

TREATY MAKING AND IMPLEMENTATION IN CANADA

The Vienna Convention on the Law of Treaties, 1969, defines a treaty in Article 2 as follows:

Treaty means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument, or in two or more related instrument and whatever its particular designation.

Treaties, which may also be called “Conventions,” “Agreements,” “Protocols” or some similar word, are binding on states and enforceable between states at public international law. Treaties may take many forms e.g. a formal multilateral convention negotiated under the auspices of the United Nations or one of its specialized agencies such as the International Maritime Organization (IMO), or a bilateral exchange of diplomatic notes or letters between states (such as was done to allow the construction of the St. Lawrence Seaway).

It is important to distinguish between the making of treaties at the international level and their domestic implementation.

Treaty Making:

The making of a treaty involves a state both participating in the negotiation of the text of an agreement and signaling its consent to be bound by it. Treaty making in Canada is the responsibility of the executive branch of government and is overseen by the Department responsible for the subject matter of the treaty and the Department of Foreign Affairs, Trade and Development. Decisions about the negotiation of treaties –including the determination of objectives and negotiating positions- are taken at the ministerial level, while the final decision as to whether to sign and ratify a treaty is taken by the federal cabinet. A state becomes formally bound by a treaty at international law upon ratification or accession. Since 2008 it has been Government of Canada policy to formally table treaties in Parliament for comment prior to the cabinet making any decisions regarding ratification or accession.

Treaty Implementation:

Treaties must be implemented in domestic law prior to ratification or accession in order for Canada to fulfill its obligations under the treaty and, where necessary, for the treaty’s obligations to be made binding on individuals within Canada. In Canada treaties must be implemented in domestic law in a way that respects the division of federal and provincial powers in the Constitution. In other words matters under federal jurisdiction must be

implemented by the federal government and matters under provincial jurisdiction by provincial governments. As a matter of practice Canada will only ratify a treaty once it has taken the necessary steps, including consultations with the provinces, to ensure that it can meet its commitments under the treaty.

It is possible to implement the legal obligations set out in treaties through a variety of methods. The existing state of the domestic law and the nature of the treaty obligation determine which method should be used. In some instances a treaty can be implemented without any need to amend the existing law: i.e. merely through executive or administrative action. In other cases new legislation or regulations or amendments to existing legislation or regulations are necessary in order for Canada to fulfill its obligations under the treaty.

Most maritime treaties are implemented in Canada through one of the following three mechanisms:

1. Regulations made pursuant to the authority in paragraph 35(1)(d) of the *Canada Shipping Act, 2001* which states:

35. (1) The Governor in Council may, on the recommendation of the Minister of Transport, make regulations

[...]

(d) implementing, in whole or in part, an international convention, protocol or resolution that is listed in Schedule 1, as amended from time to time, including regulations

(i) implementing it in respect of persons, vessels or oil handling facilities to which it does not apply,

(ii) establishing stricter standards than it sets out, or

(iii) establishing additional or complementary standards to those it sets out if the Governor in Council is satisfied that the additional or complementary standards meet the objectives of the convention, protocol or resolution;

Sections 29-31 of the Act set out a mechanism for treaties to be added or deleted to the Schedule of the Act in order to permit their implementation by regulations made under the authority in paragraph 35(1)(d).

The authority at paragraph 35(1)(d) has been used to pass regulations implementing the requirements of a number of International Maritime Organization and International Labour Organization Conventions related to ship and crew safety and pollution prevention including MARPOL, SOLAS, *International Convention on Load Lines, 1966* and the *Maritime Labour Convention, 2006*. Note that paragraph 35(1)(d) is sometimes used in conjunction with other enabling authorities in the CSA, 2001 to implement a treaty's obligations.

2. Amendments to the *Marine Liability Act* (MLA). This statute deals largely with treaties related to limitation of liability and compensation regimes for the carriage of goods, passengers and oil pollution.

The MLA presently implements seven international instruments by provisions (see for example ss. 26, 37, 43, 48, 57, 63 and 69) which expressly give relevant provisions of the treaties force of law in Canada. The treaty texts are then scheduled to the Act. The body of the MLA includes additional provisions to ensure the effective implementation of the treaties in Canada.

3. A stand alone statute implementing a treaty, see for example the *Migratory Birds Convention Act*, *Coastal Fisheries Protection Act* or the *Safe Containers Convention Act*. Such statutes can either follow the MLA model of giving the treaty force of law and annexing it, or can redraft the treaty obligations into Canadian legislative language.

Conclusion:

Since 2008 the federal government's *Policy on Tabling Treaties in Parliament* has established the framework for negotiating, tabling, signing, ratifying and implementing treaties in Canada. The policy is comprehensive and an excellent primer on how the treaty process works in Canada. It can be viewed at the following link:

<http://www.treaty-accord.gc.ca/procedures.aspx>