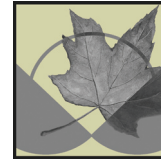


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New Treaty Approval Process Misses the Mark

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Key points

- The new procedure does not address long-standing concerns regarding the lack of accountability and secrecy of the trade-treaty negotiating process.
- It also falls short of the Conservatives' campaign pledge to "place international treaties before Parliament for ratification."
- It should, however, provide an opportunity for increased Parliamentary and public scrutiny of treaties after they are signed but prior to ratification (i.e. before the government expresses its final consent to be bound by the treaty).
- It will also provide the possibility of a parliamentary vote and a window for lobbying parliamentarians on the treaty. The government, however, "will maintain the legal authority to decide whether to ratify the treaty." It merely commits to "give consideration to the view of the House in coming to a decision."

Background and discussion

On January 25, 2008 the Conservative government announced a new procedure to involve the House of Commons in the approval of international treaties negotiated and signed by the Canadian government. The new process will apply to all treaties "governed by international public law," including trade treaties.¹

In their 2006 campaign platform, the Conservatives promised to "place international treaties before

Parliament for ratification."² Subsequently, in the 2006 Speech from the Throne the Conservative government stated that "significant international treaties will be submitted for votes in Parliament." The new process backtracks from both these earlier commitments.

Treaties will normally be tabled for review in the House of Commons at least 21 sitting days prior to the government finally binding Canada to the treaty. The backgrounder outlining the new procedure states that: "Very exceptionally the Government may have to bind Canada to the treaty before the treaty is tabled, informing the House of the treaty at the earliest opportunity." When treaties require legislative amendment, the government commits "to delaying the legislation until this 21-sitting-day period has passed."

The new procedure allows the House of Commons a short period to debate the treaty, "if it chooses to do so." But it does not require that new treaties be put to a vote, leaving open the questions whether the House will vote and, crucially, whether the government will respect the expressed will of the House if it does so.

Under the new procedure, the executive (the prime minister, cabinet and the permanent civil service) explicitly reserves the authority to decide whether to ratify the treaty, committing only to consider the view of the Commons. In practice, it could prove difficult for the government to ignore a parliamentary vote that clearly rejects a treaty.

The new process does not address long-standing, fundamental concerns about the lack of accountability and excessive secrecy of the trade-treaty negotiating process. Existing consultation processes are weak and ineffective. Non-governmental organizations, the general public and even parliamentarians have little role or access to texts during the negotiations. By contrast, commercial and corporate interests have privileged access to government negotiators, are consulted closely in the development of negotiating positions and are frequently provided with confidential draft texts.

This approach contrasts unfavourably with the UN treaty negotiation process, where draft texts, government positions, detailed proposals and even negotiating sessions are relatively open and transparent. Such openness facilitates effective and meaningful public and civil society participation throughout the treaty negotiations—when it is still possible to influence the outcome.

Once a trade treaty is signed it is very difficult to make changes. It becomes a take-it-or-leave-it proposition. Meaningful transparency and accountability require early involvement, publication of draft texts, full consultation with non-governmental organizations other than those representing commercial interests, and public and parliamentary debate throughout the negotiations. Greater parliamentary debate and public scrutiny are essential during the negotiations, not merely after talks are concluded and the treaty is signed.

The new approval process is similar to that employed in the United Kingdom and Australia. Although within the United Kingdom the treaty-making and ratification power is a prerogative of the crown, it has become established practice that treaties which involve changes in domestic law, add to the financial burdens on government or affect the rights of British citizens

will be first submitted to Parliament. Under the so-called “Ponsonby Rule,” treaties are submitted to the British Parliament at least 21 days prior to ratification. Similarly, Australia provides for tabling of treaties in Parliament at least 15 sitting days prior to binding. Australia, a federal state, has also developed procedures for involving state governments in the consideration of international treaties that affect matters within their jurisdiction. In the U.S. the constitutional separation of powers gives the Congress a central role in the approval of international treaties negotiated by the President. Under “fast-track” procedures first established by the 1974 Trade Act, Congress agrees that it will not amend a trade agreement negotiated by the administration and must simply accept or reject it as negotiated. Fast-track procedures expired in July 2007 and have not been renewed.

The first tests of the new Canadian process will be the recently concluded free trade agreements with the European Free Trade Association and with Peru. The 21-day period for Parliament to consider the treaty begins when the agreement is tabled in the House of Commons. According to the government backgrounder: “The Clerk of the House will distribute the full text of the agreement and an explanatory memorandum giving the salient issues in the treaty to each Member of Parliament.”

Notes

1 A media release and a short backgrounder on the new process are available on the Department of Foreign Affairs and International Trade web site at: <http://news.gc.ca/web/view/en/index.jsp?articleid=374729>. All quotations, unless indicated otherwise, are from this release and backgrounder.

2 The Conservative platform is available at www.conservative.ca/media/20060113-Platform.pdf