAIT, Annex E, *supra* note 11.

15. Atkinson, *supra* note 11 at 1545, 1555, 1615; Ciuriak, *supra* note 11 at 219; Interview of Pierre Desmarais, Deputy Director, Intergovernmental Relations Division, Department of Foreign Affairs and International Trade (10 June 2007) [unpublished].

16. Atkinson, *supra* note 11 at 1545; Ciuriak, *supra* note 11 at 217–18; DFAIT, Annex E, *supra* note 11.

17. *Ibid*; Annex A in DFAIT, *supra* note 11, online: FAITC <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/AnnexA-en.pdf>> [DFAIT, Annex A].

18. RSC 1985, c E-22, ss 2–5, 10(2). See also Maurice Copithorne, "National Treaty Law and Practice: Canada" in Monroe Leigh, Merritt R Blakeslee & L Benjamin Ederington,

provides that this Department is to initiate the “negotiation process”¹⁹ and approve the delegation that will carry out the negotiations on Canada’s behalf.²⁰ As treaty-making power belongs to the executive branch of government, Parliament has historically played no official role in the negotiation process.²¹ However, in 2008 the Canadian government adopted a new policy under which “members of the House of Commons may review and discuss the treaty... before Canada formally agrees to ratify it”.²² The news release issued at that time underlines that “[t]he government will maintain the executive role in negotiating agreements” and “the legal authority to decide whether to ratify the treaty”.²³ Parliament therefore has only a non-binding consultative role at a point when negotiations have been completed and the content of the treaty cannot be modified.

After negotiations are complete and the text of the treaty is agreed upon, parties proceed to the treaty conclusion stage. The authority to commit Canada to an international agreement is a royal prerogative power which, by constitutional convention, is only exercised by the

eds, *National Treaty Law and Practice: Canada, Egypt, Israel, Mexico, Russia, South Africa* (Washington, DC: The American Society of International Law, 2003) 1 at 1.

19. Daniel Dupras, *International Treaties: Canadian Practice* (Ottawa: Library of Parliament, 2000) at 4–5, online: Government of Canada Publications <<http://publications.gc.ca>>; Sophie Bernier, *Le déficit démocratique dans la négociation commerciale internationale : une dynamique politique canadienne* (MA, mémoire, Université Laval, 2002) at 17–18, online: Université Laval <http://www.hei.ulaval.ca/fileadmin/hei/documents/documents/Section_Etudes_Plans_de_cours/Essais_et_memoires/MRIEssaiSophieBernier.pdf>; Desmarais Interview, *supra* note 15; DFAIT, Annex E, *supra* note 11.

20. Dupras, *supra* note 19 at 4; Desmarais Interview, *supra* note 15; Copithorne, *supra* note 18; Joanna Harrington, “Redressing the Democratic Deficit in Treaty Law Making: (Re-) Establishing a Role for Parliament” (2005) 50 McGill LJ 465 at 475–76 [Harrington, “Democratic Deficit”].

21. Gotlieb, *supra* note 11 at 4–5; J Maurice Arbour & Geneviève Parent, *Droit International Public*, 5th ed (Cowansville, Que: Yvon Blais, 2006) at 172–73; Hogg, *Constitutional Law*, *supra* note 4 at 11–12–11–13.

22. Foreign Affairs and International Trade Canada, News Release no 20, “Canada Announces Policy to Table International Treaties in House of Commons” (28 January 2008), online: FAITC <<http://international.gc.ca>>. From this communiqué, it is clear that this practice only occurs after the authentication and before the ratification of a treaty.

23. *Ibid.*

democratically elected government.²⁴ *The Constitution Act, 1867* divides executive power between the federal government and the provinces, in accordance with the distribution of legislative powers. For that reason, Quebec has claimed the right to conclude treaties on matters within its jurisdiction.²⁵ In practice, however, the right to conclude treaties is exercised exclusively by the Governor General in Council, regardless of the subject matter.²⁶ The Minister of Foreign Affairs must therefore obtain the federal Cabinet's authorization²⁷ before committing Canada to any type of international agreement. To that end, the Foreign Affairs Minister presents Cabinet with a request for authorization, accompanied by a document explaining the agreement.²⁸

Let us now see how provinces are consulted at the various stages of the treaty-making process.

24. Because of the constitutional convention of responsible government, the royal prerogative to conclude treaties is exercised by the Governor General in Council, which in reality means the federal Cabinet. Gotlieb, *supra* note 11 at 4–5; Hogg, *Constitutional Law*, *supra* note 4 at 11–2.

25. See “Documents sur la position du Québec en matière de conclusion et de mise en oeuvre d’accords internationaux” in Jacques-Yvan Morin, Francis Rigaldies & Daniel Turp, eds, *Droit international public : notes et documents*, t 2 (Montréal: Éditions Thémis, 1997) at 127–46.

26. The Canadian provinces conclude agreements with other countries, but in principle they do so under the control of the federal government or with its approval. Quebec’s policy of not submitting some of its agreements to the federal government for review before its signature has not fostered a Canadian constitutional convention which would allow provinces to conclude treaties within their jurisdictions. A constitutional convention limiting the powers of one level of government cannot be created by actions taken without the knowledge of that level of government. See Jacques-Yvan Morin, “La personnalité internationale du Québec” (1984) 1 RQDI 163 at 251, 260, 262; Canada, Department of Foreign Affairs and International Trade, News Release no 170, “Axworthy Eager to Assist Quebec Government in Concluding a Legal Cooperation Arrangement with France” (22 October 1997) (to access News Releases before 2003, contact DFAIT directly); Henri Brun, Guy Trembley & Eugénie Brouillet, *Droit constitutionnel*, 5th ed (Cowansville, Que: Yvon Blais, 2008) at 45–48; Hugo Cyr, *Canadian Federalism and Treaty Powers: Organic Constitutionalism at Work* (New York: PIE Peter Lang, 2009) at 186–96.

27. An order in council by the Governor General in Council confers this authorization. See Copithorne, *supra* note 18 at 19, 22.

28. Gotlieb, *supra* note 11 at 10–12; Copithorne, *supra* note 18 at 1, 3, 18, 21; Dupras, *supra* note 19 at 4–6; DFAIT, Annex A, *supra* note 17 at 15.

B. Provincial Consultation in Treaty Negotiations

Two basic considerations underlie the provincial role in the negotiation process. First, Canadian dualism requires federal and/or provincial legislation in order to incorporate a treaty into domestic law.²⁹ Second, the *Labour Conventions* case divides the power to implement treaties between the federal and provincial governments according to the subject matter covered by the particular treaty. More specifically, the Privy Council held that the federal government's power to enter into treaties did not automatically give it a right to implement a treaty if its subject matter fell within provincial jurisdiction.³⁰

This division of authority between the two levels of government has led to a complex network of intergovernmental relations. Each year, numerous federal-provincial-territorial meetings are organized at the level of first ministers, ministers and senior officials in almost every sector of government activity to harmonize policies and programs between the two levels of government. When treaties are being considered or negotiated, these meetings sometimes become a forum for provinces and the federal government to exchange information, assert their views and develop mutually acceptable negotiating strategies and positions.³¹

In this paper, I will focus on provincial consultation during the negotiation of important trade and environmental treaties. Because the provinces saw those treaties as potentially having a great impact on their legislative powers, they demanded an active role in the treaty-making process, and their demands led to the concrete and original, though

29. This aspect of Canada's constitutional law derives from the United Kingdom. See *Arbour & Parent*, *supra* note 21 at 172-73, 177-79. However, if the treaties "do not impinge on individual rights, nor contravene existing laws, nor require action outside the executive powers of the government", no legislation is needed to incorporate them into domestic law. Hogg, *Constitutional Law*, *supra* note 4 at 11-5-11-7.

30. *Canada (Attorney General) v Ontario (Attorney General)*, [1936] SCR 461 (JCPC) [*Labour Conventions*]; Hogg, *Constitutional Law*, *supra* note 4 at 11-12-11-14.

31. To provide the technical and administrative services for these numerous conferences, the federal and provincial first ministers created, in 1973, the Canadian Intergovernmental Conference Secretariat, see Canadian Intergovernmental Conference Secretariat, "Our Role", online: CICS <<http://www.scics.gc.ca/english/view.asp?x=1>> [Conference Secretariat].

often imperfect, consultation mechanisms that still largely exist today.

(i) Trade Treaties

In the area of trade, the provincial consultation process first emerged during the Tokyo Round in 1975,³² because this was the first time that the *General Agreement on Tariffs and Trade* (GATT) negotiations could potentially have led to encroachments on provincial powers.³³ This threat became even more serious for the Uruguay Round, the *Free Trade Agreement* (FTA) and the *North American Free Trade Agreement* (NAFTA),³⁴ which are referred to below.

To deal with these concerns, an ad hoc federal-provincial committee of deputy ministers was created in 1975.³⁵ Both the federal and provincial

32. Gilbert R Winham, *International Trade and the Tokyo Round Negotiation* (Princeton: Princeton University Press, 1986) at 336. The Tokyo Round (1973–1979) was the 7th round of negotiations held under the *General Agreement on Tariffs and Trade* (GATT 1947), the predecessor of the World Trade Organization (created in 1995). The Tokyo Round negotiations led to the adoption of a series of tariff reductions and was also more successful than the preceding rounds in adopting agreements aiming to reduce non-tariff barriers (e.g. the Code on Subsidies and Countervailing measures). See Peter Van den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, 2d ed (Cambridge: Cambridge University Press, 2008) at 80–81; World Trade Organization, “The GATT Years: From Havana to Marrakesh”, online: WTO <<http://www.wto.org>>.

33. Ivan Bernier, “La Constitution canadienne et la réglementation des relations économiques internationales au sortir du ‘Tokyo Round’” (1979) 20:4 C de D 673.

34. These negotiations dealt with new topics which could encroach on provincial jurisdiction, such as services, investment and procurement. Vilaysoun Loungnarath, “La participation des provinces canadiennes et en particulier du Québec à la négociation de l’Accord de libre-échange entre le Canada et les États-Unis” (1987) 4 RQDI 9; Robert Howse, “NAFTA and The Constitution: Does *Labour Conventions* Really Matter Any More?” (1994) 5:3–5:4 Const Forum Const 54; H Scott Fairley, “Jurisdiction Over Intentional Trade in Canada: The Constitutional Framework” in Maureen Irish & Emily F Carasco, eds, *The Legal Framework for Canada-United States Trade* (Toronto: Carswell, 1987) 131; Douglas M Brown, “Canadian Federalism and Trade Policy: The Uruguay Round Agenda” in Ronald L Watts & Douglas M Brown, eds, *Canada: The State of the Federation* (Kingston: Institute of Intergovernmental Relations, Queen’s University, 1989) 211 [Brown, “Canadian Federalism”].

35. In 1977, this committee was placed under the chairmanship of a Canadian coordinator (J H Warren). On its role, see Winham, *supra* note 32 at 336–38.

governments were satisfied with the results of that initiative,³⁶ so it led, a decade later, to the establishment of a provincial consultation mechanism³⁷ for the negotiation of the *Free Trade Agreement* (FTA) between Canada and the United States.³⁸ At the outset, in 1985, the FTA talks were led by the Trade Negotiations Office (TNO) composed entirely of federal negotiators and the TNO chief negotiator, Simon Reisman. As of January 1986, the TNO chief negotiator also chaired monthly meetings of the Continuing Committee on Trade Negotiation (CCTN), which brought together provincial and federal senior officials. At that point, provincial consultation mechanisms established for the FTA and the Tokyo Round negotiations were entirely ad hoc, and subject to the goodwill of federal negotiators.

That all changed on June 2, 1986, when provincial and federal ministers concluded an agreement which rendered provincial involvement in the FTA negotiations more stable and predictable. This agreement provided for meetings every three months among the first ministers, and as required among the trade ministers, in order to assess the progress of negotiations. Negotiations with the US would still be led exclusively by the TNO chief negotiator, and while there would be no provincial representatives within the TNO, the federal government would set the chief negotiator's mandate in consultation with the premiers and provincial trade ministers. The agreement also called for continuing consultation with the provinces within the CCTN, and required the federal government to formally seek the opinion of all provinces before committing to any agreement.³⁹ Provincial consultation was thus formally imprinted on the process and an effective role was reserved for the provinces.

36. *Ibid* at 339–45.

37. C Garneau, *Provinces Involvement in MTN* (28 April 1986) [unpublished, obtained by request made to DFAIT under the *Access to Information Act*].

38. Negotiations took place from September 1985 to December 1987.

39. Douglas M Brown, "The Federal-Provincial Consultation Process" in Peter M Leslie & Ronald L Watts, eds, *Canada: The State of the Federation* (Kingston: Institute of Intergovernmental Relations, Queen's University, 1987–1988) 77 at 83 [Brown, "Federal-Provincial"]. This agreement was not accompanied by an official communiqué by first ministers.

From September 1986 to December 1987,⁴⁰ the FTA bilateral negotiations and the multilateral Uruguay Round negotiations overlapped. In January 1987, the federal government declared that the June 2, 1986 agreement would govern provincial participation in both multilateral and bilateral trade negotiations until the first ministers decided otherwise.⁴¹ During that period, meetings of the first ministers, the trade ministers and the CCTN focused on both the Uruguay Round and the FTA negotiations.⁴²

According to a direct observer,⁴³ the June 2, 1986 agreement was respected by all stakeholders until September 1987, when Ontario, Manitoba and Prince Edward Island withdrew their support for the FTA by way of declarations and leaks to the press.⁴⁴ At the same time, the TNO chief negotiator also broke off formal negotiations with the United States on grounds of American intransigence, and a political phase of talks began in which key federal ministers were directly involved.⁴⁵ During this phase, the federal government, made suspicious by the provinces' leaks to the press, effectively terminated the formal provincial consultation agreement but continued to consult informally with those provinces which remained favourable to the FTA.⁴⁶ Finally, in December 1987, the final text of the FTA was reviewed at a session of the CCTN and a meeting of the first ministers, at which seven provinces gave their support.⁴⁷

The Uruguay Round continued until April 1994. From June 1991 to

40. These dates correspond respectively to the beginning of Uruguay Round negotiations and the end of FTA negotiations.

41. Telex to Geneva, *MTN: Federal/Provincial Dimension* (5 January 1987) [unpublished, obtained by request made to DFAIT under the *Access to Information Act*].

42. Brown, "Federal-Provincial", *supra* note 39 at 86-87. See also Alan Nymark, *Federal/Provincial Calendar: Canada-US Trade Negotiations* (4 February 1987) [unpublished, obtained by request made to DFAIT under the *Access to Information Act*] and Alan Nymark, *CPNC: 27 Janvier 1987* (23 January 1987) [unpublished, obtained by request made to DFAIT under the *Access to Information Act*] [Nymark, *The Meeting Agendas*].

43. Brown, "Federal-Provincial", *supra* note 39 at 77.

44. Those provinces were asking for popular consultation on the FTA, *ibid* at 85-90.

45. *Ibid* at 89.

46. *Ibid* at 90-91.

47. *Ibid* at 91. Ontario, Prince Edward Island and Manitoba remained opposed.

August 1992, this round was carried out in parallel with NAFTA talks between the United States, Canada and Mexico, which were led by the NAFTA Trade Negotiations Office.⁴⁸ For both the Uruguay Round and the NAFTA talks, federal-provincial meetings were held at the level of first ministers and trade ministers in accordance with the model established by the June 2, 1986 federal-provincial accord—without, however, referring to that accord directly, or attempting to formally revive it. Moreover, the Federal-Provincial Trade Committee, which was renamed the C-Trade Committee⁴⁹ and was composed of senior officials, resumed its activities during this period. It met about once every two months “to review the negotiating agenda, discuss the Canadian position and exchange data and analysis”.⁵⁰ During the Uruguay Round, “[p]rovincial Ministers and officials [were] welcomed in Geneva and [were] assisted by the Canadian Delegation in making the rounds to other delegations”.⁵¹ Throughout that period, consultations with the provinces were of an ad hoc, non-institutionalized character,⁵² signalling a return to an informal process dependent on the goodwill of the federal government.

Since the end of the Uruguay Round in 1994, this informal federal-provincial cooperation model has remained in place for all trade negotiations.⁵³ The model is used when talks will not necessarily lead to a treaty, as well as when Canada must implement a treaty. Currently, in addition to the annual meetings of the first ministers, ministers and deputy ministers responsible for federal, provincial and territorial trade meet at least once a year to discuss trade policy, strategies for trade

48. The NAFTA Trade Negotiations Office was placed under the chairmanship of a chief negotiator, John Weekes.

49. Letter from Helmut Mach, Executive Director, Alberta Federal Intergovernmental Affairs (6 June 1997) at Annex I [unpublished, obtained by request made to the Privy Council Office under the *Access to Information Act*].

50. Brown, “Canadian Federalism”, *supra* note 34 at 229. See Nymark, *The Meeting Agendas*, *supra* note 42.

51. Brown, “Canadian Federalism”, *supra* note 34 at 229 [emphasis added].

52. Sylvie Scherrer, “La pratique québécoise en matière de traités, accords et autres instruments internationaux” in *Actes de la XIe Conférence des juristes de l’État* (Cowansville, Que: Yvon Blais, 1992) 123 at 144, online: Conférence des juristes de l’État <<http://www.conferencedesjuristes.gouv.qc.ca>>.

53. Such as the Doha Round and the *Free Trade Area of the Americas* (FTAA).

negotiations, and the evolution of ongoing trade talks.⁵⁴ Senior officials also meet every three months as members of the C-Trade Committee. These meetings are mainly information sessions on a variety of trade matters concerning Canada, and serve as a federal-provincial discussion forum on areas relevant to treaty negotiations.⁵⁵ Additionally, “the Department of Foreign Affairs and International Trade maintains intranet networks, provides access to several restricted websites, holds numerous conference calls with the provinces, and facilitates the sharing of documents and up-to-date information”.⁵⁶ This keeps provinces informed of new developments, and allows the federal government to obtain their reactions quickly.

(ii) Environmental Treaties

Given that the provinces and the federal government share constitutional responsibility in environmental matters, Ottawa realized in the early 1990s that even if it retained the right to conclude treaties, provincial consultation was necessary if it wanted to conclude agreements which would then be implemented.⁵⁷

The most important mechanism for coordination and consultation on environmental questions is the Canadian Council of Ministers of the

54. Foreign Affairs and International Trade Canada, “It’s Your Turn: Federal-Provincial-Territorial Consultations on Trade”, online: FAITC <<http://www.international.gc.ca>>.

55. Ciuriak, *supra* note 11 at 221–22; DFAIT, Annex A, *supra* note 17 at 15–16. For details on the current role of the C-Trade Committee see Brown, “Federal-Provincial”, *supra* note 39 at 85–90; Canada, Department of Foreign Affairs and International Trade, “Reports on Plans and Priorities 2010–2011, 2.2.2 Program Activity 2: Diplomacy and Advocacy”, Ongoing Work, online: Treasury Board of Canada Secretariat <<http://www.tbs-sct.gc.ca/rpp/2010-2011/inst/ext/ext02-eng.asp>>.

56. “It’s Your Turn”, *supra* note 54.

57. Yves A Grondin & Lucie Charbonneau, “La participation et la mise en œuvre des conventions et engagements du Sommet Planète-Terre de Rio par le Québec” (1994) 25:4 RDG 537 at 557; Jack Stilborn, *The Kyoto Protocol: Intergovernmental Issues* (Ottawa: Parliamentary Research Branch, 2002) at 4, online: Government of Canada Publications <<http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/PRB-e/PRB0221-e.pdf>>.

Environment (CCME).⁵⁸ The CCME is composed of federal, provincial and territorial environment ministers, who meet at least once a year to discuss priorities on environmental matters and to agree on what will be done under the aegis of the Council.⁵⁹ Decisions are made by consensus.⁶⁰ Between CCME meetings, the Environmental Planning and Protection Committee, which is made up of senior officials from all levels of government, carries out the CCME's functions. When necessary, that Committee establishes working groups of experts from federal, provincial and territorial environmental and other ministries, and from the private sector (e.g. universities, environmental NGOs and aboriginal groups). The Committee also provides the CCME with advice on an ongoing basis.⁶¹

Historically, the CCME played an important role in negotiating environmental treaties. For example, Grondin and Charbonneau write that the CCME coordinated the negotiation strategies in all areas covered by the 1992 United Nations Conference on Environment and Development (Rio Conference), such as biodiversity, forests and climate change and was represented at "all of the meetings and discussions pertaining to the development of the Canadian position for the negotiation of the Rio commitments".⁶²

In addition to the CCME, there were various other mechanisms for provincial involvement in working out the commitments that resulted from the Rio Conference. For instance, the Canadian negotiation of the Convention on Biological Diversity was facilitated not only by the CCME but also by an advisory group⁶³ composed of representatives

58. Canadian Council of Ministers of the Environment, "About CCME", online: CCME <<http://www.ccme.ca>>; Canadian Council of Ministers of the Environment, "Organizational Chart" (25 November 2011), online: CCME <<http://www.ccme.ca/assets/pdf/orgchart.pdf>>.

59. Hélène Trudeau & Suzanne Lalonde, "La mise en œuvre du Protocole de Kyoto au Canada : concertation ou coercition?" (2004) 34:1 RGD 141 at 169 [translated by author].

60. *Ibid.*

61. *Ibid.*; CCME, "About CCME" and "Organizational Chart", *supra* note 58.

62. Grondin & Charbonneau, *supra* note 57 at 558 [translated by author]. See also Meakin, *supra* note 12.

63. Established in 1991 by the Canadian government. It advised government authorities during the negotiations on the Convention on Biological Diversity. It also joined together the industry, volunteer groups, youth representatives and aboriginal groups. It has evolved into the Canadian

from the provinces and civil society, and by meetings of federal, provincial and territorial ministers responsible for parks and wildlife.⁶⁴ For the *Forest Principles*, the provinces were consulted during meetings of the Canadian Council of Forest Ministers (CCFM).⁶⁵ In order to develop Canada's negotiating position on *Agenda 21* (Rio's action plan for sustainable development) and the *Rio Declaration* (a list of principles designed to guide state cooperation and future legal progress on sustainable development), discussions were held during meetings of the CCME and other federal, provincial and territorial councils.⁶⁶ For the *UN Framework Convention on Climate Change* (UNFCCC), the Canadian energy and environment ministers followed the negotiation process and the Provincial-Territorial Advisory Committee, composed of representatives of the provincial and territorial governments, was created to help formulate the Canadian position during those negotiations.⁶⁷

Until the breakdown in federal-provincial dialogue brought about by the federal government's unilateral ratification of the Kyoto Protocol in December 2002,⁶⁸ negotiations for that Protocol had been characterized by extensive provincial consultations. The provinces had been invited in June 2002 to co-chair fourteen national non-public workshops to foster

Biodiversity Forum. See Canadian Biodiversity Web Site, "Legislation", online: Canadian Biodiversity Web Site <<http://canadianbiodiversity.mcgill.ca>>.

64. Grondin & Charbonneau, *supra* note 57 at 558.

65. *Forest Principles* is the informal name given to the statement of principles developed in the 1992 *Rio Declaration on Environment and Development. Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests*, UNDESA, Annex 3, Agenda 21, UN Doc A/CONF.151/26 (vol III) (1992) at 289. The CCFM "provides leadership on national and international issues and sets direction for the stewardship and sustainable management of Canada's forests". Canadian Council of Forest Ministers, "About Us", online: CCFM <<http://www.ccfm.org>>.

66. Including the Canadian Council of Wildlife Ministers, the Canadian Parks Council, the Canadian Council of Forest Ministers, Canada's Council of Energy Ministers and the Conference of Canadian Ministers of Agriculture, see Grondin & Charbonneau, *supra* note 57 at 558-60. The technical and administrative services for these Councils are provided by the Canadian Intergovernmental Conference Secretariat created in 1973, Conference Secretariat, *supra* note 31.

67. Grondin & Charbonneau, *supra* note 57 at 559.

68. Stilborn, *supra* note 57 at 1-2.

exchanges among expert stakeholders in the field of climate change,⁶⁹ and were consulted during multiple joint federal-provincial-territorial meetings of environment and energy ministers. Indeed, the *Air Quality Management Framework*, agreed upon by the three orders of government after Canada's ratification of the UNFCCC, had designated these joint meetings as a forum for intergovernmental collaboration and provincial consultation for future international negotiations in this area.⁷⁰

More recently, the federal Associate Deputy Minister for the Environment acknowledged that no formal federal-provincial meeting was held in preparation for the 2007 Bali Conference on the UNFCCC (COP13).⁷¹ However, this lacuna seems to have been corrected for the 2009 COP15 in Copenhagen and for the 2010 COP16 in Cancun.⁷² A working group with provincial and territorial representation was established for the entire year leading up to COP15.⁷³ In a February 2009 CCME meeting, the federal government promised to consult the provinces before the COP15 in Copenhagen and "in future Canada-U.S. discussions on climate change",⁷⁴ and to continue to work with them

69. Environment Canada, *Climate Change Consultation Process* (Ottawa: Environment Canada, 7 June 2002), online: Environment Canada
< http://www.ec.gc.ca/media_archive/press/2002/020607_n_e.htm > .

70. On the joint meetings of ministers of energy and environment, see Stilborn, *supra* note 57 at 4.

71. On the COP13 in Bali, see House of Commons, Standing Committee on Environment and Sustainable Development, "Evidence" in *Committee Meetings*, 39th Parl, 2nd Sess, No 9 (28 January 2008) at 1545 (Ian Shugart), online: Government of Canada Publications < <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=3222731&Language=E&Mode=1&Parl=39&Ses=2> > .

72. An October 2009 communiqué from the CCME states that the "Ministers have agreed to meet in November to discuss preparations for the COP15 UN Climate Change Conference in Copenhagen in December 2009". Canadian Council of Ministers of the Environment, "Environment Ministers Tackle Waste, Adopt Canada-Wide Vision for Water" (29 October 2009), online: CCME
< <http://www.ccme.ca/about/communiques/2009.html?item=368> > .

73. House of Commons, Standing Senate Committee on Energy, the Environment and Natural Resources, "Evidence, Issue 2" in *Committee Meetings*, 40th Parl, 3rd Sess, No 9 (15 April 2010), online: Parliament of Canada
< http://www.parl.gc.ca/Content/SEN/Committee/403/enrg/02evc-e.htm?comm_id=58&Language=E&Parl=40&Ses=3 > .

74. Government of Canada, "Consulting with the Provinces and Territories", online:

throughout 2010 “to implement the Copenhagen Accord and to complete the negotiations under the UNFCCC for a comprehensive, legally binding post-2012 agreement”.⁷⁵ Notwithstanding this promise, after the COP17 in Durban the Canadian government announced Canada’s withdrawal from the Kyoto Protocol at what an opposition Member of Parliament has described as a “hastily arranged press conference without any consultation with Parliament, the provinces, or Canadians”.⁷⁶

The World Summit on Sustainable Development (WSSD) held in Johannesburg in September 2002 had no mandate to develop new treaties. However, it was supposed to develop a plan of concrete actions, targets and timetables for implementing existing commitments made at the Rio Conference in 1992.⁷⁷ Presumably, the federal government recognized the need for input, because it sought provincial and territorial participation at the seventeen round-tables held to prepare the Canadian position for the WSSD.⁷⁸ The provinces also contributed to the drafting of the national report⁷⁹ on sustainable development presented at that summit.⁸⁰

Canada’s Action on Climate Change <<http://www.climatechange.gc.ca>>.

75. *Ibid.*

76. Liberal Party of Canada, News Release, “Conservative Decision to Withdraw from the Kyoto Protocol” (13 December 2011), online: Liberal <<http://www.liberal.ca>> (statement made by Kristy Duncan).

77. Antonio GM La Viña, Gretchen Hoff & Anne Marie DeRose, *The Outcomes of Johannesburg: Assessing the World Summit on Sustainable Development* (2003) at 2, online: World Resources Institute <<http://www.wri.org>>.

78. Government of Canada, “Johannesburg and Beyond: Discussions with Canadians, Synthesis Report of Earth Summit 2002 Canadian Secretariat Cross-Canada Consultations” (2002), The Discussion Process, online: Canada at the World Summit on Sustainable Development <http://www.canada2002sommetdelaterre.gc.ca/canada_at_wssd/consultation_report/cr001_e.cfm>.

79. *Ibid.* For other contributions and the National Report see “WSSD: National Report”, *supra* note 12.

80. The CCME and the Canadian Councils of Ministers for Wildlife, Endangered Species, Forests, Fishing and Aquaculture also contributed, sometimes jointly, to the preparation of the Canadian position for the WSSD. For information on meetings of Canadian intergovernmental councils held after 2006, see Conference Secretariat, *supra* note 31. For conferences held before 2006, contact the Canadian Intergovernmental Conference Secretariat directly.

C. Provincial Consultation in Concluding Treaties

To ensure that Canada respects its treaty commitments, it is in the interest of the federal government not to definitively commit to a treaty on matters within provincial jurisdiction without first ensuring that the provinces agree to implement it.⁸¹ The case of the Kyoto Protocol is illustrative. It was ratified in 2002 by the Chrétien government in spite of provincial disapproval.⁸² Subsequent attempts to achieve a consensus on its implementation failed, and the federal government formally withdrew from it in December 2011.

To avoid this scenario, provincial consultation during the negotiation process⁸³ often serves as a vehicle to obtain the agreement of the provinces on the content of treaties they will have to implement once ratified. Sometimes, it also serves as an occasion for the provinces and the federal government to agree on the authentication and ratification of agreements once they have been negotiated. For instance, Canadian federal, provincial and territorial ministers responsible for parks, wildlife and the environment met on November 25, 1992 to approve the Convention on Biological Diversity adopted during the Rio Conference, thus enabling its prompt ratification on December 4, 1992.⁸⁴ Similarly, ratification of the Framework Convention on Climate Change was supported by federal, provincial and territorial energy and environment ministers following numerous consultations held in September and November 1992.⁸⁵

Historically, the Canadian government developed the practice of informally contacting the provinces before the ratification of treaties falling within their jurisdiction in order to obtain assurances that they would adopt the legislation required to implement those treaties.⁸⁶ In Quebec, this process is more formal in the sense that a decree from the Quebec government confirms its commitment to adopt implementing

81. For the reasons mentioned in the text accompanying notes 29–30.

82. Trudeau & Lalonde, *supra* note 59 at 170; Arbour & Parent, *supra* note 21 at 180.

83. See text accompanying notes 53–56.

84. Grondin & Charbonneau, *supra* note 57 at 559 [translated by author].

85. *Ibid.*

86. Gotlieb, *supra* note 11 at 77–78, nn 23, 29.

legislation.⁸⁷ This practice has evolved in light of the principle of parliamentary sovereignty,⁸⁸ which allows a legislature to change its mind. In principle, the federal government would not currently ratify a treaty within provincial legislative jurisdiction until the provincial implementing laws had been enacted or were on the verge of being enacted.⁸⁹ Through this *modus operandi*, Canada aims to protect its reputation as a trustworthy treaty partner.

D. Critical Observations

(i) On Treaty Negotiations

Although, as the preceding sections demonstrate, numerous consultation mechanisms have developed between the provinces and the federal government, they have often been criticized by both levels of government.⁹⁰ From 1996, the provinces, with Alberta leading the charge, condemned the ad hoc character of these consultations, especially for treaties in areas of provincial competence.⁹¹ They alleged

87. *An Act respecting the Ministère des Relations internationales*, RSQ c M-25.1.1, ss 20, 22.1–22.3, 22.7.

88. Hogg, *Constitutional Law*, *supra* note 4 at 12–8, 12–11.

89. ALC de Mestral & Christiane Verdon, “La conclusion et la mise en oeuvre des traités dans les États fédérés et unitaires” in *Droit contemporain* (Cowansville, Que: Yvon Blais, 1990) 442 at 460–62; Christiane Verdon, “Le Canada et l’unification internationale du droit privé” (1994) 32 ACIDI 3 at 28, 32 (before ratifying a treaty, the Canadian government waits for Parliament to adopt the necessary implementing legislation). See also Copithorne, *supra* note 18 at 5.

90. Mach, *supra* note 49; Jennifer Irish, *Meeting with AMB Weekes: Provincial Role in Trade Policy* (5 May 1997) [unpublished, obtained by request made to DFAIT under the *Access to Information Act*]; Winham, *supra* note 32 at 335–49.

91. Mach, *supra* note 49; Morris Rosenberg, *Towards Formal Provincial Participation in the Making and Management of International Trade Policy* (24 July 1996) [unpublished, obtained by request made to the Privy Council Office under the *Access to Information Act*]; Government of Alberta, “Report of the MLA Committee on Strengthening Alberta’s Role in Confederation” (2004) at 45–46, online: Government of Alberta <http://www.international.alberta.ca/documents/Trade/mla_committee_report_003.pdf>; Council of the Federation, Media Notice, (28–30 July 2004) online: The Council of the Federation <http://www.councilofthefederation.ca/meetings/meetings_0304.html>.

that this allowed the federal government to freely end any dialogue with the provinces in order to pursue international talks on its own. At least three examples to that effect are provided by the developments discussed above. First, following the breakdown of formal FTA talks with the United States, the federal government withdrew from the June 2, 1986 accord on provincial consultation⁹² and instead took an informal approach, consulting only the provinces that supported the agreement.⁹³ Second, in 2002, the Chrétien government broke off dialogue with the provinces when it decided to ratify the Kyoto Protocol in spite of their opposition.⁹⁴ Third, no formal federal-provincial meetings were held in preparation for the 2007 COP13 in Bali.⁹⁵ Studies by Harrington and Stilborn also show that the voluntary character of consultations with the provinces during treaty negotiations offers no legal guarantee that any consensus reached during discussions will be respected by Ottawa, even if the subject area falls within provincial jurisdiction.⁹⁶ For example, the federal government broke away from the federal-provincial consensus which had been reached in 1997 on the position to be adopted by Canada during the Kyoto Conference.⁹⁷

Moreover, the absence of formalism allows for some of the more vocal or powerful provinces to unduly influence negotiations. For instance, the federal government's position at the COP15 in Copenhagen and at the COP16 in Cancun is seen by many as having been influenced by Alberta and its oil sands industry.⁹⁸ Furthermore, it

92. See text accompanying note 39.

93. See text accompanying notes 44–46.

94. See text accompanying note 68. See also Harrington, "Democratic Deficit", *supra* note 20 at 468; Joanna Harrington, "Accommodating a Provincial Role in Canadian Treaty-Making: Lessons from Britain" (2005) 31:3 Can Council Int'l L Bull 1; Stilborn, *supra* note 57 at 1–2; Standing Committee on Environment and Sustainable Development, *supra* note 71.

95. See text accompanying note 71. Although not related to provincial consultation during the negotiation of a treaty, the unilateral federal decision to withdraw from Kyoto after COP17 in Durban is another example of the ad hoc character of provincial consultation.

96. Harrington, "Democratic Deficit", *supra* note 20 at 505; Stilborn, *supra* note 57.

97. *Ibid* at 4–5.

98. *Ibid* at 6–9; Steven Guilbeault et al, "Lutte aux changements climatiques—Le Québec et ses partenaires doivent faire entendre leur voix au Conseil de la fédération", *Le Devoir*

allows for consultations to vary in quality and intensity with the nature of the proposed treaty and the political circumstances—as was shown by the fact that provincial consultations broke down during the FTA and the Kyoto Protocol negotiations but succeeded during negotiations for the 1992 Rio Conference and the 2002 World Summit.⁹⁹ Although there were some successes, the provinces pointed out in a September 1996 document addressed to Prime Minister Jean Chrétien that the consultation mechanisms were closer to one-way information sessions than to a true federal-provincial dialogue.¹⁰⁰

The absence of a formal framework for provincial consultation leaves very imprecise roles for the provinces in negotiating and concluding treaties, and limits the respect that is given to their contributions. In the specific context of trade negotiations, neither the federal-provincial ministerial meetings nor the C-Trade Committee are “decision-making bodies”; they “do not have formal procedures, there are no votes and *even a unanimous provincial consensus does not preclude federal decisions to the contrary*”.¹⁰¹ News releases following such meetings often indicate opposition by one or more provinces, but give no indication that it had any impact on the talks.¹⁰²

We should not forget, however, that the provinces have not always behaved in an exemplary way. At times, they too have exploited the ad hoc character of the current consultation processes. Ottawa is not likely in the future to commit to an agreement similar to that reached with the provinces on June 2, 1986 if the federal government might be the only one to respect it. This could jeopardize Canada’s credibility in treaty negotiations with other states. When Manitoba, Prince Edward Island and Ontario withdrew their support for the FTA negotiations by way of leaks to the press, they broke the existing federal-provincial

(3 August 2009), online: Le Devoir.com

< <http://www.ledevoir.com/non-classe/261426/lutte-aux-changements-climatiques-le-quebec-et-ses-partenaires-doivent-faire-entendre-leur-voix-au-conseil-de-la-federation> >.

99. Stilborn, *supra* note 57 at 6–9; see text accompanying notes 62–67, 77–80.

100. Rosenberg, *supra* note 91.

101. Brown, “Canadian Federalism”, *supra* note 34 at 229 [emphasis added]; Mach, *supra* note 49.

102. To consult the Canadian Intergovernmental Conference Secretariat news releases, see “Conferences” at Conference Secretariat, *supra* note 31.

consensus, causing the end of the June 2, 1986 agreement and the disruption of systematic consultations with the provinces.¹⁰³

In the same vein, certain provinces have decided, at most for political reasons, not to participate in certain federal-provincial consultations. For example, as Jack Stilborn has noted, in 2002 a “joint Energy/Environment committee was established for consultation purposes during the early 1990s, although its effectiveness was impeded by uneven provincial participation”.¹⁰⁴ Another example is the “empty chair” policy which was frequently practiced by Quebec. During federal-provincial consultations aimed at preparing Canada’s national policy for the Rio Conference, Quebec left its seat vacant during the official meetings of the Canadian Council of Ministers of the Environment, although it was informally briefed and consulted by federal officials involved in developing the Canadian negotiating strategy.¹⁰⁵ Such practices are a waste of time and energy for all actors involved. They are not conducive to a true federal-provincial dialogue, and they abuse the voluntary and ad hoc character of current consultation mechanisms.

(ii) On Concluding Treaties

The criticisms of current provincial consultation mechanisms for treaty negotiations, due to their ad hoc character and lack of a formal framework, are just as relevant at the treaty conclusion stage. As Rosemary Rayfuse has remarked, Canadian dualism and the *Labour*

103. See text accompanying notes 44–46; Brown, “Federal-Provincial”, *supra* note 39 at 91. The provinces also reneged on their *Provincial Statement of Intentions with Respect to Sales of Alcoholic Beverages by Provincial Marketing Agencies in Canada*, concluded in the context of the Tokyo Round. See Brown, “Canadian Federalism”, *supra* note 34 at 227; GATT Panel, *Panel on Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies: Report of the Panel*, (22 March 1988), online: WTO <http://www.wto.org/english/tratop_e/dispu_e/85liquor.pdf>. For another example of questionable behaviour by provinces, see Armand de Mestral & Evan Fox-Decent, “Rethinking the Relationship Between International and Domestic Law” (2008) 53:4 McGill LJ 573 at 594.

104. Stilborn, *supra* note 57 at 3.

105. Grondin & Charbonneau, *supra* note 57 at 560.

Conventions case in fact require the federal government to negotiate on two fronts, with international partners as well as with the provinces. The Canadian position during negotiations could be weakened if other parties exploited this situation.¹⁰⁶ Equally, having to wait for provincial implementing legislation means that there can be a lengthy delay before the Canadian government can definitively commit to a treaty.¹⁰⁷ These concerns could prevent Canada from playing its international role as well as it should.

In spite of these concerns, Canada should have little interest in committing to treaties which have not received provincial approval, especially on subjects within provincial jurisdiction. Conventions on the environment and international trade have such important repercussions for society as a whole that provincial cooperation and approval should be mandatory for their conclusion, if only to ensure their respect and application in the future. The Kyoto Protocol exemplifies the problems that can result, at both the national and international level, from unilateral action by the federal government. Even if the courts were to recognize exclusive federal jurisdiction in trade and environmental matters,¹⁰⁸ it seems inconceivable that Ottawa would wish to commit to any convention in those areas without verifying beforehand that the provinces support it.

In the *Labour Conventions* case, the Privy Council held that federal-provincial cooperation was required to implement treaties which affected the competencies of the two orders of government.¹⁰⁹ The same should be true for the earlier stages of negotiating and concluding such treaties—the current uncertain state of federal-provincial consultation

106. Rosemary Rayfuse, "Treaty Practice: The Canadian Perspective" in Philip Alston & Madelaine Chiam, eds, *Treaty-Making and Australia: Globalisation versus Sovereignty?* (Sydney: The Federation Press, 1995) 252 at 257–59.

107. *Ibid* at 259.

108. This has been argued for by some writers, see Micheline Patenaude, "L'interprétation du partage des compétences à l'heure du libre-échange" (1990) 21 RDUS 1 at 17, 22–23; Grondin & Charbonneau, *supra* note 57 at 566. See also Donald M McRae & John H Currie, "Treaty-Making and Treaty Implementation: The Kyoto Protocol" (2003) 29:2 Can Council Int'l L Bull 1; Trudeau & Lalonde, *supra* note 59 at 172 ff; Howse, *supra* note 34 at 56.

109. *Labour Conventions*, *supra* note 30.

should be replaced with formal and predictable cooperation mechanisms.¹¹⁰

Let us now analyze the European Union's procedure for treaty making, in the hope of finding some inspiration for improving current Canadian practice.

II. The Member States' Role in European Union Treaty Making

In an attempt to draw meaningful comparisons with the Canadian treaty-making process, this paper focuses on treaties concluded by the "European Community" (what was known before 2009 as the first pillar of the European Union) which handled economic, social and environmental policies. This paper does not deal with EU international agreements under what were known before 2009 as the second pillar—Common Foreign and Security Policy (CFSP)—and the third pillar—Police and Judicial Cooperation in Criminal Matters (PJCC). In 2009 the *Treaty of Lisbon* came into force and integrated these three pillars into a single legal structure.¹¹¹

110. Dupras, *supra* note 19 at 14.

111. See generally Morrisette, *supra* note 10, at 77–90, 98–101, 108–17. I focus on the "European Community" because there is very little law on the second and third pillars since the European Court of Justice (ECJ) had no jurisdiction over the second pillar and had only very limited jurisdiction over the third (former Article 46 TEU). Although the *Treaty of Lisbon* (TL) combined the three pillars, the ECJ's jurisdiction is still almost non-existent for the CFSP (now mainly in Title V of the *Treaty on European Union* as modified by the TL) and limited concerning the PJCC (now included in Title V of Part Three of the *Treaty on the Functioning of the European Union* with the provisions (visas, asylum, immigration, etc.) contained previously in Title IV of Part Three of the *Treaty Establishing the European Community* (TEC)). On those points, see Koen Lenaerts & Piet Van Nuffel, *Constitutional Law of the European Union*, 2d ed (London: Sweet & Maxwell, 2005) at 446–48, 891–92 [Lenaerts & Van Nuffel, *Constitutional Law*]; Koen Lenaerts & Piet Van Nuffel, *European Union Law*, 3d ed (London: Sweet & Maxwell, 2011) at 67–68, [Lenaerts & Van Nuffel, *European Union*]; Piet Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (New York: Oxford University Press, 2004) at 147; Piet Eeckhout, *EU External Relations of the European Union*, 2d ed (New York: Oxford University Press, 2011) at 478–83 [Eeckhout, *External Relations*, 2011]; Jean-Luc Sauron, *Comprendre le Traité de Lisbonne* (Paris: Gualino, 2008) at 55.

This section first describes the legal framework within which member states intervene in the EU treaty-making procedure. This framework is set out in Article 218 of the *Treaty on the Functioning of the European Union* (TFEU)¹¹² and governs the basic EU procedure for creating bilateral or multilateral conventions.¹¹³ This provision governs the negotiation and conclusion of treaties in which only the EU participates, without the member states acting alongside it in their own right. In such cases, the EU has exclusive competence to act, because those treaties regulate areas enumerated in Article 3(1) TFEU, such as “common commercial policy”¹¹⁴ or situations covered by Article 3(2)

112. See also EC, *Treaty Establishing the European Community*, [2006] OJ C 321 E/37, art 300 (consolidated text) [TEC]; Nigel G Foster, *Blackstone's EC Legislation 2006–2007*, 17th ed (Oxford: Oxford University Press, 2006) [Foster, *Blackstone's*]. I will refer to the new *Treaty on the Functioning of the European Union* (TFEU) and the new *Treaty on European Union* (TEU) as modified by the *Treaty of Lisbon* (TL). However, I also indicate the corresponding articles in force prior to the TL, thus enabling the reader to consult works published before the TL which remain relevant with respect to rules and principles unchanged by the TL. The consolidated versions of both the TFEU and TEU with cross-references to the corresponding articles in force prior to the TL and official tables of equivalencies can be found in Foster, *Blackstone's*, *ibid* at xv and online: Eur-lex <<http://eur-lex.europa.eu/en/treaties/index.htm>>.

113. On 218 TFEU see Lenaerts & Van Nuffel, *European Union*, *supra* note 111 at 1025–39; Eeckhout, *External Relations*, 2011, *supra* note 111 at 195–207. This study does not include Article 219 TFEU (former Article 111 TEC) which establishes a different treaty-making procedure for agreements on the monetary regime and exchange rates for the euro, see *ibid* at 200.

114. Article 3(1) TFEU enumerates the exceptional and only areas of EU a priori exclusive competence. These are: (a) customs union; (b) establishing the competition rules necessary for the functioning of the internal market; (c) monetary policy for the member states whose currency is the euro; (d) the conservation of marine biological resources under the common fisheries policy; and (e) common commercial policy. In these rare areas, the a priori exclusive competence belongs solely and irreversibly to the EU whether it exercises it or not. Consequently, the member states have lost all power to act in these domains, Lenaerts & Van Nuffel, *European Union*, *supra* note 111 at 125; Dashwood et al, *supra* note 6 at 100–101; K Lenaerts, “Les répercussions des compétences de la Communauté européenne sur les compétences externes des États membres et la question de la préemption” in P Demaret, ed, *Relations extérieures de la Communauté européenne et marché intérieur : aspects juridiques et fonctionnels* (Bruxelles : Story-Scientia, 1988) 37 at 41; Marianne Dony, *Après la réforme de Lisbonne : Les nouveaux traités européens* (Bruxelles: Éditions de l'Université de Bruxelles, 2008) at XV.

TFEU.¹¹⁵ Therefore, according to Article 3(1), trade agreements fall within the EU's a priori exclusive competence, which is in clear contrast with the Canadian situation.

That being said, many EU treaties regulate some matters that fall within the EU's exclusive competence and some matters that fall within the members states' competences. This is the case with environmental conventions, where the situation is much the same as in Canada. These treaties are called "mixed agreements". The Framework Convention on Climate Change and the Kyoto Protocol are good examples.¹¹⁶ The treaty-making procedure for a mixed agreement requires side by side participation of the EU and member states, each acting according to their own constitutional requirements. Consequently, to conclude such agreements, the EU still has to follow the basic treaty-making procedure laid out in Article 218, which will be described in the following paragraphs.¹¹⁷

It is not always easy to determine whether all or only some of the elements of a treaty fall within the EU's areas of exclusive competence, and consequently under Article 218. This is particularly true when the agreement regulates a field covered by 3(2) TFEU.¹¹⁸ To deal with such

115. Article 3(2) gives the EU exclusive competence to conclude an international agreement "when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter its scope". The three situations listed in Article 3:2 TFEU codify the ECJ case law on the question. On this point, see Lenaerts & Van Nuffel, *European Union*, *supra* note 111 at 125–26, 1016–18; Eeckhout, *External Relations*, 2011, *supra* note 111 at 112–13. For a detailed analysis of this case law, see *ibid* at 70–119.

116. Mar Campins Eritja, Xavier Fernández Pons & Laura Huici Sancho, "Compliance Mechanisms in the Framework Convention on Climate Change and the Kyoto Protocol" (2004) 34:1 RGD 51 at 65; Leonardo Massai, *The Kyoto Protocol in the EU: European Community and Member States under International and European Law* (The Hague: TMC Asser Press, 2011) at 59.

117. Mixed agreements are also concluded for political and legal reasons beyond the allocation of competences. See Lenaerts & Van Nuffel, *European Union*, *supra* note 111 at 1036–37; Panos Koutrakos, *EU International Relations Law* (Portland: Hart Publishing, 2006) at 137 ff.

118. The situations in Article 3(2) are particularly applicable in areas of EU shared competences, enumerated in Article 4(2) TFEU. The EU's shared competence continues to come under the member states' jurisdiction until the EU exercises it entirely, which

issues, Article 218(11) allows for a member state, the Commission (the EU's overall executive power),¹¹⁹ the Council (the EU legislative body made up of member states),¹²⁰ or the European Parliament (the directly elected co-legislative body)¹²¹ to ask the European Court of Justice for an opinion on who, as between the EU and its member states, is competent to

then transforms it into an EU exclusive competence. Therefore, as long as the EU does not exhaustively legislate in an enumerated field of shared competence, the member states remain free to act, at both the internal and international levels, "to the extent that the Union has not exercised its competence" in that area (Article 2(2) TFEU). Article 3(2) TFEU attempts to consolidate and clarify the complicated history of EU jurisprudence on shared competences, however it is still a difficult area to navigate. For example, to exclude the application (in favour of the EU) of the third situation mentioned in 3(2) TFEU (*supra* note 115) the member states' actions must not affect or alter the scope of the EU legislation adopted in an area of shared competence. Applying this vaguely formulated condition to concrete situations often needs the intervention of the ECJ. For more details on shared competences, see Lenaerts & Van Nuffel, *European Union*, *supra* note 111 at 127–30; Lenaerts, *supra* note 114 at 42; Dashwood et al, *supra* note 6 at 99–104; Dony, *supra* note 114.

119. The EU Commission is composed of 27 commissioners chosen on merit by their member state. The Commission is divided into branches and each is assigned a particular domain of activity. The Commission has a near-monopoly on legislative initiatives and implements the EU's policies. It also ensures respect for the founding treaties. See Dashwood et al, *supra* note 6 at 51–54; Foster, *EU Law*, *supra* note 7 at 52–55; Sionaidh Douglas-Scott, *Constitutional Law of the European Union* (Essex: Longman, 2002) at 53–74; France, Senate, *Rapport d'information au nom de la commission des Affaires étrangères, de la défense et des forces armées sur le traité de Lisbonne*, by Jean François-Poncet, Report No 188, (30 January 2008) at 35–37; Articles 244–250 TFEU (former Articles 211–219 TEC); Article 17 TEU.

120. The Council is composed of a government representative from each member state, who changes according to the topic on the agenda. Depending on the law-making procedure prescribed by the TL, the Council shares the legislative power with the European Parliament in different degrees and ways. See Foster, *EU Law*, *supra* note 7 at 56–64; Dashwood et al, *supra* note 6 at 46–51; Douglas-Scott, *supra* note 119 at 74–85; François-Poncet, *supra* note 119 at 30–35; Articles 237–243 TFEU (former Articles 202–210 TEC).

121. The European Parliament is made up of directly elected members (750 plus the president) for a period of five years and spread between the member states according to a grid established according to the population. For more details on the Parliament see Foster, *EU Law*, *supra* note 7 at 64–70; Douglas-Scott, *supra* note 119 at 85–94; François-Poncet, *supra* note 119 at 24–27; Articles 223–234 TFEU (former Articles 190–201 TEC). For details on EU legislative procedures, see Foster, *EU Law*, *supra* note 7 at 136–41.

conclude a particular agreement. If the envisaged agreement does not fall entirely within the scope of EU exclusive powers, it must be concluded as a mixed agreement in order to be valid under the EU constitutive treaties.¹²²

The first section of this paper analyzed the Canadian mechanisms for provincial participation in the making of important trade and environmental treaties. Reviewing the general EU treaty-making procedure as defined by Article 218 will allow us to understand and compare the steps followed by EU member states in the negotiation and conclusion of EU environmental agreements and most trade agreements, since Articles 207(3) and 207(5) TFEU subject trade agreements to the same process. For the specific trade treaties mentioned in Article 207(4), there are some slight differences in the basic procedure, mainly in voting, that I will point out when necessary.¹²³

A. The EU Treaty Negotiation Process

Although Article 218 does not set out requirements for a “preliminary phase” before the start of the EU treaty negotiation process, the Commission will inform the Council of any informal contact with a third-party state with respect to a potential treaty. This practice aims to guarantee the Council’s future cooperation during the various stages of the treaty-making procedure.¹²⁴ In matters not relating

122. The EU constitutive treaties are the TFEU and TEU, *supra* note 5. For more details on the ECJ’s opinion given under Article 218(11) TFEU, see Lenaerts & Van Nuffel, *European Union*, *supra* note 111 at 1038–39. Article 218(11) TFEU has played a crucial role in defining EU external relations law.

123. Article 207 TFEU corresponds to former Article 133 TEC as modified by the *Nice Treaty*. Article 133 TEC set out different negotiation and conclusion procedures for certain types of trade conventions. The result was extremely complex. See Koutrakos, *supra* note 117 at 70–74; Eeckhout, *External Relations*, 2011, *supra* note 111 at 48–55; Lenaerts & Van Nuffel, *Constitutional Law*, *supra* note 111 at 828–34. The *Treaty of Lisbon* provides overall a much simpler solution, see Dony, *supra* note 114 at XXII–XXIII.

124. Aline de Walsche, “La procédure de conclusion des accords internationaux” in Jean-Victor Louis & Marianne Dony, eds, *Commentaire J Megret : Le droit de la CE et de l’Union européenne*, vol 12 (Bruxelles: Éditions de l’Université de Bruxelles, 2005) 77 at 83–96.

to the Common Foreign Security Policy, only the Commission can, after certain required economic, environmental and social impact analyses,¹²⁵ recommend to the Council that negotiations begin¹²⁶ and can suggest guidelines to orient the negotiations.¹²⁷

In contrast to the Canadian negotiation procedure, only the Council, which shares EU legislative power with the European Parliament, can provide “political approval” to begin negotiations. According to Articles 218(2), 218(3) and 218(8) TFEU (former Article 300(1) TEC) and Article 207(4) TFEU (which applies to specific trade agreements), all of the Council’s decisions on the EU treaty-making process are made by a qualified majority vote, except for those requiring a unanimous decision.¹²⁸ The Council’s decision will also endorse, with or without

125. See generally European Commission, “Impact Assessment”, online: EC <http://ec.europa.eu/governance/impact/index_en.htm>.

126. Lenaerts & Van Nuffel, *European Union*, *supra* note 111 at 1027. According to Article 218(3) TFEU, when the agreement relates exclusively or principally to Common Foreign and Security Policy (CFSP or former second pillar of the EU), it is the High Representative of the Union for Foreign Affairs and Security Policy that makes the recommendation to begin negotiations.

127. I MacLeod, ID Hendry & Stephen Hyett, *The External Relations of the European Communities* (Oxford: Clarendon Press, 1996) at 86–87; de Walsche, *supra* note 124 at 83–84; Eeckhout, *External Relations*, 2011, *supra* note 111 at 195.

128. The following agreements require a unanimous decision: 1) association agreements referred to in Article 217 TFEU (former Article 310 TEC); 2) economic, financial and technical cooperation agreements with states that are candidates for accession referred to in Article 212 TFEU (former Article 181a TEC); 3) treaties for which unanimity is required for the adoption of internal legislation such as those in Articles 192(2) and 352 TFEU (former Articles 175(2) and 308 TEC respectively); 4) agreements for trade in services, commercial aspects of intellectual property and foreign direct investment “where such agreements include provisions for which unanimity is required for the adoption of internal rules” referred to in Article 207(4), second subpara, TFEU (former Articles 133(5), first and second subpara, TEC); 5) agreements for trade in cultural and audio-visual services where they “risk prejudicing the Union’s cultural and linguistic diversity” referred to in Article 207(4), third subpara, sub (a); and 6) agreements for trade in social, educational and health services where they “risk seriously disturbing the national organization of such services and prejudicing the responsibility of Member States to deliver them” referred to in Article 207(4), third subpara, sub (b). See Eeckhout, *External Relations*, 2011, *supra* note 111 at 197, 201–202; Lenaerts & Van Nuffel, *European Union*, *supra* note 111 at 965–66, and 1027. On qualified majority voting as defined by the *Treaty of Lisbon*, see François-Poncet, *supra* note 119 at 31–35.

modifications, the Commission's proposed negotiation guidelines.¹²⁹ Once the Council's authorization has been obtained, the Commission conducts the negotiations on behalf of the EU within the negotiating framework established by the Council.¹³⁰ Usually this task is delegated to civil servants from the General Directorates concerned with the topics being negotiated. At the end of negotiations, the Commission, as chief negotiator for the EU, will initial the text of the negotiated treaty.¹³¹ This will be followed by a final report to the Council, in which the Commission proposes that the treaty be concluded.¹³²

In the case of a mixed agreement, no rules exist for how the negotiations should be conducted. Sometimes the member states will mandate the Commission itself or the Presidency of the Council¹³³ to negotiate and initial the draft mixed agreement on their behalf. At other times these processes are taken on by a negotiating team consisting of the Commission, acting for the EU according to Article 218 TFEU, and representatives of the Council, acting for the member states.¹³⁴

129. MacLeod, Hendry & Hyett, *supra* note 127 at 87. See also Eeckhout, *External Relations*, 2011, *supra* note 111 at 197.

130. For trade agreements, Article 207(3) TFEU requires that negotiations must be conducted by the Commission. Article 218(3) TFEU seems to leave the Council some latitude when choosing whether the Commission or the High Representative of Foreign Affairs and Security Policy will conduct negotiations. However, the most accepted interpretation is that the High Representative negotiates in the CFSP area, whereas the Commission negotiates in all other areas except those covered by Article 219 TFEU (see *supra* note 113). For more details, see Lenaerts & Van Nuffel, *European Union*, *supra* note 111 at 1027; Eeckhout, *External Relations*, 2011, *supra* note 111 at 196, 255–56; de Walsche, *supra* note 124 at 86–87.

131. Eeckhout, *External Relations*, 2011, *supra* note 111 at 199; Lenaerts & Van Nuffel, *European Union*, *supra* note 111 at 1029; de Walsche, *supra* note 124 at 88–89.

132. *Ibid* at 89; Lenaerts & Van Nuffel, *European Union*, *supra* note 111 at 1030. For more details on the final report and the Commission's proposal to conclude the treaty, see text accompanying note 152.

133. For an explanation of the rules governing the Presidency of the Council see generally Paul Craig, *The Lisbon Treaty* (Oxford: Oxford University Press, 2010) at 41–42.

134. For more details and concrete examples, see Lenaerts & Van Nuffel, *European Union*, *supra* note 111, at 1027, 1029; Eeckhout, *External Relations*, 2011, *supra* note 111 at 255–56, 197–98; Delano R Verwey, *The European Community, the European Union and the International Law of Treaties* (The Hague: TMC Asser Press, 2004) at 167; MacLeod, Hendry & Hyett, *supra* note 127 at 151, n 47.

Finally, the European Parliament, as the elected representative of the population of the EU, finds itself in a situation similar to that of the Canadian Parliament. According to Articles 207(3) and 218(10) TFEU, the European Parliament is merely informed of the progress of negotiations and is not given a formal role. However, since its consent is required for the conclusion of many EU treaties, the Parliament has “a means of applying pressure with a view to its being more closely involved in the drawing up of agreements or of particular clauses therein”.¹³⁵ Moreover, many inter-institutional agreements between the Parliament, the Commission and the Council undertake to informally integrate the Parliament into every phase of EU treaty making.¹³⁶

B. The Member States' Role in Treaty Negotiations

This section focuses only on the role of the member states in the EU's basic treaty negotiation process, because in the negotiation process for mixed agreements, it goes without saying that member states participate in their own right. Contrary to the Canadian practice, Articles 218(2) to 218(4) guarantee that in negotiating treaties partly or entirely within exclusive EU jurisdiction, member states are continually and legally present during the various phases of the process in at least two ways. First, the Commission must steer the negotiations while adhering to the guidelines set by the Council. Even if it is the Commission's role to suggest guidelines to Council, the latter has the last word, since it can modify the guidelines before they are approved.¹³⁷ Second, the Commission must consult with ad hoc committees which

135. Lenaerts & Van Nuffel, *European Union*, *supra* note 111 at 1035–36. See also Eeckhout, *External Relations*, 2011, *supra* note 111 at 210.

136. Those inter-institutional agreements are respected by the EU institutions even if they hold no legal weight. The inter-institutional agreements between the Parliament and the Council have historically been less generous towards the Parliament than those between the Parliament and the Commission. For a historical perspective on these agreements, see de Walsche, *supra* note 124 at 98–100; Lenaerts & Van Nuffel, *European Union*, *supra* note 111 at 1028, 1030, 1032–36; Eeckhout, *External Relations*, 2011, *supra* note 111 at 199–200; Koutrakos, *supra* note 117 at 147–49; MacLeod, Hendry & Hyett, *supra* note 127 at 98–100.

137. Articles 218(2) to 218(4) TFEU correspond to former Article 300(1) TEC. See also MacLeod, Hendry & Hyett, *supra* note 127 at 89.

are appointed by the Council on the basis of Article 218(4),¹³⁸ and in the case of a trade agreement, with the Permanent Committee provided for in Article 207(3), third subparagraph, TFEU.¹³⁹ Both committees are composed of member state representatives. Although these committees only play an advisory role in the negotiation process, as they have no power to issue instructions,¹⁴⁰ they monitor the evolution of negotiations for the benefit of the Council¹⁴¹ throughout the entire negotiation process.¹⁴²

The omnipresence of the Council and consequently the member states during negotiations compels the Commission to negotiate on two fronts: with the future partner in the proposed convention, and with the committees referred to in Articles 218(4) or 207(3), third subparagraph, TFEU.¹⁴³ As a general rule, the designated committee meets outside of negotiation sessions. The Commission then informs the committee of the new developments which came up during the talks, and in return the committee informs the Commission of the member states' expectations and occasionally suggests obtaining new or modified guidelines from the

138. Former Article 300(1) TEC Committees. Lenaerts & Van Nuffel, *European Union*, *supra* note 111 at 1028.

139. Former Article 133 TEC Committee. This Committee was created by the *Treaty Establishing the European Economic Community* in 1958. It is a permanent body of the Council and is more influential than the 218(4) TFEU Committees in the negotiation process. First, it examines the Commission's proposal to the Council to begin trade negotiations and the Commission's suggested guidelines. The Committee then submits these guidelines to the Council with its own recommendations. For more details on the Permanent Committee, see Verwey, *supra* note 134 at 107–108; Fiona Hayes-Renshaw & Helen Wallace, *The Council of Ministers*, 2d ed (New York: St Martin's Press, 2006) at 91–92; de Walsche, *supra* note 124 at 87.

140. This is clear from the wording of Article 218(4) TFEU (former Article 300(1) TEC). Also, the ECJ held that the former Article 133 TEC Committee's "task is to assist the Commission . . . [and its] role is purely advisory", *Commission v Federal Republic of Germany*, C-61/94, [1996] ECR I-3989 at para 14.

141. Eeckhout, *External Relations*, 2011, *supra* note 111 at 197; de Walsche, *supra* note 124 at 87.

142. Lenaerts & Van Nuffel, *European Union*, *supra* note 111 at 1028.

143. *Ibid*; former Articles 300(1), first subpara, or 133(3), second subpara, TEC; Lenaerts & Van Nuffel, *European Union*, *supra* note 111; Eeckhout, *External Relations*, 2011, *supra* note 111 at 197.

Council.¹⁴⁴ In some cases, the committee itself requests clarification of the Council's position on a particular question raised during the talks. The Commission also provides interim reports to the Council, and can solicit new guidelines on its own initiative.¹⁴⁵ The Council can also issue additional guidelines without a prior proposal from the Commission, if they are linked to the original mandate.¹⁴⁶

In sum, although the Commission (which embodies the Union's executive power) conducts the negotiations, the terms of Articles 218 and 207 TFEU guarantee a formal and important role to the Council, which is a forum for the member states and jointly holds the legislative power with the European Parliament. These EU actors also have the legal obligation to cooperate loyally and sincerely.¹⁴⁷ Therefore, we can observe that the EU's international negotiations are carried out in full compliance with and respect for the federal principle.

Let us now turn to the EU treaty conclusion process to see whether we can make the same observation.

C. *The EU Treaty Conclusion Process*

As mentioned above, Article 218 TFEU,¹⁴⁸ to which Articles 207(3)

144. Hayes-Renshaw & Wallace, *supra* note 139 at 93.

145. de Walsche, *supra* note 124 at 86.

146. *Ibid*; MacLeod, Hendry & Hyett, *supra* note 127 at 89; Lenaerts & Van Nuffel, *European Union*, *supra* note 111 at 1028.

147. The principle of loyal and sincere cooperation (Article 4(3) TEU as modified by the TL (former Article 10 TEC)) and the reciprocal duties it creates among EU actors govern both the relations between EU institutions and the relations between the member states and those institutions. See *Parliament v Council*, C-65/93, [1995] ECR I-00643 at paras 21–23; *Hellenic Republic v Council*, 204/86, [1988] ECR 5323 at para 16. See also de Walsche, *supra* note 124 at 103–104; Douglas-Scott, *supra* note 119 at 121; Anne-Marie Tournepiche, “La clarification du statut juridique des accords interinstitutionnels : Commentaire de la déclaration du projet de Traité de Nice relative à l'article 10” (2002) RTD eur 209 at 210–15; Foster, *Blackstone's*, *supra* note 112 at 126.

148. Article 218 TFEU (former Article 300 TEC) covers the steps leading to a formal agreement (which involves two steps: authentication and ratification) or to a simplified agreement (where consent to be bound is expressed in one step, without authentication). This paper primarily analyzes the application of Article 218 in the case of a formal agreement. See Eeckhout, *External Relations*, 2011, *supra* note 111 at 200–201.

and 207(5) TFEU subject most trade agreements,¹⁴⁹ regulates the different phases of the treaty-making process of an EU agreement.¹⁵⁰ According to Articles 218(5) and 218(6) TFEU, the Council has the final responsibility to commit the EU to a formal agreement by authorizing its authentication (or signing) and ratification.¹⁵¹ However, unless the treaty relates to Common Foreign Security Policy, the Council can only do so after a proposal by the Commission.¹⁵² When the Commission makes such a proposal, it provides the Council with the history and background of the proposed treaty, as well as its legal basis as grounded in the TFEU.¹⁵³ The Council can only modify this proposal by a unanimous decision.¹⁵⁴

In contrast to the informal and limited role of the Canadian Parliament, Article 218(6) TFEU requires the Council, before ratifying¹⁵⁵ an agreement, to obtain the opinion or (when required for trade and many environmental treaties) the consent of the European Parliament.¹⁵⁶

149. See text accompanying note 123.

150. Treaty conclusion ends the EU procedure leading to the creation of a treaty, both at the intra-Union level and at the international level. See de Walsche, *supra* note 124 at 89–90; Verwey, *supra* note 134 at 111–21.

151. Articles 218(3)–218(6) TFEU correspond to former Article 300(2) TEC. For the distinction between formal agreements and simplified agreements see *supra* note 148.

152. de Walsche, *supra* note 124 at 89–90; Lenaerts & Van Nuffel, *European Union*, *supra* note 111 at 1027–30.

153. Lenaerts & Van Nuffel, *European Union*, *supra* note 111 at 112–16.

154. Contrary to the Commission's recommendation to start negotiations, the Commission's proposal to conclude a treaty is governed by Article 293(1) TFEU (former Article 250(1) TEC). This is why unanimity within the Council is necessary to modify it. MacLeod, Hendry and Hyett, *supra* note 127 at 96–97. On the exceptional and limited powers of the Commission to conclude certain types of agreements, see *France v Commission*, C-327/91, [1994] ECR I-3641; Koutrakos, *supra* note 117 at 141–44; MacLeod, Hendry & Hyett, *supra* note 127. Even though Article 218 TFEU does not expressly refer to such special powers of the Commission (as former Articles 300(2) and 300(4) TEC did) I believe they can still be implicitly inferred from the very nature of the Commission's functions.

155. Or before concluding, notably in case of a simplified agreement. See *supra* note 148.

156. François-Poncet, *supra* note 119 at 24–25. Like the opinion given by the Canadian Parliament before ratification of a treaty (see text accompanying notes 22–23), the EU Council is not bound in any way by the EP's opinion. On this point see Lenaerts & Van Nuffel, *European Union*, *supra* note 111 at 1032–33. The EP's consent is required for categories of agreements listed under Article 218(6), second subpara, sub (a) TFEU. The

Additionally, even though Article 218 TFEU is silent on the European Parliament's role in relation to a treaty's authentication,¹⁵⁷ many inter-institutional agreements between the EU actors require the Parliament's opinion and sometimes its consent before the Council can proceed.¹⁵⁸ This point should not be overlooked; in international law, authentication (or signing) is an important phase in the conclusion process of a treaty, as it creates the obligation "to refrain from acts which would defeat the object and the purpose of the agreement".¹⁵⁹ The Council's decision to authenticate and finally commit the EU to a treaty will also specifically authorize either the Council Presidency or the Commission to authenticate and ratify the agreement on behalf of the EU.¹⁶⁰ These decisions will usually be adopted by a qualified majority of the Council. However, for certain agreements, Articles 218(8) and 207(4) TFEU require unanimity.¹⁶¹ For a mixed agreement, in addition to their participation in the treaty conclusion process just described, member

last category of agreements mentioned in that article is: "agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the EP is required". The TL enlarged this last category considerably. Now the ordinary legislative procedure applies to 73 articles instead of 33 under the TEC. Because this procedure applies in particular to common commercial policy and to Articles 192(1) and 192(3) TFEU (environment), the ratification of trade treaties and many environment treaties requires the EP's prior consent. See *ibid* at 966, 1034; Fondation Robert Schuman, *Le traité de Lisbonne expliqué en 10 fiches* (December 2007) at 4, 39, online: Fondation Robert Schuman <<http://www.robert-schuman.eu/doc/divers/lisbonne/fr/10fiches.pdf>>.

157. However Piet Eeckhout is of the opinion that when Article 218(6) second subpara TFEU stipulates that "[t]he Council shall adopt the decision concluding the agreement"; it should be understood as "a generic [expression] for Council decisions on undertaking international commitments" and it should therefore include the Council's decision to undertake the obligations resulting from authentication. Eeckhout, *External Relations*, 2011, *supra* note 111 at 201.

158. For more details on those inter-institutional agreements, see *supra* note 136 and the accompanying text.

159. See *Vienna Convention*, *supra* note 2, art 18; Lenaerts & Van Nuffel, *European Union*, *supra* note 111 at 1029.

160. Verwey, *supra* note 134 at 117, 120; de Walsche, *supra* note 124 at 90; MacLeod, Hendry & Hyett, *supra* note 127 at 91, 93.

161. Articles 218(8) and 207(4) TFEU correspond to former Articles 300(2) and 133(4)–(5) TEC respectively. For the agreements requiring a unanimous decision from the Council, see *supra* note 128.

states will also have to authenticate and ratify it in their own right, in accordance with their own constitutional requirements.¹⁶² The Council, like the Canadian federal government, customarily does not ratify a mixed agreement until all member states have ratified it.¹⁶³

This EU process for the conclusion of treaties involves a sharing of tasks, and thereby promotes an inter-institutional balance between the Commission, the Council and the European Parliament.¹⁶⁴ Since agreements concluded by the EU become an integral component of the Union's legal order when they come into force,¹⁶⁵ it makes sense that the EU legislators, the Council and the Parliament play an important role in their conclusion, even though the initiative must be taken by the executive.

D. The Member States' Role in Concluding Treaties

The above analysis of Articles 218(5) to 218(8) TFEU indicates that, contrary to Canadian practice, the member states through the Council play a continuous and formal role during the different stages of the Union's treaty conclusion process. Indeed, considering that the Council is composed of representatives from the member states, they have preserved for themselves, in conformity with the federal principle, the right to have a crucial say in the conclusion of EU treaties and therefore an opportunity to defend their own interests. By virtue of Articles 218 and 207 TFEU, they contribute to the process often through a qualified

162. Lenaerts & Van Nuffel, *European Union*, *supra* note 111 at 1036; Eeckhout, *External Relations*, 2011, *supra* note 111 at 258–59. The member states could mandate the Commission or the Presidency to authenticate the agreement on their behalf. See Lenaerts & Van Nuffel, *European Union*, *supra* note 111 at 1029. See also text accompanying notes 133–134.

163. Eeckhout, *External Relations*, 2011, *supra* note 111 at 259; text accompanying note 89.

164. Jacques Mégret et al, *Le droit de la Communauté économique européenne*, vol 12, (Bruxelles: Universités de Bruxelles, 1981) at 24; MacLeod, Hendry & Hyett, *supra* note 127 at 121.

165. See Article 216(2) TFEU (former Article 300(7) TEC); Lenaerts & Van Nuffel, *European Union*, *supra* note 111 at 861.

majority vote, which has the effect of binding the minority states.¹⁶⁶ However, because unanimity is required for treaties deemed sensitive by some EU actors, concluding these treaties becomes more difficult—even impossible—if there is opposition from even a single member state.¹⁶⁷ These different majority requirements highlight the conflicting dynamics within the EU, and often lead the various players to agree on mutual concessions in order to reach a final arrangement that serves the EU's global interests.

I will now point out a few lessons that Canada could draw from European Union practices, with a view to bringing the Canadian treaty-making process more in line with the federal principle.

III. Proposals for Enhanced Provincial Participation in Canadian Treaty Making

Modern international conventions often regulate subjects within provincial legislative competence. In acknowledging that fact, the Council of the Federation¹⁶⁸ in 2004 requested the development of formal mechanisms for provincial participation in the negotiation of such international treaties.¹⁶⁹ These were not new demands. As far back as 1972, the Special Joint Committee of the House of Commons and the Senate on the Canadian Constitution emphasized that the federal government should not commit to treaties in areas of provincial jurisdiction

166. Articles 218 and 207 TFEU correspond to former Articles 300 and 133 TEC respectively. Recall that, contrary to the Canadian Parliament, the European Parliament has a crucial role to play in the conclusion process of the European Union's treaties. On this point see text accompanying notes 135, 156–159.

167. See *supra* note 128 (on agreements requiring unanimous decisions).

168. See “The Council of the Federation Founding Agreement” (5 December 2003), online: The Council of the Federation

<http://www.councilofthefederation.ca/pdfs/COF_agreement.pdf>.

169. Council of the Federation, “Council of the Federation, Report and Decisions” (February 2004), online: The Council of the Federation

<<http://www.councilofthefederation.ca>>; Council of the Federation, “Communiqué” (12 August 2005), online: The Council of the Federation
<http://www.councilofthefederation.ca/pdfs/communique_aug12.pdf>.

without having consulted each affected province.¹⁷⁰ In 1985, the report of the Royal Commission on the Economic Union and Development Prospects for Canada made several proposals on this matter.¹⁷¹ During the annual conference of provincial first ministers in July 1996, the provinces, then led by Alberta, requested a formal federal-provincial agreement which would confer a genuine provincial role in the development of Canadian trade policies and strategies during treaty negotiations in this sector.¹⁷²

International law offers several possible avenues that would help to avoid confrontation with the provinces on these questions. First, on matters within provincial legislative competence, Ottawa could enter into a framework treaty with a foreign state which would authorize the provinces to conclude future agreements in conformity with that treaty. Second, if the particular treaty expressly or implicitly allowed it, Ottawa could, at the time of ratification, issue a reservation which would limit Canada's international commitment to the obligations falling within federal jurisdiction. Finally, Ottawa could negotiate the inclusion of a federal state clause in a treaty. Depending on its wording, such a clause could achieve the same result as a federal reservation, or it could allow Ottawa (upon ratifying the accord) to exclude any part of the country from its application.¹⁷³

170. Parliament of Canada, Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, *Final Report* (Ottawa: Queen's Printer for Canada, 1972) at 68–69.

171. Canada, Privy Council Office, *Royal Commission on the Economic Union and Development Prospects for Canada: Macdonald Report*, vol 1 (Ottawa: Privy Council Office, 1985) at 372.

172. See Rosenberg, *supra* note 91; "Report of the MLA Committee" *supra* note 91 at 46, 57–58.

173. *The Canadian Intergovernmental Agreement Regarding the North American Agreement on Environmental Cooperation* and the *Canadian Intergovernmental Agreement Regarding the North American Agreement on Labour Cooperation* represent another avenue to avoid confrontation with the provinces. For more details, see Human Resources and Skills Development Canada, "Quebec Signs the Canadian Intergovernmental Agreement Regarding the North American Agreement on Labour Cooperation (NAALC)" (10 February 1997), online: HRSDC

<http://www16.rhdcc-hrsdc.gc.ca/labour/newsrele/manb2_e.html-ssi>; Human Resources and Skills Development Canada, "Canadian Intergovernmental Agreement Regarding the NAAEC", online:

However, a federal state clause may be difficult to negotiate with other states and they may not accept a reservation, so we must consider whether there are other solutions. Most modern treaties, including those that deal only with topics falling within federal jurisdiction, have considerable potential impact on provincial governance. It therefore seems unacceptable that Ottawa could unilaterally impose a treaty on the entire population and on all governmental players without first informing them of the content of the treaty and convincing them of its necessity. Proper consultation and participation mechanisms in the negotiation and conclusion of international conventions represent the best way to obtain a wide-ranging consensus on treaties and to ensure that they will be respected.

The EU practice on “mixed agreements” explained above brings to mind the “Gérin-Lajoie Doctrine”, which claims for the Canadian provinces the right to conclude treaties in their fields of legislative competence.¹⁷⁴ For treaties on matters falling within both federal and provincial jurisdiction, the application of that doctrine could lead to mixed agreements concluded side by side by both levels of government. However, in the following sections I will make some less controversial proposals aimed at improving provincial involvement in Canadian treaty making. These are inspired mainly by the EU member states’ participation in the basic treaty-making procedure established by Article 218 TFEU.

A. Treaty Negotiations

As noted above, Article 218(4) TFEU committees represent member states and accompany the Commission throughout the negotiation process. The Permanent Committee (Article 207(3), third subparagraph, TFEU) is particularly influential because of its involvement in defining

HRSDC <http://www16.rhdcc-hrsdc.gc.ca/labour/newsrele/9709_e.html-ssi>. See also Trudeau & Lalonde, *supra* note 59 at 152–60; Arbour & Parent, *supra* note 21 at 183–89; Hogg, *Constitutional Law*, *supra* note 4 at 11–16.

174. On the “Gérin-Lajoie Doctrine” see Cyr, *supra* note 26; Stéphane Paquin, *Les relations internationales du Québec depuis la Doctrine Gérin-Lajoie (1965–2005) : Le prolongement externe des compétences internes* (Lévis: Les Presses de l’Université Laval, 2006).

the EU's trade policy and in developing negotiation guidelines.¹⁷⁵ This paper's review of the Canadian context also demonstrates that Canada has an existing framework for provincial consultation during treaty negotiations,¹⁷⁶ but that framework is criticized for its ad hoc and informal character and its imprecise role.¹⁷⁷

My proposal to improve the mechanism for consulting the provinces is predicated on what currently exists in Canada, but adds certain improvements inspired by the EU committee system. First, the Canadian federal and provincial ministers now meet regularly in councils based on their areas of responsibility. Some of those councils have established committees made up of federal-provincial senior officials to continue their work between meetings.¹⁷⁸ For example, the federal-provincial Canadian Council of Ministers of the Environment created an Environment Planning and Protection Committee.¹⁷⁹ In the area of trade, there are meetings among trade ministers and the C-Trade Committee.¹⁸⁰ To improve Canada's current negotiation process, every federal-provincial council of ministers should establish such committees, which would be mandated to closely follow the work of Canadian negotiators in the process of negotiating treaties within the particular council's field of competence. Like the EU Permanent Committee, they could do the following on behalf of the provinces: receive information from the negotiators; contribute to the general orientation of the negotiations and the development of negotiating guidelines or mandates; communicate the provinces' expectations and priorities to the federal government; provide comments on the content of the proposed treaty throughout its elaboration; and approve the text before it is finalized and adopted. They could also participate in creating Canadian policies in areas related to their jurisdiction, and in the decision to begin

175. The Article 218(4) TFEU committees correspond to the former Article 300(1) TEC committees. The Article 207(3) TFEU Permanent Committee corresponds to the former Article 133(3) TEC Permanent Committee. See also text accompanying notes 138–146.

176. See text accompanying notes 54 ff.

177. See text accompanying notes 90 ff.

178. Those functions are often related to implementing and managing agreements that have already been concluded.

179. See text accompanying note 61.

180. See text accompanying notes 49–50, 55.

negotiations. Each committee would report the results of its involvement in treaty negotiations to the relevant federal-provincial council of ministers and would, if necessary, ask that council for clarification or additional instructions.

Each committee could be composed of two federal representatives and two delegates from each province.¹⁸¹ In response to the provinces' demands for transparent and predictable proceedings, each committee and council of ministers should adopt a regulation determining the frequency of regular meetings and the possibility of additional meetings with the negotiators themselves when talks are ongoing or nearing completion. The regulation should also set out a clear and equitable decision-making process that avoids bias toward any province and ensures that consultations offer a useful and valuable contribution to the treaty negotiation process.¹⁸² For example, it could require that negotiation decisions be adopted by consensus, with the possibility of requesting a vote¹⁸³ if consensus cannot be achieved, thereby binding minorities to the decision. As in the EU, different majorities could be required for different types of agreements.¹⁸⁴

B. Concluding the Treaty

Following the EU example, the federal government should not definitively commit to any treaty before receiving provincial approval. This should apply not only to agreements regulating matters within provincial legislative competence, but also, for the reasons already mentioned, to those falling exclusively within federal jurisdiction. Depending on the scope of the treaty in question, provincial approval

181. Modeled after the Continuing Committee of Officials on Human Rights. Daniel Turp, "Le Comité permanent fédéral-provincial-territorial des fonctionnaires chargés des droits de la personne et sa participation à la mise en œuvre des traités" (1984-1985) 2 Can Hum Rts YB 77 at 91-92.

182. This should respond to the criticisms mentioned above, see text accompanying notes 98, 101-102.

183. As in EU law, a system of weighted voting according to population could also be established.

184. See text accompanying note 167.

could be given in a meeting of the Council of the Federation¹⁸⁵ or of the provincial component of the council of ministers responsible for the particular subject area covered by the treaty.¹⁸⁶ Provincial approval to conclude a treaty should be sought by consensus, and if this fails, by a vote that would bind minorities. As in the EU,¹⁸⁷ the required majority could vary with the nature and importance of the treaty and should follow the logic of what is known in the EU as the principle of subsidiarity—the principle that decisions are to be “taken at the most appropriate level, whether that is at the level of the Union or the level of the Member States”.¹⁸⁸ In the EU context, this means that “the desire to regulate activities within the Union should not insist on action at the Union level when it is not necessary”.¹⁸⁹ In the Canadian context, this would mean that the more a treaty intrudes on provincial jurisdiction, the higher the level of provincial consent that is required—ranging from a simple majority to a qualified majority, and sometimes to unanimity. Also, fairness may require a voting system that is weighted according to population.¹⁹⁰

185. See generally “Council of the Federation”, online: Secretariat aux affaires intergouvernementales canadiennes <<http://www.saic.gouv.qc.ca>>. Since the Council of the Federation meets only once a year, a special meeting may have to be convened. Also, depending on the scope of the envisaged treaty, the first ministers might decide to give their approval through an exchange of notes or letters, rather than in-person meetings.

186. By provincial component I mean that only the provincial ministers of the relevant council of ministers (and not the federal minister) would approve the conclusion of the agreement.

187. See text accompanying notes 160–161, 166–167 and sentence following note 167.

188. Foster, *EU Law*, *supra* note 7 at 98.

189. *Ibid.* For an analysis of the principle of subsidiarity in the Canadian context, see Peter W Hogg, “Subsidiarity and the Division of Powers in Canada” (1993) 3:3 NJCL 341.

190. In the EU, each member state is granted votes in proportion to its population. See Article 238 TFEU (former Article 205 TEC). On former Article 205 TEC, see Foster, *Blackstone’s*, *supra* note 112 at 58, 128–31, 730; Douglas-Scott, *supra* note 119 at 78. On Article 238 TFEU, see François-Poncet, *supra* note 119 at 32–33. The *Macdonald Report* suggested a majority of two-thirds of the provinces representing at least half of the Canadian population, *supra* note 171, vol 1 at 383–84 and vol 3 at 154.

C. A Formal Framework to Improve Provincial Consultation

In accordance with provincial demands, proposals of the sort mentioned above should be incorporated in a written federal-provincial-territorial agreement¹⁹¹ accompanied by an official communiqué,¹⁹² as was done in the 1975 agreement between Ottawa and the provinces to implement the two United Nations covenants on human rights.¹⁹³ This agreement could be arrived at during a meeting of concerned federal-provincial-territorial ministers or at the level of first ministers. It could even be put into the Canadian constitution in order to ensure that it will be consistently applied to the treaty-making process and be legally binding. As early as 1985, the *Macdonald Report* launched the idea “to modify the Constitution in order to provide the intergovernmental agreements with a legal status”.¹⁹⁴ If this were an easier procedure, a constitutional amendment to this effect would appear to be the best way to ensure respect for the proposed consultation process and for the resulting decisions. However, history has demonstrated that a constitutional amendment is unlikely.¹⁹⁵ Therefore, it would be more realistic for the federal and provincial governments to incorporate such an agreement into federal and provincial law by adopting legislation at both levels of government.¹⁹⁶

191. Preferably the agreement would apply generally from the start. However the Canadian players could initially decide to apply it only to certain chosen fields, with the objective of eventually extending its application to every area.

192. This is in contrast to the July 2, 1986 agreement. See text accompanying note 39; Brown, “Federal-Provincial”, *supra* note 39 at 83.

193. Réal Forest, “Quelques aspects de la mise en oeuvre au Canada des Pactes de l’O.N.U. relatifs aux droits de l’Homme” (1981) 12:2 RGD 375 at 392–93. See Loungnarath, *supra* note 34 at 15; Trudeau & Lalonde, *supra* note 59 at 160–62; Turp, *supra* note 181 at 81, 133–35.

194. Loungnarath, *supra* note 34 at 51 [translated by author]. See also *Macdonald Report*, *supra* note 171, vol 3 at 294–95.

195. Peter W Hogg, “The Difficulty of Amending the Constitution of Canada” (1993) 31:1 Osgoode Hall LJ 41.

196. See e.g. *The Atlantic Accord*, The Government of Canada and the Government of Newfoundland and Labrador, 11 February 1985 at 57, online: Service Newfoundland and Labrador <<http://www.gs.gov.nl.ca>>; Denis Roy, “Plateau continental juridique: La surprenante pratique canadienne concernant l’exploitation des hydrocarbures sur le plateau continental de la côte atlantique” (2009) 39:2 RGD 329 at 362.

Conclusion

Canada and the European Union both see as important the establishment of a dialogue between the central authority and the provinces or member states during the treaty-making process. In the EU, however, the existing mechanisms for collaboration between the two levels of government are better organized and more efficient than in Canada—which is not surprising in light of the fact that those mechanisms are set out in the EU's constitutive treaties.¹⁹⁷ The future of the EU depends largely on the quality of its relationship with its member states. Although the Canadian provinces are not sovereign states, Canada and the EU share some of the features of federalism,¹⁹⁸ so a similar dynamic animates the relationship between the provinces and the federal government. Therefore, the federal principle could be promoted in this country by incorporating certain elements of the EU model with a view to enhancing provincial participation in the treaty-making process.

197. See *supra* note 5.

198. See text accompanying notes 3–9.

