

UNION INTERPARLIAMENTARY



INTER-PARLIAMENTARY UNION

CONTRIBUTION

by

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to the general debate on

THE ROLE OF PARLIAMENT IN INTERNATIONAL NEGOTIATIONS

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Conducting negotiations with other states or with international organisations is generally the prerogative of government. This situation is derived from a traditional allocation of roles in which the government has the power to direct foreign policy while domestic policy is the responsibility of parliament. This distinction has made foreign policy the preserve of the executive, an exception within the democratic system largely beyond the influence of parliament. Parliamentary approval for international treaties has long been the only link between government and parliament on foreign policy.

Over time, parliaments' contribution to the framing of international negotiations has expanded and intensified. This development can be attributed to the evolution of international law, the increase in cooperation between states, greater regional integration and to the growing influence of foreign policy on national legislation. Today, a significant number of decisions that fall under domestic policy – and therefore within the jurisdiction of parliaments – are dependent on decisions taken outside of parliament and have to be transposed into domestic law; certain authors have termed this process the 'domestication of international policy'. Once taken, international decisions can no longer be changed by national parliaments and have to be applied in domestic law. In these circumstances, it seems logical that parliaments have sought to influence the course of negotiations and pre-empt the content of decisions that they will later have to put into practice.

The increasing involvement of parliaments in foreign policy is also in line with the trend towards democratising international relations and making them more transparent and inclusive.

In Switzerland, Parliament has a wide range of instruments for influencing international negotiations. It can actively use them at various stages in the process and in various ways.

Before negotiations

Under the Swiss Constitution and Swiss law, Parliament should 'participate in shaping foreign policy' (Art. 166 para. 1 of the Swiss Federal Constitution). It should 'follow international developments and participate in the decision-making process on important foreign policy issues' (Art. 24 para. 1 Parliament Act). To exercise this power, Parliament uses long-established parliamentary instruments such as questions to the government, parliamentary procedural requests, mandates or plenary debates.

In addition, the government is required by law to report regularly to Parliament on its foreign policy (Art. 148 para. 3 Parliament Act) and on its foreign economic policy (Art. 10 para. 1 Federal Act on International Trade Measures). The foreign policy committees of the two chambers carry out a preliminary examination of these reports, which are then debated in plenary session. These committees also organise regular exchanges of views with government ministers and senior civil servants on the directions taken in foreign, trade and European policy (Art. 152 para. 1 Parliament Act).

The foreign policy committees must be consulted when defining mandates for negotiations. The Parliament Act in fact stipulates that the government must 'consult the committees responsible for foreign policy on important plans, (...) and on the guidelines and directives relating to mandates for important international negotiations before it decides on or amends the same' (Art. 152 para. 3 Parliament Act). The same also applies to mandates likely to create legal obligations for Switzerland and to negotiations on the recommendations and decisions of specialist agencies ('soft law'). The government is not bound by the opinions of the committees and is free to reject them if need be. The debates on the mandates for negotiations are confidential and may not be held in public session.

During negotiations

During the actual negotiation phase, the Swiss parliament has no role to play. No provision has been made for members of parliament to join governmental delegations at ministerial meetings or international summits. In 1978, a panel of experts¹ proposed allowing members of parliament to attend negotiations on international treaties as observers, but the idea was rejected for reasons related to the separation of powers. However, the foreign policy committees can ask the government at any time to keep them up to date on progress with negotiations ('(the government) shall inform (the foreign policy) committees of the status of its plans and of the progress made in negotiations', Art. 152 para. 3 Parliament Act). This power is derived both from the Parliament Act and from the Constitution, which provides that Parliament should 'supervise the maintenance of foreign relations' (Art. 166 para. 1 Swiss Federal Constitution).

After negotiations

Once negotiations have been concluded, Parliament is required to 'approve international treaties, with the exception of those that are concluded by the (government) under a statutory provision or an international treaty' (Art. 166 para. 2 Swiss Federal Constitution). It then attends to the task of implementing the treaties in domestic law. The procedure for approving treaties follows the normal legislative procedure, with a preliminary examination by committees, followed by a public debate in the two chambers. Occasionally Parliament rejects an important treaty, but this is rather rare.

Treaties of minor importance, which do not have to be approved by Parliament, are the subject of an annual public report (Art. 48a para. 2 Government and Administration Organisation Act). The report also covers decisions taken by joint committees and other bodies set up by treaties, provided these decisions are equivalent in value to an international treaty or to an amendment to an existing international treaty. This report is examined by the competent parliamentary committees, then debated in public session.

In addition to these various mechanisms, Parliament has certain traditional instruments that it can also use to exert an indirect influence on international negotiations, such as its power to approve the budget or specific items of expenditure.

This brief description shows that the Swiss parliament has become a key player in defining Swiss foreign policy. The way in which it is organised conforms largely to the principles set by the Inter-Parliamentary Union (IPU).

According to the IPU², for a parliament to exercise an effective role in international affairs it must:

1. have a clear legal basis for parliamentary involvement;
2. be informed sufficiently in advance of government policies and negotiating positions and have accurate information about the policies and their background;
3. have the necessary organisation and resources to address the issues, including sufficient expertise among the individual parliamentarians involved through their work in specialised committees;

¹Final report of the review committee on the future of the Swiss parliament, 29.6.1978 (FF 1978 II 1139).

² *Parliament and democracy in the twenty-first century: A guide to good practice*, Inter-Parliamentary Union, Geneva, 2006, p. 158.

4. have an opportunity to put questions to ministers and negotiators, and thus be able to express its political (though not necessarily legally binding) views to the government;
5. be included as a matter of course in governmental delegations to international organisations.

In the light of these principles, it seems that the time when the Swiss parliament only ever intervened in a formal manner, retrospectively approving treaties without knowing anything as to their purpose and impact, is largely over. Yet it is hard to assess the precise scope of its influence. It is certain, however, that the growing involvement of Parliament in foreign policy provides a stronger democratic basis for reaching decisions on international matters and thus guarantees greater legitimacy for the results of negotiations.

The involvement of parliaments in international affairs raises two fundamental questions:

The first relates to the separation of powers. The closer involvement of parliaments in defining foreign policy poses the risk that members of parliament will disregard their roles as lawmakers and come to confuse their responsibilities with those of the executive. For this reason, it is vital that the influence of parliaments is brought to bear *ex ante*, so that the executive knows clearly what Parliament expects of it, and then *ex post*, at the point where the treaties negotiated have to be approved and implemented. By intervening earlier in the process, parliaments can justify their approval of a treaty on the grounds that it takes account of the demands made before the negotiations. The conduct of negotiations, strictly speaking, must remain the exclusive prerogative of government, which must be able to speak with one voice.

The second issue is confidentiality. In order to be able to hold talks with foreign partners, a state must have the maximum flexibility to negotiate. This essentially implies that the negotiators should be able to employ certain tactics that do not benefit from being made public. For this reason, it is crucial that the committees responsible for approving negotiating mandates do everything necessary to ensure that their work is only disclosed to a limited number of people.

The role of Parliament in international negotiations: legal bases

Federal Constitution of the Swiss Confederation of 18 April 1999

Art. 166 Foreign relations and international treaties

1 The Federal Assembly shall participate in shaping foreign policy and supervise the maintenance of foreign relations.

2 It shall approve international treaties, with the exception of those that are concluded by the Federal Council under a statutory provision or an international treaty.

Parliament Act of 13 December 2002

Art. 24 Co-determination of foreign policy

1 The Federal Assembly shall follow international developments and participate in the decision-making process on important foreign policy issues.

2 It shall approve treaties under international law, unless the Federal Council has the power conferred by a federal act or an international treaty approved by the Federal Assembly to enter into such treaties at its own behest.

3 It shall approve treaties under international law that are subject to a referendum by issuing a federal decree. It approves other treaties under international law by issuing a simple federal decree.

4 It shall participate in international parliamentary conferences and cultivate relations with foreign parliaments.

Art. 148 Further plans and reports

3 The Federal Council shall submit a regular report to the Federal Assembly on Switzerland's foreign policy.

Art. 152 Information and consultation on foreign policy

1 The committees responsible for foreign policy and the Federal Council shall have regular contact with each other in order to exchange views.

2 The Federal Council shall inform the Presiding Colleges of the Councils and the committees responsible for foreign policy regularly, comprehensively and in good time of important foreign policy developments. The committees responsible for foreign policy shall also pass on this information to other committees involved in foreign policy related matters.

3 The Federal Council shall consult the committees responsible for foreign policy on important plans, on planned changes to the number of Switzerland's diplomatic and consular representations abroad, and on the guidelines and directives relating to mandates for important international negotiations before it decides on or amends the same. It shall inform these committees of the status of its plans and of the progress made in negotiations.

3bis The Federal Council shall consult the committees responsible before it provisionally applies an international treaty that must be approved by the Federal Assembly. If the committees of both Councils are against the proposal, it shall refrain from provisionally applying the treaty.

4 In urgent cases, the Federal Council shall consult the presidents of the committees responsible for foreign policy. The presidents shall inform their committees without delay.

5 The committees responsible for foreign policy or other relevant committees may request that they be informed or consulted by the Federal Council.

Government and Administration Organisation Act of 21 March 1997

Art. 48a Conclusion of international treaties

1 The Federal Council may delegate responsibility for concluding international treaties to a department. In the case of treaties of limited significance, it may also delegate this responsibility to a group or federal office.

2 It provides the Federal Assembly with an annual report on the treaties entered into by the Federal Council, the departments, groups and federal offices. Only the Control Delegation receives notice of treaties that are not published in accordance with

Article 6 of the Publications Act of 18 June 2004.

Federal Act on International Trade Measures of 25 June 1982

Art. 10 Report and approval

¹ The Federal Council shall submit a yearly report to the Federal Assembly on Switzerland's foreign trade policy.