FEDERALISM AND INTERNATIONAL RELATIONS

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PREFACE

In recent years new attention has been directed to the conduct of Canada's external relations, partly because the growing activities of the provinces have given them a greater interest in external matters, and partly because the nature of external relations has altered in a manner that makes them of more relevance to areas of provincial domestic jurisdiction. An additional special factor has been the new interest of French-speaking Canadians in closer contacts with the French-speaking community of the world. It is particularly appropriate, at a time when the federal and provincial authorities are engaged in a general review of our constitutional institutions and practices, that related issues in the foreign affairs field should be given careful study.

The present paper is intended, first, as a background document which describes the constitutional and legal considerations relating to the conduct of foreign affairs in Canada and other federal states, and, second, as an outline of the steps being taken increasingly by the Federal Government to frame and implement a policy which meets provincial needs and wishes and the requirements of the two linguistic communities in Canada. As such its purpose is to contribute to constructive consideration and discussion of the implementation of Canadian federalism in the field of international relations. It is the Government's view that such an examination, not only by experts but by the public at large, can only serve to enhance Canadian unity and the interests of all our citizens.

L B Pearson

Prime Minister

Ottawa, 1968

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CHAPTER I

Introduction

Foreign Policy as an Expression of the National Interest

A viable foreign policy must be a national policy which reflects to the greatest possible extent the aspirations and goals of all the people. For Canada such a policy must not only be consonant with the interests of Canadians across the country, but must also take account of two distinctly Canadian qualities: our federal constitutional structure and our cultural heritage. Thus, in framing and implementing Canadian foreign policy, the Government of Canada must take account of the desires and needs of the provinces, and it must also recognize the traditions which both French- and English-speaking Canadians seek to maintain and develop within the fabric of the Canadian federation.

The Development of Foreign Relations Since Confederation

To understand the situation as it exists in 1968 it is necessary to trace the evolution which has taken place since Confederation. This in turn requires an examination of two separate but interlocking series of developments: first, the fundamental alterations which have taken place in the field of foreign relations since that time; and, second, the evolution toward Canadian sovereignty which has been witnessed over the same period.

(i) Traditional Diplomacy and Modern Diplomacy

The range of every country's foreign relations and the manner in which foreign policy is pursued have altered radically in the last hundred years. At the time of Confederation, foreign affairs were concerned principally with such matters as peace and war, the sending and receiving of diplomatic envoys, the negotiation and conclusion of treaties of a general nature, and

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so forth. Rules of international law were few in number and restricted in their scope. Moreover, the size of the world community was of limited proportions, and indeed remained so even at the time of the outbreak of the Second World War.

On both these counts there have been fundamental changes. First, the conduct of external affairs has become increasingly complex and far-reaching as a result of the greater interdependence of states. This has led to increasing international regulation through the medium of multilateral conventions on such widely different matters as human rights, labour conditions, telecommunications, civil aviation, and a host of other subjects which affect the interests of individuals in every quarter of the globe. Second, there has been a remarkable increase in the number of sovereign states. There are now 123 members of the United Nations and new states continue to be admitted. Furthermore, in addition to the United Nations itself, there are numerous world-wide and regional organizations of a more specialized nature and new institutions are being created almost every year. These developments have resulted both in an extending world order and in forms of international regulation which touch more directly on local interests and provincial jurisdictions than has been the case in the past.

(ii) The Attainment of Canadian Sovereignty and its Implications

There have also been profound changes in Canada's position in the world. Canada's attainment of independence is the result of a long process, and the fact that it was not anticipated in 1867 that Canada would achieve full independence is of major significance with respect to the constitutional distribution of powers in the foreign affairs field. The constitutions of other federal states have conferred upon their central governments an overriding power in matters of foreign affairs, but no such direct and express provision is found in the British North America Act. Indeed, the Act makes no specific reference to the power to enter into treaties. The reasons for this are essentially that the treaty-making power is a Royal Prerogative and that at the time the Act was drafted it was not contemplated that Canada would negotiate or conclude international agreements in her own right, this power having been reserved to the Queen acting on the advice of Her British Ministers.

The process of achieving Canadian autonomy was a gradual one, and freedom of action in external affairs was one of the most recent of a series of steps towards independent status. It was not until the Imperial Conference of 1926 that the general principle was confirmed that no autonomous dominion could be bound by commitments incurred by the Imperial Government except with the consent of the dominion concerned. At that Conference the unanimous desire on the part of the dominions to define the status which they had attained was given expression in a celebrated declaration:

> They (Great Britain and the Dominions) are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of

their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.

This declaration was given legal effect, as concerns the legislative competence of the parliaments of the dominions, by the Statute of Westminster in 1931. The process of achieving independent status was completed in 1939 when the outbreak of war put an end to the popular debate of the Thirties as to whether a part of the Commonwealth could remain neutral while Britain was at war. A formal declaration of war was issued separately for Canada and a state of war was declared with Germany as of September 10, 1939, seven days after the date of the United Kingdom declaration.

Foreign Policy and Canadian Federalism

Canada is universally recognized as an independent member of the community of nations, and the Canadian Government enjoys full powers to enter into treaties and agreements on all subjects. However, under the British North America Act, as interpreted by the Judicial Committee of the Privy Council, the Parliament of Canada cannot legislate to implement a treaty if the subject matter falls within the exclusive legislative competence of the provinces. Furthermore, because so large a part of modern diplomacy relates to matters such as social welfare, economic development, and related questions, it is obvious that Canadian foreign policy in these fields must, to be effective, take into account provincial interests. It is equally clear, however, that in the modern world foreign policy cannot be fragmented and that parts of it cannot be sifted off or treated in isolation from the larger considerations which lie at the roots of national policy. In the circumstances, it is important both that the Government make clear the responsibilities which it alone can exercise in this field and the manner in which its powers are used to the benefit of all Canadians.

CHAPTER II

The Federal Responsibility

In international law, the conduct of foreign relations is the responsibility of fully independent members of the international community. Because the constituent members of a federal union do not meet this criterion, the direction and control of foreign relations in federal states is generally acknowledged to be the responsibility of the central authority. Accordingly, the members of federal states have no independent or autonomous capacity to conclude treaties, to become members of international organizations in their own right, or to accredit and receive diplomatic and consular agents.

(A) The Treaty-Making Power

The exclusive responsibility of the Federal Government in the field of treaty-making rests upon three considerations: the principles of international law relating to the power of component parts of federal states to make treaties; the constitutions and constitutional practices of federal states; and, finally, the Canadian Constitution and constitutional practice. These three aspects are examined below.

(i) The Principles of International Law

The question whether the members of a federal union can make treaties or international agreements has been studied at length by the International Law Commission, a subsidiary organ of the United Nations General Assembly, and by various experts on the law of treaties who have prepared reports for the Commission. The Commission has taken the view that the question whether a member of a federal union can have a treaty-making capacity depends upon the constitution of the country concerned. In other words,

the Commission is of the view that international law cannot by itself decide whether or not a member of a federal union can make a treaty. International law looks, in the first instance, to the constitution of the state in question to determine the treaty-making capacity.

The International Law Commission has been assisted by three experts on the law of treaties. All of them were broadly in agreement with the conclusion referred to above but gave emphasis to different aspects of the matter. One stressed that member states of a federation could not be regarded as having the power to conclude treaties unless such an authority had been conferred on them by federal law or the federal constitution. Another was of the view that, even when the constitution allowed members of a federal union to make agreements, they would act merely as agents for the union. In other words, in his opinion, the component parts could in no case themselves acquire international personality, and the union itself was necessarily the "entity that becomes bound by the treaty and responsible for carrying it out".

The most recent special rapporteur, who played a substantial role in the preparation of the draft codification adopted by the International Law Commission in 1966, stressed in his comments that for a member of a federal union to possess a treaty-making capacity it was also necessary that other states recognize the powers conferred by the constitution on the member of the federal union. His report thus brings to light the importance of the attitude of other states towards the powers which a constitution purports to give to a member of a federal union.

Taking as a point of departure the view of the Commission that the existence of a treaty-making capacity in a component part of a federal union depends upon the constitutional law of the country concerned, it becomes important to review the constitutions and experience of federal states to determine the principles of federalism that have in fact been followed by various countries so far as a treaty-making capacity is concerned.

(ii) The Constitutions of Federal States

The constitutions of the great majority of states reserve to the federal government the responsibility for the conclusion of international agreements and make it clear that the constituent parts do not possess this right. There are however, some federal states (Switzerland, the United States, the Federal Republic of Germany and the U.S.S.R.) whose constitutional practice apparently allows the constituent parts to enter into certain types of agreements with foreign states. However, the experience of these states cannot be treated as common because their constitutional practices differ materially one from another: under the Swiss Constitution the Federal Government is authorized to make international agreements on behalf of the constituent parts; the United States Constitution provides that the Congress may authorize "compacts" between the states of the union and foreign sovereign states, but as of this time no such agreements have been concluded;

finally, although the Constitutions of the Federal Republic of Germany and the Soviet Union authorize the constituent parts to make international agreements in some areas, they are subject to federal direction or control.

The constitutions of these and other federal states are examined in an annex to this paper. In summary, however, it may be concluded that even in the case of constitutions which authorize the constituent members to enter into international agreements in certain fields, all provide that this authority must be exercised either under federal control or through the intermediary of the federal government. Moreover, it has been pointed out by constitutional experts that powers of this nature which may be exercised by members of federal unions have been used with diminishing frequency in recent years.

No federal constitution authorizes the constituent parts to enter freely and independently into international agreements.

(iii) The Canadian Constitution

Having examined the constitutions of a number of federal states, it remains to be considered where the treaty-making power resides under the Canadian Constitution.

The assumption in 1867 was that the treaty-making power would remain part of the prerogative powers with respect to the conduct of external affairs, which rested with the Sovereign and were exercised on the advice of Her British Ministers. For this reason, the British North America Act is silent on this question, although it is provided in Section 132 that the Canadian Parliament and Government:

> shall have all powers necessary or proper for performing [i.e. implementing] the Obligations of Canada or of any Provinces 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 approximately the next half-century, the treaty-making capacity in respect of Canada was vested exclusively in the Imperial Government. However, in the period 1871-1923, procedures slowly evolved by which Canadian Government representatives at first participated in negotiations leading to an imperial treaty affecting Canada (Washington Treaty of 1871), then later came to sign such agreements as a member of the Empire (Treaty of Versailles, 1919), and finally signed such agreements on behalf of Canada (Halibut Fisheries Treaty, 1923). As noted above, this new procedure was confirmed at the Imperial Conference of 1926; Canada and other dominions were henceforth 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. The dominions were also accorded the right to establish direct diplomatic relations with foreign powers.

The prerogative powers of the Crown, initially reserved for the Queen under Section 9 of the British North America Act, are now exercised by the Governor-General. In the colonial period, the extent of the delegation of

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the prerogative power was limited by the subordinate position occupied by the colony, but it may be assumed that, upon the achievement of independence those prerogative powers remaining in the Crown passed to the Governor-General, and all such prerogatives are implicitly held by the Governor-General even in the absence of specific delegation. In other words, it is reasonable to conclude that the powers required by an independent state in fact reside in that state, and, further, that, when Canada achieved autonomy, only one entity became independent and was recognized as such by the international community. In addition, the new Letters Patent issued by the Governor-General in 1947 declare:

> 2. And We do 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, ...
>
> 3. 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.

From the terms of the Letters Patent, read in conjunction with the 1939 provision for a Great Seal for Canada, it may be concluded that the foreign affairs prerogative is now exercised by the Governor-General.

Further, the burden of judicial opinion, particularly in the *Labour Conventions Case (1937)*, is that the authority to enter into international agreements resides exclusively with the federal authority. Chief Justice Duff's opinion in that case includes the following observation:

> As regards all such international arrangements, it is a necessary consequence of the respective positions 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 the Lieutenant-Governor of a Province represent the Crown in respect to relations with foreign Governments. The Canadian Executive, again, constitutionally acts under responsibility to the Parliament of Canada and it is that Parliament alone which can constitutionally control its conduct of external affairs.

It was also his opinion that the documents of the Imperial Conferences of 1923 and 1926 constituted authoritative evidence of constitutional usage, including 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) . . . ". Chief Justice Duff and Justices Davis and Kerwin 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".

Proponents of a provincial capacity at international law have suggested that the prerogative powers of the lieutenant-governor include the power to carry on foreign affairs or at least to enter into treaties in areas of provincial legislative jurisdiction. Historically the powers of the lieutenant-governors have been the source of considerable dispute, but two decisions of the

Judicial Committee (*Liquidators of the Maritime Bank of Canada vs the Receiver-General of New Brunswick,* 1892; and *Bonanza Creek Gold Mining Company Limited vs the King,* 1916) have been cited as establishing both that the government of each province represents the Queen in the exercise of her prerogative regarding all matters affecting the rights of the province, and, more particularly, that external prerogatives are among those which have devolved upon the lieutenant-governors in legislative fields assigned to the provinces. This conclusion is open to doubt on various grounds. The Privy Council could not have had in mind the devolution of the Crown's external prerogatives because at the time these cases were decided they had not devolved to Canada. Moreover, the *Bonanza Creek Case* had no foreign aspects to it and dealt exclusively with internal questions. In any event, provincial legislative competence is restricted to matters of an essentially local nature and therefore any parallel executive powers would also be so limited, and not applicable to the foreign affairs field.

Further, the powers of the Federal Government as set forth in the British North America Act are not such as to support the view that the Queen's external prerogatives developed upon the lieutenant-governors of the provinces. In particular, the Federal Executive is empowered to disallow acts passed by provincial legislatures whether or not such acts deal with matters within the legislative competence of the provinces. Thus, if the provincial governments possessed treaty-making powers under the BNA Act, they would be in a position in which the Federal Government could prevent them from implementing any such agreements. Although these powers have not been used for many years, they are nonetheless historically significant in determining the nature of Canadian federalism. Seen in this way, they create a strong presumption that under the Constitution the provinces could not have been intended to enjoy independent status in their own right.

The following conclusions may be drawn from the above analysis:

1. In Canada the constitutional authority to conclude international agreements is a part of the royal prerogative and, with respect to 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 executive at the time when Canada became an autonomous member of the British Commonwealth of Nations. In addition, the delegation of the prerogative powers of the Crown in right of Canada to the Governor-General were clearly confirmed by the Letters Patent of 1947.

2. There has never been any delegation of such prerogative powers to the lieutenant-governors of the provinces. Nor is there any authority for the assertion that the provinces received any part of the royal prerogative with respect to foreign affairs and the power to make treaties.

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3. That such a situation was not created by the British North America Act may also be seen from the fact that the Federal Government, through the exercise of the power of disallowance, could make it impossible for the provinces to perform any treaty which required legislation.

(B) Membership and Participation in International Organizations

The preceding sections show that, both historically and in law, only the federal authorities can represent a federal state in its relation with other states. There can be only one Canada for purposes of membership and participation in international organizations. The alternative, that "Canada" could comprise ten or eleven entities, operating independently of one another in international organizations, would be incompatible with all known federal systems and the Canadian Constitution. Furthermore, it would be unacceptable to foreign states that such a "Canada" should acquire disproportionate rights of membership—to the extent of ten or eleven seats on this or that body—even if it were considered desirable or feasible to fragment the Canadian federation in this manner. Further implications of this position are considered below.

In examining the possibility of participation by members of federal states in international organizations, three types of membership should be distinguished: (i) full membership; (ii) associate membership; and (iii) permanent observer status. In addition, consideration should be given to the possibilities for functional participation by component members in federal representation to international organizations.

Full Membership in International Organizations

Without exception the constitutions or basic documents of international organizations make no provision for membership by component parts of federal unions. In addition they normally qualify the type of "state" which is eligible for membership by providing that it must be able to accept the obligations flowing from membership in the organizations. Thus, such states must have the capacity to enter into agreements legally binding under international law and the capacity to fulfil international obligations. It is important to note that "capacity to fulfil international obligations" does not refer to the question whether such a capacity might be said to exist in the abstract but rather to whether it is in fact recognized as existing by other sovereign states.

In a federally-constituted state only the federation as a whole meets these criteria and, in consequence, aside from all other considerations concerning the federal responsibility, only the federal government can qualify as the representative of the sovereign state eligible for membership in international organizations. Otherwise, to maintain that the constituent parts of a federal state would so qualify would amount to recognizing that each of the parts had independent status both internally and externally. Such a contention would, in effect, entail the denial of the existence of the federal

state and would make the constituent parts "states" in the international sense. The above analysis is confirmed by the fact that in practice no member of a federal union has been considered eligible for membership in international organizations except for the Ukraine and Byelorussia which are universally recognized as special cases, the circumstances of whose admission to the United Nations is of little relevance from the standpoint of other federal states.

Associate Membership

In light of the above considerations, full membership in international organizations is generally open only to sovereign states. However, a review of the constitutions of a number of international organizations shows that they sometimes also provide for associate membership of territories which are not completely sovereign in the international field. The provisions of the constitutions of those international organizations in which it is possible to have associate membership are along the following lines: "Territories or groups of territories which are not responsible for the conduct of their international relations may be admitted as associate members . . . upon application made on behalf of such territories or group of territories by the member or other authority having responsibility for their international relations".

It should be noted that this possibility does not arise in the case of the United Nations organization itself, there being no provision for associate membership in the UN Charter. Moreover, the technique has been used sparingly in other organizations, where it has been employed as a procedure designed to permit colonial powers to arrange for the admission to appropriate international organizations of former colonies which are not yet fully responsible for their external relations. Indeed, this latter consideration, which is not relevant to the position of federal states, appears to reflect the unique purpose for which the "associate membership" provision was devised. In any event, there are in fact no known instances of a member of a federal state having been admitted to associate membership in an international organization.

Permanent Observer Status

In addition to membership and associate membership, participation in international organizations may take the form of permanent observer status. There are at present six countries which have been granted permanent observer status at the United Nations. There appear to be no hard and fast rules governing the granting of such status, but the United Nations seems to have been guided by the policy of making permanent observer facilities available only to states which would otherwise qualify for membership but which have either not applied or have been precluded for a variety of reasons from acceding to full membership in the Organization. In practice the following countries have been granted permanent observer

status at the United Nations: the Federal Republic of Germany, the Holy See, the Republic of Korea, Monaco, Switzerland and the Republic of Vietnam.

It should be noted that the countries which have been granted permanent observer status in the United Nations Organization are full members of other international organizations. Although permanent observer status is not normally granted by organizations other than the United Nations, those organizations providing for such status have indicated that it could only be granted to states which would otherwise qualify for membership. The considerations outlined above with regard to possible membership or associate membership of a constituent part of a federal state in an international organization are therefore also applicable in deciding whether such an entity should be regarded as qualifying for permanent observer status.

Functional Participation by Constituent Parts of a Federal State within the Federal Delegation

There is no reason why, either in practice or in theory, federal states cannot name representatives from their constituent parts to delegations to the United Nations or other international organizations as members of the federal delegation. The Canadian Government has followed this practice for some time with respect to certain Specialized Agencies. The manner in which this procedure operates is discussed in Chapter IV.

(C) The Accreditation of Diplomatic Envoys and the Role of Diplomatic Missions

Together with the capacity to enter into international agreements and to participate in international organizations, a major attribute of sovereignty is the *jus legationis,* or the right of a state to send and receive diplomatic envoys. As a characteristic flowing from sovereignty, it is unquestioned in international law that it is applicable only to states in the full international sense and, conversely, that states possessing this right are regarded as possessing international personality. It follows that in virtually all contemporary federal states only the federal government is empowered to exercise the right of legation. The only exceptions are the Ukraine and Byelorussia, in connection with the United Nations and its Agencies. As indicated above, however, their status is recognized as being of little relevance to the experience of other federal states.

In the case of Canada, the Federal Government's responsibility for foreign policy means that it alone is empowered to exercise the right of legation. The existence of this right is an external reflection of Canada's single personality in the international sphere. In practical terms, it means that only the Federal Government has the responsibility for maintaining diplomatic relations with foreign governments both by accrediting diplomatic envoys in foreign countries and by receiving them in Canada. In addition,

the Federal Government alone is in a position to communicate officially with foreign governments, or, as the case may be, with international organizations of which governments are members. While there can, of course, be informal or unofficial contacts between provincial agents and foreign agencies or international organizations, there can be no official dealings unless they are authorized or arranged by the Federal Government. Furthermore, since the right of legation is linked directly with the formal recognition and acceptance of the sovereignty of a state, it would be contrary to international law and practice for any foreign government or international organization to deal with a constituent member of a federal union, except through officially accredited or authorized representatives of the federal authority or with the consent of that authority.

The rules which are generally accepted among nations with respect to the position of diplomatic envoys have been clarified and codified in the Vienna Convention on Diplomatic Relations, a general multilateral agreement to which Canada is a party. Article 3 defines the functions of a diplomatic mission as follows:

> (a) representing the sending State in the receiving State;
> (b) protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;
> (c) negotiating with the Government of the receiving State;
> (d) ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;
> (e) promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations. . . .

It is clear from this definition that the activities of diplomatic envoys are very broad in scope, and as a result that Canadian diplomatic missions have a special responsibility not only in the implementation of Canada's foreign policy but also in relation to the interests of the provinces and of Canadian citizens as individuals.

The division of domestic jurisdiction in Canada by itself makes it understandable that the provinces may from time to time have an interest in dealing with foreign governments. The growth of international interdependence in the years since the war has given further impetus to this trend. A number of these interests are discussed in Chapters III and IV, but it is worthy of mention here that Canadian embassies are not only the appropriate channel of communication with foreign governments but can play a useful role in facilitating provincial contacts with these authorities. Conversely, foreign governments will normally turn to Canadian embassies abroad (or to the federal authorities through their own embassies in Ottawa) as the appropriate channel of communication with respect to matters of an official nature involving Canada. The role of Canadian missions in this process is essential in normal international practice and cannot be ignored without creating situations of potential embarrassment to all the governments concerned. In recognition of this fact, and in order to take account of the greater

interest which the provinces have shown in recent years in various kinds of dealings with foreign agencies, the Department of External Affairs has established special machinery—including a Co-ordination Division with this specific function—in order to expedite action on requests which Canadian embassies or the Department in Ottawa may receive from the provincial authorities.

Federal officials also perform consular functions abroad which are distinct from their diplomatic responsibilities but closely related to them. The Vienna Convention on Consular Relations contains a full definition of the consular officer's functions, obligations and responsibilities, which cannot be dealt with in detail here. It is worth noting, however, that although he is not accredited to a foreign government in the same fashion as an ambassador, a consul remains an official agent of his government and as such is given formal authorization to act in this capacity through the "exequatur" granted by the receiving state. It is clear in international law that only the federal authorities are empowered to appoint consular officers, and to obtain the necessary "exequatur" from foreign governments, but like their diplomatic counterparts Canadian consular officials can and do play a part in assisting the provinces and individual Canadian citizens abroad.

The functions of diplomatic and consular missions accredited in Canada are essentially the same as those described above in relation to Canadian missions abroad. While it is accepted that consular agents should be in contact with the local authorities on matters falling within their usual functions, the Vienna Convention on Diplomatic Relations specifies that business conducted with the receiving state by diplomatic representatives "should be conducted with or through the Ministry for Foreign Affairs of the receiving State or such other Ministry as may be agreed." Since Canada is a single entity on the international plane, and because all diplomatic missions are accredited to the Head of State or the Federal Government, it is normal that official communications should be addressed in the first instance to the Secretary of State for External Affairs or his Department. In addition to reflecting acceptance of Canadian sovereignty, these arrangements ensure that Canada's foreign relations can be conducted in a coherent manner and in accordance with overall Canadian interests. At the same time, in view of Canada's federal structure, diplomatic missions at times have an interest in dealing with provincial administrations. Accordingly, procedures have been devised which are designed not only to take account of the legal requirements of the Vienna Convention but also to ensure that requests by embassies are facilitated. Thus, when questions involving dealings with the provinces are raised by diplomatic missions, the Department of External Affairs endeavours either itself to secure the views of the province concerned or, as appropriate, to put the mission in touch directly with the province.

It is evident from the above analysis that, although the Federal Government has exclusive responsibilities in this field, their effective discharge entails consultation and co-operation with the provinces where their interests

are concerned. Conversely, the ability of the Government fully to represent Canadian interests abroad, and of foreign diplomatic missions to work effectively in Ottawa, is conditional upon the assistance and co-operation which the Federal Government receives from the provincial authorities.

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CHAPTER III

The Provincial Interest and the Canadian Cultural Heritage

(A) Introduction

It has been shown in the foregoing pages that Canada has only one international personality. At the same time, it has also been made clear that full weight must be given to our federal constitutional system and to the interests of our two founding linguistic communities. These two fundamental requirements, a single international personality together with diversity of regional or provincial interests and of cultural backgrounds, must be considered of equal importance if Canada is to endure and national unity is to be maintained.

In foreign policy the preservation and development of the Canadian cultural heritage means that recognition must be given throughout the fabric of our relations with other countries to the distinctive values and traditions of both major linguistic groups within our population. The manner in which the Federal Government is attempting to achieve this goal will be discussed below. It should, however, be noted here that it entails equal status for the two official languages across the range of operations of the Department of External Affairs, the agency responsible for the development and implementation of Canadian foreign policy; the recognition within the administrative framework of that Department of the interests and priorities of both French- and English-speaking Canadians and close ties with English- and French-speaking countries abroad, both in terms of bilateral relations and within the framework of broader multilateral arrangements and international organizations.

Coming together with the goals of English- and French-speaking Canadians are the aspirations of all citizens of this country, of whatever cultural background, as they manifest themselves in the form of local, provincial and regional interests. The latter involve both the fundamental human concerns

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which give body and life to the conduct of foreign policy and the rights and interests of the component parts of our federal union.

The British North America Act provides that laws of a general nature—including the category of laws "for the peace, order and good government of Canada"—are such as to fall within the purview of the Federal Parliament, and that laws of a more local or private nature are within the competence of the provincial legislatures. It has been noted, however, that matters which are classified as "local" in nature often have an international aspect, and that over the years provincial interests have expanded greatly and taken on an outward-looking character which was not anticipated in the nineteenth century or even in the earlier decades of our own century.

A further element in the relation between provincial interests, on the one hand, and federal interests, on the other, has been judicial interpretation of the British North America Act. The Act has been interpreted over the years by the judicial authorities in such a fashion that the general residuary powers of the Federal Government have been given a narrow compass, while the provincial responsibility, particularly in respect of "property and civil rights", has been given broad application.

(B) Judicial Interpretation of the British North America Act—Treaty Implementation

Judicial interpretation of the Constitution has had important effects in respect of matters involving Canadian relations with foreign states. In particular there has arisen the problem of reconciling Canada's external obligations as a sovereign state with successive interpretations of Sections 91, 92 and 132 of the British North America Act. The present situation has come about principally as a result of three important cases which were decided in the 1930s: the *Aeronautics Case,* 1932; the *Radio Case,* 1932; and the *Labour Conventions Case,* 1937.

The *Aeronautics Case* arose as a result of provincial doubts as to the validity of legislation of the Federal Parliament designed to implement the Paris Convention of 1919 relating to aerial navigation, and to regulate aeronautics generally in Canada. The Convention was made in the name of "the British Empire" and the Judicial Committee of the Privy Council therefore considered that it was not necessary, in order to establish the validity of the legislation, for the Federal Government to find specific legislative power to deal with the subject in Section 91 of the British North America Act. They considered instead that the governing section was Section 132, which gives to the Parliament and Government of Canada "all Powers necessary or proper for performing 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".

The Judicial Committee found in the *Radio Case* that federal legislation regulating and controlling radio communication in Canada was valid. Here again the legislation related to an international convention, the International

Radio-Telegraph Convention and Annexed General Regulations of November 25, 1927. In this case, however, unlike the *Aeronautics Case*, the Judicial Committee explicitly stated that Section 132 of the British North America Act was not applicable because at the time the British North America Act was drafted, "the only class of treaty which would bind Canada was thought of as a treaty by Great Britain" and the Radio-Telegraph Convention was "not such a treaty as defined in Section 132". They decided instead that, because Canada had achieved independent status since the British North America Act was drafted she must have power to legislate for the performance of treaty obligations which she herself incurred, and that this power did exist under the residuary clause of Section 91.

The decision of the Judicial Committee in the *Labour Conventions Case* resulted from a reference to the Supreme Court by the Federal Government concerning the validity of federal legislation purporting to carry out the obligations of Canada under certain conventions of the International Labour Organization. These conventions created obligations which, for their effectiveness, depended upon legislative action, and the Judicial Committee held that it clearly did not fall within the terms of Section 132 of the British North America Act literally construed.

The essential point of the case was that the Judicial Committee in effect repudiated the statement in the *Radio Case* that the federal authority could legislate for the implementation of treaties under the residuary clause of Section 91 where the treaty involved did not come under Section 132 of the British North America Act. They established instead the principle that "for the purposes of. . .the distribution of legislative powers between the Dominion and the Provinces, there is no such thing as treaty legislation as such. The distribution is based on classes of subjects; and as a treaty deals with a particular class of subjects so will the legislative power of performing it be ascertained."*

By virtue of this decision Canada has been placed in an unsual position as compared with other federal states. The federal authorities have the power to enter into treaties but the Parliament of Canada is unable to enact legislation implementing such agreements where the subject matter falls within provincial jurisdiction. The provinces possess legislative competence in relevant fields but they do not have the right to enter into international agreements. Although the record of federal-provincial co-operation in the treaty field is creditable, the resulting situation is complex and at times unwieldy.

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* It should be noted that doubts have been expressed regarding the judgement in the *Labour Conventions Case* on a number of occasions since 1937. For example, Lord Wright, who sat on the case, expressed his disagreement many years later, and Chief Justice Kerwin noted in his judgement in *Francis vs. the Queen* (1956) that the *Labour Conventions* judgement might have to be considered again in future. The *Johannesson Case* (1952) is also of relevance, as is the opinion of the Supreme Court of Canada on offshore mineral rights. It would appear, however, that up to now there has been no crystallization of judicial opinion on this matter and it is not the purpose of this paper to raise the possibility of further consideration or adjustment of the principles laid down in the *Labour Conventions* decision.

(C) Provincial Practice in Respect of Arrangements with Foreign States

A review of the material available reveals that provinces have long shown a desire to enter into agreements of a local nature with foreign jurisdictions, affecting, for example, roads, bridges, electric power, and similar enterprises. More recently, a desire has also been expressed to enter into agreements of a broader nature covering, for example, co-operation in the cultural and technological fields. In addition, certain provinces maintain representation abroad in the form of commercial or trade offices, information and travel bureaux, and offices of agents general or delegates general, which lead both to a variety of dealings with foreign governments and their agents and to certain arrangements of a contractual nature with the authorities of the countries concerned.

Dealings between the provinces or their agents and foreign jurisdictions may take a variety of forms.

Agreements Between Provincial or Local Jurisdictions and Foreign Entities, not Regarded as Subject to the Provisions of International Law

It has been the practice for Canadian provinces to enter into various kinds of administrative arrangements of an informal character with foreign jurisdictions which, as they are not subject to international law, are generally not regarded by it as binding. Arrangements of this type often involve the reciprocal recognition of legislation between two jurisdictions, for example, legislation concerning automobile licensing as between Ontario and other jurisdictions, or arrangements (upheld judicially in the *Scott Case,* 1952) regarding maintenance orders between provinces and other jurisdictions in the Commonwealth.

Arrangements Between the Provinces and Foreign Governments Which Are Subsumed Under Agreements Between Canada and the Foreign Government Concerned

Arrangements of this sort are fewer in number and more recent in time. The following are examples:

(a) *ASTEF*—In 1962, after consultations among the Quebec authorities, the French Embassy in Ottawa and the Department of External Affairs, it was agreed that a draft contract between ASTEF (*Association pour l'organisation des stages en France*) and the Ministry of Youth of the Province of Quebec leading to the establishment of a programme of exchanges and co-operation would be submitted to the Federal Government for its assent. The Government's assent was given at the end of December 1963 by means of an exchange of letters between the Secretary of State for External Affairs and the French Ambassador in Ottawa.

(b) *Education Entente*—In June 1964 the Province of Quebec expressed an interest in entering into arrangements with France covering the exchange of professors and students between Quebec and France. The Federal Government stated that it had no objection to applying the procedure followed in the case of ASTEF to the proposed programme in the field of education. The procedure eventually used consisted of a *procès verbal* recording the results of discussions between Quebec and French officials which was signed by the Ministers of Education of Quebec and France and the Director-General of Cultural and Technical Affairs in the French Foreign Ministry. It was agreed that the signing of the *procès verbal* would be accompanied by an exchange of letters between the French Ambassador and the Secretary of State for External Affairs, requesting and granting the Canadian Government's assent in the proposed exchange programme. In January 1965, the title *procès verbal* was changed to *entente*, and the *entente* was signed in Paris on February 27, 1965, with the exchange of letters mentioned above taking place in Ottawa on the same day.

(c) *Proposed International Bridge Across St. Croix*—The proposal of the State of Maine and the Province of New Brunswick to construct an international bridge at Milltown on the St. Croix River requires an agreement between the state and the province. New Brunswick requested the authorization of the Federal Government and the Government agreed in 1965 to a procedure whereby Canada and the United States would enter into an agreement authorizing provincial participation. Under United States constitutional law, however, the State of Maine required authorization from the United States Congress to conclude such an agreement. A bill was proposed in Congress to authorize the State of Maine to enter into the agreement with New Brunswick. When it asked for an expression of Canadian views, the State Department was informed that the proposed agreement was welcomed by the Canadian Government, but that it should be accompanied by an exchange of notes between the two governments recording the fact that the agreement was being concluded with their assent. The bill giving the necessary assent to the State of Maine has not yet received the approval of the U.S. Senate.

It may be noted that occasionally agreements of this nature have been authorized by Act of Parliament, for example an Act of Parliament of 1958 authorizing an agreement between New Brunswick and Maine for the construction of the Campobello-Lubec Bridge.

(d) *Quebec Cultural Entente with France*—On November 24, 1965, Quebec entered into a cultural *entente* with France. This arrangement was similar in its legal form to the education *entente* and was signed by the French Ambassador on behalf of France and by the Quebec Minister of Culture for the province. On November 17, 1965, a cultural agreement and exchange of letters between Canada and France had been signed by the French Ambassador in Ottawa and the Secretary of State for External Affairs. This agreement established a general framework (*accord cadre*) designed to facilitate arrangements between provincial governments and the French Government, and provided that such arrangements could be entered into by the provinces either by reference to the *accord cadre* and exchange of notes or by specific authorization on the part of the Federal Government through a further exchange of letters. The latter procedure was employed in the case of the France-Quebec Cultural *Entente* which was authorized by an exchange of letters, dated November 24, 1965, between the Secretary of State for External Affairs and the French Ambassador.

Contracts Subject to Private Law

It appears that the Canadian provinces have entered into and continue to enter into a variety of contracts of a private law character. For example, many Canadian provinces maintain offices in the United States or Europe and it may be assumed that they have entered into contracts with governmental agencies in the jurisdictions within which their offices are located relating to leases, fuel and power supply, telephones and a variety of other matters. These contracts, it should be noted, are exclusively of a private or commercial nature.

(D) Conclusions

The conclusions to be drawn from the above examination may be summarized as follows:

(i) In the conduct of Canadian foreign policy, full recognition must be given to the interests of both French- and English-speaking Canadians, as well as to both official languages.

(ii) There are provincial interests in fields which involve dealings with foreign countries and the provinces have therefore experienced a need to enter into various kinds of arrangements with foreign entities.

(iii) It is important to achieve the greatest possible harmony between these interests and the federal responsibility for the conduct of foreign affairs.

The purpose of the following chapters is to discuss the means of achieving greater harmony, to review the steps which the Federal Government has already undertaken in this direction, and to outline the prospects for further action.

CHAPTER IV

Harmony Through Co-operation

(A) Introduction

It is sometimes suggested that a greater degree of harmony between the Federal Government's powers and responsibilities in the international field and the powers of the provinces in their own spheres of legislative concern could be achieved most directly by means of amendments to the British North America Act. Such amendments might involve:

(i) giving the Federal Government full powers, as is the case in most federal states, to carry out its external obligations whether or not they touch upon local interests or provincial competence in the domestic sphere; or

(ii) granting autonomy to the provinces in the external field in those areas in which they are competent domestically.

These are not, of course, the only possible approaches to constitutional amendment in relation to foreign affairs. Other possibilities can be found in the constitutions of various countries discussed in the Annex to this paper. However, it is useful to mention specifically the above two approaches as they have been, at various times, the subject of discussion in Canada.

With regard to the first alternative, suggestions have been put forward that the federal authority should be given greater treaty-implementing powers, perhaps in conjunction with a more general restructuring of the governmental framework within Canada. It is not the purpose of this paper to evaluate these views, as they would involve an analysis of the distribution of domestic legislative powers and are thus beyond the scope of a study of federalism in the context of foreign relations.

The second thesis can be expressed in various ways, some of which can be taken into account without constitutional amendment, but it has been pointed out above that in its most characteristic form it would lead to the dissolution of the federal system upon which Canada is founded. That is to say, an examination of Canadian constitutional practice, as well as the principles of international law and the experience of other federal states, makes it clear that a system which would permit the constituent members of a federal union to act autonomously in the foreign affairs field could no longer be regarded as a federation but would inevitably take on the character of a loose association of states. Moreover, in Canada, no such system would be able to take full account of the rights and interests of the French-speaking element of our population. This requirement can only be dealt with effectively at the national level, since even though the majority of French-speaking Canadians are located in one province there are a very considerable number who live in other provinces.

As a result, whether or not it is plausible in the abstract to advocate an extreme solution with respect to the external competence of the provinces, in fact such a course would entail grave consequences for the Canadian federal system. This does not, of course, imply that any form of constitutional adjustment in the field of external powers would be without value. But it suggests that the immediate problem is to improve the means of working effectively within a system which assigns general responsibility for the conduct of foreign relations to the federal authority, and which at the same time in no way detracts from, but rather furthers, both provincial interests and the aspirations of French- and English-speaking Canadians. The present Chapter will review the main initiatives already undertaken by the Federal Government in this direction and Chapter V will suggest possibilities for further action.

(B) Co-operation in Treaty-Making and Implementation

For some time the Federal Government has followed the practice of consulting with the provinces on various questions related to treaty-making and treaty-implementation. This procedure provides a means for harmonizing the interests of the federal and provincial governments and, in addition, offers an opportunity to give effect to the wishes of the provinces with respect to treaties in areas in which they have legislative responsibility. In the latter field, it is also a necessary component of the process leading to the implementation of international agreements.

Consultation may take a number of forms, including direct discussions between the federal and provincial authorities, and may be initiated prior to or during negotiations on a proposed treaty, as well as in the stages subsequent to signature when questions regarding implementation may require federal-provincial co-operation. Although they have not followed a fixed pattern, the procedures which have been devised thus far have

proved successful in many cases, and have resulted in a substantial Canadian achievement in respect of ratification and implementation (some examples are noted below, page 34). Nevertheless, it is a record which the Government recognizes could be improved through more effective means of consultation.

As suggested in Chapter III, the provinces may enter into a variety of administrative arrangements which are not binding in international law. In addition, various means for giving international validity to agreements involving the provinces have been employed or contemplated. Certain of these techniques are instructive as an indication of the means which are open for more extensive co-operation. Most prominent among them are indemnity agreements, *ad hoc* covering agreements and general framework agreements (*accords cadres*).

Indemnity Agreements

According to this procedure the Federal Government, after consultation with a province or provinces, enters into an agreement with the government of a foreign state on a matter of interest to a province. The agreement is supplemented, on the Canadian side, by an agreement between the Federal Government and the province concerned, under which the province undertakes to provide such legislative authority as might be necessary to enable the discharge within its territory of its obligations under the agreement. The province also indemnifies the Federal 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 foreign state. An example of this technique is the Columbia River Treaty and Protocol. The procedure adopted was that, after extensive consultations with the British Columbia government, a federal delegation including representatives from the province negotiated a bilateral agreement with the United States. An arrangement was worked out with the Province of British Columbia whereby the province undertook to execute the terms of the treaty and to indemnify the Federal Government in the event of its failure to do so. Another example is the procedure worked out in the case of the St. Lawrence Seaway, involving the Province of Ontario.

As the examples cited above suggest, this technique may have particular merit in cases in which a province wishes to conclude an agreement with a U.S. state on a local matter of joint concern. An added advantage of this type of arrangement is that a province can be directly involved in the consultations leading to the bilateral agreement which forms the basis of Canada's international obligation.

Ad hoc *Covering Agreements*

This technique allows the provincial authorities a direct way of achieving international arrangements in matters affecting their interests. It would

normally take the form of an exchange of notes between the Federal Government and the foreign state concerned, which gives assent to arrangements between the provincial authorities and a foreign governmental agency. The exchange of notes gives international legal effect to the arrangements between the province and the foreign entity, but does not involve the province itself acquiring international rights or accepting international obligations. Only the Canadian Government is bound internationally by the agreement, but the province participates fully in treaty making through co-operation with the federal authorities.

An example of this procedure is the "education *entente*" discussed on Page twenty-seven, in which an understanding in the field of education between Quebec and France was given international status by an exchange of notes between the French Ambassador in Ottawa and the Secretary of State for External Affairs.

General Framework Agreements or Accords Cadres

This technique is similar to the *ad hoc* procedure described above except that it is not intended to be restricted in its application to a specific agreement between a province and a foreign entity, but rather to allow for future agreements in a given field by any province which may be interested. As in the case of the *ad hoc* procedure, the Federal Government remains responsible in international law for such arrangements. At the same time, the provinces are provided with an open-ended opportunity to provide for their interests in a given field—for example, educational or cultural exchanges—whenever they wish to take advantage of the framework agreement to conclude appropriate arrangements with the foreign government in question.

The best known example of this type is the cultural agreement and accompanying exchange of letters signed by the Canadian and French Governments on November 17, 1965. As noted above, this agreement provides for the possibility of collaboration in the cultural field between France and any of the Canadian provinces, and was accompanied by an exchange of letters which specified that the authority for the provinces to enter into *ententes* with France could be derived in future, if they so wished, from the cultural agreement and exchange of letters or through a further exchange of notes by the Governments of Canada and France.

The above methods provide a broad and flexible range of techniques which, when employed in conjunction with close consultation and co-operation between the federal and provincial authorities, are capable of allowing for the full expression of provincial interests in treaty-making. At the same time, they give validity in international law to provincial arrangements with foreign jurisdictions, thereby avoiding confusion as to the rights and responsibilities of the members of the Canadian federation on the international plane. Put in other words, they are fully as capable of taking

account of substantive provincial interests as any arrangement which a province might wish to conclude itself without reference to the federal authorities, and at the same time they engage the Canadian Government on behalf of the interests of the province. Thus, they appear to the Government to provide adequate means of allowing within the existing constitutional framework for arrangements with foreign entities which the provinces may wish to conclude, and where there is an evident need for such arrangements which could not otherwise be met. They depend for their full success, however, upon effective consultative procedures between the provinces and the Federal Government, and the latter will require further examination below.

(C) International Organizations

A number of international organizations whose functions relate to matters partly within provincial jurisdiction have been created since the end of the Second World War. As they have increased in number and importance, the Federal Government has moved to strengthen the role played by the provinces in Canada's relationship with them and this process will be further extended in a manner consistent with the Government's responsibility for the conduct of Canada's foreign relations.

It is also governmental policy that Canadian representation on such organizations should clearly reflect Canada's bilingual character. This requirement is on the whole being met with respect to the numbers of English- and French-speaking Canadians serving on Canadian delegations to United Nations and other international conferences. It is also being taken increasingly into account in terms of the use of the two official languages. In both respects, however, it is the Government's intention to pursue the further development of the present policy.

(i) Canadian Participation in International Organizations

Canada is a member of all the international organizations which make up the United Nations system. Some of these agencies, such as the International Labour Organization (ILO), the World Health Organization (WHO), the Food and Agriculture Organization (FAO), the United Nations Educational, Scientific and Cultural Organization (UNESCO), as well as the United Nations itself and its Economic and Social Council, have functions which relate to matters falling partly within provincial jurisdiction. Parallel with the growth of the United Nations system and the radical changes in its membership over the last decade, the organizations themselves have evolved from international meeting-places or clearing-houses for the exchange of information into purveyors of a wide variety of services, particularly to countries which are in the process of economic development. Consequent upon these changes it has become more important that the provincial governments be kept informed of the activities of organizations whose functions fall partly within fields of provincial interest, and of the contribution required of Canada as a member of these agencies. To keep pace with this

evolution the Federal Government is developing a series of guide-lines designed to achieve a greater degree of co-ordination between the provinces and the central authority.

Consultation with the Provinces

A fundamental purpose common to all of the organizations described above is the drafting at general conferences of international conventions which affect an increasing number of aspects of international life. The implementation of such conventions often requires action only at the federal level. However, the co-operation of the provincial governments is needed in some cases because they possess or share the necessary legislative competence.

As a result, it is important that there be close consultation with the provinces in order to facilitate the ratification and implementation by Canada of the conventions in question. Accordingly, the federal and provincial authorities have been in consultation on numerous occasions in recent years concerning the possibility of giving effect to international conventions adopted by certain Specialized Agencies and by the United Nations itself. To illustrate, since 1964 Canada has ratified three international labour conventions, the subject matter of which falls partly within provincial jurisdiction and partly within federal jurisdiction, and, in December 1965, Canada acceded to the International Road Traffic Convention. Similarly, the Federal Government is engaged at present in consultation with the provinces concerning the possible ratification of the International Convention on the Elimination of All Forms of Racial Discrimination, adopted by the United Nations General Assembly in December 1965, and signed by Canada in August of 1966.

Distribution of Documentation

Since the provincial governments have a special interest in the work of several intergovernmental agencies, it is important that they be kept informed of developments in these organizations. The Federal Government is therefore developing procedures designed to ensure that the provinces will be provided, on a regular basis, with documentation published on various questions falling within their respective fields of interest.

The United Nations Educational, Scientific and Cultural Organization (UNESCO) provides an instructive example. Much of the work of UNESCO in the fields of education, cultural affairs, and the natural and social sciences, is of interest to the provincial governments in Canada. Although not all the provinces would be interested in every aspect of UNESCO's work, it is nevertheless worth while for them to be able to receive the full range of UNESCO documents, as this allows an opportunity to review the information which is available, and to determine which aspects of the Organization's programme are of primary concern to them. Appropriate procedures for the distribution of such documentation are now being developed by the Government.

Provincial Participation in Canadian Delegations to International Conferences

One of the most practical ways of giving effect to the policies described above is to strengthen provincial participation in Canadian delegations to those international conferences whose activities are of special interest to the provinces. Accordingly, the Federal Government has attempted to develop an effective and consistent practice with regard to the provincial component of such delegations. A brief review of developments with regard to Canadian delegations to the ILO and UNESCO and conferences sponsored by certain other organizations is illustrative.

The International Labour Organization brings together government, labour and management to recommend international minimum standards and to draft international labour conventions on a wide variety of subjects ranging from wages, through hours of work and vacations with pay, to freedom of association. The ILO is also engaged in assisting the growth of labour's role in developing countries. All these matters are of interest to the provinces and as a result the Federal Government has adopted the practice of inviting senior provincial officials to be members of Canadian delegations to ILO general conferences. It has also been a long-standing practice of the Federal Government to invite provincial labour ministers to accompany Canadian delegations as observers.

Similarly, in the case of UNESCO, provincial ministers of education have been invited to attend general conferences and senior officials have been included as members of the Canadian delegation. Consultation with respect to the composition of Canadian delegations has taken place with the Standing Committee of Ministers of Education of the Provinces (now the Council of Ministers of Education), and the Canadian National Commission for UNESCO, and this practice will continue.

Further, the Canadian delegations to the 1966 and 1967 sessions of the International Conference on Education (sponsored jointly by UNESCO and the International Bureau of Education) were headed by a Provincial official and included senior officials from other provinces. As in the case of UNESCO, the delegations included representatives chosen in consultation with the Standing Committee of Ministers of Education.

Also of interest are consultations which are now taking place with the provinces with respect to Canadian adherence to the Hague Conference on Private International Law. It is the Government's expectation that procedures will be developed to permit appropriate representation of both our civil and common law systems.

Growing out of the experience with these and similar organizations it has now been established as a general rule that Canadian delegations to conferences of Specialized Agencies dealing with subjects within provincial jurisdiction should contain members drawn from provincial governments who are nominated by the Federal Government in consultation with the provincial governments concerned. It is understood that they will act as Canadian dele-

gates and that in that capacity they will speak as representatives of Canada and not of their provinces. Considerable flexibility is required in the choice of such representatives, having regard to the character and functions of the organization in question. However, in general terms the following guidelines, which have been prepared with respect to Canadian representation at UNESCO, may be considered characteristic:

(a) Provincial ministers of education will be invited to attend sessions of the UNESCO General Conference as observers, at the expense of their provincial governments.

(b) The Federal Government will invite provincial officials to each session of the General Conference to form part of the Canadian Delegation in the capacity of delegates or special advisers, at the expense of the Federal Government.

(c) On occasion, a Provincial Minister will be invited to act as one of the Canadian delegates to General Conferences, at the expense of the Federal Government.

Guide-lines are also being developed for the composition of Canadian delegations to the World Health Organization, the Food and Agriculture Organization and the International Labour Organization.

(ii) Conclusions

The foregoing paragraphs show that there is broad scope for continuing and enhancing co-operation between the federal and provincial authorities in the several organizations which make up the United Nations system. The same conclusion is warranted with respect to other international groupings, and Canadian participation in them can be organized along similar lines as the need arises. It is important in all these cases to make clear that participation in Canadian delegations in no way involves disadvantages for the provinces by comparison with individual or independent provincial participation. On the contrary, even if the latter procedure were possible under the existing constitutions of the Specialized Agencies, from the Canadian point of view it would involve a multiplication of policies which would not only verge on chaos but would substantially reduce the influence which Canada (and by extension any one of the Canadian provinces) can exercise. If "Canada" were represented by ten or eleven independent entities in an international organization, there would not only be several "Canadian" positions with respect to broad issues of policy in that organization, some of which might be incompatible with others, but each of those policies would carry with it only a fraction of the authority of present Canadian policy. Provincial participation in Canadian delegations, and close consultation between the provinces and the Federal Government, is therefore not only more acceptable on the international plane but more likely to lead to an effective presentation of provincial views.

(D) Federal-Provincial Co-operation Abroad

(i) External Aid

The increasing attention now being given to problems of economic development, both by individual states or groups of states, and by international institutions, gives particular significance to external aid programmes in the conduct of foreign relations. As a result of the priority given to the provision of aid by the Federal Government, Canada has been able to play an increasingly important role in this field, to the point where close to $300 million are now committed annually to aid programmes. By the 1970s it is hoped that Canadian contributions will approach one per cent of the GNP, the target recommended by the United Nations.

It is the policy of the Government, so far as co-ordinated programming and the needs of potential recipients permit, that Canada's cultural character should be more adequately reflected in the apportionment of aid funds. Thus, for example, of the $30 million allotted to Canadian aid to African states in the current financial year, some $12 million will be directed to French-speaking countries. In future, it is intended that aid allotted to French-speaking and Commonwealth countries in Africa should be even more closely balanced.

The implementation of foreign aid programmes involves close contact between the state providing aid and the recipient country, and the negotiation and conclusion of agreements at the governmental level. As a result, external aid forms an integral part of Canadian foreign policy and ultimate control must rest with the federal authority. At the same time, it is clear that an effective aid programme depends for its realization upon full co-operation from the provinces. In recent years provincial authorities have contributed generously to the Canadian aid effort, especially in the recruitment of teaching and advisory personnel for service abroad and the provision of training facilities in Canada.

In addition to participation in federal programmes, a number of provinces have indicated an interest in providing assistance directly to developing countries, particularly in the field of education and other spheres of provincial jurisdiction. Ontario, for example, has a programme of educational assistance in the Commonwealth Caribbean and Quebec is providing subsidies to the National University of Rwanda. The Federal Government welcomes provincial contributions as consistent with the objective of increasing Canada's aid effort to the greatest extent possible. The Government nevertheless considers it essential that the Canadian contribution as a whole be maintained and developed in a coherent fashion. As a result, the Federal Government has put forward a number of suggestions to the provincial authorities which would permit fuller consultation and more effective arrangements with the provinces. They involve the following general proposals:

> The Federal Government will consult with the provincial authorities on the development of programmes involving substantial recruitment of personnel.

Recruitment of teaching personnel in particular will be carried out in consultation and collaboration with interested provinces.

Appropriate arrangements will be made with respect to the payment of provincial personnel and the retention of their seniority, pension and related rights.

Where possible a decision as to termination of employment will be made in consultation with the provinces.

The provincial authorities will be kept informed as to federal administrative arrangements, and provision will be made for inspection visits which may include provincial officials in the federal team.

Arrangements will be made for effective communications through Canadian diplomatic missions.

In addition, in order to ensure coherent policy and programmes, it is intended that procedures should be established to provide for consultation with the Federal Government with regard to aid projects financed or supported by the provinces. It would be understood that liaison with foreign states, and any agreements that might be required with them, should be undertaken by the federal authorities. The Federal Government would also arrange to keep the provincial authorities informed of progress in external aid programmes, it being understood that they would be carried out under the general aegis of the External Aid Office and the senior Canadian diplomatic representative in the country concerned.

(ii) Other Provincial Activities Abroad

In addition to areas of provincial activity abroad which are directly linked with Canada's external policy, there is a broader field which is primarily an adjunct of domestic policy. The number of examples of provincial activities along these lines is as extensive as provincial and private interests in Canada, but the fields of immigration and trade and industrial promotion are illustrative.

Under the Canadian Constitution the field of immigration is shared between the federal and provincial authorities. It is also an area in which both levels of government have a continuing and major interest owing to its direct relationship with the economic well-being of Canada. The Federal Government is responsible for the control of all persons wishing to enter Canada and it is the central authority which therefore exercises jurisdiction over questions pertaining to the admission of prospective immigrants. Within this framework, however, there is a broad role to be played by the provinces in publicizing the opportunities available to immigrants, in distributing information, and in counselling prospective immigrants with respect to qualifications and procedures required for entry. Thus, for example, the Province of Ontario has been active for many years in these fields in the United Kingdom by making known the opportunities available in that province and encouraging immigrants wishing to come to Canada to settle in Ontario. The

Province of Quebec has also expressed an interest in increasing its activities in a number of countries, particularly French-speaking countries, to encourage immigration to that province.

The economic development of the provinces is also closely related to the level of investment of foreign capital and to increases in the sales of Canadian goods abroad. In consequence, activities directed toward encouraging the establishment of plants and other business facilities and toward finding new sales outlets are traditional areas of provincial interest. There has been considerable collaboration between the federal and provincial authorities in this field and Canadian embassies have on several occasions made representations to foreign governments on behalf of the provinces or provincial representatives abroad. In addition, co-operation in the field of external trade promotion has been the subject of careful study, for example, at federal-provincial meetings at the ministerial or deputy ministerial level.

One of the main instruments for the realization of provincial interests abroad is the agencies which a number of provinces maintain in various foreign centres. Although provincial governments are not empowered to appoint diplomatic or consular representatives, or to enter into international agreements with foreign governments independently of the federal authority, they can, of course, maintain offices in other countries and appoint officials to deal with matters of provincial concern that relate essentially to the private sector. These offices have traditionally maintained good working relations with Canadian embassies and high commissions with a view to increasing the effectiveness of the Canadian effort as a whole.

(E) Cultural Relations

Looked at in broad terms, "cultural relations" involve not only academic exchanges, the theatre, music, and the arts, but a wide range of activities of an educational, scientific and technological character. As such, a programme of cultural activities and exchanges sponsored at the governmental level, like an external-aid programme, is a closely integrated part of a country's foreign policy, and is so considered by virtually every modern state. Canada is no exception, and in recent years increasing attention has been given to devising a co-ordinated policy in this field. Since it reflects a policy designed to meet the interests of all Canadians, such a programme must take full account, as in all other areas of Canada's foreign relations, both of our federal constitutional framework and of our bilingual character.

An account has been given in a preceding section of the manner in which federal policy allows for the provinces to conclude arrangements with foreign countries which are designed to reflect their own interests. Procedures for engaging the provincial authorities more directly in negotiating multilateral agreements, and for their participation in international conferences of an educational or cultural character, have also been described above. Taken in conjunction with continuing consultation between the federal and

provincial authorities which their effective use implies, these techniques provide considerable scope for the realization of the diverse interests which Canada's federal character and culture traditions entail. There remains, however, a broad field of activity, both bilateral and multilateral in nature, in which the Federal Government itself can give expression to the Canadian bilingual heritage, as well as to the ties we maintain with other countries which have contributed to the development of our national character.

For example, for many years, Canada has fostered the development of closer relations with the countries of the English-speaking world with which we have a common historical past. Similarly, the Government has encouraged the development of closer relations with French-speaking countries, in recognition of traditions shared in more than 25 countries, including 6 million French-speaking Canadians. The development of *la francophonie*, as the expression of a linguistic and cultural heritage common to the French-speaking world, has been given particular priority and emphasis by the Government, and has taken a variety of forms. The Government has, for example, already given its support to French-speaking organizations such as the *Association des Universités partiellement ou entièrement de langue française* (AUPELF), the *Association interparlementaire de langue française, la Fédération du français universel*, and associations of French-speaking jurists, journalists and doctors. In addition, Canada has suggested the establishment of an international organization which would become the focal point for cultural co-operation among French-speaking peoples. The Canadian delegation has also taken part in the effort to extend the use of French in the United Nations.

The above activities are illustrative of undertakings of a multilateral nature which the Government has supported. There is, in addition, a cultural programme at the bilateral level which bears witness to the Government's concern to provide a clearer reflection of the interests of French- and English-speaking Canadians. In student and teacher exchanges, in educational training programmes, in exchanges of information and personnel in the sciences, in subsidies extended to theatrical and musical companies, in exchanges in the arts and the cinema, and in numerous related areas, the Government's policy of encouraging an appreciation of our cultural traditions has for some time been given priority in the development of Canadian foreign relations. It has recently been given further expression through the signature of cultural agreements with France and Belgium and, in broader terms, the intention of the Government to enter into negotiations for the conclusion of similar agreements with other European countries from which we have drawn important groups within our population.

In all these areas the goal remains to give full and effective expression not only to local and provincial interests, and to the French and English languages, but to support and encourage effective co-operation among all areas of the Canadian community in a manner which will ensure unity of purpose at home as well as abroad. To achieve such unity, the acceptance

of diverse provincial and regional interests, and of the interests of French- and English-speaking Canadians across Canada, are recognized by the Government as fundamental.

(F) Bilingualism and the Department of External Affairs

Although the subject of bilingualism as such is beyond the scope of this paper, it has been made clear at various points above that it plays a significant role in the development and execution of Canadian foreign policy. To begin with, it is a truism that English and French are the principal languages of diplomacy. Thus, a sound knowledge of the two languages would be a valuable asset to personnel of the Department of External Affairs even in isolation from the facts of Canadian life. There are, however, more compelling reasons why this is so in light of the Canadian experience. First, Canadian diplomacy is designed to serve Canadians, and it is recognized by the Government that this cannot be done effectively without the capacity to conduct the Department's operations in both languages. More important, as stated at the outset of this paper, foreign policy must reflect national priorities, and for Canada this implies that it must take account of the interests of both major linguistic groups. It follows that officials engaged in the conduct of that policy must be able to use the official languages, and that both French- and English-speaking Canadians must play a full part in the development of that policy. It is therefore worth while to consider the ways in which Government is seeking to move closer to the goal of bilingualism as it applies to the operations of the Department of External Affairs.

First, with respect to the Canadian diplomatic presence, our representation in the French-speaking world has been substantially increased. Sizeable embassies are maintained in the French-speaking countries of Europe and two consulates general have been established in France. Embassies have been opened in countries of French-speaking Africa and the Maghreb which were once part of the French colonial community. By means of multiple accreditation Canada is represented throughout French-speaking Africa, and Canadian participation in the International Control Commissions has assisted in the development of fruitful relations with Laos, Cambodia and Vietnam even though we do not maintain full-fledged diplomatic missions in those countries. Financial considerations permitting, it is the Government's intention to continue the expansion of Canadian diplomatic representation in the French-speaking world.

Moreover, it is a matter of policy within the Department of External Affairs to ensure that the staffing of Canadian diplomatic missions adequately reflects our dual linguistic heritage. Thus, for example, where an officer whose first language is French is appointed head of mission, it would be desirable for his deputy to be an officer whose first language is English, and *vice versa*. In addition, it would be normal for officers of both linguistic

backgrounds to occupy senior positions in the most important Canadian diplomatic missions. A similar policy is followed in the organization and staffing of the Department of External Affairs in Ottawa. The creation of a new Division of the Department to concentrate on Canada's expanding relations with French-speaking countries is illustrative. The staffing of the Department, from the most senior positions, through heads of division, to officers at work on all aspects of Canadian foreign policy, is a further example of the same trend.

In addition, official communiques of the Department of External Affairs are produced in the two languages and treaties to which Canada is a party, even with English-speaking countries, are done in both English and French. Correspondence with the public, whether in Canada or abroad, is conducted in either language, as appropriate, as are communications exchanged with other governments. Further, and probably most important, it is gradually becoming normal practice for working papers and memoranda within the Department, and telegraphic communications and despatches exchanged with missions abroad, to be drafted in either French or English, as circumstances and the mother tongue of the drafting officer dictate. It has also become more frequent for meetings and conferences of officials to be conducted in the two languages. Although a considerable amount remains to be done, the period of only one working language is past and the use of both is now not only a matter of official policy but increasingly one of practice.

Bilingualism among the personnel of the Department of External Affairs is a condition *sine qua non* of effective implementation of this programme. It will take time to accomplish, but statistics show substantial progress in that direction, particularly among younger officers. In addition, it is now accepted practice for *all* new officers who are not bilingual when they enter the service to undergo language training for an extended period on a full-time basis. Support is also given both at home and abroad to more senior officers who wish to improve their knowledge of one or other of the two official languages, and an effort is being made to ensure that clerical and secretarial employees have an opportunity to do likewise.

(G) Conclusions

The measures discussed in this chapter are part of a co-ordinated programme designed to ensure that Canada will act with unity of purpose abroad, and at the same time that such action will reflect the linguistic, provincial and regional interests upon which the country is based. Like all the objectives discussed in this paper, the full accomplishment of these goals requires the co-operation of the two linguistic communities and of provincial authorities across the country. A number of the ways in which this joint enterprise can be encouraged have been discussed in the preceding pages. The comments which follow are intended to provide an outline of further possibilities for developing new techniques of co-operation.

CHAPTER V

New Perspectives for Co-operation

(A) Introduction

Consideration has been given in Chapter IV to various steps designed to assist in achieving effective federal-provincial co-operation and the full expression of the interests of French- and English-speaking Canadians. These measures are not merely a policy for the future; they are already under way. They do, however, fall short of the complete realization of the Government's intention to accomplish the highest possible degree of harmony through co-operation, and a continuing effort in this direction remains a first priority. Further proposals and programmes will require careful consideration by all interested parties.

(B) Foreign Policy and the Canadian Cultural Heritage

Canada must act as one country in its dealings with other states, but it is equally important that Canadian actions on the international plane should reflect the facts of our life at home. Thus, as indicated above, the Canadian diplomatic presence abroad must be so developed as to reflect in full measure our interest in the French-speaking world, as well as in those areas which represent the British heritage and other national strains of which our society is composed. This objective is an important factor in the Government's programme of cultural relations, in the expansion of our aid to the developing world, and in technical and scientific co-operation, as well as in our diplomatic representation and our policy with respect to other traditional areas of intergovernmental dealings among states. It also entails the development of our resources at the provincial, local and private levels to ensure that Canada's relations with the outside world are such as to benefit and enrich the lives of all Canadians.

(C) Machinery for Consultation with the Provinces

Several means for ensuring greater harmony between the Federal Government and the provinces in the fields of treaty-making and implementation, and in other international activities, have already been discussed. In particular, consideration has been given to the ways in which the provinces themselves can act in matters of an informal, administrative or contractual nature, or under federal auspices in the conclusion of such international arrangements as may be required to meet their interests, and to the manner in which they can participate in federal delegations to international conferences. In large measure these are questions which are being resolved through a common desire to respect both national and provincial needs and wishes and which by their nature require close and continuing consultation. Such consultation is taken for granted in many fields and will be extended to others, but it is desirable to keep under review the extent to which the machinery thus far devised is sufficient to meet present and future needs. The mechanics of consultation are less important than the will to consult, but the Government nevertheless considers that adjustments at the administrative level could help to alleviate difficulties which may stand in the way of accomplishing universally desired goals.

A question of the first importance, having in mind the interpretation given the British North America Act with respect to treaty-implementation, is to develop procedures which will make it easier for the Federal Government to consult the provinces in order to determine whether they are willing to take the legislative action necessary to implement certain general multilateral treaties. There are, for example, a number of multilateral instruments such as the human rights covenants and the convention on racial discrimination which are at present the subject of consultation with the provinces. The existing procedure calls for consultation to be carried out through correspondence at the highest level, and in certain cases can be both cumbersome and time-consuming. As a result, although it cannot be said that Canada's performance in ratifying multilateral treaties is to our discredit by comparison with other countries, there is room for improvement in the Canadian record. This will be the more so in future given the expanding international involvement in the social and cultural fields, with the result that added stress will be imposed on the present consultative machinery.

One way in which these difficulties could be overcome, at least in specific cases, would be to include ratification of multilateral conventions as a recurring item on the agenda of federal-provincial conferences. Another possibility would be to convene periodic conferences between the Federal Government and the provinces in order to review past, present and proposed treaties with a view to determining the provinces' interest in Canadian ratification. Such a procedure would permit a review of the obligations involved and discussion of the implementing steps necessary in order to ratify the instruments in question. Such meetings could also serve as a means by which the Federal Government could explore provincial attitudes towards

implementation of general multilateral conventions whose subject matter falls within provincial competence. At the same time they would provide an opportunity for provincial governments to raise specific subjects on which they might wish to see an international agreement concluded, and to discuss federal-provincial co-operation in the making of such treaties. They would also permit discussion of implementing legislation by one or more provinces which would make it possible for Canada to ratify a particular treaty in which some but not all the provinces had an interest.

This consultative process would be complemented, as suggested above, by appropriate provincial participation in international organizations, conferences and meetings where such international instruments are being drafted, and by making relevant documentation available to the provinces on a continuing basis.

As an outgrowth and extension of the above arrangements it would also be possible to call meetings of senior federal and provincial officials which could deal with all aspects of consultations with the provinces on foreign affairs problems which engage provincial interests. To some extent these functions are already performed by the Co-ordination Division of the Department of External Affairs. It would also appear that agencies of a similar nature exist in other federal countries—for example, the office of Special Assistant to the Secretary of State for Liaison with the Governors in the field of foreign affairs which has recently been established in the United States—and it may be that others' experience would serve as a useful precedent in devising suitable machinery in Canada. In any event, periodic consultations among federal and provincial officials would give greater precision to central points requiring further examination, and make for an easier and more fruitful interchange of ideas.

(D) Constitutional Amendment

Beyond the adjustments outlined above there remains the possibility of constitutional amendment. It has been suggested in chapter IV that an extreme course of constitutional amendment in relation to the conduct of foreign relations would be self-defeating. There may be other possible approaches to the question of constitutional change in relation to foreign affairs. However, there is reason to be cautious about formal constitutional change when we have not yet fully investigated and applied the possibilities existing within the present constitutional framework to permit the continued development of procedures which would be satisfactory to the provinces and reflect the reality of the Canadian cultural heritage. If more far-reaching constitutional amendments were considered desirable they would entail an overall revision of the Constitution in order to ensure that provisions respecting treaty-making and implementation formed part of a harmonious and balanced Constitution accompanied by appropriate checks and balances. A revision of this kind may well be warranted in respect of various aspects of the Constitution, but it is questionable whether such reform should be undertaken on the basis

of considerations relating exclusively to the problem of treaty-making and implementation or restricted in scope to the foreign affairs field.

CHAPTER VI

Conclusions

The main considerations set forth in this paper can be briefly restated as follows:

First, in official dealings with other countries, that is to say in the conduct of foreign relations in the strict sense of that term, only the Federal Government is empowered to act on behalf of Canada. This statement applies to the negotiation and conclusion of treaties and other international agreements, to membership in international organizations, and to the right to accredit and receive diplomatic representatives.

Second, despite the limitations of constitutional practice and international law, the provinces are legitimately concerned with the conduct of Canada's foreign relations, whether by reason of their legislative responsibilities or, less directly, because of their interest in matters which have taken on an international character in the modern world.

Third, French-speaking Canadians have a clear interest in ensuring that their preoccupations, like those of the English-speaking population, are given full recognition and expression in the development of Canadian foreign policy.

Fourth, extreme solutions to the problem of reconciling diverse interests within Canada, however plausible they may appear in isolation from our history and the needs of our people, would be to the disadvantage of Canadians as individuals, as well as to provincial, linguistic and cultural interests. Not only would they lead to the disintegration of the Canadian federation but little of lasting value

would be gained in return, and much would be lost inasmuch as considerably less weight would be given by the international community to the views and policies of the smaller and weaker entities which would result. Further, they would lead to confusion and uncertainty as to the responsibilities and obligations which such entities could effectively discharge, and in all likelihood would be unacceptable to other sovereign states as they would entail the granting of excessive privileges to a divided "Canada".

These considerations reflect both the fundamental requirements of a viable federal system as they relate to foreign affairs and the Government's wish to ensure that the Canadian system will be developed so as to meet the needs of all Canadians. A bifurcated or fragmented foreign policy is conceivable, but it would not be compatible with the continued existence of our federal union. Nor could it give full expression to the desires and aspirations of Canadians. In consequence, neither centralization to the exclusion of other priorities nor decentralization to the point of dissolution is desirable or necessary. What is of particular importance is to improve and extend the present framework, on the basis of the very broad range of options which is available, in a manner that will leave no doubt at home or abroad that the Canadian federation can deal effectively with problems in the field of foreign relations.

Within these limits, it is not the intention of the Government to fix upon or crystallize any one formula for improvement or adjustment in existing arrangements. Those which are referred to above are open to consideration and it is the Government's hope that they will receive close attention and examination in all interested quarters. For its part, the Government will be prepared to consider the further development of any such procedures which are found to be of general interest, as well as alternatives which may be proposed, with a view to achieving a fully effective design for future co-operation.

ANNEX

An Analysis of State Practice Concerning the Powers of Members of a Federal Union to Make Treaties

The constitutional practice of fourteen federal states with respect to external powers is examined briefly below. The comments set out in this section are based on a careful reading of published sources but do not purport to be a definitive interpretation of the constitutions, laws or constitutional practice of the countries with which they deal.

Examples of constitutions of federal states which do not allow the constituent parts to conclude international agreements (Argentina, Australia, Austria, Brazil, Burma, India, Malaysia, Mexico, Venezuela, Yugoslavia)

1 Argentina

The Constitution of the Argentine Republic of 1949 assigns twenty-eight express powers to the Federal Congress General. Authority to make all laws and regulations needed to implement the express powers is also granted. According to Article 83 (14), the President of the nation concludes and signs treaties of peace, of trade, of navigation, of alliance, of boundaries and neutrality, and agreements with the Pope; he is responsible for other negotiations required for the maintenance of good relations with foreign nations, and receives their ministers and admits their consuls. By way of treaty-making power, the provinces apparently have the right only to enter into partial agreements among themselves, with the knowledge of the Federal Congress. There are other requirements in the Argentine Constitution, such as those requiring the approval by the Federal Congress of treaties signed with other nations that appear to reflect federal primacy in foreign affairs.

Recently, a series of statutes, laws and directives has been passed relating to the functioning of the Constitution. This description does not deal with the effects of these changes.

2 Australia

Although the Australian Constitution of 1900 does not deal expressly with the making of treaties, the component states of the Australian Commonwealth appear to have no power to make such agreements. The power to conclude treaties is part of the Queen's prerogative and is exercised by the executive of the Government of the Commonwealth under the common law without express statutory provision.

The Commonwealth Parliament has powers to make laws respecting "external affairs". 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. 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. However, the precise limits of these powers have not yet been decided.

3 Austria

The Austrian Constitution reserves to the *Bund*, or federal authority, the "powers of legislation and execution in respect of matters such as foreign relations, including political and commercial representation in relations with foreign countries, in particular the conclusion of all international treaties. . ." (Article 10).

Moreover, Article 16 of the Constitution requires that the *Länder* take the steps necessary to implement treaty provisions falling within their powers:

> The *Länder* are bound, within the limits of their independent competence, to take such measures as are necessary for the execution of international treaties. Should a *Land* fail to comply in due time with this obligation, its competence in the matter, and particularly in the enactment of the necessary legislation, will pass to the *Bund*.

The same article gives the federal authority a right of supervision over the carrying out of treaties even over matters which are within the competence of the *Länder*.

4 Brazil

The Constitution of Brazil empowers the Union "to maintain relations with foreign states and conclude treaties and conventions with them, to participate in international organizations" (Article 8(1)).

5 Burma

The Union of Burma's Constitution includes a Union Legislative List. Subjects enumerated in the List shall not, according to Article 92 of the Burmese Constitution, "be deemed to come within the class of matters of a local or private nature comprised in the list of subjects assigned exclusively to the State Councils". The Revolutionary Council of the Revolutionary Government of the Union of Burma has the power to make laws for the whole or any part of the Union in matters of external affairs, including "the entering into and implementing of treaties and agreements with other countries".

6 India

Under the Indian Constitution, there exist three lists determining whether a particular subject falls within the legislative sphere of the federal or state governments or both. The "Union List" assigns to the Federal Government the power of "entering into treaties, agreements and conventions with foreign countries", and the right to participate in "international conferences, associations and other bodies" and to implement their decisions. Thus the Union Parliament has the exclusive power in India to enter into treaties and exercise all foreign affairs powers on the international plane.

In passing legislation to implement treaties and international agreements, the Union Parliament has the right to invade the "State List". This is made clear by Section 253 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.

7 Malaysia

The constitutional position both with regard to the treaty-making and the treaty-implementing power in Malaysia is quite precise. The executive power, which runs with legislative power, is divided according to federal, state and concurrent lists attached to the Constitution. The first head of power on the federal list embraces all aspects of relations with foreign countries.

In addition, under Article 76 (1) (a), the Federal Parliament may make laws with respect to any matter enumerated in the state list "for the purpose of implementing any treaty, agreement or convention between the Federation and any other country, or any decision of an international organization of which the Federation is a member", though no bill may be introduced into either House of Parliament "until the government of any state concerned has been consulted".

8 Mexico

The Constitution of the Federal Representative Republic of Mexico withholds the treaty-making power from its component states. Article 117 reads as follows:

> Under no circumstances may a State enter into alliances, treaties or coalitions with another State or with foreign powers.

The Constitution also states that it is the right and duty of the President to conduct diplomatic negotiations and conclude treaties with foreign powers, subject to ratification by the Federal Congress.

9 Venezuela

The conduct of the international relations of Venezuela is reserved for the jurisdiction of the National Power under Article 136 of the Constitution, which states that "The sphere of authority of the National Power is as follows: (a) The international action of the Republic . . . ". This position is further strengthened by Article 190 (5) by which the President of the Republic is given the power to direct the foreign relations of the Republic and make and ratify international treaties, agreements and resolutions. In addition to the powers of the President, the Senate has the right to "initiate the discussion of draft laws relating to international treaties and agreements". The Chamber of Deputies acquires legislative competence in this field through the provision that, upon a bill being approved in one of the Chambers, it passes to the other.

Article 137 of the Venezuelan Constitution provides for a delegation of national powers to the states or municipalities, but the conduct of international affairs has apparently never been delegated.

10 Yugoslavia

Article 115 of the Constitution of the Socialist Federal Republic of Yugoslavia grants to the federal authority the responsibility for "the sovereignty, independence, territorial integrity, security and defence of Yugoslavia and for its international relations". In this area, the federal authority has the exclusive right to pass and enforce laws, even when executive competence in some aspect of the above matters may rest with one of the other levels of government. Further, Article 160 (3), which defines the jurisdiction of the federal organs, lists "Representation of the Socialist Federal Republic of Yugoslavia, political, economic and other relations with other states and interstate organizations, international agreements, matters of war and peace". In addition, the Federal Assembly is assigned competence in foreign policy and the President of the Republic the duty to represent Yugoslavia abroad.

While it would appear that one or more of the six component republics may on occasion take part in the drafting of treaties with foreign states, this

has been done under the aegis of the central authority, whose approval is required before the agreement can be signed. The federal authority alone signs and ratifies all treaties.

A constitution which authorizes the federal government to make international agreements on behalf of the constituent parts (Switzerland)

Article 8 of the Swiss Constitution states that the Confederation has the right of "concluding alliances and treaties with foreign powers and in particular treaties concerning customs duties and trade". However, Article 9 states: "In specific cases the cantons retain the right of concluding treaties with foreign powers upon the subjects of public economic regulations, 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."

In practice these direct discussions normally deal with matters of a minor administrative nature. Even such questions, however, are discussed with and approved by the federal authorities before an agreement is concluded. Matters of any significant scope are thoroughly discussed and planned with the federal authorities and the agreement with the foreign state concluded and signed at the federal level.

Under Article 102 (7), the Federal Council examines the treaties which cantons make with foreign countries and sanctions them if they are allowable. It maintains direct control over all such agreements by having the right to withhold its assent from agreements which are contrary to the Constitution or infringe on the rights of other cantons. If the Federal Council does object, the agreement is then taken up by the Federal Assembly under Article 85 (5) of the Constitution. The two houses of the Federal Assembly then sanction or disallow the agreement which the canton or cantons may have made with a foreign country. In practice no cantonal treaty has been disallowed by the Federal Council and brought before the Federal Assembly.

On the international plane, authorities in international jurisprudence agree that the Swiss Confederation alone has the power to become bound by international law for the execution of cantonal agreements. Further, federal agreements are binding on all cantons. It is not considered necessary to obtain the agreement of all the cantons before the federal authorities ratify an agreement. The Confederation not only has the power to *make* treaties with regard to matters falling within the cantonal legislative competence but can acquire powers to *implement* the treaty.

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, the power to implement treaties through legislation otherwise falling within cantonal jurisdiction.

A constitution which contemplates the possibility of certain types of agreement between constituent states and foreign powers subject to federal consent (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 or compact with another 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".

It would appear that the only agreements between states and foreign jurisdiction of the type requiring the consent of Congress that have been authorized are interstate compacts open to accession by Canadian provinces, for example, bridge agreements. Three cases where Congressional consent was or is being sought are the Northeast Interstate 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, it seems that the states can, *without* the consent of Congress, enter into minor arrangements which are not considered to be agreements or compacts with a foreign power within the meaning of Article 1:10:3 of the Constitution. It is, however, the Congress which decides whether express Congressional consent is necessary or appropriate. If a participating state puts a compact into effect without Congressional approval, it may be challenged in the Courts. (Letter from Deputy Attorney General to Chairman of Committee on Interior and Insular Affairs, 1962).

It would accordingly appear that individual states may:

(a) without the consent of Congress, enter into informal arrangements of a more minor character which do not amount to agreements or compacts within the terms of Article 1:10:3 of the United States constitution;

(b) with the consent of Congress, enter into agreements or compacts which are not otherwise prohibited. There appears to be no clear authority on whether it is the Federal Government or the individual

state that is bound by any agreement entered into by a state with a foreign jurisdiction.

Although the Constitution grants to the states the power to enter into certain compacts subject to Congressional approval, it appears that no such agreement has ever been concluded with a foreign sovereign state. Furthermore, 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 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.

Constitutions which authorize the constituent parts to make international agreements in some areas subject to federal direction or control (U.S.S.R., Federal Republic of Germany)

1 The Union of Soviet Socialist Republics

On February 1, 1944, the U.S.S.R. adopted an amendment to its Constitution of December 5, 1936 giving each Republic of the Union:

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

Moreover, as a result of political negotiations relating to the establishment of the new world organization, the Ukrainian and Byelorussian Soviet Socialist Republics were admitted to the United Nations in 1945. They are the only constituent parts of any federal state to belong to the UN or a Specialized Agency. Thus, according to the Soviet Constitution, the Union Republics appear to have the right to become parties to agreements with foreign states and to be considered subjects of international law, although few states have been willing to so regard them.

It is doubtful, in any case, to what extent the Soviet experience is relevant to the question of the treaty-making power in other federal states. There are, in the first place, other means by which central control can be exercised in the U.S.S.R. over the constituent republics. In addition, the Soviet Constitution expressly provides (Article 14 (a)) that the jurisdiction of the All-Union Government includes "the establishment of the general procedure governing the relations between the Union Republics and other states". Furthermore, Article 20 states that "In the event of divergence between a law of the Union Republic and a law of the Union, the Union law prevails", and Article 68 (d) asserts that the U.S.S.R. Council of Ministers "exercises general guidance in the sphere of relations with foreign states".

2 Federal Republic of Germany

The Constitution of the Federal Republic of Germany provides for the exercise of foreign relations by the Federation. It is the Federal President who represents the Federation in international law matters, who receives and

accredits envoys, and who concludes treaties with foreign states on behalf of the Federation. This federal responsibility for external affairs is spelled out in Article 32 (1) and Article 59 of the Constitution:

32 (1) The maintenance of relations with foreign states is the concern of the Federation.

59 The Federal President represents the Federation in its international relations. He concludes treaties with foreign states on behalf of the Federation. He accredits and receives envoys.

Moreover, Article 73 provides that "The Federation has the exclusive power to legislate on: 1. Foreign affairs . . .".

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. The Bonn constitution of 1949 provides that the *Länder* shall have the power to conclude treaties with foreign states in matters falling within their legislative competence. It is important to note, however, that the conclusion of treaties by the *Länder* is subject to the approval of the Federal Government.

32 (3) In so far as the *Länder* are competent to legislate, they may, with the approval of the Federal Government, conclude treaties with foreign states.

This treaty making power has apparently not been used extensively by the *Länder*.

In addition, the federal authority is required to consult *Länder* if their special interests are affected by a treaty:

32 (2) Before the conclusion of a treaty affecting the special conditions of a *Land*, the *Land* must be consulted sufficiently early.

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

Only consultation with the *Land* is required, not its consent. The Federal Government would therefore have the power to enter into treaties dealing with matters that fall within the constitutional competence of the *Länder* without obtaining the consent of the *Länder*. However, according to judicial decision the Federal Government cannot, by means of entering into a treaty commitment, acquire legislative powers in an area otherwise reserved to the *Länder*, and the Federal Government might find itself without the power to implement the treaty.