

CANADA

1. SUBSTANTIVE ASPECTS

1.1. Distinction

- 1.1.1. Does your national legislation differentiate between different categories of treaties? If it does, how are they categorised?

There is no legislation that specifically deals with Canada’s approach to the treaty-making process. The *Department of Foreign Affairs, Trade and Development Act*¹ vests the Minister of Foreign Affairs with the power to “foster the development of international law and its application in Canada’s external relations”² but there are no legislative provisions specifically on international treaties.

The Government of Canada’s current *Policy on Tabling of Treaties in Parliament* does not differentiate or categorize treaties in terms of their function. For example, there is no distinction drawn between a “treaty” and “protocol to amend a treaty”—these are both simply regarded as treaties. The *Policy* recognizes that a treaty may be called a “convention,” “agreement,” “protocol” or similar word and that an exchange of diplomatic notes or letters can be a treaty.

- 1.1.2. What are the criteria for their classification into specific category (subject matter, scope, financial effects, etc.)? Does the form of the instrument lead to a different category of treaty?

Not applicable.

- 1.1.3. What is the legal status of treaties not requiring parliamentary approval in the internal hierarchy of norms?

Treaty actions do not require approval by the Parliament of Canada. In Canada, international relations, including treaty-making, are a prerogative of the Crown that is exercised by the federal executive branch of government.

1.2. Competence

- 1.2.1. Which authority is responsible for drafting the text of each category of treaty?

The text of a bilateral treaty may be drafted by the department that has the expertise on the subject matter in close co-operation with Global Affairs Canada (GAC) to ensure that the overall relationship with a given country or international organization is taken into consideration in the drafting process and that the formulation of provisions is consistent with Canadian treaty practice.

Canada sometimes uses model treaties on specific subject matters, including air transport, audiovisual co-productions, and social security.

- 1.2.2. In the process of drafting a treaty, which authority is responsible for the assessment of the legal character and category of an agreement?

GAC’s Legal Affairs Bureau, specifically its Treaty Law Division, has direct responsibility for the application of the treaty adoption process that includes both legal and policy steps.

¹ S.C. 2013, c. 33, s. 174.

² Section 10(2)(j).

Legally binding instruments are subject to the treaty adoption process that is initiated by obtaining a negotiation mandate from Cabinet.

- 1.2.3. Which authority has the general responsibility for ratification/approval/confirmation procedures for treaties (is it generally the responsibility of the Parliament and only certain categories are confirmed by the government or vice versa)?

In Canada, treaty making is the prerogative of the Crown that is exercised by the federal executive branch of government. Treaty actions do not require approval by the Parliament of Canada.

- 1.2.4. What are the responsibilities of the line ministries and the Ministry of Foreign Affairs throughout the procedure of conclusion and ratification of each category of treaty?

Departments and agencies responsible for the subject-matter of a treaty would serve as policy leads in the development of negotiating positions and in seeking necessary policy approvals from Cabinet to negotiate, sign and bring into force the treaties, in cooperation with GAC. The Minister of Foreign Affairs is expected to co-approve negotiation mandates and to seek legal authority from the Governor in Council to sign and bring into force treaties.

- 1.2.5. What is the competence of autonomous regions/territories for the conclusion of a treaty?

Canada does not have autonomous regions/territories. Furthermore, international law and the Canadian constitution do not provide Canada's provinces or territories with the authority to conclude treaties.

- 1.2.6. Does the Ministry of Foreign Affairs have delegated competence to conclude less significant treaties on its own, by producing full powers signed by the Minister of Foreign Affairs? If it does, what typically characterises these agreements?

It is not clear from the question whether the word "conclude" refers to the act of expressing the consent of the State to be bound by a treaty, or refers more generally to acts relating to the process of concluding a treaty, such as the negotiation/conclusion of the treaty text between negotiators. If the former, the answer is no.

Pursuant to Canada's treaty adoption process, the minister(s) responsible for the treaty's subject-matter, along with the Minister of Foreign Affairs, must normally obtain policy authority from Cabinet to negotiate a treaty. When negotiations are concluded, the minister(s) responsible for the treaty's subject-matter, along with the Minister of Foreign Affairs, must normally obtain Cabinet approval of the negotiated text and policy authority for the Minister of Foreign Affairs to seek legal authority from the Governor in Council to sign and ratify a treaty. The Governor in Council provides such legal authority through the issuance of Orders in Council. It is only then that the Minister of Foreign Affairs may sign, or delegate authority to sign, a treaty and subsequently take steps to bring the treaty into force.

Ministers may not need to seek a specific policy mandate from Cabinet to negotiate a new treaty if a blanket authority exists for a specific category of treaties (e.g. Foreign Investment Protection Agreements, Double Taxation Agreements, etc.).

2. PROCEDURAL ASPECTS

2.1. Procedure before conclusion/signature

2.1.1. What are the procedures required for the conclusion of different categories of treaties? Can a treaty be concluded through a simplified procedure? If yes, please provide a detailed presentation of the circumstances in which such procedures can be applied and describe the procedures.

Canada has a standard procedure for concluding all treaties. (See Annex A of Canada's [Policy on Tabling of Treaties in Parliament](#)).

Before the Government of Canada enters into an international agreement, certain steps must be followed. In summary:

- The Department initiating a treaty action must receive a specific policy mandate from Cabinet to negotiate a new treaty, unless a blanket authority exists for a specific category of treaties (e.g. Foreign Investment Protection Agreements, Double Taxation Agreements, etc.);
- Negotiations take place, leading to an agreed text at the negotiators' level;
- Cabinet is asked to approve the negotiated text and to authorize the Minister of Foreign Affairs to seek legal authority from the Governor in Council to sign and bring into force the treaty (or accede to a treaty already in force);
- Once the treaty is signed, it is tabled in Parliament for 21 sitting days;
- Implementing legislation (if necessary) is passed through Parliament (see question 2.1.2 for a discussion of Canada's dualist system);
- Following the end of the 21-day tabling period and the adoption of any required implementation legislation, the Minister of Foreign Affairs initiates the measures necessary to bring into force the treaty, e.g. formal notification to the other party (or parties) of the completion of Canada's domestic procedures;
- The treaty enters into force for Canada in accordance with its provisions.

2.1.2. Do you have a procedure to review the harmonization and compliance of treaties not requiring parliamentary approval with existing national laws? What authority does the review and when?

Treaty actions do not require the approval of Parliament.

Canada's approach to international law is often referred to as "dualist" because treaties are normally not self-executing in Canada. Rights and obligations created by treaties generally have no effect in Canada's domestic law unless legislation is in force to give effect to them or the obligations therein are consistent with our domestic law.

In order to avoid a situation where Canada would be in violation of its international legal commitments, the Government of Canada will not enter into treaty obligations unless it is satisfied that domestic law is or will be in accordance with these obligations.

The Department of Justice is responsible for ensuring that federal law is consistent with Canada's international obligations and determining whether legislation is required to implement the treaty at the domestic level.

To implement a treaty, Canada must consider the subject-matter of the treaty and determine whether it is under federal or provincial jurisdiction, or both. This is necessary because of the division of powers under the *Constitution Act, 1867*, sections 91 and 92(10) (federal jurisdiction); 92, 92A, and 93 (provincial jurisdiction), and 94A and 95 (concurrent jurisdiction). If all or part of the substance of the treaty is governed by subject matter that is under provincial jurisdiction, Canada is required to consult the provinces and ensure that any necessary

provincial legislation has been implemented to fulfil the treaty obligations, prior to the treaty's entry into force for Canada.

New comprehensive free trade agreements are subject to an additional requirement. When introducing the implementing legislation for these treaties in Parliament, an economic impact assessment must also be tabled, unless an exemption to that requirement is granted.

2.1.3. Do these procedures have one or two phases (before and/or after signature)? Can a treaty enter into force upon signature?

An initial determination as to whether federal law is consistent with a treaty action and, in turn, whether legislation is required to implement the treaty at the domestic level, would normally take place before the treaty is signed. A final determination, as well as the actual passing of implementing legislation, must take place before ratification (or acceptance, approval or accession).

A treaty can enter into force upon signature in exceptional cases. (See response to question 2.2.2). In such cases, implementing legislation must be passed and authority to bring the treaty into force must be obtained from the Governor in Council before the treaty is signed. Furthermore, an exemption from tabling in Parliament must be obtained in accordance with the procedure set out in the *Policy*.

2.1.4. Are there any differences in the procedures when considering multilateral vs bilateral treaties?

No.

2.1.5. Are there certain denominations of treaties, which, according to your domestic law, always imply a treaty in simplified form? (for example, "Memorandum of Understanding", "Minutes" etc.)

All international instruments that are binding under international public law are considered treaties, irrespective of their denomination, and are subject to the treaty adoption process described in the response to question 2.1.1. The legally binding or non-legally binding nature of the instrument is determined by the choice of the terms used in drafting its provisions and/or by a clear statement of the intent (for further discussion, see the separate questionnaire on non-legally binding instruments).

2.1.6. Is the procedure for obtaining the mandate for negotiations differentiated according to different categories of treaties? If yes, how?

Generally, the lead federal department initiating a treaty action must receive a specific policy mandate from Cabinet in order to negotiate a new treaty, in the absence of blanket approval to negotiate. Blanket approval to negotiate has been granted by Cabinet for certain categories of treaties, e.g. Foreign Investment Protection Agreements, Double Taxation Agreements, Mutual Legal Assistance Treaties, Sharing Agreements, Extradition Agreements, Transfer of Offenders Treaties, Social Security Agreements, International Civil Aviation Agreements, etc.

In addition, for new comprehensive free trade agreements, the Government is required under the *Policy* to table in Parliament prior to negotiations:

- a Notice of Intent to enter into negotiations, at least ninety calendar days before they begin; and
- the objectives of the negotiation, at least thirty calendar days before they begin.

2.1.7. Are the signatories of all categories of treaties required to produce full powers upon signature or just some of them?

Canada abides by Article 7 (*Full Powers*) of the VCLT in the case of all treaty actions.

2.1.8. Do you allow for electronic signature of treaties? If so, are there certain requirements concerning what type of electronic signature is acceptable? Do you accept the electronic transmission of treaties instead of the exchange of physical copies? What is the procedure?

Canada does not currently accept electronic signature of treaties.

2.2. Procedure after conclusion

2.2.1. Does the internal procedure for expressing consent to be bound change based on different categories of treaties (i.e., ratification, approval, acceptance, etc.)? If so, please explain.

Generally, no.

In the case of Canada becoming Party to a treaty through acceptance or approval, a negotiation mandate often does not need to be sought as the given treaty is often already in its final form and in force for other States. In such cases, the minister responsible for the treaty's subject-matter and the Minister of Foreign Affairs would not need to seek policy authority from Cabinet to negotiate. However, they would need Cabinet approval of the treaty as it stands and authorization for the Minister of Foreign Affairs to seek legal authority from the Governor in Council to accept or approve the treaty on behalf of Canada. As in the case of signature and ratification, the Governor in Council grants this legal authority through the issuance of Orders in Council.

2.2.2. Is entry into force of a treaty possible on the date of the signature? If yes, what are the procedural requirements that enable such entry into force?

In principle, a treaty can enter into force on the date of its signature if:

- this is provided for in the treaty, pursuant to article 12 of the VCLT;
- domestic authorities are obtained to bring the treaty into force prior to signature (as described above); and
- domestic laws are consistent with the obligations in the treaty.

An exemption from tabling in Parliament would also need to have been obtained as all signed treaties must normally be tabled prior their entry into force for Canada.

2.2.3. If entry into force is not possible on the date of the signature, is it possible to use provisional application for an earlier application of such treaty?

This would depend on the nature of the treaty and requirements for early application of its provisions. At a minimum, for provisional application to be considered, implementation of the treaty should not require changes to domestic law.

2.3. Form

2.3.1. Do different categories of treaties require specific form when the text is prepared for signature (i.e., printing on treaty paper, sealing, treaty folder)?

The Treaty Law Division of Global Affairs Canada is responsible for the preparation, formatting and printing of treaties consistent with Canadian practices (including requirements relating to paper format and quality, folders, etc.). The same process is followed for all treaties.

2.3.2. Who prepares the text of different categories of treaties for signature?

See the answer to question 2.3.1.

2.4. Implementation

How are treaties not requiring parliamentary approval implemented in national legislation in order to ensure respect of the principle of *pacta sunt servanda* in accordance with Article 26 of the VCLT?

Treaties do not require parliamentary approval in Canada but may require implementing legislation, which, in the case of federal implementing legislation, is introduced by a Minister or Parliamentary Secretary once the treaty tabling period of 21 sitting days is completed. See, also, the answer to 2.1.2.

2.5. Publication, Registration and Depository

2.5.1. Do all categories of treaties have to be published?

All treaties in force in Canada are published in the *Canada Treaty Series* (CTS). The latest editions of the CTS are available online on Global Affairs Canada's public treaty website: www.treaty-accord.gc.ca. The website also contains information on treaties signed by Canada.

2.5.2. If not, which categories do not need to be published and made available to the general public? Is there room for discretion?

Not applicable.

2.5.3. Which authority decides whether a treaty should not be published?

All treaties are considered public, consistent with the VCLT and, as such, subject to publication.

2.5.4. Where is each category of treaty published (Official Gazette, website, database, etc.)?

See the answer to question 2.5.1.

2.5.5. Which categories of treaties are registered with the UN Secretariat?

As per Article 102 of the UN Charter, every treaty entered into by Canada after the coming into force of the Charter is registered with the UN Secretariat. Canada also registers aviation-related treaties with ICAO.

2.5.6. Where are the originals (or certified true copies) of different categories of treaties kept (e.g., MFA, authority responsible for their implementation, state archives)?

The Treaty Law Division of Global Affairs Canada maintains the official government archive of originals of bilateral treaties and certified copies of multilateral treaties in the Treaty Vault at Global Affairs Canada headquarters.