ENSURING ADEQUATE PARLIAMENTARY SCRUTINY
OF FOREIGN AND COMMONWEALTH AFFAIRS

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In today’s world, national policy is constantly being influenced and indeed, determined by global issues, the decisions of international institutions and for small states, by actions of super powers. Yet, in many Commonwealth countries, Parliamentarians are often poorly or not at all informed of activities and decisions taken by their governments in relation to foreign affairs. This means that they have little or no opportunity to exercise influence on the decisions which affect the citizens whom they represent. It also means that their role in keeping governments accountable on these issues which extends to foreign trade matters, is severely limited.

Some small Commonwealth countries (with populations of under 500,000) have the financial resources to set up and maintain standing committees and provide them with research assistance and the use of well-stocked libraries. In
addition, they may have parliaments of over 100 members some of whom serve on a full-time basis.

Countries in these categories have the resources both in terms of manpower, expertise, and finance to provide services needed for parliamentary committees to function. The committees on foreign policy and foreign trade can meet at regular intervals, commission research and publish reports for the edification of Members of parliament and the public and Members can speak authoritatively in Parliament on various aspects of foreign policy and foreign trade and generate debate on these subjects.

This is not generally the situation in the Commonwealth Caribbean. The tradition is for the Executive, which is successor to the prerogative powers of the Crown, to conduct foreign affairs, defence and international trade matters and subscribe to international treaties on behalf of the State, without the approval, or indeed, knowledge of Parliaments and without the production of documentary authority or full powers.

I have been an Independent Senator in Barbados for 12 years. The Parliament of Barbados comprises a House of
Assembly of 30 Members and a nominated Senate of 21. I cannot say that a general debate on the country’s foreign policy or international trade objectives has taken place during my tenure. Indeed, few foreign affairs matters come to Parliament and there is no parliamentary committee to deal with foreign affairs.

About one decade ago a former Minister of Foreign Affairs Dame Billie Miller instituted a Bipartisan Foreign Policy Committee which included members from both Houses of Parliament, the labour movement, academia, youth and other segments of the society. It seems that the Committee seldom met due to lack of a quorum. The members of civil society organisations attended, but the parliamentarians did not turn up.

When a new Minister of Foreign Trade was appointed in 2006 the Foreign Policy Committee as constituted above was replaced by a Joint Parliamentary Committee on Foreign Affairs and Trade. The terms of reference of this Committee were as follows:
• to keep under constant review the development and implementation of Barbados’s political and economic external relations;

• receive reports and recommendations from the Minister of Foreign Affairs and Foreign Trade and other relevant authorities;

• to send for persons, papers and records;

• appoint specialists and experts as advisory to the Committee as deemed necessary;

• meet concurrently with other departmental committees to exchange information and views;

• receive oral and written submissions from members of a general public concerning matters relating to foreign affairs and trade;

• examine bills/legislation pertinent to the Ministry of Foreign Affairs and Foreign Trade and any other matters referred to it;

• report recommendations and findings and submit such reports and findings to the Hon the House of Assembly from time to time as may be considered appropriate;

• convene at least once every quarter;
• perform any other functions and tasks that may be referred to the Committee.

The fate of this committee was the same as its predecessor - parliamentarians did not attend meetings, and it faded into oblivion. The question is why the lack of interest on the part of parliamentarians. Answers could be: lack of time to conduct research themselves and the fact that no research assistants were appointed to assist the committees; unavailability of a well-equipped and adequately staffed Parliament Library; some Members may have found Foreign Affairs complex and even uninteresting; foreign policy may not have been considered a vote catcher and the Ministers of Foreign Affairs and Foreign Trade who would have been expected to play key roles in the functioning of the committees were often travelling overseas on government business. Furthermore, the terms of reference of the 2006 committee would have been daunting, even if research assistance and adequate library facilities were available unless parliamentarians who were members were serving on a full-time basis!
With regard to treaties, the current position, which is the same as for foreign affairs generally, is exemplified in the Vienna Convention on the Law of Treaties of 1969 which identified Heads of State and Ministers of Foreign Affairs as representatives of their respective States for the purpose of performing all acts relating to the conclusion of treaties. Heads of diplomatic missions and representatives accredited by States to an international conference or organisation are also given power to adopt the text of agreements concluded in receiving states or at conferences. In many democracies outside the Commonwealth, express permission to conclude treaties is usually given to the officials mentioned above, but subject to constitutional provisions guaranteeing legislative participation.

The concept of legislative participation in the international law arena is not a prominent feature of the Constitutions of the 12 independent Commonwealth Caribbean States. Article 37 of the Constitution of the Cooperative Republic of Guyana provides that the State “will establish relations with all other states on the basis of sovereign equality, mutual respect, inviolability of frontiers, territorial integrity of states”. The Preamble of the Constitution of Belize
requires that State to adopt policies which promote “respect for international law and treaty obligations in dealings among nations.” It is of interest that both Guyana and Belize are states which at Independence had unresolved boundary disputes, and were therefore interested in international law sources which guaranteed territorial integrity. In St. Kitts and Nevis, the Constitution of provides for parliamentary approval in case of secession of Nevis from the Federation, which would have important implications for international law. However, the other Constitutions are silent on the question of international law.

With regard to legislative provisions for the making of treaties, some Caribbean statutes provide for the making of treaties in certain substantive fields, eg. Maritime law but there is no legislation which states that treaty making power must be distributed between the executive and Parliament as in the UK (in relation to EU law).

So, in general, treaty making is regulated by the rules of common law and is based on custom and usage, and there is no requirement that treaty conclusion must be subjected
to approval of Parliament. That is, except in Antigua and Barbuda.

The 1987 *Ratification of Treaties Act* of Antigua and Barbuda (ROTA) which commenced in 1989 was intended to remedy a fundamental defect in Caribbean law and practice by legislating a role for Parliament in treaty conclusion. It provides that where a treaty to which Antigua and Barbuda becomes party after the coming into force of the Act is one which affects or concerns the status of the country under international law or the maintenance or support of such status, or the security of Antigua and Barbuda, its sovereignty, independence, unity or territorial integrity, or the relationship of Antigua and Barbuda with any international organisation, agency, association or similar body, the treaty shall not enter into force with respect to Antigua and Barbuda unless it has been ratified, or its ratification authorised or approved in accordance with the provisions of the Act.

The definition of treaty in the Act is as follows:
“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 instruments and whatever its particular designation.”

It would seem that the definition does not extend to regional agreements with territories which are not states or to oral treaties which are rare, but do exist. Nevertheless, the categories of treaties to be subjected to parliamentary approval is broad enough to include most treaties. The Act makes special provision for parliamentary discussion of agreements affecting national security and defence which are a prime category usually excluded from parliamentary purview. A treaty to which the Act applies must be ratified by Parliament before the Minister of Foreign Affairs deposits the instrument of formal acceptance. A treaty concerning the relationship of the country with an international organisation may also be ratified by way of resolution.

Of importance is the fact that no specified majority is required for ratification, whether by legislation or resolution. This means that the government of the day can use its majority in Parliament to ensure ratification of all
international treaties that it wishes to adopt. This requirement for a simple majority could be a serious obstacle to efficient management of the country’s affairs.

The Antigua and Barbuda Act may thus be unfavourably compared with the U.S. model which requires the President to obtain 2/3 of the Senate before being able to adopt treaties.

Also in contrast to the U.S., the ROTA ratification process does not necessarily mean that the treaty becomes part of national law. If a treaty is ratified by Resolution the provisions will then have to be legislated into local law on a subsequent occasion.

The section 4 provision for denouncing treaties is that the Minister responsible for External Affairs informs the House of the fact that the State has ceased to be a party to a treaty. This has been criticised by Hon. Justice Winston Anderson, an international law expert, whose view is that while denunciation is not generally dealt with in countries which allow legislative involvement in treaty making, termination should be subject to full parliamentary
participation. His ground for so arguing is that the process whereby the state terminates its treaty obligations is of no less importance to the citizens than the process whereby the state enters into those treaty arrangements. I support this view.

The ROTA is an important piece of legislation not only because it provides for participation in treaty making by the legislature of Antigua and Barbuda. It has also been of great assistance to researchers on the international law of the region in that most of the treaties ratified by Antigua and Barbuda are also ratified by other Commonwealth Caribbean countries, and one merely has to look at the Revised Laws of Antigua or the Consolidated Index to those laws for a list of all treaties ratified since the Act came into force in 1989.

**Recommendation for Parliamentary Scrutiny of Foreign Affairs in the Commonwealth Caribbean**

1. It is doubtful whether committees such as the one established by the Parliament of Barbados in 2002 and 2006 will work in the Commonwealth Caribbean. Few
legislatures have members with the expertise, time and interest to serve on these committees; the resources to hire researchers to assist the committees either on a part-time or full-time basis; scheduling meetings may also pose problems because the Ministers of Foreign Affairs and International Trade who would be key participants travel frequently.

2. Provision for debate on an annual or more frequent basis of reports on policies and on the work of the Foreign Affairs and International Trade Ministries by the Ministers when the reports are laid in parliament could provide an opportunity for input by other parliamentarians. Given the low level of interest and expertise in Foreign Affairs, it is not likely that much debate would be generated, and the situation likely to result would be akin to the Ministers delivering lectures. Also, this recommendation might be unacceptable to other Ministers who see it as providing unfair advantage to the Minister of Foreign Affairs by allowing those Ministers additional public exposure. However, the recommendation for an annual or more frequent debate on foreign policy
could be justified on the ground of the paucity of information on this subject usually placed before the House(s) and by extension, the public.

3. Fostering informed public debate that impacts on parliamentary discussion of treaty ratification might well be the best that can be achieved at this time. Therefore, the passing of a ROTA similar to that in place in Antigua and Barbuda by other countries in the region would seem to be the way forward. No Minister would feel that his colleague is being given unfair advantage. It would provide the opportunity for members of parliament to debate general foreign policy issues and have a say in treaty ratification. In countries where parliamentary debates are broadcast on television and radio it would provide an opportunity for citizens interested in foreign affairs be updated on developments and to have their say on the radio “call-in” programmes.

3. However, as an ordinary Act of Parliament a ROTA on the Antigua and Barbuda model can be repealed by subsequent legislation passed by a simple majority.
Therefore what is needed is an amendment to Commonwealth Caribbean Constitutions to entrench the principle of parliamentary participation in treaty making. As in the USA and other non-Commonwealth countries, the amendment could require a 2/3 majority. But it must be pointed out that failure to achieve such a majority could be a grave obstacle to efficient management of the country’s affairs. It is also possible that an opposition party could withhold its approval of treaties as part of a wider campaign to embarrass the government and frustrate its policies.

4. If the ROTA model is followed, greater clarity should be provided in relation to the range of treaties to be submitted for parliamentary approval. All international instruments which have a significant impact on the nation, its nationals and its resources should be included. This would mean that transnational development contracts with foreign corporations, agreements with international organisations and agreements that include non-independent territories should all be included. The
Act would also have to specify whether certain treaties. For instance, those regarding national security are to be excluded from full debate and be sent to a parliamentary committee.

5. The question of treaty implementation in national law must be addressed. The logical choice would be to make all treaties ratified by parliament directly applicable in municipal law. This means that the treaty would become effective in international and municipal law simultaneously. The issue then would be whether a treaty is self-executing or non-self-executing. A non-self executing treaty requires enabling legislation before it may be relied on before a municipal court. The question whether or not a treaty is self-executing is a matter for national determination and practice differs widely among countries. To be considered applicable without more, the two most important criteria are first, that the treaty creates clear and enforceable rights and duties and is not merely goal-oriented or programmatic in nature, and that it creates the rights and obligations for individuals.
6. Provision would also have to be made in the Act for situations in which a treaty should be passed urgently in the national interest.

Conclusion

The Barbados experience suggests that for some small states, the establishment of parliamentary committees to discuss and report to parliament on foreign affairs on an ongoing basis is not the way forward in terms of ensuring greater parliamentary scrutiny.

Suggestions being made in this paper are: (1) the preparation of reports on the work of the Foreign Affairs and International Trade Ministries by the relevant Ministers who would lead debate when the reports are laid in parliament. Each Member who desires to speak could be given a maximum of 15 minutes. Where bicameral chambers exist, the reports and debate could take place at a joint sitting of the chambers; (2) adoption of provisions similar to the ROTA of Antigua and Barbuda. This would be an important step in the development of the Caribbean region’s response to the challenge of providing greater
participation of parliaments in the formation of international law. The Act is not without its shortcomings. Some of the shortcomings have been identified in this paper which is based on an article on the subject written by Hon. Mr. Justice Winston Anderson of the Caribbean Court of Justice.¹ It would seem that the best way forward is for states in the region to amend their constitutions to provide for treaty ratification, and by specified majorities rather than by ordinary majority and to use the ROTA as the base from which to start in formulating provisions to ensure meaningful participation by parliaments.

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