THE PROVINCES OF CANADA AND THE EXERCISE OF TREATY-MAKING POWERS

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INTRODUCTION

The purpose of this study is to examine

(a) whether, under the principles of international law, the members of a federal union can make international agreements; and, if so,

(b) what is the nature of such agreements under international law and under what conditions can they be made;

(c) what are the implications of these principles and practices for the exercise of treaty-making in Canada.

This study accordingly examines

(I) The principles of international law relating to the powers of members of a federal state to make treaties;

(II) The practice of federal states other than Canada in respect of treaty-making by the members of the union;

(III) Interpretation of the Canadian Constitution concerning possible provincial treaty-making powers;

(IV) Provincial practice in Canada in respect of treaty-making;

(V) Possible future provincial participation in treaty-making.

The conclusions drawn are set out at the end of the study.

I THE PRINCIPLES OF INTERNATIONAL LAW RELATING TO THE POWER OF COMPONENT PARTS OF A FEDERAL STATE TO MAKE TREATIES

Introduction

The starting point for examining this question is the principle, formulated in 1962 by the International Law Commission, that:

> "Capacity to conclude treaties under international law is possessed by states and by other subjects of international law." 1

As a general statement, it is true to say that federal states have placed the conduct of foreign affairs in the hands of the federal government. It is also true, as a general proposition, that some federal states have authorized their constituent members to partake of a degree of international intercourse, but that existing federations have not divided their international personality.

But these propositions are true only as general statements whose accuracy reflects the tendency of federal states to guard, for the central authority, the general responsibility for foreign affairs.

It will be seen that, under certain circumstances, there is no incompatibility, on the legal plane, between the existence of a primary international responsibility in the central authority and a fragmented, or partial, international responsibility in particular units of a federal complex.

Scholars who have examined this question have uniformly found it not free from difficulty. Rather than clarifying the matter, they have tended to spread confusion by starting their investigations

with certain prior assumptions about the nature of statehood or sovereignty and either ignoring the facts of international life or interpreting them so as to fit them into the mould of their preconceived ideas. Thus even leading authorities have sometimes misinterpreted state practice and cited the constitutions of particular states to support different conclusions.

The Rapporteurs of the International Law Commission have studied this question for over a decade. In 1962 the Commission was able to adopt the following succinct statement:

> "In a federal state, the capacity of the member states of a federal union to conclude treaties depends on the federal constitution." 2

The question of the capacity of the component members of a federal union to make treaties had been studied by three different special rapporteurs on the Law of Treaties for a decade before the Commission adopted this formulation. These three successive rapporteurs, Sir Hersch Lauterpacht, Sir Gerald Fitzmaurice and Sir Humphrey Waldock, are among the most authoritative jurists of this generation. Yet each adopted a different approach and a different solu[illegible] to this question.

The formulation of the Commission constituted acceptance of the view of Lauterpacht that the existence of a genuine treaty-making power in the members of a federal union could not, a priori, be rejected. Lauterpacht thus accepted the possibility of a member of a federal union possessing an international capacity in respect of treaty-making powers.

But his "plural" view of the nature of treaty-making in a federal state, advanced in 1953, was rejected five years later by his successor, Sir Gerald Fitzmaurice, who saw the treaty-making power in a federal union as an indivisible quality. Fitzmaurice's successor, Sir Humphrey Waldock, tried in 1962, without success, to reconcile the conflicting views of his two predecessors. His formulations led to the Commission's acceptance of Lauterpacht's approach.

This represented the victory of a pragmatic and flexible interpretation of international law, as distinguished from the widely held but more doctrinaire view of Fitzmaurice and others about the unitary nature of a nation's treaty-making power.

As the controversy over the years in the Commission reflects, in brief, both the existing conflict of views on this question and the extent to which leading jurists have been able to reconcile these views, it is worth analyzing in some detail the respective approaches of Lauterpacht, Fitzmaurice and Waldock, and the International Law Commission itself.

Lauterpacht's View

Lauterpacht wrote that:

> "It is impossible to lay down a hard and fast rule defining the competence of all not-full sovereign states. Everything depends upon the special case." 3

He accordingly concluded that agreements by subordinate units in a federal state could be "treaties in the meaning of international law".[4] The value of Lauterpacht's study is somewhat marred by the

inaccurate list of examples of such partial treaty-making powers which he gives. This does not, however, affect the validity of his general conclusion that

> "International law authorizes states to determine the treaty-making capacity of their political subdivisions." 5

Thus Lauterpacht saw the existence of this fragmented treaty-making power as a function or quality delegated by the federal state to its subordinate units. Proof of the "delegated" character of this limited treaty power was to be found in the

> "occasional requirement of express authorization by the federal authority and of conformity with the interest of the other members of the federation". 6

Lauterpacht concluded that

> "in the absence of such authority conferred by federal law, member states of a Federation cannot be regarded as endowed with the power to conclude treaties. For, according to international law, it is the Federation which, in the absence of provisions of constitutional law to the contrary, is the subject of international law and international intercourse." 7

Lauterpacht's general approach is also that of Lord McNair.[8]

Fitzmaurice's View

Fitzmaurice did not regard with favour the views of his predecessor. He proposed, as a part of his draft code on the Law of Treaties, that the Commission agree that

> "The component states of a federal union, not possessing any international personality apart from that of the union, do not possess treaty-making capacity. Insofar as they are empowered or authorized under the constitution of the union to negotiate or enter into treaties with foreign countries, even if it is in their own name, they do so as agents for the union which, as alone possessing international personality, is necessarily the entity that becomes bound by the treaty and responsible for carrying it out." 9

After referring to certain specific examples of treaty-making powers by component parts of a federal union (in particular, the Swiss cantons), Fitzmaurice asks whether this practice amounts

> "to any more than a species of appointment, authorization or accrediting of the component state or division of the union as a whole? It is believed not, for -- however much such a treaty might relate only, or have its application confined to the territory or affairs of the component state or division alone -- it would be the union as a whole that would be bound by it, and that would be the entity internationally responsible should the treaty not be carried out." 10

Thus Fitzmaurice, like Lauterpacht, saw the exercise of treaty-making powers by subordinate units of a state as an exercise of delegated powers. To Fitzmaurice, the constituent unit acts as an agent for the federal union and this is not bound by the treaties it makes. In consequence, it is not in any sense a subject of international law. For Lauterpacht, the delegated power can have the effect of conferring an element of genuine treaty-making capacity on the constituent state, as the unit is presumably bound by its international agreements and is thus, to some extent, subject to international law.

Sir Gerald Fitzmaurice's approach was valuable in that he gave recognition to the importance of knowing whether the member of a federal union purporting to enter into a treaty was itself internationally responsible for violating the treaty or whether the federal state was the responsible entity in international law. Only in the latter case could it be said that the member state was actually exercising a treaty-making power subject to international law. But Fitzmaurice tended to ignore the actual practice of

certain states and thus to overstate his conclusions.

Waldock's View

Sir Humphrey Waldock tried to reconcile the opposing views of his two predecessors. As the normal rule, he proposed that in a federation or union

> "international capacity to be a party to treaties is in principle possessed exclusively by the federal state or by the union. Accordingly, if the constitution of a federation or union confers upon its constituent states power to enter into agreements directly with foreign states, the constituent state normally exercises this power in the capacity only of an organ of the federal state or union, as the case may be." 11

Waldock thus accepted Fitzmaurice's unitary view as the normal rule.

But Waldock then went on to formulate an exception:

> "International capacity to be a party to treaties may however be possessed by a constituent state of a federation or union, upon which the power to enter into agreement directly with foreign states has been conferred by the constitution:
>
> (i) if it is a member of the United Nations (Waldock was thinking of the Ukrainian and Byelorussian SSR);
>
> (ii) if it is recognised by the federal state or union and by the other contracting state or states to possess an international personality of its own." 12

Thus, in addition to the "normal" (Fitzmaurice's) rule that a constituent state acts as agent of the federal state insofar as it has a treaty-making power, Waldock formulated an exceptional (Lauterpacht's) rule that the constituent member can, through a delegation of powers from the central authority, make treaties as a principal (i.e. internationally responsible) power and not merely as an agent of the principal (central) power.

International Law Commission's Formulation

The International Law Commission, in its deliberations in 1962, dropped Waldock's "normal" rule. In deciding that "in a federal state the capacity of the member states of a federal union to conclude treaties depends on the federal constitution", (Article 3) the Commission, in effect, approved, in modified form, Waldock's "exceptional" rule which in turn was based on Lauterpacht's view.

The Commission's article thus accepts with equanimity that a component part of a federal state may have some treaty-making powers. This is made clear by the following comment of the Commission:

> "More frequently, the treaty-making capacity is vested exclusively in the federal government, but there is no rule of international law which precludes the component states from being invested with the power to conclude treaties with third states. A question may arise in some cases as to whether the component state concludes the treaty as an organ of the federal state or in its own right. But on this point also the solution has to be sought in the provisions of the federal constitution." 13

Theoretical Basis for the Commission's Rule

In deciding, in effect, that international law remits to the constitutions of federal states the determination of the treaty-making powers of its constituent members, the Commission did not articulate any theoretical basis for this statement such as that expressed by Lauterpacht, i.e. that the unit receives this power by delegation from the federal authority.

The Commission simply reduced the matter to a factual

determination of the powers of particular units under particular constitutions.

But in so doing, they seem to have accepted the view that such powers can exist only if they are assigned to the members of a union by its constitution.

The Question of Sovereignty

Has the Commission thereby accepted the view that the members of a federal union may be partially sovereign?

This is a difficult question because the concept of sovereignty is vague and has stronger emotional than rational connotations. A sovereign state in today's world enjoys not an absolute but a limited sovereignty; it is subject to the rules of international law and to its other international obligations, but it is not under any other form of external limitation or control.[14]

If a member of a federal union has power to negotiate treaties in the sphere of its own domestic competence and without control or authorization from the federal authority, the member state not only has a certain international personality, but it would appear to be partially sovereign, i.e. sovereign within the sphere of its own competence. To the extent that other states were willing to deal with such an entity, it would, through international recognition, have the potentiality of acquiring the legal power to play an independent rule on the international plane. In such circumstances, the overall form of the constitution embracing such

member states would not be that of a federal union but of a more loose-knit inter-state association.

If, however, the member states were subject, in exercising their treaty-making powers, to the concurrence of a central authority, they would not exercize any genuinely sovereign powers because, in order to be sovereign, even within a limited sphere, an entity must be free from external control other than that imposed by international law or treaty obligations.[15]

Treaty-making power is a prerogative of a "subject of international law". But the exercise of a limited, delegated, treaty-making power by an entity, although making the unit, in a limited sense, a subject of international law and the recipient of a degree of international personality, does not have the result of that entity becoming a partially "sovereign" or "independent" state, in circumstances where such treaty-making powers are subject to federal control.

Conclusions

The conclusions to Part I are given on the following pages.

I THE PRINCIPLES OF INTERNATIONAL LAW RELATING TO THE POWER OF COMPONENT PARTS OF A FEDERAL STATE TO MAKE TREATIES

1. There is no rule of international law which precludes the component states of a federal union from being invested with the power to conclude treaties with third states. The view that, in a federal state, the treaty-making power is necessarily indivisible is not well-founded.

2. Whether or not the members of a federal state possess any treaty-making powers depends on the federal constitution.

3. In determining what meaning should be given to a federal state's constitution, resort should be had not merely to the relevant written instruments but to the existence of any constitutional conventions which may have evolved concerning the interpretation to be given to the federal state's constitution.

4. If a member of a federal state exercises treaty-making powers as an agent of the federal state, then it is the federal state alone which is a party to and bound by the treaty and the component state is not, in any sense, subject to international law.

5. If, however, the component member is itself bound under the treaty, then the member state is, in fact, a party to an international treaty and to that extent is both subject to international law and is recognized by other parties to the treaty as responsible on the international plane for its performance.

6. If a member of a federal union has, under the constitution, both extensive legislative jurisdiction in a given sphere and unrestricted power to enter into treaties falling within that sphere and for whose violation the member would itself be internationally responsible, the state may properly be regarded as partially sovereign. If, however, its powers to become a party to a treaty and be internationally responsible for its performance are subject to the permission of the federal authority, the member would not be sovereign or partially sovereign, as it would be subject, within the very sphere of its competence, to the external control of a superior authority. The possession of such external control on the part of a superior federal authority is incompatible with the attribution of a genuine sovereignty to a subordinate member subject to that control.

7. The existence of extensive treaty-making powers in various members of a union would, if not subject to federal control, make them sovereign in large areas of international law and thereby reflect the existence not of a federal state but of a loose form of inter-state association.

8. The general view of legal scholars upholding the possibility of a member of a federal union having the power, under a federal constitution, of being a party to an international treaty (and accordingly, to that extent, being subject to international law and acquiring some legal personality) is that such powers exist on the basis of delegation from a federal authority or the federal constitution.

II A SURVEY OF STATE PRACTICE CONCERNING THE POWERS OF MEMBERS OF A FEDERAL UNION TO MAKE TREATIES

The constitutions and practice of a number of leading federal states are examined. These are Australia, India, Switserland, the United States, the Soviet Union and Germany.

(a) Component units which have or appear to have no treaty-making powers

1. Australia

The component states of the Australian Commonwealth appear to have no power to make treaties but this point cannot be regarded as entirely settled. The Australian Constitution of 1900 does not deal expressly with the making of treaties. The power to conclude treaties is part of the Queen's prerogative (as in Britain and Canada) and is exercised by the executive of the government of the Commonwealth under the common law without expressed statutory provision.

The Commonwealth Parliament has powers to make laws respecting "external affairs".[16] The federal government, by making a treaty, appears to obtain powers to pass laws on matters which without a treaty would be beyond the power of the Commonwealth legislature.[17] Thus the High Court of Australia held in 1936 that the power to carry treaties into effect brought within the scope of the Commonwealth Parliament subjects which, without a treaty, would be beyond those powers.[18] But the precise limit of these powers has not yet been decided and their nature and extent is disputed by some of the Australian states.[19]

2. India

Under the Indian constitution there exist three lists determining whether a particular subject falls within the legislative sphere of the federal or provincial governments or both. The "Union List" assigns to the federal government the power of "entering into treaties, agreements and conventions with foreign countries". Thus the Union Parliament has the exclusive power in India both to enter into treaties and to make laws respecting them.

In passing legislation in order to implement treaties, the Union Parliament has the right to invade the "State List". This is made clear by Section 263 of the Union Constitution:

> "...Parliament has powers to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international convention, association or other body".

The federal government thus exercises all foreign affairs powers on the international plane and possesses plenary powers to implement, through legislation, obligations undertaken through international instruments.

Although Kashmir is treated separately under the Constitution, a Constitutional Order of 1954 had the effect of making the Union List concerning the power to make and implement all treaties applicable to the territory of Kashmir.

(b) Member states with powers to make certain treaties as agents of the federal union

1. Switzerland

The Swiss practice is often cited by authors seeking to uphold broad powers in members of a federal union to enter into treaties. This does not seem justified.

Article 8 of the Swiss Constitution states that the Confederation has the sole right of "concluding alliances and treaties with foreign powers and in particular treaties concerning customs duties and trade". But Article 9 states:

> "In specific cases the cantons retain the right of concluding treaties with foreign powers upon the subjects of public economic regulation, cross-frontier intercourse and police relations; but such treaties shall contain nothing repugnant to the Federation or to the rights of other cantons."

Article 10 provides:

> "Official relations between a canton and a foreign government or its representatives take place through the intermediary of the Federal Council. Nevertheless, upon the subjects mentioned in Article 9 the cantons may correspond directly with the inferior authorities or officials of a foreign state."

Under the federal constitution the cantons are sovereign subject to the constitution and exercise all powers that have not been transferred to the federal government (Article 3). The Federal Council, under Article 85(5) "examines the treaties which

cantons make with each other or with foreign governments and sanction them if they are allowable".[20] The federal authorities can examine a proposed treaty of a canton if the Federal Council or other cantons raise objections to it.

The Federal Council thus maintains direct control over all such agreements and is authorized to prevent their formation if they contain anything contrary to the constitution or if they infringe on the rights of other cantons.

If negotiations are to take place on a matter falling within the legal rights of the cantons, prior discussions first take place between federal and cantonal authorities and an agreed Swiss position is reached. Negotiations are then undertaken with a foreign power (under the auspices of the Federal Council) by the Federal Political Department.

Federal agreements are binding on all cantons; they cannot opt out. The federal government does not consider it necessary to obtain unanimous agreement of all cantons before the federal authorities ratify an agreement.

Among specific examples of cantonal treaties are those of 1874 between Basel and Baden concerning the agreement to establish a ferry; of 1907 between Basel and Argau concerning the establishment of a hydro-electric plant; and of 1935 between Berne and Neuchatel and France.[21] Formerly agreements on taxation were made between the cantons and foreign states (for example between Vaud and the British Government). These are now being replaced by Confederation agreements.

According to Professor Guggenheim of Geneva, it is the federal state and not the cantons which are internationally responsible for the execution of a treaty.

> "La Fédération...est responsable sur le plan international de la violation d'un tel traité par le canton; l'acte contraire au droit des gens commis par le canton est imputable à la Fédération qui assume la fonction de sujet de responsabilité." 22

The Confederation has the power to make treaties with regard to matters falling within the central legislative competence.[23] The Confederation also has or can acquire powers to implement the treaty:

(a) by legislation pursuant to its powers to perform treaty obligations;

(b) through initiating a constitutional amendment;

(c) through holding a popular referendum so as to acquire legislative jurisdiction.[24]

Thus, on the international plane, the Swiss Confederation alone has the power to become bound by international law through the making of treaties, and the Confederation has, or can legally acquire, in broad manner, the power to implement treaties through legislation otherwise falling within cantonal jurisdiction.

(c) Members of a federal union with powers to make certain treaties as principals (i.e. as subjects of international law) and not as agents for the federal state

1. The United States of America

Article 1, Section 10 of the United States Constitution

declares that "no state shall enter into any treaty, alliance or confederation". The same article further declares that no state "shall, without the consent of Congress,...enter into any agreement, compact or contract with any other state or with a foreign power".

According to the advice given by the Attorney-General of the United States to the Secretary of State on May 10, 1909, the above provision "necessarily implies that an agreement" (for the construction of a dam on a stream forming part of an international boundary) "might be entered into between a foreign power and a state, to which Congress shall have given its consent".[25]

The prohibitions of Article 1 of the Constitution have been taken as not applying to all possible agreements, compacts or contracts between one state and another or foreign power but only to "the formation of any combination tending to the increase of political power in the states which may encroach upon or interfere with the just supremacy of the United States".[26]

The above statement is based upon a decision of the Supreme Court of the United States in Virginia vs Tennessee.[27] This principle has come to be known as the "Political Balance Doctrine" which has been used as a device to combine the maximum flexibility of states' dealings and control within the overall limits of national interests.

It would appear that agreements of this type entered into with the consent of Congress have never been exercised with the exception of inter-state compacts open to accession by Canadian

provinces.[28] Three cases where Congressional consent was sought and obtained were the Northeast Inter-state Forest Fire Protection Compact of 1951, the Great Lakes Basin Compact of 1955 between several states of the Union, and the Minnesota-Manitoba Highway Agreement of 1962.

In addition, according to United States jurisprudence, the states can, without the consent of Congress, enter into agreements which are not considered to be "an agreement or contract... with a foreign power". For example, the Supreme Court of North Dakota held that an agreement between counties of North Dakota and a Canadian municipality for constructing a drain from North Dakota into Canada was not an agreement or a contract within the meaning of Article I(10) of the Constitution.[29] (See page 57 for two other examples.)

Thus, as will be seen later, it would appear that, without the consent of Congress, some of the states of the Union, over the years, have entered into a number of minor or technical agreements, presumably not governed by international law, with certain Canadian provinces. It would seem that, as a general rule, the agreement of Congress was not sought for such compacts because they could not possibly be considered as raising the question whether they would affect "the political balance" of the Union.

It would accordingly appear that states can enter into two types of agreements:

(a) With the consent of Congress, individual states can enter into essentially non-political agreements; these would presumably

be governed by international law. There appears to be no clear authority on whether the individual states are themselves bound by agreements entered into with a foreign power. It would appear that since compacts between states and between states and foreign powers are authorized in the same article of the United States Constitution (1(10)), the effect would be that, at least in the case of agreements approved by Congress, the individual state is bound under international law. This conclusion is, however, not free from doubt.[30]

(b) Without the consent of Congress, states can enter into agreements of a more minor character which would probably not be governed by international law; i.e. the agreement would be in the nature of a contract governed by private international law.[31] (In the absence of adequate authority, the accuracy of this analysis is uncertain.)

Notwithstanding these exceptional powers existing in the states, the United States Constitution is overwhelmingly centralist in respect of the exercise of both treaty-making and treaty-implementing powers. Everywhere possible in the Constitution

> "there is found...a recognition of the principle that the exclusive control, actually or potentially, of relations with foreign states rests with the government of the whole country." [32]

The United States Constitution (Article VI) provides that all treaties made under the authority of the United States "shall be the supreme law of the land". This has been interpreted so as to provide for very extensive powers in the United States Congress to legislate on matters which are the subject of a treaty even though they would otherwise fall within the jurisdiction of the states.

This is the effect of the decision of the Supreme Court in the case of Missouri vs Holland in 1920. The Curtiss-Wright Case of 1936[3] goes even further. The federal government's powers in the foreign affairs field are virtually unrestricted.

As a result of the interpretation given to the American Constitution, the situation in the United States is that, at least when the treaty-making power is activated, the United States is in effect a unitary rather than a federal state.

2. The Union of Soviet Socialist Republics

On February 1, 1944 the USSR adopted an amendment to its Constitution of December 5, 1936 (Article 18a) giving each Republic of the Union

> "the right to enter into direct relations with states, to conclude agreements with them, and to exchange diplomatic representatives with them".

In reporting this amendment to the Supreme Soviet of the USSR, the Soviet Foreign Minister stated that the Union Republics

> "have quite a few specific economic and cultural requirements which cannot be covered in full measure by All-Union representation abroad and also by treaties and agreements of the Union with other states. These national requirements can be met by means of direct relations of the Republics with corresponding states." 34

Under Article 68 of the Constitution

> "the Council of Ministers of the USSR...exercises general guidance in the sphere of relations with foreign states".

The Ukrainian and Byelorussian Soviet Socialist Republics were admitted to the United Nations and are parties to a number of

multilateral treaties. Thus the Union Republics appear to have the right to become parties to treaties on any subject and to be considered as internationally responsible and partially sovereign subjects of international law if other states are willing to treat with them and so regard them. Soviet theorists seem to regard the Union Republics as having virtually unlimited powers in the foreign affairs field.[35] It is well known that the Republics possess, under the Constitution, a right of secession from the Union.

It is doubtful, however, whether the Soviet experience has much relevance from the standpoint of the practical problems of treaty-making in a federal state.

Since the USSR is not a democracy as the term is understood in the West and as there are methods of Party control (organized on a central basis) which are not reflected in other federal unions, it would seem that the "autonomy" of the Union Republics and the degree of "sovereignty" which the Soviet Constitution grants them do not provide either useful parallels to or insights into the problems of federalism in the democracies.

Furthermore, the exercise by the Union Republics of their broad powers may be substantially affected by an addendum to Article 14(a) of the Constitution which provides that the All-Union government has exclusive authority to regulate "the establishment of the general character of relations between the Union Republics and other states". A Soviet writer has described the relationship between the Republics' Commissariat of Foreign Affairs and the All-Union Commissariat as that of "a subordinate to a superior".[36]

This and other features of the Soviet Constitution giving general powers to the USSR government have led an authoritative writer to doubt whether the USSR system can properly be described as federal. He describes the grant to the various Union governments of foreign affairs as "a grant upon the principle of decentralization, of delegation from the centre, and not upon the federal principle".[37]

3. Germany

(a) Federal Republic of Germany

Under the Constitution of 1871 and again under the Constitution of the Weimar Republic, the constituent German states (fully sovereign earlier in the nineteenth century) possessed certain powers to enter into agreements with foreign states. Under Article 32 of the Bonn Constitution (1949) it is provided that:

(1) The maintenance of relations with foreign states shall be the affair of the Federal Government;

(2) Before the conclusion of a treaty affecting the special condition of a Land, the Länder must be consulted sufficiently early;

(3) Insofar as the Länder are competent, they may, with the approval of the Federal Government, conclude treaties with foreign states.

Article 59 of the Constitution provides that

"the Federal President shall represent the Federation in matters concerning international law. He shall conclude treaties with foreign states on behalf of the Federation and shall accredit and receive envoys".

Thus, according to the Bonn Constitution, the Länder have powers to make treaties with regard to matters falling within their legislative competence, subject to the approval of the Federal Government. However, only sparing use has been made of these treaty-making powers.

Treaties are negotiated initially by the Land authorities. The agreements achieved are binding only on the Land or Lander signing them. The Federal Government has never disallowed a treaty but has, it appears, discouraged Lander from attempting to enter into them. The Federal Government, in general, takes a negative attitude towards the use by the Lander of the powers they possess under Article 32.[38]

Some recent examples of treaties entered into by Lander are:

(a) between Bavaria and Baden-Wurtemburg, Austria and Switzerland concerning certain matters arising from the joint use of Lake Constance (not yet signed);

(b) concordat between Lower Saxony and the Vatican signed on February 26, 1965;

(c) unilateral accession of Lower Saxony to a UNESCO agreement against discrimination in education.

(d) Cultural Convention between Germany and France January 1954

The Federal and Lander Governments agreed in 1957 on procedures (contained in the "Lindau Agreement") to be followed by the Federal Government for use in negotiating treaties on matters affecting the fundamental interests of or falling within the exclusive constitutional jurisdiction of the Lander (eg. cultural agreements).

It would appear that under the German Constitution the Federal Government cannot, by means of entering into a treaty commitment, acquire powers to legislate in an area otherwise reserved exclusively to the Lander. In the Reichskonkordat case (decision

of 1957)[39] the Federal Constitutional Court of West Germany upheld legislation enacted by a Land which was inconsistent with a treaty binding on the Federal Government. The effect of the decision seems to be that the Federal Government cannot encroach upon the powers of the Lander through entering into international treaties binding the Federal Government to take certain action in the legislative sphere.

Thus in West Germany the situation is that the Lander have the power both to enter into treaties on matters falling within their legislative competence and to implement such treaties.

On the other hand, it would appear that while the Federal Government has the power to enter into treaties on matters falling within the domestic competence of the Lander, it has no powers to implement the treaty through legislating on matters falling under the jurisdiction of the Lander.

(b) German Democratic Republic

A similar situation exists in East German Lander which possess a right to conclude treaties under the Constitution of 1950. Article 177 of this Constitution provides that the Lander may conclude treaties with foreign states on matters within their competence. Such treaties, before taking effect, are subject to the approval of the People's Chamber.

Conclusions

The conclusions to Part II are given on the following pages.

II A SURVEY OF STATE PRACTICE CONCERNING THE POWERS OF MEMBERS OF A FEDERAL UNION TO MAKE TREATIES

9. The powers and practice of the constituent parts of federal unions concerning treaty-making powers fall within three broad categories:

(1) component units which have or appear to have no treaty-making powers; examples are Australia and India;

(2) component units which have powers to make certain treaties but only as agents of the federal union (i.e. the unit is not responsible in international law for a violation of the agreement); Switzerland is an example;

(3) component units with powers to make certain treaties as principals and not merely as agents (i.e. component unit is a party to the treaty and is bound by it in international law); examples are the Soviet Union and Germany and, it seems, the United States. (In these cases, the possibility cannot be excluded that the federal governments, under the principles of international law, would also be held responsible.)

10. In Australia and India, the treaty-making power falls exclusively within the federal competence; the federal authorities appear to have powers to implement the treaties through passing legislation which would otherwise fall within the jurisdiction of the component states. Thus a certain harmony exists between the allocation of treaty-making and treaty-implementing powers in both unions.

11. The Swiss system, in terms of its broad effects in the foreign affairs field, presents several similarities to the federal systems in Australia and India. In all three countries, the federal authorities are responsible for the performance of international treaties and have or can acquire extensive powers to pass implementing legislation in spheres otherwise falling within the legislative competence of the member states.

12. The Swiss, however, through the concept of the canton acting as agent for the Confederation, allow greater participation in treaty-making to the cantons in matters of local interest but without derogating from the general effectiveness of the central authorities in the foreign affairs sphere and without the cantons acquiring any substantial degree of international personality. The Federation, and not the canton, is bound by the agreement entered into by the canton. The Confederation negotiates the treaty and must approve it.

13. Although in Germany, the Soviet Union and the United States the member states can enter into agreements and, it would

seem, be responsible internationally for their execution, this power is in all three cases exercised with the consent of the federal authorities.

14. In the case of the United States, there is, as in Australia, India and Switzerland, in large measure, a harmony of both treaty-making and treaty-implementing powers in the federal authority. The states' powers to make agreements with the consent of Congress has been used very sparingly and never with any country or unit other than a Canadian province.

15. The powers of the member states of the Soviet Union to enter into treaties are extensive but are subject to federal authority. The formal power to enter into treaties which the various Republics have under the Soviet constitution does not enable individual Republics to act either independently or freely on the international plane. For a variety of reasons, the Soviet experience is of limited interest from the standpoint of federalism in the Western democracies.

16. The German constitution contrasts with those of Australia, India, Switzerland and the United States. In Germany, the member states can exercise treaty-making powers within the sphere of their domestic competence and the federal government seems to lack plenary powers to implement treaties falling within that sphere. The result is that in Germany there is also, in certain measure, a harmony of treaty-making and treaty-implementing powers in the members of the federation. But these treaty-making powers are subject to the control of the federal executive and their use is discouraged.

17. In those federal states where the central government has the power to <u>implement</u> international treaties even where the subject matter would otherwise fall within the legislative competence of the members, the members either have no power to enter into treaties (as in the case of India and Australia) or can enter into treaties only as agents acting for the federal government (as in Switzerland) or can enter into agreements only on a very exceptional basis and under the strict control of the federal authorities (as in the United States). In all of these cases, there is a harmony of treaty-making and treaty-implementing in the federal sphere.

18. In the case of a federal government which does not appear to have either the power to require its members to bring their legislation into line with international obligations undertaken by the federal government or to adopt the necessary legislation itself, the constituent members may have treaty-making powers falling within the scope of their own competence. It appears that the only example of this type of constitution is that of Germany. Even in this case, however, any treaties of the Lander are subject to approval by the federal executive authorities. Furthermore, it appears that the federal government in Germany strongly discourages the Lander from entering into such agreements.

19. The experience of all the federal countries examined shows that the federal authorities firmly regulate (through requiring federal approval) and, it seems, discourage, the member states from entering into treaties.

20. There appears to be no example of the constitution or practice of a federal union which allows a member to act independently in the international sphere.

21. It would appear that, except in India and Australia, the federal states examined all allow some sort of treaty-making action to take place at the level of the member states. This is true both in federal states possessing a centralized foreign affairs power (the United States and Switzerland) and possessing a more decentralized constitutional framework for treaty-making (Germany and the U.S.S.R.). In this way, the member states are able, exceptionally and subject to federal control, to participate in treaty-making on matters of a local or essentially non-political character.

22. Such treaty-making powers as exist in members of a federal union derive from the constitution itself. These treaty-making functions are thus delegated powers, a fact which may be clearly seen from the fact that in all the countries concerned they can only be exercised with the approval, i.e. authorisation, of the central powers.

23. It accordingly follows that, although the component members of Germany, the Soviet Union and (perhaps) the United States may become parties to an international agreement and be internationally responsible for its performance, and although to this extent they may be subject to international law and acquire a limited degree of international personality, these states nevertheless cannot be considered as possessing a measure of sovereignty because their international capacity is subject to the external control of the central authority.

III INTERPRETATION OF THE CANADIAN CONSTITUTION CONCERNING POSSIBLE PROVINCIAL TREATY-MAKING POWERS

Where does the treaty-making power reside under the Canadian Constitution?

In determining the answer to this question, it is important to bear in mind the difference between the power to enter into treaties and the power to implement such treaties by legislation.

Background

The British North America Act does not touch directly upon the subject of treaty-making in Canada.

The assumption in 1867 was that the treaty-making power was and would remain in the Imperial Parliament in London. For this reason the only provision of the Act referring to treaties was Section 132 which provided that the Canadian Parliament

> "shall have all the powers necessary and proper for performing [i.e. implementing] the obligations of Canada or of any province thereof, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries".

Thus, in 1867, and for the next fifty years, treaty-making capacity in respect of Canada existed exclusively in the Imperial Parliament. However, in the period 1871-1923, procedures slowly evolved by which Canadian Government representatives at first participated in international negotiations leading to an Imperial treaty affecting Canada (Washington Treaty of 1871); then later came to sign such agreements as an (autonomous) member of the Empire (Treaty of Versailles, 1919); and then finally signed such agreements

on behalf of Canada (Halibut Fisheries Treaty, 1923).[40]

At the Imperial Conference of 1926 this new procedure was confirmed; Canada and other Dominions were to be able to negotiate and enter into treaties affecting their own interests and ratification was to be effected at the instance of the Dominion concerned. Treaties were to be signed in the name of the King in the right of Canada and not of the British Empire. The Conference also gave the Dominions the right of legation and of establishing direct diplomatic relations with foreign powers.

If the powers of treaty-making and of conducting foreign relations are not assigned to the Federal Government by the British North America Act, by what rights are these powers exercised in Ottawa?

Such powers were normally part of the prerogative of the Crown, by which

> "we mean a right that remains in the Sovereign as one of that bundle of discretionary common law rights which were, at and by the common law, exercisable by the Sovereign in person, and we use that term whether the prerogative in question is or is not now exercisable by the Sovereign in person or through him by his representative..." [41]

Thus, under the common law, and in the absence of any statute bearing on the question, the prerogative in respect of foreign affairs remains in the Crown and in the executive authority.

External Prerogatives and Canada As an Independent State

The external prerogative powers of the Crown, initially reserved to the Queen under Section 9 of the British North America

Act, have now devolved exclusively upon the Governor-General. According to a memorandum of July 21, 1952, submitted by the Canadian Government to the United Nations for reproduction in its legislative series on "Laws and Practices Concerning the Conclusion of Treaties",

> "The Constitutional Authority to negotiate and conclude treaties /in Canada/ is part of the Royal Prerogative, which in practice is exercised in the name of the Crown by the Governor-General in Council on the advice of the Secretary of State for External Affairs, who is responsible (under the Department of External Affairs Act, R.S.C. 1927, c. 65) for the negotiation and conclusion of treaties and other international agreements.

The basis for the proposition that the external prerogatives have devolved exclusively upon the Governor-General is found in constitutional usage, confirmed by the Letters Patent of 1947.

In 1933 Keith wrote:

> "It is necessary to make it clear that the King delegates to the Governor the prerogative insofar as that is proper for the exercise in a Dominion. This issue unquestionably has been affected by the progress of Dominion autonomy. Formerly the extent of the delegation of the prerogative in the case of the Dominion had to be judged on the basis of their subordinate position; now that equality of status has been asserted, it may be argued that prima facie every royal prerogative has by necessary intendment passed to the Governor-General...In all probability, however, without special delegation there may be held to be implicit in the office of the Governor-General all such prerogatives as are necessary for the government of the territory concerned." 42

In other words, one explanation of the devolvement to the Crown in the right of Canada of the prerogative relating to foreign affairs and treaty-making[43] is that all prerogatives incidental to the conduct of an independent state must be taken to reside in that state.

When Canada became an independent state, only one entity became sovereign, i.e. free from any form of external control, and thus only one international personality was created and recognized as such by the international community. One of the essential attributes of international personality which accrued to Canada as an independent state was the power to make binding agreements under international law with other members of the international community. It followed therefore that such prerogatives implicitly

devolved

upon the office of the head of the independent state which had been created.

This interpretation of the devolvement of the prerogative is consistent both with the assumption of these powers by Canada in the period following World War I, at a time when it became an autonomous member of the Commonwealth, and with the fact that other states recognized such powers in the Canadian executive authority by beginning, at that time, to enter into many treaties with Canada in its own right.

The Devolution of the Foreign Affairs Prerogative

Another widely accepted view is that the prerogatives which the Canadian Dominion came to exercise were those expressly delegated by statute, letters patent, instructions to governors and conventions. This is a view which has been widely accepted with respect to the devolution of powers in Australia. So far as Canada is concerned, new Letters Patent issued to the Governor-General in 1947 declare:

> "We hereby authorize and empower Our Governor-General, with the advice of Our Privy Council for Canada or of any members thereof or individually, as the case requires, to exercise all powers and authorities lawfully belonging to Us in respect of Canada." (Article 2)
>
> "And We do hereby authorize and empower Our Governor-General to keep and use Our Great Seal of Canada for sealing all things whatsoever that may be passed under Our Great Seal of Canada." (Article 3)

Thus, from the broad terms of these Letters Patent, read in conjunction with the 1939 provision for a Great Seal for Canada,

the conclusion should be drawn that the prerogative has now devolved, in respect of Canada,[44] to the Crown in the right of Canada.

According to Chief Justice Duff in the Labour Conventions Case,[45]

> "in regard of such international arrangements, it is a necessary consequence of the respective provisions of the Dominion Executive and the Provincial Executives that this authority (to enter into international agreements) resides in the Parliament of Canada; the Lieutenant-Governors represent the Crown for certain purposes but in no respect does a Lieutenant-Governor of a Province represent the Crown in respect to relations with foreign governments. The Canadian Executive, again constitutionally, acts upon responsibility to the Parliament of Canada and it is that Parliament alone which can constitutionally control the conduct of external affairs."

Chief Justice Duff examined the documents of the Imperial Conferences of 1923 and 1926, particularly the assertion that

> "agreements between Great Britain and a foreign country or a Dominion and a foreign country shall take the form of treaties between Heads of State (except in the case of agreements between governments)..."

In his opinion, "there could hardly be more authoritative evidence as to constitutional usage than the documents of such a Conference" and they must be "recognized by the Courts as having the force of law". Chief Justice Duff and Justices Davies and Kerwin then concluded that Canada had the power to enter into agreements on matters falling within the provincial legislative competence by the "crystallization of constitutional usage and constitutional law".[46]

The Privy Council in the Labour Conventions Case did not pass on the ability of the central government or of the

provinces to ratify conventions; they were concerned only with the powers of the federal government to pass implementing legislation. The Privy Council held categorically that the Canadian Parliament did not possess the legislative competence to implement conventions the subject matter of which lay within provincial legislative jurisdiction.[47]

Lord Atkin left undecided the provincial contention that the federal government had no executive authority to make a treaty on subject matters falling within provincial legislative jurisdiction. But the inferences from his decision support Chief Justice Duff's opinion. It would appear from a number of statements in Atkin's opinion that their Lordships "obviously had the central executive in mind as the lawful treaty-making authority".[48]

The Provinces and the Foreign Affairs Prerogative

It has nevertheless been argued by the exponents of a provincial capacity at international law that the prerogative powers of the Lieutenant-Governor include the power to carry on foreign affairs or at least to enter treaties, in the areas of provincial legislative jurisdiction. The powers of the Lieutenant-Governors have historically been open to much dispute, but in 1892 the Judicial Committee decision in the case of the Liquidators of the Maritime Bank of Canada vs the Receiver-General of New Brunswick established the proposition that the government of each province represents the Queen in the exercise of her prerogative as to all matters affecting the rights of the province. It has sometimes been alleged by some

provinces that the external prerogatives are among those which, following the distribution of legislative powers, have devolved upon the Lieutenant-Governors. The case of Bonanza Creek Gold Mining Co. Ltd. vs the King[49] decided by the Privy Council in 1916 has been cited as a general authority for this proposition.

However, the Bonanza Creek Case decided only that

> "executive power...in many situations which arise under the statutory constitution of Canada /are/ conferred by implication in the grant of legislative power, so that where such situations arise the two kinds of authority are correlative".

Thus the Privy Council was stating only the proposition that in many situations the executive power is conferred by implication in the grant of legislative power.

The Privy Council could not have had in mind the devolution of the Crown's external prerogatives because at that time (1916) none of these had devolved to Canada; all foreign prerogatives remained in the King in the right of the British Empire.

Moreover, the Bonanza case was dealing only with the interpretation of the internal allocation of powers. The case had no foreign aspects to it and it in no way dealt with questions other than internal ones.

Finally, it is important to note that any decision or view to the effect that in Canada the external prerogatives follow the allocation of legislative competence would be entirely inconsistent with the concept of a federal Canada.

It follows from the analysis made in Parts I and II of this study that if the provinces were to be regarded as having treaty-making powers co-terminous with their legislative powers they would be sovereign, or at least partially sovereign, states. Canada would then not be a federal state but an association of sovereign states. It would therefore seem to be a contradition in terms to uphold the view, on the one hand, that the British North America Act created a federal state and, on the other, that it is comprised of sovereign or partially sovereign states.

The Federal Power of Disallowance

There is yet another reason why it would be incorrect and illogical to take the position that the Queen's external prerogatives devolved upon the Lieutenant-Governors of the provinces.

> "The executive of the Dominion has power to disallow any act passed by a provincial legislature, whether or not the act deals with subjects falling within the legislative field exclusively assigned to the provinces. Further the Dominion executive appoints the Lieutenant-Governor of a province, that is, the formal head of the provincial government. It can instruct the Lieutenant-Governor to withhold his assent from provincial bills and to reserve them for consideration by the Dominion executive, and it may refuse assent to such reserved bills if it thinks fit. Finally, appointments to all the important judicial posts in the provinces are in the hands of the Dominion executive. These are all unitary elements in an otherwise strictly federal form of constitution. They are matters in which the regional governments are subordinate to the central government, and not co-ordinate with it." 50

Thus, the provincial governments, if they possessed sovereign treaty-making powers, would be in the position where the Federal Government, through exercising the above-mentioned powers, could prevent them from implementing treaties. This is, in itself,

not conclusive evidence that such treaty-making powers were not meant under the constitution to devolve upon the provinces. But it creates, in itself, a strong presumption that under the British North America Act the provinces could not have been intended to be sovereign states.

While it is true that the federal government is not in a position to implement through its own powers all international obligations which it undertakes, this is a different situation than the provinces would be in if they had treaty-making powers. The federal government could, in such a situation, prevent the provinces from implementing any agreement which required legislation.

The provinces would accordingly be juristic persons in international law but an abortive type for which there would be no precedent in international law or practice.

Some Provincial Comments

Nevertheless, as will subsequently be seen, some of the provinces, in communications from time to time with the federal government, have seemed unwilling to admit that the provinces have no treaty-making powers. In 1956, for example, the Senior Solicitor of Nova Scotia (perhaps unaware of the new Letters Patent of 1947) reiterated the arguments put forward by Ontario in the Labour Conventions Case, namely, that

> "there is no ground for saying that the parties to advise the Crown in matters relating to the provinces have in some way come to be the Federal Ministers. The province has the right to advise the Crown in matters where its legislative powers apply."

In the case of the Manitoba-Minnesota Highway Agreement, the Government of Manitoba, although not spelling out the legal basis for the position, insisted that the agreement is "valid as it stands and binding upon...the Province of Manitoba".

The Canadian Constitution and the Conduct of Foreign Powers

The Canadian constitution is the only example of a federal union in which in a large area of national competence there is no concurrence or harmony between treaty-making and treaty-implementing powers. The Federal Government has the power to enter into treaties of all kinds but cannot, according to the Labour Conventions Case, implement treaties falling within provincial jurisdiction. On the other hand, the provinces, which possess certain legislative powers within the spheres of their own jurisdiction, have no powers to enter into international agreements concerning the matters over which they have legislative competence. The Canadian federal experience thus differs both from that of most other federal states where there is a concurrence of treaty-making and treaty-implementing powers in the federal executive and from the exceptional case of Germany, whose constitution creates a certain harmony by allowing the constituent members to legislate in specific fields and, subject to federal control, to enter into agreements in those fields.

As shown in Part I of this study, the general principles of international law remit to the constitution of a federal state the determination of whether its members can enter into treaties.

Foreign states are accordingly bound to accept the constitution of Canada as the legal basis for their dealings with this country.

If a member of a federal union, the constitution of which does not allow its members to enter into treaties, purports, nevertheless, to enter into such agreements, it would be attempting to exercise an act of sovereignty in violation of the constitution. It could obtain recognition of such treaty rights only by states which are prepared to violate the principle of international law that remits the question of such capacity to the constitution of the federal union.

Conclusions

The conclusions to Part III are given on the following pages.

III INTERPRETATION OF THE CANADIAN CONSTITUTION CONCERNING POSSIBLE PROVINCIAL TREATY-MAKING POWERS

24. The constitutional authority in Canada to conclude international agreements is a part of the royal prerogative and in practice, as regards treaties, is exercised in the name of Canada by the Governor-General, usually on the advice of the Secretary of State for external affairs. The prerogative powers in respect of foreign affairs and treaty-making devolved upon the federal government at a time when it became an autonomous member of the British Commonwealth of Nations. In addition, the prerogative powers of the Crown in the right of Canada were clearly delegated to the Governor-General in the Letters Patent of 1947.

25. There has never been any delegation of such prerogative powers to the Lieutenant-Governors of the provinces nor is there any valid authority in constitutional conventions or practice for the assertion that the provinces received any part of the royal prerogative with respect to foreign affairs and the power to make treaties.

26. To uphold the opposite view would be incompatible with the concept of Canada as a federal state. To assert the proposition that the provinces have received the sovereign treaty-making powers in respect of matters falling within their legislative competence is to assert that "Canada" is not a federal state but an association of states.

27. That such a situation cannot have been created by the British North America Act may also be seen from the fact that the federal government, through exercise of various powers which it possesses under the Act (disallowance, right to appoint Lieutenant-Governors who could withhold assent from provincial legislation) could make it impossible for the provinces to perform any treaty which required legislation.

28. The Canadian constitution is unique in that it is the only example of a federal union in which, in a large area of national competence, there is no concurrence or harmony between treaty-making and treaty-implementing powers.

29. The federal government has the power to enter into treaties of all kinds but cannot, according to the Labour Conventions Case, implement treaties falling within provincial jurisdiction. On the other hand, the provinces, which possess certain legislative powers within the spheres of their own jurisdiction, have no powers to enter into international agreements concerning the matters over which they have legislative competence.

30. In this respect the Canadian federal experience differs both from that of most other federal states where there is a concurrence of treaty-making and treaty-implementing powers in the

federal executive and from the exceptional case of Germany, whose constitution creates a certain harmony by allowing the constituent members to legislate in specific fields and, subject to federal control, to enter into agreements in those fields.

31. The Canadian constitution, in comparison with other federal states, is accordingly handicapped in that it appears to be the only federal constitution which fails to designate a treaty-implementing power in some organ which is at the same time a treaty-making power.

32. Since international law remits to the constitution of a federal state the determination of whether its members can enter into treaties, foreign states are bound to accept the constitution of a federal union -- with its limitations -- as the legal basis for their dealings with Canada.

33. Any willingness by a foreign power to enter into treaties with members of a federal state such as Canada, in the knowledge that the constitution of the federal state does not authorize this, may properly be regarded by the federal union as interference in its domestic affairs and, in the case of an offer to enter into treaty relations, as an illicit act of recognition of the international personality of the member states.

34. Any attempt by a foreign state to enter into a treaty with a Canadian province would therefore be a violation of the principles of international law, and would also be inconsistent with the recognition that such a foreign state has already given to Canada.

35. If a member of a federal union, the constitution of which does not allow its members to enter into treaties, purports, nevertheless, to enter into such agreements, it would be attempting to exercise an act of sovereignty in violation of the constitution. It could obtain recognition of such treaty rights only by states which are prepared to violate the principle of international law that remits the question of such capacity to the constitution of the federal union.

IV PROVINCIAL PRACTICE IN CANADA IN RESPECT OF TREATY-MAKING

Introduction

As already noted, the Federal Government in Canada has always taken the position that the provinces possess no powers to enter into international agreements. On a number of occasions this view, on the advice of the Department of Justice, has been communicated by the Department of External Affairs to the provinces.

A study over the years of the attitude of the provinces shows not only a reluctance on the part of some of them to accept this view but a pattern of dealing on their part with various states of the American Union.

It would be beyond the scope of this study and of available resources to make an exhaustive enquiry into the practice of the provinces in this sphere over the years. However, information at hand seems to show that the provinces have continued to strive for many years to find a way to deal directly with the American states and occasionally with European powers. These dealings may be summarized under the following categories:

(a) examples of purported agreements by the provinces or agents of the provinces and foreign entities or their agents;

(b) examples of agreements which the provinces sought to enter into but did not do so on the advice of the federal authorities that they lacked the necessary powers;

(c) examples of ad hoc agreements entered into between a province and a foreign entity but as part of an arrangement between the federal government and the foreign entity;

(d) proposed general agreements (accord-cadre type) to facilitate

subsidiary arrangements between provincial and foreign governments;

(e) other types of arrangements -- contracts subject to private law.

(a) Examples of purported agreements between the provinces or agents of the provinces and foreign entities or their agents

1. British Columbia

(a) Tourist Advertising Agreement

Arrangement of an administrative character among Oregon, Washington and British Columbia for co-operation in matters relating to tourist advertising and information. Date of entry into force uncertain. Existing in 1952.[51]

(b) Civil Defence Agreement

"Memorandum of Understanding" on civil defence measures between Washington and British Columbia. Believed to be in force in 1960. This Memorandum provided for reciprocal civil defence liaison measures to meet the threat of nuclear, biological or chemical attack. The agreement purported to be in the spirit of the Civil Defence Agreement between Canada and the United States of March 27, 1951[52]

(c) Skagit Agreement

Agreement, apparently renewed annually, between the City of Seattle and the British Columbia Government concerning the Skagit River in respect of a dam and flooding of a portion of British Columbia. Approval given by B.C. Order-in-Council 1219 of May 7, 1962. The agreement is in the form of an instrument drawn up between "Her

Majesty the Queen in the right of the Province of British Columbia" as represented by the Minister of Lands, Forests and Water Resources.[53]

(d) Supply of Power Arrangements

Arrangements between various American border communities and British Columbia authorities concerning the supply of power. The Deputy Attorney-General of British Columbia, on March 2, 1964, described these as "small minor arrangements" drawn up through local residents and utility companies and approved by the B.C. Public Utilities Commission. He added that there may also be contracts between the British Columbia Hydro and Power Authority and American sources.[54]

(e) Maintenance Orders Agreements

Reciprocal arrangements entered into directly between British Columbia and Attorneys-General of American states, pursuant to the Reciprocal Enforcement of Maintenance Orders Act and Reciprocal Enforcement of Judgements Act. Information given by British Columbia Attorney-General on March 2, 1964.[55]

(f) Agreements relating to Taxation of Motor Fuels

According to a United States Senate Judiciary Committee report, British Columbia has entered into "a uniform motor vehicle registration and proration agreement" with 15 western states.[55a]

2. Manitoba

(a) North Dakota Drainage Agreement

Agreement between North Dakota Drainage Board and a Manitoba municipality. Entered into about 1917. The agreement provides for the construction of fourteen miles of drainage works by the Board in Canada, with control vested in Canada.[56]

(b) Manitoba-Minnesota Highway Agreement

Manitoba-Minnesota Highway Agreement signed on February 2, 1962. The agreement provided for construction of a highway in Manitoba that would permit road access to the Northwest angle of Minnesota from the rest of the state, the costs to be shared equally. The agreement was submitted for approval to the United States Congress as an inter-state compact within the meaning of Article I, Section 10 of the Constitution. On August 29, 1964 the Attorney-General of Manitoba informed the Secretary of State for External Affairs that

> "in the opinion of our legal advisers...the agreement, as executed, is...valid as it stands and binding upon the State of Minnesota and the Province of Manitoba subject to the conditions set out in the agreement itself".

The Secretary of State for External Affairs replied shortly thereafter (on October 5, 1964) informing the Attorney-General that in the view of the Canadian Government "the present agreement has no validity in international law". The State Department formally requested the Canadian Government's views on the matter. As the agreement had already been signed, the Government decided to inform the State Department that it had no comment to make on the authorizing bill then before the United States Congress.

3. Nova Scotia

(a) Lands Settlement Board Agreement

Agreement between the Netherlands Government and the Nova Scotia Lands Settlement Board. Entered into force in 1956. By this agreement Nova Scotia agreed to sell farms to persons who emigrated

from the Netherlands and the latter agreed to indemnify the Province against a percentage of any loss incurred in connection with such sales. The Attorney-General of Nova Scotia, on November 8, 1956, advised the Premier of that Province that

> "there is nothing to prevent Her Majesty in the right of Her Province of Nova Scotia from entering into any agreement with any government in relation to a matter which is within the legislative jurisdiction of the Province".

The Attorney-General specifically approved the arguments to this effect by counsel for Ontario in the Labour Conventions Case. The Deputy Minister of Justice advised this Department on August 16, 1956 that the Nova Scotia Lands Settlement Board had no capacity to conclude this agreement. It appears that the Netherlands Government was informed that they should have approached the Nova Scotia Government through the intermediary of the Department of External Affairs.

4. Ontario

(a) Lake Erie Fisheries Agreement

Agreement among Ontario, Michigan, New York, Pennsylvania, and Ohio for the regulation of the fisheries of Lake Erie. Entered into in 1931, terminated in 1937. Described in a Report of the International Board of Inquiry for the Great Lakes Fisheries as a "formal contract, signed by the representatives of four Great Lakes States and the Province of Ontario".[57]

(b) Port Huron-Sarnia Bridge Agreement

"Agreement" between the Ontario Department of Highways and Michigan State Bridge Commission. Entered into on April 8, 1937.

The agreement provides for the Port Huron-Sarnia Bridge to be free from tolls or charges after certain debentures had been paid.

(c) Michigan International Bridge Authority Agreement

"Agreement" between the Treasurer of the Province of Ontario and the Michigan International Bridge Authority. Entered into May 17, 1960. The "Agreement" was entered into by "Her Majesty the Queen in Right of the Province of Ontario, Canada, as represented by the Treasurer of the said Province". It provided that tolls received from a certain bridge should be applied to repayment to the Michigan Bridge Authority of the costs of construction of the bridge.[58]

(d) Maintenance Orders Agreements

Reciprocal Arrangements entered into directly between Ontario and Attorneys-General of American states, pursuant to the Reciprocal Enforcement of Maintenance Orders Act and Reciprocal Enforcement of Judgements Act. Information given by Ontario Attorney-General on February 19, 1964.[59]

(e) Driving Privileges Agreements

The Department of Transport of Ontario has reciprocal arrangements with various jurisdictions in respect of the suspension of driving privileges. Information supplied by Ontario on February 19, 1964.[60]

(b) Agreements into which the provinces were not competent to enter, in the view of the federal authorities

It is likely that there are many such examples. Three in particular are:

1. Northeast Inter-state Forest Fire Compact

This 1949 compact provides in Article II that

> "subject to the consent of the Congress of the United States, any province in the Dominion of Canada which is contiguous with any member State may become a party to this compact by taking such action as its laws and the laws of the Dominion of Canada may prescribe for ratification".

However, when New Brunswick wished to join the compact, the Federal Government discouraged the idea, suggesting the alternative procedure whereby the two federal governments would conclude an agreement on the subject to be supplemented by a federal-provincial agreement by which the Province would agree to carry out the obligations of the agreement falling on Canada. The Province apparently did not take up this suggestion and as far as is known no use has been made of Article II of the compact. 61

2. Civil Defence Compacts

Following upon the 1951 agreement between Canada and the United States providing for co-ordination of civil defence activities, there have been a number of proposals for Canadian provinces to join with the states in civil defence arrangements. In 1953 the State Department proposed to the Department of External Affairs that the two federal governments, on behalf of such states and provinces as wished to participate, would conclude an inter-state civil defence and disaster compact.

> "Although the two federal governments recognize that primary responsibility for performing the obligations arising out of portions of the compact will rest with the states and provinces party thereto, their respective federal governments guarantee one to the other the performance by such states and provinces on such obligations."

The Department of Justice advised that

> "it was not competent for a province to enter into an international agreement, either on its own behalf or through the agency of the Canadian Government".

Accordingly, no further action was taken on this proposal. (Nevertheless, the Province of British Columbia and the State of Washington are believed to have concluded a memorandum of understanding on this subject.)[62]

3. Great Lakes Basin Compact

The Great Lakes Basin Compact, which became effective on July 1, 1955 upon approval by four of the Great Lakes states, has among its purposes "to promote the orderly, integrated and comprehensive development, use and conservation of the water resources of the Great Lakes Basin..." The Compact established a Great Lakes Commission as an inter-governmental agency to accomplish the objectives of the Compact, and provided for the adherence of Quebec and Ontario. The Deputy Minister of Justice was asked whether the provinces would have the capacity to adhere to it, bearing in mind that the Compact was not obligatory, and was not intended to be enforceable according to public international law. He replied

> "After considering the form of the Compact and the provisions therein contained, it appears to me that the Compact is in fact intended to be a binding international agreement and, in my opinion, the province has no power to enter into such an agreement."

Suggestions for Indemnity Agreements between the Federal and Provincial Governments

The Government, in communicating with the provinces in connection with purported agreements between them and a foreign entity (for example in the cases of the Northeast Inter-state Forest Fire Compact of 1949 and the agreement between Manitoba and Minnesota in 1962) has taken the position that the most appropriate way for a province to achieve the objective it pursues in seeking to enter into a treaty with a state of the United States would be for the two federal governments to enter into an agreement concerning the subject.

> "This would be supplemented, on the Canadian side at least, by a suitable agreement between Canada and /the province concerned/ under which the province would undertake to provide and maintain whatever legislative authority might be necessary to enable the discharge within its territory on behalf of the federal government of its obligations under the agreement. As part of such an arrangement, /the province/ would indemnify the Canadian Government in respect of any liability that might arise by reason of the default of the province in implementing the obligations of Canada under its international agreement with the United States."

However, in both the case of the Northeast Inter-state Forest Fire Compact and the Manitoba-Minnesota agreement, the provinces concerned did not respond to these federal suggestions.

(c) Examples of agreements entered into between a province and a foreign entity as part of an arrangement between the Federal Government and that entity

A.S.T.L.F.

In 1963 L'Association pour l'organisation des stages en

France (A.S.T.E.F.) approached the Ministry of Youth in the Province of Quebec and the University of Toronto with a view to establishing a programme of exchange and co-operation in the industrial and technical fields. After consultations among the Quebec provincial authorities, the French Embassy in Ottawa and the Department of External Affairs, it was agreed that the draft contract between A.S.T.E.F. and the Ministry of Youth of the Province of Quebec leading to the establishment of the programme would be submitted formally to the federal government for its assent. On December 23, 1963, a letter was sent by the French Ambassador in Ottawa to the Secretary of State for External Affairs attaching the text of the proposed contract and asking whether it met with the assent of the federal government. On December 27, 1963, the Secretary of State for External Affairs informed the French Ambassador that the text met with the federal government's assent.

Agreement in the Field of Education in Quebec

In June 1964, following the creation of the Ministry of Education in Quebec, the Province of Quebec expressed an interest to the French Government in entering into arrangements with France covering the exchange of professors and students between Quebec and France. On being informed of this matter by the French Ambassador, the Secretary of State for External Affairs indicated that the Federal Government would be interested in a general cultural agreement with France in this field which would be extended to all interested provinces. In order not to delay implementation of the proposed Quebec programme, the Federal Government stated that it

had no objection to applying the procedure followed in the case of A.S.T.E.F. to the proposed programme in the field of education. In the latter part of 1964, discussions took place between the Ministry of Education of Quebec and the Ministry of Education of France and later with the Federal Government concerning arrangements to be entered into. The procedure used consisted of a "procès-verbal" recording the results of the discussions held between the Quebec and French officials concerned with the exchange programme in the field of education. The "procès-verbal" was signed by the Ministers of Education of Quebec and France and the Director-General of Cultural and Technical Affairs in the French Ministry of Foreign Affairs. It was agreed that the signing of the "procès-verbal" would be accompanied by an exchange of letters between the Ambassador of France in Canada and the Secretary of State for External Affairs requesting and granting the Federal Government's assent to the proposed exchange programme. In January 1965 at the request of the Quebec Government the title "procès-verbal" was changed to "entente". This "entente" was signed in Paris on February 27, 1965 and on the same day an exchange of letters took place in Ottawa between the Chargé d'affaires of France in Ottawa and the Secretary of State for External Affairs respectively seeking and conveying the assent of the Government of Canada to the entente.

On February 23, 1965, in reply to a question in the House of Commons whether it was contemplated that any province should have the right to participate in any agreement as an independent signatory, the Secretary of State for External Affairs responded in the negative. He stated that

"on the international plane the Federal Government represents all of Canada...One, if not the most important, attribute of this personality accruing exclusively to the Canadian Government is the power to negotiate and conclude agreements or treaties of a binding character in international law on behalf of the whole country or any part thereof with foreign countries ...Standing alone [the agreement between France and Quebec] could not have been regarded as an agreement subject to international law."

(d) Agreements proposed to facilitate subsidiary arrangements between provinces and foreign governments

Draft Cultural Agreement with France (Accord-cadre)

As an outgrowth of the desire of the Quebec Government to undertake exchanges in the field of education with the French Government and the desire of the Federal Government to ensure that, given Canada's constitutional framework, the other provinces could participate in similar arrangements with France if they so wished, Canadian Government officials prepared a draft cultural agreement ("accord-cadre") between the Government of Canada and the Government of France. This accord-cadre provides a framework for collaboration in the cultural field between France and any of the provinces of Canada. Both France and Canada would undertake, under the accord-cadre, to encourage scientific, technical and cultural exchanges and co-operation between the two countries. The accord-cadre provides that the elaboration and implementation of such a programme should be carried out and financed directly between the departments, officials, services and organisations concerned in the two countries. However, Article 3 of the accord-cadre would provide that

"within the framework of the present agreement and under its authority, French ministries, officials, services and other designated organizations and similar bodies of any Canadian

province, having given due notice to their respective national government, will be able, by common agreement, to elaborate and implement directly between themselves administrative arrangements of a provincial scope in Canada, including their financial aspects. These arrangements shall stipulate in every case that they are concluded under the authority of the present agreement."

Article 4 would provide

"that the texts of any arrangements which may be concluded under Article 3 shall in every case be communicated to the respective national governments which shall, prior to the final conclusion of any such arrangement, confirm one to the other than the proposed arrangements are in a form acceptable to each of them".

At the present time the agreement is still in draft stage.

Accord-cadre with Belgium

Discussions are now taking place with the Belgian Government for an accord-cadre between the Governments of Canada and Belgium similar in scope to the draft accord-cadre with France.

United States-Canada Agreement on Civil Emergency Planning

By an exchange of letters of November 15, 1963 between the United States Ambassador in Canada and the Secretary of State for External Affairs, a joint United States-Canada Civil Emergency Planning Committee was created with responsibility for making recommendations to the two Governments, their departments and agencies, concerning plans and arrangements for co-operation and mutual assistance between the civil authorities of the two countries in the event of an attack on either country.

The Agreement provides that the Committee may arrange for

direct communications between such national authorities of Canada and the United States that the Committee considers to be concerned with aspects of civil emergency planning in either country likely to be directly affected by comparable planning in the other. The Agreement also provides that the Committee may make arrangements to facilitate joint United States-Canada civil emergency planning by the appropriate public authorities, within their respective jurisdictions, of those states, provinces and municipalities which are adjacent to one another along the international boundary.

There have been indications recently from civil emergency planning authorities in both countries that the 1963 Agreement would have to be supplemented if it is hoped to achieve in practice the required degree of co-operation to implement an effective system of civil emergency planning. Civil emergency planners in both countries have apparently reached the conclusion that the results of the consultations which have been going on at the local level between authorities of the two countries must now be embodied in an Agreement between provinces and states and between municipalities if an effective system of emergency planning is to be attained.

It has been suggested informally by the United States authorities that consideration might be given to the United States and Canada entering into a general agreement (accord-cadre type) for the purpose of authorizing state-provincial agreements and compacts between interested municipalities approving informal plans and procedures relating to mutual aid and assistance in the event of a civil defence emergency or a major natural disaster.

(e) Other types of agreements -- contracts subject to private law

The question arises whether it is possible for the provinces of Canada to enter into contracts or agreements with foreign entities which are not agreements in the international law sense of the term. A treaty or international agreement in international law is an agreement to which the rules of international law apply. It is furthermore an agreement between two subjects of international law for the breach of which the parties would be responsible according to the principles of international law. Is it not possible for an entity such as a member of a federal union to enter into agreements or contracts of a private nature, i.e. an agreement which would not be subject to the rules of public international law but only to those of private international law?

This question has been considered from time to time by Canadian Government authorities. In June 1956, in connection with the agreement of the Nova Scotia Lands Settlement Board and the Netherlands Government, the Department of External Affairs asked the Department of Justice whether the provinces have the capacity to enter into private contracts with foreign governments. The Department of Justice was asked to consider whether a distinction could be drawn between an agreement made by a province

> "in what one might call its business or private capacity, such as, for instance, contracts for the sale of goods or renting of premises, and an agreement negotiated in its political or public capacity".

In April 1957 the Deputy Attorney-General replied:

> "There does not appear to be sufficient legal authority available at the present time with respect to this proposal to enable me to express a firm opinion thereon."

In the absence of any constitutional or judicial authority against the validity of such "private agreements" between a provincial government or an agency of it and a foreign entity, it would seem that there is much to be said in favour of the view that such agreements are legal and valid. It would appear that the American states enter into such agreements without seeking the consent of Congress as the compact clause of the Constitution (Article I, Section 10) has been interpreted so as not to require the United States Congress to have to approve minor arrangements of a technical character entered into between one state and another or a foreign entity. This proposition is supported by the case of McHenry County vs Brady in 1917.

More recent examples are the contracts between the Canadian Department of Public Works and the State of Alaska concerning the winter maintenance of the Haines' Road, and the proposed contract between Alaska and the Department of Public Works concerning the paving of a small portion of the Alaska Highway.

It is important to bear in mind the distinction between the question of the enforceability of a contract and its validity. The fact that a contract is unenforceable (voidable in private law) does not mean that it is invalid. Thus the fact that an entity cannot, without its consent, be sued in a court of law by a foreign entity would not mean that the commercial or private agreement entered into with that foreign entity was invalid.

In the field of public international law, most treaties

are unenforceable since very few countries have accepted without reservation the compulsory jurisdiction of the International Court of Justice. Under the general principles of international law as they grew up centuries ago the only effective sanction for a breach of international agreement was the power of a country to go to war in order to enforce its legal rights. Yet treaties were still valid. In private law there are many contracts (i.e. those entered into by minors) which are not enforceable but are nevertheless legal.

It would seem that a careful study of provincial practice (which the Department of External Affairs is not in a position to carry out) would show that Canadian provinces have entered into and continue to enter into a variety of contracts of a private law character.

Over half of the Canadian provinces have established offices in the United States or Europe. The following is a list of such offices.

Provincial Government Offices in the United States

Alberta	Alberta Department of Industry and Development, Los Angeles
British Columbia	Commissioner of Trade and Tourism for British Columbia, British Columbia House, San Francisco
Newfoundland	Government of Newfoundland Representative, New York
Nova Scotia	Nova Scotia Travel Bureau, New York Nova Scotia Information Office, Boston
Ontario	Ontario Department of Planning and Development, Chicago Ontario Department of Planning and Development, New York
Quebec	Office of the Agent General of the Province of Quebec, New York

Provincial Government Offices in Europe

London	Agents General of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec and the Maritimes
Paris	Quebec Delegate General
Milan	Economic Counsellor of the Province of Ontario
Dusseldorf	Special European Trade and Industrial Counsellor of the Province of Ontario

It may be assumed that the provincial governments or their agents have entered into many contracts with foreign government agents in the jurisdictions within which their offices are located relating to leases, fuel and power supply, telephones and a variety of other matters. (For example, in Britain and France, telephone and other facilities are supplied by a government corporation, utility or agency.)

Furthermore, a scrutiny of the list of agreements entered into between Canadian provinces and foreign entities (see Section 4a) leads to the conclusion that a number of these agreements are probably more of a private than a public law character. This would appear to be true, for example, in connection with the agreement between the Netherlands Government and the Nova Scotia Lands Settlement Board, the agreement between North Dakota and a Canadian municipality concerning drainage, and the agreements between British Columbia and American states with regard to supply of power. While the notion that agreements between provinces and foreign entities or individuals can be binding in private law would not be a sufficient legal basis to justify the majority of the agreements which the provinces have purported to enter into, this concept nevertheless provides a basis for legitimizing some of the activities of a purely

local or commercial nature which it may be presumed the provinces wish to undertake.

Conclusions

The conclusions for Part IV are given on the following pages.

IV PROVINCIAL PRACTICE IN CANADA IN RESPECT OF TREATY-MAKING

36. A survey of material available leads to the conclusion that the provinces, although lacking the capacity to enter into international agreements, have long shown a desire and need to enter into agreements of an essentially local nature affecting technical and non-political matters on such subjects as bridges, roads, power supplies, civil defence etc. It seems likely that a careful study of the practice of the provinces would show the existence of a very high number of such agreements. Twelve examples are given of such agreements entered into by British Columbia, Manitoba, Nova Scotia and Ontario. The Canadian Government regards such agreements (at least insofar as they purport to be subject to international law) to be invalid.

37. There are many examples of agreements which the provinces have expressed a wish to enter into but did not do so following advice of the Federal Government that they lacked the capacity to do so. Examples are the Northeast Inter-state Forest Fire Compact, certain civil defence compacts and the Great Lakes Basin Compact.

38. The federal authorities have sometimes suggested to the provinces that if they wished to enter into an agreement with an American state, the Canadian and United States Governments could enter into a treaty which would accomplish what the province wished to achieve. The provinces would then enter into an agreement with the Federal Government undertaking to perform the obligations concerned and to indemnify the Canadian Government for any failure to do so. The provinces have so far shown little interest in this type of agreement.

39. The Canadian Government has never taken a position on whether the provinces may enter into agreements with foreign entities which are in the nature of private or commercial contracts covered by private law only. Although direct evidence is not available, it would seem that the provinces have over the years entered into many such agreements particularly in relation to commercial matters. There would seem to be no compelling reason why the provinces cannot enter into agreements of a private law character with foreign entities or their agents.

40. There have recently been examples of agreements entered into between the provinces and a foreign entity as part of an arrangement agreed upon by the Federal Government and the foreign entity. Examples of this type of agreement concern technical and cultural matters in Quebec.

41. There has also been discussion and consideration by federal authorities of more general types of agreements (accords-cadres) which would authorize the provinces to enter into administrative arrangements with foreign powers concerning certain matters falling within a specific sphere of provincial authority (education, civil defence).

V POSSIBLE FUTURE PROVINCIAL PARTICIPATION IN TREATY-MAKING

Introduction

It will have been seen that, in a number of the federal states examined, the members of the federal union have certain limited possibilities of participating, in one way or another, in treaty-making. This is true even in cases such as Switzerland and the United States where the central authorities have or may acquire pervasive treaty-implementing powers.

The powers of members of a federal union to enter into agreements of a certain type have always been limited to matters of local concern and exercised under the stringent control of the central authorities. Accordingly they are not "sovereign" powers; they are delegated by the federal constitution and controlled by the central organs of the state. This is true even in Germany which is the only federal country allowing the member states to be internationally responsible for its agreements.

The constitution of Canada has been interpreted in such a way as to lead to the situation where the central government lacks treaty-implementing powers in respect of areas falling within the jurisdiction of the provinces which in turn lack treaty-making powers in this sphere. Over the years the provinces have tried, notwithstanding their lack of treaty-making powers, to enter into a variety of agreements in respect of matters falling within their jurisdiction. The federal government regards these as invalid.

Thus for some years at least some of the provinces have manifested a desire to be able to enter into arrangements with foreign entities in order to further the regulation and development of matters falling within their own legislative competence. This is not surprising, in view of the diversity of elements contributing to the Canadian people and Canada as a nation.

The factors that have led to this situation are likely to continue, indeed to increase, in future.

Nature of the Present Problem

The problem that arises, therefore, is how to achieve, under the Canadian constitution, that degree of harmony between treaty-making and treaty-implementing powers that exists in other federal countries. Can this harmony or concurrence of powers be furthered in the provincial field?

Five specific questions arise:

(a) whether methods can be found within the framework of existing constitutional practices and techniques to allow the provinces, in certain types of cases, a greater degree of participation in treaty-making and in the policy formation leading to it;

(b) whether, within the framework of the constitution, techniques can be found of a new character which have not been used before, in order to allow the provinces to play this greater role;

(c) what should be the general limitations on the scope of the above arrangements;

(d) whether it would be desirable to contemplate more far-reaching procedures for allowing provincial participation in treaty-

making techniques which would change the nature of the Canadian constitution;

(c) whether new forms of federal-provincial consultations should be undertaken so as to facilitate both the provincial role in treaty-making and federal treaty-implementation in Canada.

(a) Existing methods of allowing provincial participation in treaty-making in certain types of cases

1. Ignoring Invalid Agreements

The federal authorities could continue to turn a "blind eye" on the provinces entering into agreements with foreign entities in the name of Her Majesty in the Right of the Provinces. There are many examples of such agreements; the federal government regards them as invalid but has not challenged any of them in court.

This is an unsatisfactory policy to continue. Foreign entities are placed at a disadvantage. Canada, by failing to put a stop to this practice, may be contributing to a situation whereby the federal government would be internationally responsible for the agreement of the province by failing to take steps to ensure that foreign entities know that such agreements, under the Canadian constitution, have no standing in international law. It should also be remembered that the process, if continued often enough, will contribute to an erosion of the present constitutional structure, creating instead a confused and uncertain constitutional situation of benefit neither to the federal government nor to the provinces.

2. Federal-Provincial "Indemnity" Technique

A method often suggested by the federal government but rarely used is that of the federal government entering into an agreement with another state on the subject matter of interest to a province on the condition that the province enter into an agreement with the federal government to perform the obligation specified in the treaty between the federal government and the foreign country or reimburse the federal government if it failed to do so.

This method is cumbersome and would place a place a heavy burden on the federal authorities if it were acceptable to all provinces. It has found little favour with the provinces (as in the cases of the Manitoba-Minnesota Highway Agreement and the Northeast Inter-state Fire Fighting Compact).

In addition, obligations of the provinces to reimburse the federal government in cases where the federal government acts on their behalf can probably be implied from the terms of the agreements concerned or the principles of the law of agency.

3. Private International Law Contracts

It has been shown earlier in this study that there appear to be no compelling reasons why the provinces cannot enter into agreements, on matters of local interest, which are subject not to public international but to private law. The fact that such agreements would not always be enforceable would not affect their validity. There is a distinct limit to the usefulness of this type of agreement; it cannot, for example, apply to matters of a public law character --

such as agreements in the fields of education, enforcement of judicial orders, etc. It would seem, however, that the federal government could regard commercial dealings between a province and its agent and a foreign entity and its agent as being valid private-law contracts. This would help to reduce the number of instances when the federal government would be required to regard a provincial agreement as invalid.

4. Ad Hoc "Umbrella" Arrangements with Foreign States

Last year the federal government entered into an agreement (exchange of notes) assenting to an arrangement between the Quebec provincial authorities and a French Government agency concerning a programme of exchange and co-operation in technical fields. The exchange of notes on the inter-governmental level (France-Canada) gave international legal effect to the contract between A.U.T.E.F. and the Quebec authorities. The only entity in Canada that may be considered to be bound by the arrangement in international law is the federal government.

Thus, this "umbrella" technique, by which no part of the external prerogatives of the federal government is delegated, allows the provincial authorities a direct and simple way of achieving the establishment of an international arrangement applying to the province concerned. The federal government, through assenting to the agreement in an exchange of notes, has the opportunity to exercise approval. The province acquires no international right or accepts no international obligations. There is neither acquisition by the

province of international treaty-making capacity or any degree of sovereignty. Yet by use of this technique, it may initiate and participate in treaty-making on the federal plane.

It would seem that this ad hoc "umbrella" technique has some potential value for use in future situations where the provinces wish to enter into a specific type of agreement with a foreign power. Its utility would presumably be limited to the situation where the arrangement is a specific one not requiring further similar or parallel agreements, and where the subject matter is informal enough to be dealt with by an exchange of notes.

A possible type of case where such an arrangement might have been followed was that concerning the Manitoba-Minnesota Highway Agreement. Such agreements can be "covered" by exchanges of notes, on the federal inter-governmental level, giving assent to them.

5. Generic "Umbrella" Arrangements with Foreign States

The proposed accord-cadre with France and with Belgium in the field of education would allow the provinces or their agencies and the foreign entities and their agencies to elaborate and implement directly between themselves administrative arrangements of a provincial scope in Canada. The arrangements would be exercised under the authority of the accord-cadre (the umbrella agreement) and all such arrangements would in each case be subject to the approval of the federal authorities.

It is thus clear that this generic "umbrella" arrangement is fundamentally similar to the ad hoc "umbrella" arrangement (A.S.T.E.F.). The reasons for this are that approval must be given by the federal authorities to each specific administrative arrangement between the province and the foreign entity. There would thus appear to be, both in this type and in the ad hoc arrangement, no delegation of the external prerogative from the federal government to the provinces. The federal government, insofar as treaty relations are established, is responsible in international law for the breach of any administrative arrangements of the provinces. The provinces do not exercise, under the accord-cadre, any degree of treaty-making powers. But they participate in them by means of the arrangements provided for in the accord. Thus, there is delegation only of the power to sign subsidiary agreements which will bind the federal government; a species of agency is created in the provinces.

This particular technique of a "generic" umbrella arrangement appears to hold considerable potential for the future. It would be in the interests of both the provinces and the federal government to stand ready to negotiate agreements of this nature with various foreign powers in respect of matters falling within the sphere of interest and competence of the provinces.

This holds particularly true in respect of agreements with the United States. It would seem to be in the interests of both the federal and provincial governments if the Governments of Canada and the United States were to enter into generic agreements of this type pursuant to which the provinces would be authorized to

enter into specific administrative arrangements between themselves and states of the Union, subject to federal approval of those arrangements. Such an accord could, for example, be made in the fields of civil defence, fire-fighting and international routes, bridges and highways.

Similar types of agreements could also be entered into with foreign states concerning such matters as land settlement and immigration.

(b) Within the framework of the constitution, can new techniques be found which would allow the provinces to play a greater role in treaty-making?

It will have been seen from the above discussion that in recent years such techniques have been evolving -- a sign of the continued vitality of the Canadian constitution.

In examining what new techniques could be found to allow a province a greater role in treaty-making, consideration should be given to treaty-making powers of a member of a federal state based on the Swiss principle and on the German principle.

The Swiss Principle

The Swiss principle is that of agency; the cantons are allowed to enter into agreements with foreign entities but only as agents of the federal union. While the cantons are named as parties to the treaty, this is misleading; it is the federal state and not the canton which appears to be responsible in international law for a breach of the agreement.

It would appear that the concept of an accord-cadre, i.e. of a generic umbrella agreement under which the province could enter into arrangements within the scope of a general agreement, is a technique based on the Swiss principle of agency. As noted above, the accord-cadre would create the situation whereby the province, by entering into an administrative arrangement with a foreign entity, under the terms of the general agreement, would bind the federal government and not the province in international law. The accord-cadre would not delegate the foreign affairs prerogative of the Crown to the provinces; it would delegate only the power to sign an agreement which would bind the federal government. The method of delegation is used not to bring about a devolution of the foreign affairs prerogative from the federal government to the provinces but to create an agency which can sign an agreement on behalf of the federal government.

Thus the accord-cadre seems to contemplate a procedure based on the Swiss constitutional principle in respect of the treaty-making powers of the cantons.

The accord-cadre technique comprises a grant or delegation of powers on the principle of agency and not on the principle of the devolution of the foreign affairs prerogative.

In the Swiss Constitution, the federal government must approve all agreements entered into. This would be true also in respect of specific administrative arrangements entered into in Canada pursuant to an accord-cadre. A difference between the Swiss principle of agency and the technique of accord-cadre is that,

according to the Constitution of Switzerland, the principle of agency can apply only to "public economic regulations, cross-frontier intercourse and police relations". Thus the Constitution is in a sense an accord-cadre authorizing the cantons to enter into agreements binding on the federal government in these specific spheres. The federal government must, however, find that there is nothing in the agreements of the cantons which would be "repugnant to the federal government or to the rights of another canton".

Internal Accord-cadre of a General Nature

It would accordingly be possible for the federal government, acting on the Swiss principle, to enter into an agreement with all the provinces in which it would be stipulated that, in the matters falling within the exclusive jurisdiction of the provinces, the provincial governments would have the right to enter into agreements with foreign entities, as agents of the federal government. It would be necessary to stipulate that such agreements could only be entered into with the consent of the federal authorities. It would also be desirable to provide that in case the province concerned does not fulfill the obligations contained in the agreement, it would indemnify the federal government for any damages which the federal government would have to pay as the internationally responsible power.

Thus an accord-cadre type of agreement would not appear to require any amendment of the constitution; such arrangements would involve no devolution of the prerogative powers but merely the appointment of a species of agency to bind the federal government

with its consent. If a broad federal-provincial accord-cadre would be considered desirable, it would be necessary to provide similar safeguards as exist in the Swiss Constitution. First, it should be stipulated that before a province undertook to make any agreement with a foreign entity as agent for the federal government, it should initiate discussions with the federal government to determine the policy aspects of the matter and to obtain approval for the undertaking. Secondly, as in Switzerland, the negotiations should be conducted through the Department of External Affairs which would include in its negotiating team members of the provincial government concerned. This would be expressly in accordance with the Swiss principle that all negotiations in the name of the cantons are undertaken by the Federal Political Department. Participation by the provinces of Canada in treaty-making on the basis of the Swiss principle would involve no attribution of international personality to the provinces and no attribution of an element of sovereignty to them.

An accord-cadre of the type described here could be termed an internal accord-cadre of a general nature.

(c) General limitations on the scope of provincial role in treaty-making

The various arrangements of the types discussed above (ad hoc and generic accords-cadres and a federal-provincial accord-cadre) should apply only to matters of provincial competence which do not relate to Canadian interests as a whole. For example, it

would obviously be wrong for such a technique to be used so as to allow a province to bind the Canadian Government in respect of matters which are normally covered by a multilateral convention, e.g. concerning labour matters. This principle of agency could appropriately be used in the case of matters of direct, local and exclusive interest to a particular province and not to a number of provinces. Possible examples are land settlement, certain types of immigration and education arrangements, and local works (bridges, highways, etc.)

(d) Would it be desirable to contemplate more far-reaching techniques for provincial participation in treaty-making (i.e. by changing the nature of the Canadian constitution)?

The German Principle

A consideration of treaty-making in Canada on the basis of the German principle falls within this category. In Germany the Lander have powers to enter into treaties on their own behalf. The Lander and not the federal government are bound in international law and are internationally responsible for the performance of the agreement. However, no agreement may be entered into by a Land without the authority of the federal executive.

In considering whether the German principle could be applied to Canada, it should be remembered that the German federal experience appears to be unique. With the exception of the USSR, which presents considerations of an entirely different nature, Germany appears to be the only federal country which allows its member units to become parties to international agreements. The

background to this constitution is the existence prior to 1871 of sovereign German states with powers to enter into treaties of all sorts with all countries and with full powers of legation and diplomatic intercourse. The Constitutions of the Weimar Republic and the Bonn Republic reflect these origins of the German Republic. It appears that the German Government actively discourages the Lander from using the power which they have to enter into treaties. It does so presumably because the free use of such powers by the Lander would create an elaborate and complex network of treaty relationships on the levels of member states and the federal government which would introduce highly complicated factors in the formation and management of German foreign policy.

It would appear that if it were decided that treaty-making powers should be attributed to the provinces of Canada on the basis of the German principle, this could be achieved by the device of the Governor-General, by Letters Patent, transferring some of his powers in the foreign affairs field to the Lieutenant-Governors of the provinces. This would denote an actual devolution of the prerogative; a genuine delegation of prerogative powers would take place and not merely the device of signing powers on the Swiss principle of agency.

The German principle would not create member states of a federal union having sovereign powers. This is because the member states are, in the exercise of their treaty-making powers, subject to the control of a federal authority. Nevertheless, under the German principle, member states, to the extent that they become

parties to and bound by treaties, become subjects of international law and acquire international personality. The introduction of such a system in Canada would be highly anomolous, given the absence of a background in which the Canadian provinces were, like the German Lander, fully developed and sovereign members of the international community. Furthermore, as Canada is contiguous to the United States, the introduction of such treaty-making powers in the provinces would undoubtedly lead quickly to a sharp alteration in the nature of Canadian treaty-making and foreign relations as it would have to be anticipated that a great number of treaties on the province-state level and province-United States level would come about -- provided of course that the federal government assented to their being entered into. This would tend to create a confusing pattern of relationships between Canada and foreign powers.

If an agreement were to be entered into between the provinces of Canada and the federal government providing for the devolution of prerogatives to the provinces in respect of treaty-making, this would appear to require the federal government in good faith to allow the provinces to enter into treaties within their sphere of jurisdiction. This would be contrary to every federal experience in the world today.

Inter-state Association

There remains only to consider an even more far-reaching possibility and that is that the Canadian Government delegate its external prerogative powers to the provinces in respect of matters

falling within the provinces' jurisdiction and in such a way that the federal government does not retain the right of control. Only in these circumstances could the provinces become independent signatories to a treaty in the sense that they could adhere to a treaty as a sovereign state and not subject to the external control of a central power. In these circumstances the provinces would become sovereign states and Canada would be not a federal union but an inter-state association.

(e) Should new forms of federal-provincial consultations be undertaken so as to facilitate both the provincial role in treaty-making and federal treaty-implementation in Canada?

Thus there are a number of ways in which, through increasing the participation of the provinces in treaty-making by the federal government, a greater degree of harmony can be achieved in Canada between treaty-making and treaty-implementing powers. It will be noted that this can be achieved without any major changes in the Canadian constitution and without requiring any amendment to it.

It is also important, however, that procedures be instituted on the federal-provincial plane which would make it easier for the federal government to consult the provinces in order to determine whether they would be willing to take the legislative action necessary in order to implement general multilateral treaties which Canada has signed but not ratified. In view of the decision of the Judicial Committee in the International Labour Conventions Case, it is clear that the Canadian Government, according to this interpretation of the Constitution, lacks the power to implement an

international treaty to which it is a party if the subject matter of the treaty falls within the legislative competence of the provinces. Over the years the federal government has experienced great difficulty in determining whether or not the provinces would wish to ratify a particular multilateral convention. Perhaps the most well-known example of these difficulties is the United Nations Road Traffic Convention. For a number of years Canada has been soliciting the opinions of the provinces as to whether or not they would like the federal government to adhere to this treaty and whether they would accordingly be willing to initiate the necessary legislation for its implementation. Although a majority of provinces favour this legislation, some have never replied to the federal government's enquiries over the years.

Permanent Conference

Perhaps the only way in which these difficulties may be overcome in specific cases would be to institute an annual or semi-annual conference between the federal government and representatives of the provinces in order to review past, present and proposed treaties with a view to determining the provinces' interest, if any, in Canadian ratification. Such a procedure would enable the federal government to explain the obligations entailed and what implementing steps would be necessary in order to ratify the instruments. Provinces interested in ratification would also have an opportunity to explain the reasons why ratification would be desirable.

Although held only once or twice a year, such meetings

could form part of a permanent conference which could serve as a channel by means of which

(a) the federal government could explore provincial attitudes towards ratification and implementation of general multilateral conventions;

(b) the provincial governments could

(i) raise with the federal government specific subjects on which particular provinces might wish to see an international agreement take effect; and

(ii) discuss the ways for obtaining provincial participation in the making of such a treaty;

(c) one or more provinces could urge the others to agree to implement legislation which would make it possible for Canada to ratify a particular convention in which some but not all the provinces have an interest.

We must recognize that the Canadian constitution is defective in that it is the only federal constitution which fails to establish a harmony between treaty-making and treaty-implementing powers. To accept this conclusion is, however, neither to admit that nothing can be done to improve the present situation nor to admit that radical changes must be made in the Canadian constitution in respect of treaty-making powers in Canada.

A course lies between these alternatives -- the course of a positive and dynamic approach to federal-provincial co-operation. The establishment of a permanent conference in which federal and

provincial authorities may co-operate in relation to the making and implementing of treaties in Canada would go a long way towards enabling a handicapped constitution to work in a generally satisfactory way.

Conclusions

The conclusions to Part V are given on the following pages.

V POSSIBLE FUTURE PROVINCIAL PARTICIPATION IN TREATY-MAKING

42. The problem that arises in Canada is how to achieve, under the Canadian constitution, that degree of harmony between treaty-making and treaty-implementing powers that exist in other federal states.

43. It would appear that greater use might be made of existing possibilities for allowing the provinces to participate in the making of international agreements. There would appear to be no reason why they could not be allowed to enter into treaties of a local commercial nature subject to private and not public international law.

44. Greater use might also be made of techniques recently developed providing for an ad hoc "umbrella" arrangement between the federal government and a foreign power which would allow a province to enter into an agreement with a foreign state. Such an agreement would bind the federal government and not the province in international law.

45. Greater use might also be made of the accord-cadre type of arrangement -- a generic "umbrella" agreement between the federal government and a foreign power under which a province could enter into arrangements in respect of specific matters in fields falling within its own jurisdiction. In an accord-cadre type of arrangement, the agreement entered into between the provinces and the foreign power would be subject to federal approval and would bind not the provinces but the federal government.

46. In both the ad hoc and generic umbrella-type of agreements, the provinces would not acquire international personality or become subjects of international law; the federal government is responsible in international law for their performance.

47. The ad hoc and generic "umbrella" arrangements reflect the Swiss principle of agency according to which the member states can bind the federal unit with its consent and subject to its control.

48. Consideration might also be given to whether it would be desirable for the federal government to enter into a broad accord-cadre agreement with a federal state, particularly the United States, with regard to such specific subjects of interest to the provinces as civil defence matters, fire fighting and road and bridge building and maintenance, and other matters. It would seem desirable for generic umbrella agreements of this sort to provide that the provinces would reimburse the federal government for any breach of specific administrative arrangements undertaken by them.

49. It would also seem possible for the federal government, without legislative amendment to the Constitution, to establish an accord-cadre of an internal variety with the provinces by which they would be allowed, subject to the control of the federal authority,

to enter into agreements with foreign entities on matters within their own jurisdiction. This would be analagous to the situation existing in Switzerland in that the provinces would be only agents of the federal government. The provinces, pursuant to a federal-provincial internal accord-cadre, would not become parties to international agreements with foreign states, but through acting as a species of agent, achieve a greater participation in treaty-making through the ability to bind the federal government, with their consent, in respect of matters of specific concern to the provinces. The application of the Swiss principle would mean that the federal government and not the provinces would be responsible for any negotiations undertaken under such an accord-cadre but the provincial authorities would form part of the federal-provincial team involved in these negotiations.

50. The various arrangements of the types described above (ad hoc and generic accords-cadres and federal-provincial accord-cadre) should apply only to matters of a provincial competence which do not relate to Canadian interests as a whole. For example, it would obviously be wrong for such a technique to be used so as to allow a province to bind the Canadian Government in respect of the ratification of a multilateral convention, i.e. concerning labour matters. This principle of agency could appropriately be used in the case of matters of direct, local and exclusive interest to a particular province and not to a number of provinces. Possible examples are land settlement, certain types of immigration and education arrangements, and local works (bridges, highways etc.).

51. It seems doubtful whether the treaty-making powers of member states of a federal union based on the German principle would be desirable in Canada. Application of the German principle, by allowing member states to become internationally responsible parties to agreements with foreign entities, would create a situation whereby the member states become subjects of international law and acquire international personalities to the extent that they enter into treaty relationships. Although the German principle requires the federal government to approve all international agreements, the German experience has been to discourage member states from using these powers.

52. There seems little question that a devolution by the federal government of its external prerogatives to the provinces would be contrary to the experience of all federal countries which in all cases except Germany do not allow member states to exercise such powers and which in Germany are exercised only sparingly and exceptionally.

53. Procedures should also be instituted on the federal-provincial plane which would make it easier for the federal government to consult the provinces in order to determine whether they would be willing to take the legislative action necessary in order to implement general multilateral treaties which Canada has signed

but not ratified. Perhaps the only way in which these difficulties may be overcome in specific cases would be to institute an annual or semi-annual conference between the federal government and representatives of the provinces in order to review past, present and proposed treaties with a view to determining the provinces' interest, if any, in Canadian ratification. Such a procedure would enable the federal government to explain the obligations entailed and what implementing steps would be necessary in order to ratify the instruments. Provinces interested in ratification would have an opportunity to explain the reasons why ratification would be desirable.

54. We must recognise that the Canadian constitution is defective in that it is the only federal constitution which fails to establish a harmony between treaty-making and treaty-implementing powers. To accept this conclusion is, however, neither to admit that nothing can be done to improve the present situation nor to admit that radical changes must be made in the Canadian constitution in respect of treaty-making powers in Canada.

55. A course lies between those alternatives -- the course of a positive and dynamic approach to federal-provincial co-operation. The establishment of a permanent conference in which federal and provincial authorities may co-operate in relation to the making and implementing of treaties in Canada would go a long way towards enabling a handicapped constitution to work in a generally satisfactory way.

56. A permanent conference (meeting twice a year) could serve as a channel by means of which

(a) the federal government could explore provincial attitudes towards ratification and implementation of general multilateral conventions;

(b) the provincial governments could

(i) raise with the federal government specific subjects on which particular provinces might wish to see an international agreement take effect; and

(ii) discuss the ways for obtaining provincial participation in the making of such a treaty;

(c) one or more provinces could urge the others to agree to implement legislation which would make it possible for Canada to ratify a particular convention in which some but not all the provinces have an interest.

RESTATEMENT OF CONCLUSIONS

I THE PRINCIPLES OF INTERNATIONAL LAW RELATING TO THE POWER OF COMPONENT PARTS OF A FEDERAL STATE TO MAKE TREATIES

1. There is no rule of international law which precludes the component states of a federal union from being invested with the power to conclude treaties with third states. The view that, in a federal state, the treaty-making power is necessarily indivisible is not well-founded.

2. Whether or not the members of a federal state possess any treaty-making powers depends on the federal constitution.

3. In determining what meaning should be given to a federal state's constitution, resort should be had not merely to the relevant written instruments but to the existence of any constitutional conventions which may have evolved concerning the interpretation to be given to the federal state's constitution.

4. If a member of a federal state exercises treaty-making powers as an agent of the federal state, then it is the federal state alone which is a party to and bound by the treaty and the component state is not, in any sense, subject to international law.

5. If, however, the component member is itself bound under the treaty, then the member state is, in fact, a party to an international treaty and to that extent is both subject to international law and is recognized by other parties to the treaty as responsible on the international plane for its performance.

6. If a member of a federal union has, under the constitution, both extensive legislative jurisdiction in a given sphere and unrestricted power to enter into treaties falling within that sphere and for whose violation the member would itself be internationally responsible, the state may properly be regarded as partially sovereign. If, however, its powers to become a party to a treaty and be internationally responsible for its performance are subject to the permission of the federal authority, the member would not be sovereign or partially sovereign, as it would be subject, within the very sphere of its competence, to the external control of a superior authority. The possession of such external control on the part of a superior federal authority is incompatible with the attribution of a genuine sovereignty to a subordinate member subject to that control.

7. The existence of extensive treaty-making powers in various members of a union would, if not subject to federal control, make them sovereign in large areas of international law and thereby reflect the existence not of a federal state but of a loose form of inter-state association.

8. The general view of legal scholars upholding the possibility of a member of a federal union having the power, under a federal constitution, of being a party to an international treaty (and accordingly, to that extent, being subject to international law and acquiring some legal personality) is that such powers exist on the basis of <u>delegation</u> from a federal authority or the federal constitution.

II A SURVEY OF STATE PRACTICE CONCERNING THE POWERS OF MEMBERS OF A FEDERAL UNION TO MAKE TREATIES

9. The powers and practice of the constituent parts of federal unions concerning treaty-making powers fall within three broad categories:

(1) component units which have or appear to have no treaty-making powers; examples are Australia and India;

(2) component units which have powers to make certain treaties but only as agents of the federal union (i.e. the unit is not responsible in international law for a violation of the agreement); Switzerland is an example;

(3) component units with powers to make certain treaties as principals and not merely as agents (i.e. component unit is a party to the treaty and is bound by it in international law); examples are the Soviet Union and Germany and, it seems, the United States. (In these cases, the possibility cannot be excluded that the federal governments, under the principles of international law, would also be held responsible.)

10. In Australia and India, the treaty-making power falls exclusively within the federal competence; the federal authorities appear to have powers to implement the treaties through passing legislation which would otherwise fall within the jurisdiction of the component states. Thus a certain harmony exists between the allocation of treaty-making and treaty-implementing powers in both unions.

11. The Swiss system, in terms of its broad effects in the foreign affairs field, presents several similarities to the federal systems in Australia and India. In all three countries, the federal authorities are responsible for the performance of international treaties and have or can acquire extensive powers to pass implementing legislation in spheres otherwise falling within the legislative competence of the member states.

12. The Swiss, however, through the concept of the canton acting as agent for the Confederation, allow greater participation in treaty-making to the cantons in matters of local interest but without derogating from the general effectiveness of the central authorities in the foreign affairs sphere and without the cantons acquiring any substantial degres of international personality. The Federation, and not the canton, is bound by the agreement entered into by the canton. The Confederation negotiates the treaty and must approve it.

13. Although in Germany, the Soviet Union and the United States the member states can enter into agreements and, it would

seem, be responsible internationally for their execution, this power is in all three cases exercised with the consent of the federal authorities.

14. In the case of the United States, there is, as in Australia, India and Switzerland, in large measure, a harmony of both treaty-making and treaty-implementing powers in the federal authority. The states' powers to make agreements with the consent of Congress has been used very sparingly and never with any country or unit other than a Canadian province.

15. The powers of the member states of the Soviet Union to enter into treaties are extensive but are subject to federal authority. The formal power to enter into treaties which the various Republics have under the Soviet constitution does not enable individual Republics to act either independently or freely on the international plane. For a variety of reasons, the Soviet experience is of limited interest from the standpoint of federalism in the Western democracies.

16. The German constitution contrasts with those of Australia, India, Switzerland and the United States. In Germany, the member states can exercise treaty-making powers within the sphere of their domestic competence and the federal government seems to lack plenary powers to implement treaties falling within that sphere. The result is that in Germany there is also, in certain measure, a harmony of treaty-making and treaty-implementing powers in the members of the federation. But these treaty-making powers are subject to the control of the federal executive and their use is discouraged.

17. In those federal states where the central government has the power to implement international treaties even where the subject matter would otherwise fall within the legislative competence of the members, the members either have no power to enter into treaties (as in the case of India and Australia) or can enter into treaties only as agents acting for the federal government (as in Switzerland) or can enter into agreements only on a very exceptional basis and under the strict control of the federal authorities (as in the United States). In all of these cases, there is a harmony of treaty-making and treaty-implementing in the federal sphere.

18. In the case of a federal government which does not appear to have either the power to require its members to bring their legislation into line with international obligations undertaken by the federal government or to adopt the necessary legislation itself, the constituent members may have treaty-making powers falling within the scope of their own competence. It appears that the only example of this type of constitution is that of Germany. Even in this case, however, any treaties of the Lander are subject to approval by the federal executive authorities. Furthermore, it appears that the federal government in Germany strongly discourages the Lander from entering into such agreements.

19. The experience of all the federal countries examined shows that the federal authorities firmly regulate (through requiring federal approval) and, it seems, discourage, the member states from entering into treaties.

20. There appears to be no example of the constitution or practice of a federal union which allows a member to act independently in the international sphere.

21. It would appear that, except in India and Australia, the federal states examined all allow some sort of treaty-making action to take place at the level of the member states. This is true both in federal states possessing a centralized foreign affairs power (the United States and Switzerland) and possessing a more decentralized constitutional framework for treaty-making (Germany and the USSR). In this way, the member states are able, exceptionally and subject to federal control, to participate in treaty-making on matters of a local or essentially non-political character.

22. Such treaty-making powers as exist in members of a federal union derive from the constitution itself. These treaty-making functions are thus delegated powers, a fact which may be clearly seen from the fact that in all the countries concerned they can only be exercised with the approval, i.e. authorization, of the central powers.

23. It accordingly follows that, although the component members of Germany, the Soviet Union and (perhaps) the United States may become parties to an international agreement and be internationally responsible for its performance, and although to this extent they may be subject to international law and acquire a limited degree of international personality, these states nevertheless cannot be considered as possessing a measure of sovereignty because their international capacity is subject to the external control of the central authority.

III INTERPRETATION OF THE CANADIAN CONSTITUTION CONCERNING POSSIBLE PROVINCIAL TREATY-MAKING POWERS

24. The constitutional authority in Canada to conclude international agreements is a part of the royal prerogative and in practice, as regards treaties, is exercised in the name of Canada by the Governor-General, usually on the advice of the Secretary of State for External Affairs. The prerogative powers in respect of foreign affairs and treaty-making devolved upon the federal government at a time when it became an autonomous member of the British Commonwealth of Nations. In addition, the prerogative powers of the Crown in the right of Canada were clearly delegated to the Governor-General in the Letters Patent of 1947.

25. There has never been any delegation of such prerogative powers to the Lieutenant-Governors of the provinces nor is there any valid authority in constitutional conventions or practice for the assertion that the provinces received any part of the royal prerogative with respect to foreign affairs and the power to make treaties.

26. To uphold the opposite view would be incompatible with the concept of Canada as a federal state. To assert the proposition that the provinces have received the sovereign treaty-making powers in respect of matters falling within their legislative competence is to assert that "Canada" is not a federal state but an association of states.

27. That such a situation cannot have been created by the British North America Act may also be seen from the fact that the federal government, through exercise of various powers which it possesses under the Act (disallowance, right to appoint Lieutenant-Governors who could withhold assent from provincial legislation) could make it impossible for the provinces to perform any treaty which required legislation.

28. The Canadian constitution is unique in that it is the only example of a federal union in which, in a large area of national competence, there is no concurrence or harmony between treaty-making and treaty-implementing powers.

29. The federal government has the power to enter into treaties of all kinds but cannot, according to the Labour Conventions Case, implement treaties falling within provincial jurisdiction. On the other hand, the provinces, which possess certain legislative powers within the spheres of their own jurisdiction, have no powers to enter into international agreements concerning the matters over which they have legislative competence.

30. In this respect the Canadian federal experience differs both from that of most other federal states where there is a concurrence of treaty-making and treaty-implementing powers in the

federal executive and from the exceptional case of Germany, whose constitution creates a certain harmony by allowing the constituent members to legislate in specific fields and, subject to federal control, to enter into agreements in those fields.

31. The Canadian constitution, in comparison with other federal states, is accordingly handicapped in that it appears to be the only federal constitution which fails to designate a treaty-implementing power in some organ which is at the same time a treaty-making power.

32. Since international law remits to the constitution of a federal state the determination of whether its members can enter into treaties, foreign states are bound to accept the constitution of a federal union -- with its limitations -- as the legal basis for their dealings with Canada.

33. Any willingness by a foreign power to enter into treaties with members of a federal state such as Canada, in the knowledge that the constitution of the federal state does not authorize this, may properly be regarded by the federal union as interference in its domestic affairs and, in the case of an offer to enter into treaty relations, as an illicit act of recognition of the international personality of the member states.

34. Any attempt by a foreign state to enter into a treaty with a Canadian province would therefore be a violation of the principles of international law, and would also be inconsistent with the recognition that such a foreign state has already given to Canada.

35. If a member of a federal union, the constitution of which does not allow its members to enter into treaties, purports, nevertheless, to enter into such agreements, it would be attempting to exercise an act of sovereignty in violation of the constitution. It could obtain recognition of such treaty rights only by states which are prepared to violate the principle of international law that remits the question of such capacity to the constitution of the federal union.

IV PROVINCIAL PRACTICE IN CANADA IN RESPECT OF TREATY-MAKING

36. A survey of material available leads to the conclusion that the provinces, although lacking the capacity to enter into international agreements, have long shown a desire and need to enter into agreements of an essentially local nature affecting technical and non-political matters on such subjects as bridges, roads, power supplies, civil defence etc. It seems likely that a careful study of the practice of the provinces would show the existence of a very high number of such agreements. Twelve examples are given of such agreements entered into by British Columbia, Manitoba, Nova Scotia and Ontario. The Canadian Government regards such agreements (at least insofar as they purport to be subject to international law) to be invalid.

37. There are many examples of agreements which the provinces have expressed a wish to enter into but did not do so following advice of the Federal Government that they lacked the capacity to do so. Examples are the Northeast Inter-state Forest Fire Compact, certain civil defence compacts and the Great Lakes Basin Compact.

38. The federal authorities have sometimes suggested to the provinces that if they wished to enter into an agreement with an American state, the Canadian and United States Governments could enter into a treaty which would accomplish what the province wished to achieve. The provinces would then enter into an agreement with the Federal Government undertaking to perform the obligations concerned and to indemnify the Canadian Government for any failure to do so. The provinces have so far shown little interest in this type of agreement.

39. The Canadian Government has never taken a position on whether the provinces may enter into agreements with foreign entities which are in the nature of private or commercial contracts covered by private law only. Although direct evidence is not available, it would seem that the provinces have over the years entered into many such agreements particularly in relation to commercial matters. There would seem to be no compelling reason why the provinces cannot enter into agreements of a private law character with foreign entities or their agents.

40. There have recently been examples of agreements entered into between the provinces and a foreign entity as <u>part</u> of an arrangement agreed upon by the Federal Government and the foreign entity. Examples of this type of agreement concern technical and cultural matters in Quebec.

41. There has also been discussion and consideration by federal authorities of more general types of agreements (<u>accords-cadres</u>) which would authorize the provinces to enter into administrative arrangements with foreign powers concerning certain matters falling within a specific sphere of provincial authority (education, civil defence).

V POSSIBLE FUTURE PROVINCIAL PARTICIPATION IN TREATY-MAKING

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FOOTNOTES

1 I.L.C. Report, 17th session, 1962. Article 3(1) (A/5209).

2 IBID, Article 3(2).

3 In Oppenheim International Law, 8th edition, Vol. 1.

4 I.L.C. Yearbook 1953, Vol. II, p. 138 (A/CN.4/63 of March 24, 1963).

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8 Law of Treaties, 37-38 (1961).

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10 IBID, p. 32 (commentary to Article 8).

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13 IBID, p. 164, paragraph 3 of commentary to Article 3.

14 See Hart The Concept of Law.

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16 See 51 (XXIX) of the Constitution.

17 See Wheare, Federal Government, 3rd edition, pp 183-4. K.H. Bailey, 1937 B.Y.I.L., XVIII, 175.

18 Rex vs Burgess (1936), 55 C.L.R. 608.

19 Letter 491 of October 28, 1964 from Office of the High Commissioner for Canada in Canberra.

20 See letter 59 of February 26, 1965 from the Embassy in Berne.

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26 The Constitution of the United States, S.Doc. 232, 74th Congress, 2nd session, pp 366-8, quoted in Hackworth, Vol. V, sec. 454, pp 24-5.

27 148 US 503, 519, 520.

28 McNair, Law of Treaties, 1961, p. 38.

29 37 N.D. 59 (1917); 163 N.W. 540.

30 No authority has been found for this proposition.

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51 Zimmerman and Wendell, Inter-state Compacts since 1925, (1950), p. 81.

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60 Lawford, loc. cit.

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