

8. Canada

Communication transmitted to the Secretariat, 19 July 2022:⁹

The following submission delineates the scope of Canada's evolving practice on the provisional application of treaties.

Provisional application and Canada's treaty adoption process

Canada recently put forward its position on the role of provisional application in its treaty adoption process at the General Assembly debate on the 2021 Report of the International Law Commission:

Provisional application is an integral part of Canada's treaty adoption process, though we generally prefer to rely on entry-into-force provisions as a straightforward mechanism. Canada's current practice is that provisional application may only take effect following the signing of a treaty, and if no domestic implementing legislation is required. If implementing legislation is required, provisional application is delayed until the required legislation enters into force [emphasis added].¹⁰

A similar position was articulated by Canada in a study published in 2001 by the Council of Europe (CoE) and the British Institute of International and Comparative Law (BIICL):

Provisional application is possible, for example, when such a provision is included in the legislation (e.g. the Department of Transport Act). If, however, changes in Canadian laws or regulations are necessary in order to enable the government of Canada to commit itself to provisional application of a treaty, appropriate legislative or regulatory action must be taken.¹¹

The approach taken in relation to the *Canada-European Union Comprehensive Economic and Trade Agreement* (CETA) illustrates this practice. Article 30.7.3 of CETA allows Canada or the European Union (EU) to provisionally apply the treaty granted "that their respective internal requirements and procedures necessary for the provisional application of this Agreement have been completed."¹² Canada therefore enacted the *Canada-European Union Comprehensive Economic and Trade Agreement Implementation Act* and completed other necessary procedures to domestically implement CETA (e.g., administrative and regulatory changes) prior to the initiation of CETA's provisional application pursuant to Article 30.7.3.¹³

In addition to enacting any necessary legislative, regulatory or other changes, Canada also typically provides confirmation to the other State of the completion of Canada's relevant domestic procedures to provisionally apply a given treaty and, if applicable, identifies the

⁹ Also provided in French, see: https://legal.un.org/legislativeseries/pdfs/chapters/book26/canada_f.pdf.

¹⁰ United Nations General Assembly, Sixth Committee, *International Law Commission Report*, Canada Statement—Cluster 1, 28 October 2021, p. 3, available online at https://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/19mtg_canada_1e.pdf.

¹¹ Council of Europe (CoE) and the British Institute of International and Comparative Law (BIICL), "Treaty Making—Expression of consent by States to be Bound by a Treaty", The Hague, Kluwer Law, 2001, p. 301.

¹² "Text of the Comprehensive Economic and Trade Agreement—Chapter thirty: Final provisions" Government of Canada, available online at <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/30.aspx?lang=eng>.

¹³ *Canada-European Union Comprehensive Economic and Trade Agreement Implementation Act* S.C. 2017, c. 6; see also "Order Fixing September 21, 2017 as the Day on which the Act Comes into Force, other than Certain Provisions" Canada Gazette, available online at <https://gazette.gc.ca/rp-pr/p2/2017/2017-09-07-x1/html/si-tr47-eng.html>.

relevant provisions subject to provisional application (if the intent is to limit provisional application to certain provisions of the treaty).¹⁴

Canada maintains that the ultimate objective is for States to take the necessary domestic steps to ensure that a treaty formally enters into force. Thus, provisional application should be seen as a “transitional stage” or measure that can facilitate the coming into force of a treaty.¹⁵

Canada’s practice regarding the forms for prescribing or exercising provisional application

Article 25 of the *Vienna Convention on the Law of Treaties* (VCLT) specifies that provisional application may result from the provisions of the treaty in question (Article 25(a)). Provisional application may also occur “in some other manner” (Article 25(b)) as agreed by the negotiating States, including in the form of a separate treaty or, exceptionally, a decision or resolution adopted at an international organization or conference, or by a declaration of a State accepted by another State or international organization.¹⁶

Canada’s practice is generally to prescribe provisional application in the treaty in question or alternatively as a separate treaty (typically through an exchange of notes or a protocol).

In the treaty in question (examples)

A series of bilateral treaties between Canada and Latin American States concluded between the mid-1940s to the mid-1950s include express provisions on their provisional application in the final clauses. These provisions stipulate that the treaty in question would apply provisionally upon signature or on a certain date, pending the treaty’s definitive entry into force.¹⁷

The plurilateral *Free Trade Agreement between Canada and the States of the European Free Trade Association (Iceland, Liechtenstein, Norway and Switzerland)* allows for the provisional application of the treaty and associated bilateral agreements, on condition that the domestic requirements of each State permit this provisional application.¹⁸

¹⁴ See, for example, Note no. JLI—0133 regarding *General Coordination Agreement between the United States of America and Canada on the Use of the Radio Frequency Spectrum by Terrestrial Radio-communication Stations and Earth Stations* (2021).

¹⁵ See para. 84 of Second Report of the Special Rapporteur on the provisional application of treaties, UN Doc. A/CN.4/675.

¹⁶ Sean D Murphy explains that “[w]hile the draft guideline [on provisional application] identifies these other forms, virtually all agreements on provisional application may be found in the treaty itself that is being provisionally applied or in a separate treaty; very few (if any) examples may be found of provisional application in the form of a resolution adopted at an international organization or by a declaration of a state accepted by others.” See Sean D. Murphy, “Provisional Application of Treaties and Other Topics: The Seventy Second Session of the International Law Commission” (2021) 115:4 AJIL, p. 673; see also International Law Commission, *Guide to the Provisional Application of Treaties, with commentaries thereto*, Guidelines 3 and 4 (reproduced at p. 218, below).

¹⁷ See Article X(c) of the *Trade Agreement between Canada and Spain*, (E100588–CTS 1955/12); see also Article XIV of the *Agreement between the Government of Canada and the Government of Peru for Air Services between and beyond their respective territories* (E103280–CTS 1955/1); see Article VIII(2) of the *Trade Agreement between Canada and Mexico* (E100538–CTS 1946/4); see also Article X(2) of the *Trade Agreement between Canada and Brazil* (E102985–CTS 1941/18); finally, see Article IX(2) of the *Trade Agreement between Canada and Chile* (E102997–CTS 1941/16).

¹⁸ See Article 41 of the *Free Trade Agreement between Canada and the States of the European Free Trade Association (Iceland, Liechtenstein, Norway and Switzerland)* (CTS 2009/3).

In some other manner (examples)

An exchange of notes has been used to prescribe provisional application¹⁹ or to extend provisional application that was prescribed by the initial treaty.²⁰ Canada has also prescribed provisional application in the form of a protocol with an international organization.²¹

Canada has not prescribed or exercised provisional application through forms other than the treaty itself or by a separate agreement. Canada has expressed the need for greater clarity regarding the exercise of provisional application “in some other manner” as foreseen at Article 25(b) of the VCLT, particularly to clarify whether and, if so under what circumstances, consent for provisional application could be tacit or implied and produce legal effects.²²

Conclusion

Overall, provisional application is a voluntary and flexible mechanism that allows States to accommodate differences in their respective domestic treaty adoption requirements while not unduly delaying treaty implementation.²³ Canada’s views and practice on provisional application will continue to evolve based on our experience and that of other States.

¹⁹ See, for example, *Exchange of Notes between Canada and Sweden providing for the Provisional Application between the two countries of the Provisions of the International Air Services Transit Agreement done at Chicago, December 7, 1944* (now terminated).

²⁰ See, as an example, *Exchange of Notes (September 23 and October 9 and 12, 1942) Between Canada and Chile Extending the Provisional Application of the Trade Agreement of September 10, 1941* (E104697–CTS 1942/15); cf. Article IX (2) of the *Trade Agreement between Canada and Chile* (E102997–CTS 1941/16).

²¹ See Article 17(b) of the *Protocol Additional to the Agreement between Canada and the International Atomic Energy Agency for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons*.

²² See Statement by Canada, General Assembly of the United Nations, 70th session, Sixth Committee, 25th meeting, UN Doc. A/C.6/70/SR.25, para. 60.

²³ See Memorandum by the ILC Secretariat on provisional application of treaties, United Nations General Assembly, International Law Commission, 69th session, UN Doc. A/CN.4/707[, reproduced at p. 311, below], para. 103.