Vol. 1

Department of External Affairs

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File No. 20-3-1-1

Subject: POLITICAL AFFAIRS -
TREATIES AND AGREEMENTS
TREATY MAKING POWERS -
TREATY IMPLEMTNTING POWER IN CANADA AND
OTHER COUNTRIES

Vol. 1
From SEPT/65
To [illegible]/68

References to Related Files

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File No. 20-3-1-1

CANADA

DATED FROM Sept. 1/65 FILE NO. 20-3-1-1

TO Dec. 31/68 VOLUME NO. 1

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Legal Div./J.S.Stanford/zs

cc: Mr.Yalden, O/USSEA
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Dept.of Trade & Commerce (T.M.Burns)
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Dept. of Finance (J.A.Macpherson)
File
Diary
Div.Diary

, November 5, 1968

20-3-1-1

Dear Mr. de Dardel,

I refer to your letter of August 8 and our subsequent conversation regarding the proposal of the Government of Switzerland that a treaty of conciliation be concluded between our two countries.

I am pleased to inform you that the Government has now authorized Canadian officials to undertake negotiations on this subject with representatives of the Government of Switzerland. I expect to be in a position, within the next few weeks, to forward to you the comments of the Canadian Government on the draft agreement which you submitted to us earlier.

Yours sincerely,

A. E. GOTLIEB

A. E. Gotlieb.

Mr. Gilbert de Dardel,
Counsellor,
Embassy of Switzerland,
5 Marlborough Avenue,
OTTAWA.

5.11.26(US)

20-3-1-1

EXTERNAL AFFAIRS AFFAIRES EXTÉRIEURES

file 23

TO / À: The Under-Secretary of State for External Affairs, Ottawa, CANADA

FROM / De: The Canadian Embassy, Washington, D.C.

REFERENCE / Référence: Our letter No. 1332 of September 5, 1967 J-22

SUBJECT / Sujet: "State Practice Concerning the Powers of Members of a Federal Union to make Treaties"

SECURITY / Sécurité: RESTRICTED

DATE: October 31, 1967

NUMBER / Numéro: 1640 Conf

FILE	DOSSIER
OTTAWA	20-3-1-1
MISSION	13

ENCLOSURES / Annexes

DISTRIBUTION

In our rambles through the tangled woods of law and practice under Clause 3 of Article 1 of the U.S. Constitution, we came upon a reference to an article written in the Marquette Law Review of Volume 36, 1952-53. This article is entitled "Compacts and Agreements between States and between States and a Foreign Power". We looked it up and made two copies, both of which are attached.

2. This article was written by the then General Counsel for the Great Lakes Harbors Asscciation and was directed primarily at "selling" a solution to the Chicago Diversion issue. It does, however, contain a number of references and some observations which are germane to the general question of the conclusion of agreements or compacts between states of the Union and foreign powers. You may therefore find it of some slight value.

TO: MR. BAUDOUIN
FROM REGISTRY
NOV 6 1967
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FILE CHARGED OUT
TO: MR. BAUDOUIN

The Embassy.

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The USSEA,

Ottawa, Canada.

Enclosures to letter No. 1640 of Oct. 31/67

State Practice Concerning the Powers of Members of a Federal Union to make Treaties.

MARQUETTE LAW REVIEW

Vol. 36 WINTER, 1952-53 No. 3

COMPACTS AND AGREEMENTS BETWEEN STATES AND BETWEEN STATES AND A FOREIGN POWER

HERBERT H. NAUJOKS*

I. INTRODUCTION

During the past three decades, the use of the interstate compact, as authorized by the United States Constitution,[1] has come into prominence as an effective device for the settling of differences between states or regions, and as a means of interstate cooperation in the disputed areas of conservation of natural resources and governmental activities.[2] The Compact Clause is brief and provides in part that "No state shall, without the consent of Congress, . . . enter into any agreement or compact with another state or with a foreign power. . . ."

Today, there are, among others, two outstanding controversies which could be resolved permanently and effectively through the use of the interstate compact.

One of these controversies which has at one time or another involved fourteen states bordering on the Great Lakes and the Mis-

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*B.A., M.A., and LL.B., University of Wisconsin; S.J.D., Yale University; Member of the Illinois Bar; General Counsel, Great Lakes Harbors Association.

[1] United States Constitution, Art. I, Sec. 10, provides in Clause 1: "No state shall enter into any treaty, alliance or confederation. . . ." Clause 3 provides: "No state shall, without the consent of Congress, . . . enter into any agreement or compact with another state or with a foreign power. . . ."

[2] For selected material on the history, development and scope of the Compact, see: Frankfurter and Landis *The Compact Clause of the Constitution*, 34 YALE L. J. 685 (1925); Zimmerman and Wendell, *The Interstate Compact Since 1925* (1951); THE BOOK OF STATES, 1943-44 ed. pp. 51-71; 1948-49 ed. pp. 27-52; 1950-51 ed. pp. 26-31; 1952-53 ed. pp. 20-44; Report of the New York Committee on Interstate Cooperation, LEG. DOC. No. 55, 1952; INTERSTATE COMPACTS, a compilation of articles from various sources, 1946 Colorado Water Resources Board; Dodd, *Interstate Compacts* 70 U.S. L. REV. 557 (1936) and *Interstate Compacts; Recent Developments*, 73 U.S. L. REV. 75 (1939); Bruce, *The Compacts and Agreements of States with one another and with Foreign Powers*, 2 MINN. L. REV. 500 (1918); Clark, *Interstate Compact and Social Legislation*, 30 POL. SCI. Q., 502 (1935) and 51 POL. SCI. Q. 36 (1936); Donovan, *State Compacts as a Method of Settling Problems Common to Several States*, 80 U. OF PENN. L. REV. 5 (1931); Carman, *Sovereign Rights and Relation in the Control and Use of American Waters*, 3 So. CALIF. L. REV. 84, 156, 261 (1929 and 1930); Notes: *Interstate Compacts as a Means of Settling Disputes Between States*, 35 HARV. L. REV. 322 (1922); *The Power of States to Make Compacts*, 31 YALE L. J. 635 (1922); *A Reconsideration of the Nature of Interstate Compacts*, 35 COL. L. REV. 76 (1935).

sissippi River has been the subject of litigation in the federal courts and in the United States Supreme Court for more than fifty years.[3] This controversy likewise has been the subject of congressional attention for more than fifty years, and has been under scrutiny by various public officials and many administrative bodies, including two Presidents of the United States, various Secretaries of War, the Federal Power Commission, the War Production Board during World War II and others.[4]

In this particular controversy, the differences between the states arose over the alleged right of the Sanitary District of Chicago and the State of Illinois to abstract and permanently withdraw for sewage disposal and power purposes, huge quantities of water from the Great Lakes-St. Lawrence system into the Mississippi watershed by way of the Chicago Sanitary and Ship Canal and the Illinois Waterway, to the detriment and damage of the peoples of the Great Lakes states. The states of New York, Pennsylvania, Ohio, Michigan, Wisconsin and Minnesota, as well as the port cities bordering on the Great Lakes, have from the beginning consistently opposed and vigorously challenged such alleged right as claimed by the Chicago Sanitary District and the State of Illinois. The United States Supreme Court, under a decree entered April 21, 1930, has limited the diversion of water from the Great Lakes-St. Lawrence water system through the Chicago Drainage Canal to 1500 cubic feet per second, plus domestic pumpage.[5]

The other problem, which has been the subject of heated debate in the Congress of the United States for more than two decades, is the proposal to construct, jointly with Canada, the so-called St. Lawrence Seaway and Power Project.[6]

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[3] Missouri v. Illinois, 180 U.S. 208 (1900); s.c. 200 U.S. 496 (1906); Sanitary District of Chicago v. United States, 266 U.S. 405 (1925); Wisconsin et al v. Illinois et al., 278 U.S. 367 (1929); s.c. 281 U.S. 179 and 696 (1930); 287 U.S. 578 (1932); 289 U.S. 395, 710 (1933); 309 U.S. 569, 636 (1940); 313 U.S. 547 (1941); 340 U.S. 858 (1950).

[4] Naujoks, *The Chicago Water Diversion Controversy*, 30 MARQ. L. REV. 149, 161, 176 (1946).

[5] 281 U.S. 696 (1930). Domestic pumpage averages about 1700 cubic feet per second.

[6] For selected readings on the history, details and present status of the St. Lawrence Seaway and Power Project see: Lincoln, *Battle of the St. Lawrence*, Fortune, Dec. 1950; Report of a Subcommittee to the Committee on Foreign Relations on S.J. 104, a Joint Resolution approving the agreement between the United States and Canada relating to the St. Lawrence Seaway and Power Project, 79th Congress, 2d session, 1946; Longmire, *Showdown on the St Lawrence*, Colliers Nov. 3, 1945; Gladfelter, *Flying Bombs Add Argument for Seaway to Open Midwest*, Milwaukee Journal, Jan. 14, 1945; Danielian, *The Chips are down on the St. Lawrence Seaway*, Great Lakes Outlook (published by Great Lakes Harbors Association, City Hall, Milwaukee, Wis.) January, 1952; Naujoks, *The St. Lawrence Seaway, Political Aspects*, Great Lakes Outlook, April, 1952; THE ST. LAWRENCE SURVEY, PARTS I-VII, (U.S. Dep't Comm 1941); *St. Lawrence Survey, Message from the President of the United States*. SEN. DOC. No. 110, 73rd Cong., 2d Sess., 1934.

The St. Lawrence Seaway, consisting of a series of lakes and connecting channels linked with the Atlantic Ocean by way of the St. Lawrence River, is more than 90 per cent developed for navigation. The aim of the St. Lawrence Seaway and Power Project is to remove all obstructions to deep water navigation, and at the same time to provide power facilities which will develop more than one million horsepower of hydro-electric energy. The chief aim of the seaway project is to provide a navigable waterway for large ocean-going vessels from the Great Lakes to the Atlantic Ocean. This involves principally the construction of a 27-foot channel in the so-called International Rapids section of the St. Lawrence River to replace the present 14-foot channel which Canada has long maintained on its side of the river. This channel will continue in operation as a Canadian enterprise even after the deepwater channel is created. Some additional work must also be completed in the connecting channels of the Great Lakes, as well as in many lake ports to provide the required navigable depth of 27 feet for the entire Great Lakes-St. Lawrence system.

The construction of the seaway would be on a self-liquidating basis thru the levy of tolls or charges on cargoes and passenger traffic using the new deepwater navigation facilities to be provided. Under one of the latest proposals, a commission would be set up with a fund of $10,000,000, with power to borrow up to $500,000,000 to pay for the United States' share of the cost of this project. The power project contemplates the construction and installation of power facilities in the International Rapids section of the St. Lawrence River for development of hydro-electric power to be divided equally between the United States and Canada. The cost of these power facilities would also be self-liquidating and be paid for over a period of forty years.

The majority of the people living in the Great Lakes states favor the St. Lawrence Seaway and Power Project, while the Atlantic and Gulf port cities; the eastern railroads, some private power utilities, and some coal operators oppose this project because they believe it constitutes a threat to their pocketbooks. Late in September 1951, President Truman and Premier St. Laurent of Canada, discussed the St. Lawrence Seaway and Power Project, and in December 1951 legislation to authorize the construction of the St. Lawrence Seaway Project was unanimously passed by both houses of the Canadian Parliament. Provision was made in the Act to permit the United States to participate in this project if Congressional approval was obtained in the 1952 session of Congress, otherwise Canada planned to "go it alone." Canada is dead serious in its determination to construct, as soon as possible, the St. Lawrence Seaway and Power Project. However,

Canada undoubtedly would still permit United States' participation by the interested Great Lakes states through the medium of an interstate compact with approval of Congress. In June 1952, the United States Senate defeated a proposal to approve the Canadian-United States St. Lawrence Agreement of March 19, 1941 by a vote of 43 to 40.

A study of the use of interstate compacts over the past 175 years indicates that this method of action has been extremely effective in settling differences based on regional economic, social or physical conditions in America. In order to achieve a permanent, lasting and satisfactory solution for the two mentioned perennial problems, as well as for others, it would seem that a re-examination and study by all parties concerned should be made of the interstate compact, its origin, history and past uses, its legality and applicability to the problem of the control of lake levels, the uses of the waters of the Great Lakes, diversions from and into the Great Lakes, and the like, to the end that an earnest and sincere effort be made to employ it in the settlement of the many troublesome problems involving the Great Lakes region and the adjoining states.

II. History and Construction of the Compact Clause of the Constitution

A. History of the Compact Clause

The compact section of the United States Constitution has its roots deep in American colonial history. It is a part of the story of colonial boundary disputes. Almost all of the colonial charters were vague and had to be applied to strange and poorly surveyed lands. The resulting disputes were settled by two peaceful methods. One was negotiation between contending colonies—usually carried on through joint commissions. Usually the Crown approved all such agreements. If negotiations failed or in lieu of a direct settlement, the second method was followed, namely an appeal to the Crown. This was followed by a reference of the controversy to a Royal Commission. From a decision of the Commission an appeal lay to the Privy Council. These two forms of adjustment were common practice for a hundred years preceding the American Revolution. An appeal in a boundary dispute between New York and New Jersey appears in the records of the Privy Council as late as 1773.[7]

The American Revolution found many of these disputes still unsettled. It was a logical step to carry over the old idea of settling these disputes by compacts as had been done in the past.

[7] 5 Acts of Privy Council, Col. Ser. 45.

The Articles of Confederation included a provision which would permit the adjustment of boundary and other disputes. Article VI of the Articles of Confederation prohibited a state, without the consent of Congress, from entering into an agreement, alliance or treaty with any king, prince or state. The Articles then provided that no two or more states shall enter into any alliance between them without the consent of Congress.

The language of Article VI of the Articles of Confederation is interesting and reads as follows:

> "ARTICLE VI. No state without the consent of the United States in congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with any King, prince or state . . . .
>
> "No two or more states shall enter into any treaty, confederation or alliance whatever between them, without the consent of the United States in congress assembled, specifying accurately the purpose for which the same is to be entered into, and how long it shall continue."

In *Rhode Island v. Massachusetts*,[8] the United States Supreme Court pointed out that "at the adoption of the Constitution there were existing controversies between 11 states respecting their boundaries, which arose under their respective charters, and had continued from the first settlement of the colonies."

Historically, the consent of Congress to validate an agreement between states can be traced to the consent of the Crown to agreements among colonies. The colonial records disclose that during the colonial period, at least nine different boundary disputes were settled by agreement, namely:[9]

Connecticut and New Netherlands Boundary Agreement (1656)
Rhode Island and Connecticut Boundary Agreement (1663)
New York and Connecticut Boundary Agreement (1664)
New York and Connecticut Boundary Agreement (1683)
Connecticut and Rhode Island Boundary Agreement (1703)
Massachusetts and Rhode Island Boundary Agreements (1710) and (1719)
New York and Connecticut Boundary Agreement (1725)
North Carolina and South Carolina Boundary Agreement (1735)
New York and Massachusetts Boundary Agreement (1773)

During the era of the Articles of Confederation, the following compacts were entered into under the Articles of Confederation, namely:

[8] 12 Pet. 657, 723 (U.S. 1838).

[9] See Dodd, *Interstate Compacts*, 70 U.S. L. Rev. 557 (1936); Frankfurter, and Landis, *The Compact Clause of the Constitution*, 34 Yale L. J. 685, 691-695 (1925), for discussion of early history, Colonial practices, and background of present Compact Clause.

Pennsylvania and Virginia Boundary Agreement (1780)
Pennsylvania and New Jersey Agreements (1793) and (1786)
Virginia and Maryland Agreement (1785)
South Carolina and Georgia Agreement (1788)

Since the adoption of the Federal Constitution in 1789, compacts with the consent of Congress have been resorted to often in the settlement of problems arising between the states, and have been applied in many fields of legislation, including the following:

(1) Boundaries and cessions of territory.[10]

(2) Control and improvement of navigation, fishing and water rights and uses.[11]

(3) Penal jurisdiction.[12]

(4) Uniformity of legislation.[13]

(5) Interstate accounting.[14]

(6) Conservation of natural resources.[15]

(7) Utility regulation.[16]

(8) Taxation.[17] Relating to jurisdiction to tax, the exchange of tax data, and agreements as to mutual tax exemptions, and the like.

(9) Civil defense and military aid.[18] An interstate civil defense compact was drafted in 1950 by ten northeastern states and the Federal Civil Defense Administration. New York, New Jersey and Pennsylvania entered into a military aid compact in 1951, subject to approval by Congress.

(10) Educational and Institutional Compacts.[19]

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[10] Rhode Island v. Massachusetts, 12 Pet. 657, 723 (1838); Washington v. Oregon, 214 U.S. 205 (1909); Minnesota v. Wisconsin, 252 U.S. 273 (1920).

[11] State ex rel Dyer v. Sims, 58 S.E. 2d 766 (W. Va. 1950) rev'd. in 341 U.S. 22 (1951); New York Port Authority Agreement of 1921; Colorado River Compact of 1921; LaPlata River Compact of 1923; Columbia River Compact of 1925; Atlantic States Marine Fisheries Compact, 1950; New England Water Pollution Compact, 61 STAT. 682 (1947); Canadian River Compact of 1951; Yellow River Compact of 1951; Ohio River Valley Sanitation Compact of 1940.

[12] Crime Compact of 1934—Interstate supervision of parolees and probationers; also agreement as to jurisdiction over crimes committed on Lake Michigan.

[13] National Conference of Commissioners on Uniform State Laws, organized in 1892. See BOOK OF STATES, p. 18 (1952-53).

[14] Virginia v. West Virginia, 220 U.S. 1 (1911) and same parties in 246 U.S. 565 (1918)—settlement and enforcement of financial obligations.

[15] Interstate Oil Compact of 1934; Ohio River Valley Sanitation Compact of 1940 which became effective in 1948, 54 STAT. 752 (1940). New England States Anti-Pollution Agreement of 1947—Interstate Sanitation Compact, 49 STAT. 932 (1935).

[16] National Association of Public Utilities Commissioners.

[17] Kansas-Missouri Mutual Tax Exemption Agreement of 1922; Kansas City v. Fairfax Drainage District, 34 F. 2d 357 (1929); Dixie Wholesale Grocery v. Martin, 278 Ky. 705, 129 S.W. 2d 181 (1939).

[18] See THE BOOK OF STATES, *Interstate Compacts*, pp. 2-24 (1952-1953).

[19] See Note on Regional Education, *A New Use of Interstate Compact*, 34 VA. L. REV. 64 (1948); Southeastern Regional Educational Compact of 1949 as to this kind of cooperation.

B. Construction

(1) *Art. I, Sec. 10, Cl. 3, U. S. Constitution does not prohibit all agreements between states.*

The provision of the United States Constitution relating to interstate compacts or agreements is, in its terms, broad enough to prohibit every interstate compact or agreement made without the consent of Congress. Article I, Section 10, Clause 3 of the United States Constitution as we have noted hereinbefore, provides:

> "No state shall, without the consent of Congress, . . . enter into any agreement or compact with another state or with a foreign power. . . ."

The words "agreement" and "compact" are not defined in the Constitution. Both words were in use before the adoption of our Constitution in 1789 but the precise meaning was not too clear. On occasion, the words "agreement" and "compact" were used as synonyms but at other times one word was given a different shade of meaning from the other. However, it would seem that under the ordinary rules of constitutional construction, the above provision is to be confined to those objects and purposes for which the provision was framed. As so construed, Article I, Section 10, Clause 3 of the Constitution does not apply to every possible agreement or compact between the states, but only to such as might tend to alter the political powers of the states affected, and thus encroach upon or interfere with the supremacy of the United States.[20]

(2) *Some interstate agreements may be effected without Congressional consent.*

Agreements between states which are incapable of altering the political power of the states affected may be made by the states without the consent of Congress. As was pointed out in *State v. Joslin*[21] "some contracts or business arrangements between states may be effected without congressional assent." For example, the administrative agreement does not require Congressional consent because it is not a compact. The administrative agreement is usually an informal (though sometimes formal) arrangement between the administrative officers or departments of several states, or between one or more states and the United States. In the past such administrative agreements have been used by states to provide uniform practices relating to the use of and regulations relating to highways, and in the field of education, and the regulation of the business of insurance. Other interstate agreements which do not require Congressional consent include arrangements which are approved by the state legislatures.

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[20] Wharton v. Wise, 153 U.S. 155 (1894); Virginia v. Tennessee, 148 U.S. 503 (1893); Union Branch R. Co. v. East Tenn., etc., 14 Ga. 327 (1853); State ex rel Baird v. Joslin, 116 Kan. 615, 227 Pac. 543 (1924).

[21] 116 Kan. 615, 227 Pac. 543 (1924). See also cases cited in footnote 20, *supra*.

(3) *States may enter into any kind of compact under the U. S. Constitution but cannot thereby surrender sovereign rights of the people.*

Except as limited by the Constitution, the several states may enter into any compact, agreement or other arrangement as they choose, provided, the states cannot limit or surrender by such compact or agreement, the sovereign rights of the people. Such compacts, entered into with the consent of Congress, relating to various fields of interstate cooperation, have been upheld as against numerous constitutional objections, both Federal and state.[22]

In *City of New York v. Willcox*,[23] it was held that the Port of New York Authority,[24] providing for a joint commission of New Jersey and New York authorities for management of the port of New York, etc., is not invalid as creating an unauthorized quasi-political subdivision of the United States, in violation of the United States Constitution.

In the recent case of *State ex rel Dyer v. Sims*,[25] the court, speaking through Mr. Justice Frankfurter, in sustaining the Compact in question, held that the West Virginia Act ratifying into law the Ohio River Valley Sanitation Compact[26] entered into by eight states to control pollution in the Ohio River system is not invalid, either (1) on the ground that the compact delegates police power of West Virginia to other states or to the Federal Government, or (2) on the ground that the compact binds future legislatures to make appropriations for continued activities of the Sanitation Commission and thus violates the West Virginia Constitution limiting purposes for which the state may contract debt.

In *State v. Joslin*[27] it was held that an agreement between the states of Kansas and Missouri ratified by Congress, whereby such states mutually agreed that the water plants located in Kansas City, Kansas, and Kansas City, Missouri, located within their respective territories, should be exempt from taxation, is valid notwithstanding objection on the ground that the subject is not one concerning which the states may enter into an agreement with each other with the consent of Congress.

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[22] West Virginia ex rel Dyer v. Sims, State Auditor, 341 U.S. 22 (1951); New Jersey v. New York, et al., 283 U.S. 336 (1931); Hinderlider v. LaPlata River and C. Creek Ditch Co., 304 U.S. 92 (1938); rehearing denied in 305 U.S. 68 (1938); Wharton v. Wise, 153 U.S. 155 (1894); Parker v. Riley, 18 Cal. 2d 83 (1941). See Note 134 A.L.R. 1417; 49 AM. JUR. STATES § 13.

[23] 115 Misc. 351, 89 N.Y.S. 724 (1921).

[24] New York Laws 1921, c. 154.

[25] 341 U.S. 22 (1951).

[26] 54 STAT. 752 (1940); 33 U.S.C.A. § 567a (1950).

[27] 116 Kan. 615, 227 Pac. 543 (1924); See also, State v. Cunningham 102 Miss 237, 59 So. 76 (1912).

However, there are limits upon the right of a state to contract with another, even with the consent of Congress.[28]

(4) *An interstate compact may not be amended, modified, altered or changed in any way, without the consent of all the parties to the agreement.*

As in the case of ordinary private agreements, an interstate compact between two or more states or between a state and a foreign power, cannot be amended, modified, altered or changed in any way without the consent of all the parties to the compact. Neither may the terms of the compact be renounced by one of the parties thereto in a unilateral action, in the absence of a provision in the compact for renunciation of the compact by one of the parties thereto. A recent decision of the United States Supreme Court touching on these questions is found in the case of *West Virginia ex rel Dyer v. Sims, State Auditor.*[29]

(5) *State's assent to interstate compact does not require technical terms.*

An Act of each of the legislatures of the states parties to an interstate agreement is needed to create a valid agreement between the states. In making such a contract, no technical terms need be used. It is sufficient to employ terms which would be sufficient ordinarily to give rise to a contract between the state and an individual. The Courts will construe the compact or agreement, as in the case of ordinary private contracts, so as to carry out the intention of the contracting states,[30] with due regard to the fact that sovereign states are parties to the agreement.

(6) *The Consent of Congress to an interstate compact may be informal and may be given after as well as before the making of the agreement.*

Before a compact can attain full legal stature, it must have received Congressional approval. This fact permits Congress to distinguish between a compact and a treaty. Ordinarily, a court would construe as a compact a proposal which had received Congressional approval. It is possible that under unusual circumstances, a court might construe the proposal as a treaty. However, to date this has never occurred.

The consent of Congress, which may be either general or specific, is sometimes given by resolution, and on other occasions by formal

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[28] Uncompahgre River and C. Creek Ditch Co. v. Hinderlider, 93 Colo. 128, 25 P. 2d 87 (1933), appeal dismissed in 291 U.S. 650 (1934). See 11 AM. JUR. CONSTITUTIONAL LAW §254; 16 C.J.S. CONSTITUTIONAL LAW §179.

[29] 341 U.S. 22 (1951); also see Chesapeake etc., Canal Co. v. Baltimore, etc., R. Co., 4 Gill & J. 1 (Md. 1832).

[30] Virginia ex rel Dyer et al., v. Sims, State Auditor, 341 U.S. 22 (1951); Virginia v. West Virginia, 246 U.S. 565 (1918); Kentucky v. Indiana, 281 U.S. 63 (1930).

enactments. In either event, such approval is subject to Presidential veto, since under Article I, Section 7, Clause 3 of the Constitution, "every order, resolution or vote to which the concurrence of the Senate and the House of Representatives may be necessary" is limited by the veto power. It is significant that no compact has ever been vetoed. Congressional consent may be absolute, or it may be limited in some manner.

The consent of Congress to an agreement between states may be given either before or after the making of an interstate compact. Such assent of Congress need not be formal or technical in character or language, but it is sufficient if Congress has expressed its assent to an interstate compact by some positive act in relation to the agreement or by the adoption or approval of the proceedings taken under any such agreement or by sanction of the objects of the compact.[31]

In the leading case of *Chesapeake Canal Co. v. Baltimore etc. R. Co.*[32] it was said: "There is no particular form in which the assent of Congress is required to be given, and it is not material in which form it is given, provided it is done."

In *Virginia v. Tennessee*[33] the court said: "The Constitution does not state when the consent of Congress shall be given, whether it shall precede or may follow the compact made, or whether it shall be express or may be implied."

In *State ex rel Baird v. Joslin*,[34] in upholding an agreement between two states, the Kansas Court stated:

> "The consent of Congress was given by ratification after the two states had acted, but that is not a good ground of objection. 'The Constitution makes no provision respecting the mode or form in which the consent of Congress is to be signified, very properly leaving that matter to the wisdom of that body, to be decided upon according to the ordinary rules of law and of right reason. The only question in cases which involve that point is: Has Congress by some positive act in relation to such agreement, signified the consent of that body to its validity' (Green v. Biddle, 21 U.S. 1, 85)"

The Kansas Supreme Court further pointed out that—

> "The Federal Constitution (Art. I, Sec. 10, Par. 3) by forbidding states to enter into any agreement or compact with each other without the consent of Congress, recognizes their power to do so with that consent. (Poole v. Fleeger, 36 U.S. 185, 209). Moreover, some contracts or business arrangements between states may be effected without Congressional

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[31] Wharton v. Wise, 153 U.S. 155 (1894); Virginia v. Tennessee, 148 U.S. 503 (1893); Virginia v. West Virginia, 11 Wall. 39 (U.S. 1870).
[32] 4 Gill & J. 1, 136 (Md. 1832).
[33] 148 U.S. 503, 521 (1893).
[34] 116 Kan. 615, 227 Pac. 543 (1924).

> consent. (Virginia v. Tennessee, 148 U.S. 503, 518). 'The terms, "compacts" and "agreements", as used in this section, cover all stipulations affecting the conduct or claims of states, whether verbal or written, formal or informal, positive or implied, with each other' (Annotated Constitution, published by authority of the U.S. Senate, p. 365) not forbidden by the Constitution, for even with the consent of Congress, the states may not disobey its injunctions—may not, for instance, do any of the things prohibited by the first paragraph of the section cited (In re Rahrer, 140 U.S. 545, 560), such as entering into a treaty, alliance or confederation. It has been said that the clause 'compacts and agreements' as distinguished from 'treaty, alliance or confederation' may 'very properly apply to such as regarded what might be deemed mere private rights of sovereignty, such as questions of boundary, interests in land situate in the territory of each other, and other internal regulations for the mutual comfort and convenience of states bordering on each other.' (Quoted from Story's Commentaries on the Constitution (Sec. 1403) in Virginia v. Tennessee, 148 U.S. 503, 519)"

Where consent is given in advance by Congress it is often provided that such consent is given subject to the submission of completed compacts for approval by Congress. Consent will be valid even though given after the passage of a number of years. In fact, before 1921, virtually every compact was fully negotiated and formulated before Congressional consent was sought or obtained. A new technique appearing in recent years is a Blanket Consent Act enacted by Congress, sometimes even before any negotiations have been entered into between the states.

Whether silence could be construed to operate as consent is still a moot question. One writer argues that:[35]

> "The consent of Congress may assume the form of any action signifying acquiescence in the terms of the compact. Its silence, however, may not properly be construed as assent."

Some authorities have, however, indicated a contrary view.

A more complicated question, and one upon which authorities are divided, is whether or not all agreements between the states are subject to the Compact Clause of the Constitution and hence require congressional consent to be effective, or whether some agreements are of such a nature as to avoid the Compact Clause requirement of congressional consent. The proponents of the view that congressional consent is not required for all valid agreements entered into between states rely for the most part upon statements found in the leading decision of *Virginia v. Tennessee*,[36] and in cases which cite that deci-

[35] 35 Col. L. R. 76 (1936).
[36] 148 U.S. 503 (1893).

sion, such as *McHenry County et al. v. Brady et al.*[37] Writers who take the opposite view and who insist that the validity of all compacts and agreements is dependent upon the assent of Congress, find support for this view in the case of *Holmes v. Jennison*,[38] where Mr. Chief Justice Taney declared that all compacts and agreements between states or between a state and a foreign power to be valid must be consented to by Congress.

One writer, in support of this view, argues that:[39]

> "An 'agreement or compact' must be a transaction between states: neither mere similarity of conduct arising from common motives, nor acquiesences of one state in the acts of another will constitute an 'agreement' in the absence of an interstate promise or grant. While the compact clause applies in terms to all consensual transactions between states, the view has been advanced that agreements lacking political implications are valid even in the absence of Congressional consent. Judicial authority for this position consists, however, of the reptition of an erroneous dictum in Virginia v. Tennessee, and a group of cases in state courts which either involve no interstate transactions or are concerned with no state promise or grant. Adherence to the doctrine would require that the conventional distinction between compacts and prohibited treaties, based upon the presence or absence of political consequences, be abandoned. Whatever the practical advantages of upholding certain agreements in the absence of consent, the theory is inconsistent with the apparent purpose of the compact clause; the submission of every interstate agreement to Congressional scrutiny in order to determine whether the extent and nature of its political implications are such that it is objectionable as a 'treaty'."

The view expressed above finds support in the conclusions of a writer whose discussion on this subject is found in an issue of the Yale Law Journal.[40]

As we have indicated hereinbefore some interstate agreements may be effected without Congressional consent, nevertheless a word of caution is warranted. Because almost any compact of importance is bound to affect the power balance between the states and the Federal Government and hence could be considered political in nature, the states contemplating the making of a compact would be wise to include a provision for Congressional consent. A compact on the subject of the regulation of the levels of the Great Lakes and diversions therefrom, or on the subject of the St. Lawrence Seaway and Power Project, would certainly require Congressional consent.

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[37] 37 N.D. 59, 163 N.W. 540 (1917).
[38] 14 Pet. 540 (U.S. 1840).
[39] 35 COL. L. REV. 76 (1936).
[40] 31 YALE L. J. 635 (1922).

III. Distinction Between Compacts and Treaties

The definition of a "treaty" under the United States Constitution is still a relatively unsettled matter of law. In distinguishing a treaty from a compact, under the Constitution, the problem seems political rather than legal. Inasmuch as a compact requires the consent of Congress before it can become effective, the decision is said to be left to Congress to determine in each instance whether the proposal is a treaty or a compact by withholding or granting its consent. Generally the United States Supreme Court has upheld each compact, assented to by Congress, which has come before the high court for review.

As Mr. Justice Brandeis, in considering the nature of a compact, well said in the case of *Hinderlider v. LaPlata River & Cherry Creek Ditch*:[41]

> "The compact—the legislative means—adapts to our Union of Sovereign States, the age-old treaty-making power of independent sovereign nations. Adjustment by compact without a judicial or quasi-judicial determination of existing rights had been practiced in the Colonies, was practiced by the States before the adoption of the Constitution, and had been extensively practiced in the United States for nearly half a century before this Court first applied the judicial means in settling the boundary dispute in State of Rhode Island v. (Commonwealth of) Massachusetts, 12 Pet. 657, 723-725, 9 L.Ed. 1233."

One writer, in considering the distinction between a treaty and a compact, makes the following observation:[42]

> "The distinction which the framers of the Constitution intended to draw between agreements unconditionally prohibited and those permitted with the consent of Congress is not apparent from the language of the Constitution itself. Nor is aid to be derived from literature contemporary with the Constitutional Convention. There was little or no discussion of these two clauses while the Constitution was in making, and the question has never been judicially determined. Story maintained that the terms 'treaty, alliance, and confederation' applied to treaties of a political character, such as 'treaties of alliance for purposes of peace and war; and treaties of confederation, in which the parties are leagued for mutual government; political cooperation, and the exercise of political sovereignty; and treaties of cession of sovereignty, or conferring internal political jurisdiction or external political dependence, or general commercial privileges'. The terms 'agreement' and 'compact' referred, in his opinion, to 'private rights of sovereignty; such as questions of boundary; interests in land situated in the territory of each other; and other

[41] 304 U.S. 92, 104 (1938).
[42] 31 Yale L. J. 635 (1922).

internal regulations for the mutual comfort and convenience of states bordering on each other.'"

Another author notes the reasons behind the distinction made between treaties and compacts in Article I, Section 10 of the United States Constitution, as follows.[43]

> "A distinction may be drawn between the requirements of subdivision 3 of Section 10 and the prohibition contained in subdivision 1 of the same section. . . . In order to establish the sovereignty of the Union for purposes of international relations, it was essential that the states should not enter into any alliance or confederation and that treaties should be entered into only by the Federal Government. A treaty between states would in itself be destructive of national sovereignty. A compact or agreement, however, would not necessarily be destructive of national sovereignty although it might involve issues affecting the entire nation. So it is that, while Congress cannot authorize the state to enter into any treaty, alliance or confederation, agreements between the states may be made, and to protect the national interests it is provided that the consent of Congress must be obtained."

The words "compact and agreement" in Article I, Section 10, Clause 3 of the United States Constitution, it is generally agreed, are used synonymously. In *Virginia v. Tennessee*[44] the Court, through Mr. Justice Field, said:

> "Compacts or agreements—and we do not perceive any difference in the meaning except that the word 'compact' is generally used with reference to more formal and serious engagements than is usually implied in the term 'agreement'—cover all stipulations affecting the conduct of the claims of the parties."

Regardless of the manner in which interstate compacts or agreements are negotiated, entered into and signed on behalf of the signatory states, it is clear that a true compact is not a treaty. If the agreement between the states is a treaty in fact, it could not then be a compact and hence would not be permissible under Article I, Section 10, Clause 1, of the Constitution. A compact, since it does not effect the political balance between the states and the Federal Government, is in essence nothing more than a glorified contract between two or more states or between a state and a foreign power. Accordingly, a compact should be and is generally interpreted in accordance with the rules pertaining to private contracts or agreements. The fact is, however, because of the high character of the parties to the compact (be-

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[43] Donovan, *State Compact As a Method of Settling Problems Common to Several States*, 80 U. OF PENN. L. REV. 5 (1931).
[44] 148 U.S. 503, 520 (1894).

ing quasi-sovereign states), the thinking of the courts in considering compacts is influenced to some extent. This is always the case when states are party litigants in the courts. Thus, the courts will generally follow the interpretation placed upon the particular agreement by the action of Congress in giving its consent to a compact. If the Congress labels the agreement as a compact and hence non-political in character, the courts will generally accept this interpretation as final.

IV. Validity of Compacts With a Foreign Power

In most cases to date, the signatory powers to interstate compacts are quasi-sovereign states of the Union. This is the usual situation as an examination of the interstate compacts entered into to date will disclose. However, under the Constitution, there is nothing to prevent a foreign power, such as Canada, from also participating as a signatory party under a compact. In a case where the foreign power has a significant interest in the subject matter of the agreement, it would be not only desirable but necessary for the foreign power to be a party thereto. This would be true in a matter involving international waters, such as a compact between the adjoining Great Lakes states involving the regulation of the levels of such lakes and their connecting waters. Canada would most certainly be interested because its port cities and commerce would be directly affected by any man made regulation of the levels of the Great Lakes. The same would be true in the matter of the St. Lawrence Seaway and Power Project which project would involve in part international waters.

Some individuals have raised the question whether a compact between one or more states and a foreign power would be constitutional. A reading of Article I, Section 10, Clause 3, of the Constitution would seem to dispel any such doubt. This Section states:

> "No state shall, without the consent of Congress . . . enter into any agreement or compact with another state or with a foreign power."

The above section clearly authorizes a compact with a foreign power. Logic likewise would dictate the view that under the Constitution a compact between one or more states and a foreign power is permissible and is on the same level as an ordinary compact between two states. One writer, who also takes this view, points out that:[45]

> "The constitution makes no distinction between interstate agreements and agreements between the states and foreign governments, and hence any agreement or compact, not a treaty, alliance or confederation, would be valid, provided it is approved by congress."

[45] 31 Yale L. J. 635 (1922).

The present trend toward the use of the compact to obtain co-operation between states and a foreign power is shown by the recent developments in the St. Lawrence Seaway and Power Project.

Former Senator Moody of Michigan, late in the 1952 session of Congress, introduced a bill in the United States Senate, which if enacted into law, would have authorized the states bordering on the Great Lakes by interstate compact to construct jointly with Canada a deep-water channel connecting the Great Lakes and the Atlantic Ocean via the St. Lawrence River.[46] There can be no question but that Senator Moody had a legal opinion to the effect that a compact with Canada would be authorized under the Compact Clause of the Constitution. On January 3, 1953, Representative Dingell of Michigan introduced a joint resolution "To authorize a compact or agreement between the States of Maine, New Hampshire, Vermont, New York, Pennsylvania, Ohio, Indiana, Michigan, Illinois, Wisconsin, Minnesota, and certain other States, and the Dominion of Canada, with respect to the St. Lawrence seaway."

While there is no United States Supreme Court decision directly sustaining a compact with a foreign power, since this point has never been directly involved in litigation, there are several decisions of the courts which suggest that in a proper case a compact with a foreign power would be sustained. In the case of *Holmes v. Jennison*,[47] which involved the legality of the proposed extradition of a fugitive from Vermont to Canada, the United States Supreme Court did suggest that a compact with Canada on this subject might be legal. Mr. Chief Justice Taney, in referring to the possible use of a compact, said:[48]

> "If such an arrangement is deemed desirable, the foresight of the framers of the constitution has provided the way for doing it, without interfering with the powers of foreign intercourse committed to the general government or endangering the peace of the Union. Under the . . . Constitution, any state with the consent of Congress, may enter into such an agreement with the Canadian authorities. The agreement would in that event be made under the supervision of the United States. . . ."

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[46] Senator Wiley of Wisconsin and Representative Dondero of Michigan introduced in the Senate and the House of Representatives similar bills to provide for United States participation with Canada in the St. Lawrence seaway and power project. These bills were introduced in January 1953. On January 23, 1953, the Great Lakes Harbors Association, after vote of its officers and members of the executive committee, endorsed the St. Lawrence project and specifically the principle of the Wiley and Dondero bills. The association is made up of representatives of municipalities, with the exception of Chicago, bordering on the Great Lakes. See Chicago Daily Tribune, Saturday, January 24, 1953.

[47] 14 Pet. 538 (U.S. 1840).

[48] 14 Pet. 538, 578 (U.S. 1840).

In another interesting decision,[49] the North Dakota Supreme Court sustained the action of a North Dakota Board of Drainage Commissioners which had built a drain extending fourteen miles into Canada even though a portion of the drain was vested in a Canadian municipality and no Congressional consent had been sought or obtained. The court ruled that the agreement in question was not a prohibited treaty but was a valid compact even though it lacked Congressional approval, since the compact was one which involved no national interest and hence did not need the consent of Congress.

It is clear that if the question concerning the legality of a compact with a foreign power ever is raised in the courts the ruling will be that such a compact is permissible under the Constitution.

V. Procedure in Negotiating an Interstate Compact

A. In General

The first step in the formulation of any interstate compact is to secure the active interest of the various states involved in controversy or who seek cooperation. After the states concerned become actively interested, each will normally appoint compact commissioners. Ordinarily this will be done pursuant to legislative direction, but this may be carried out by executive act alone. Another plan could have the legislature create a commission to study first the feasibility and desirability of entering into a specific compact. If commissioners are appointed, they will meet with the commissioners of the other states for the purpose of negotiating the proposed compact. The personnel for these commissions, or the chief adviser for such commissions, are most profitably drawn from those who are experts in the field.

After the joint compact commissioners have negotiated the compact, the next step normally is ratification of such agreement by each of the state legislatures concerned. However, it is also possible for the legislatures to have previously provided that the signing by the commissioners shall bind the state. The latter procedure speeds up the final adoption of the compact. The signatory states may consummate a compact by any legislative act manifesting an intent to enter into the transaction and no specific wording or phraseology is required in the enabling act.

A compact may provide that it shall take effect upon a certain date, upon ratification by a stipulated number of states, upon ratification by all of the states, or in some similar manner depending upon the nature and substance of the compact. Ratification by the legislature, whether by statute, joint resolution, statutory offer by one state to another, or parallel legislation incorporating an agreement previously drafted by

[49] McHenry County v. Brady, 37 N.D. 59, 153 N.W. 540 (1917).

the representatives party to the compact, is a legislative act and hence subject to veto by the governor. The compact may include a provision that the agreement may be terminated by mutual consent of the participating states.

B. Reciprocal Legislation

An alternative method of entering into a compact is through reciprocal legislation. One prominent writer on the subject of interstate compacts has the following to say concerning the reciprocal legislation method of entering into compacts:[50]

> "The making of a compact by the method of reciprocal legislation consists of the enactment of a statute which is in effect an offer by one state, and an acceptance evidenced by enactment of the same statute by one or more other states. The typical statute usually provides for exchange of formal ratification by the enacting states. To make it a valid compact within the meaning of the Constitution, there must, of course, be consent on the part of Congress."

In a note by J. P. Chamberlain,[51] the author reaches the conclusion that legislation through compact arrived at by negotiation rather than by reciprocal legislation is apt to be more satisfactory where the issues are important or complex. This conclusion is obviously correct. The use of reciprocal legislation should be limited to an interstate compact between a few states and on matters that do not involve important or complex problems.

Since reciprocal legislation as a method for entering into a compact is of limited value and not ordinarily used, this method must be distinguished from the more usual uses of such legislation.

VI. Enforcement of Compacts

It is well settled that an interstate compact is binding upon all of the signatory states and that one signatory state may not renounce its obligations thereunder by unilateral action. Once a compact has been entered into, has received Congressional assent, such a compact has a legal existence and is binding upon all the parties. The signatory states have a right to expect that each and every member thereto will carry out in good faith all of the duties and obligations imposed thereunder. If the compact provides, as many compacts now do, for some method whereby one member state may terminate its participation in the agreement then such method must be strictly followed. In the absence of such provision for renunciation, the agreement remains binding on all signatory states. However, some persons argue that while theoretically a state may not repudiate an existing agreement.

[50] Dodd, *Interstate Compacts*, 70 U.S. L. Rev. 557 (1936).
[51] 9 A. B. A. J. 207 (1923).

as a practical matter, there is little than can be done if a state renounces a compact.[52]

The writer does not subscribe to this view. A compact is binding upon all signatory states and if one state renounces the agreement, in the absence of provisions for renunciation, the remaining states may bring suit in the United States Supreme Court to enforce the compact.[53] While the Compact Clause of the Constitution does not have any provisions for enforcement of compacts, other sections of the Constitution confer upon the United States Supreme Court original jurisdiction to entertain suits between states of the Union.[54] When the Supreme Court enters a decree in an action between states the Court has the power to enforce its mandate. Thus, the Court could compel a recalcitrant state to fulfill its obligations under a compact. While there is no direct decision on this point, the Supreme Court has indicated that it has the means to enforce its mandate if this should be required.[55]

Actions between states have been fairly numerous. Nevertheless,

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[52] In Clark, *Interstate Compacts and Social Legislation*, 51 POL. SCI. Q. 36 (1936), the writer suggests that, "In the absence of provisions for renunciation, theory has it that a state may not repudiate an existing compact any more than it may enact legislation controverting its terms. But, as a matter of practical fact, states have on occasion resorted to the last extremity of absolute repudiation and . . . . there is little that can be done about it." The writer of the foregoing article also suggests that if a state decides that a compact violates the state constitution that this in effect abrogates the compact without the consent of the other state. *Cf.* West Virginia ex rel Dyer v. Sims, State Auditor, 341 U.S. 22 (1951).

[53] Virginia v. West Virginia, 246 U.S. 565 (1918); Virginia v. Tennessee, 148 U.S. 163 (1930); West Virginia ex rel Dyer v. Sims, State Auditor, 341 U.S. 22 (1951); Kentucky v. Indiana, 281 U.S. 163 (1930); Delaware River Joint Toll Bridge Comm. v. Colburn, 310 U.S. 419 (1940).

[54] U. S. CONST. ART. III, §2, provides in part:

> "The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, . . . Controversies between two or more States;—between a State and citizens of another State; . . .
>
> In all cases. . . . . in which a State shall be a party, the Supreme Court shall have original jurisdiction, both as to Law and Fact, with such exceptions, and under such regulations as the Congress shall make."

See also Missouri v. Illinois, 180 U.S. 208, 241 (1901); North Dakota v. Minnesota, 263 U.S. 365, 373 (1923); Kansas v. Colorado, 185 U.S. 125, 140 (1902); Minnesota v. Wisconsin, 252 U.S. 273 (1920); Nebraska v. Iowa, 145 U.S. 519 (1892); Arizona v. California, 292 U.S. 341 (1934).

[55] Virginia v. West Virginia, 246 U.S. 565 (1918); Virginia v. Tennessee, 148 U.S. 503 (1893).

In Wisconsin et al v. Illinois, et al., 281 U.S. 179, 197 (1933), the United States Supreme Court, in an opinion written by Mr. Justice Holmes showed its determination to enforce its mandates and decrees by the court's answer to the argument of the State of Illinois, that the Illinois constitution stood in the way of carrying out the court's order with respect to obtaining sufficient money through taxation for constructing the sewage disposal plants for the Chicago Sanitary District required under the Court's orders. The court pointed out it was already decided ". . . the defendants are doing a wrong to the complainants, and that they must stop it. They must find a way out of their peril. We have only to consider what is possible if the state of Illinois devotes all its powers to dealing with an exigency to the magnitude of which it seems not

such actions have always been touchy matters. Ordinarily, suits between states are filed only after all negotiations have failed in an attempt to resolve the differences between the states. States have frequently resorted to suits in the United States Supreme Court to vindicate their rights and to compel performance of obligations under agreements with other states. In *Virginia v. West Virginia*,[56] the Supreme Court reaffirmed its power to enforce its mandate in a suit brought by one state against another. In the case of *Kentucky v. Indiana*,[57] the Supreme Court was not obliged to rule on the question of compelling enforcement of the obligations assumed by one state under an interstate compact. Since it was not absolutely necessary so to do, the Court joined the states involved in assuming that the state of Indiana would perform its obligations under the compact. In this case, as in every other case, the states have adhered to the Court's ruling. Should the occasion require it is clear that the Supreme Court will coerce a recalcitrant state to perform its obligations under a compact.

VII. History and Present Status of Chicago Water Diversion Controversy

A brief review of the history and present status of the fight over diversion of waters from Lake Michigan at Chicago is necessary to understand fully the reasons why the writer believes that the compact method could solve this problem.

The so-called Chicago diversion controversy arose out of the circumstances that between the years 1892 and 1900, the City of Chicago and its suburbs carried out a plan of disposing of the sewage of the Chicago metropolitan area by cutting a canal across the low continental divide which lies about ten miles west of Lake Michigan, and discharging the sewage of that area into the Mississippi watershed by way of the Des Plaines and Illinois Rivers. However, the inception of the Chicago Drainage Canal plan of sewage disposal and protection of water supply really dates back to early Chicago.[58]

Congress in 1822 authorized the State of Illinois to survey and mark through the public lands of the United States, a route for a canal connecting the Illinois River with Lake Michigan, and setting aside ninety feet of land on either side of the proposed canal in aid of such scheme. A further grant of land was made in the year 1827. In 1836

yet to have fully awakened. *It can base no defenses upon difficulties that it has itself created. If its constitution stands in the way of prompt action, it must amend it or yield to an authority that is paramount to the state.*" (Emphasis ours)

[56] 246 U.S. 565 (1918).

[57] 281 U.S. 163 (1930).

[58] For a detailed discussion of the history, legal problems and present status of the Chicago water diversion problem, see 30 MARQ. L. REV. 149, 228 (1946-7); and 31 MARQ. L. REV. 28 (1947).

the State of Illinois enacted legislation providing for the construction of the canal, which was to be known as the Illinois & Michigan Canal. It was finally completed in 1848, a part of it substantially on the route of the present Chicago Drainage Canal. The Illinois & Michigan Canal crossed the continental divide between the Chicago and Des Plaines Rivers at a level of eight feet above the lake, and then continued on to LaSalle, Illinois, where it entered the Illinois River. It had been planned to provide a depth for this canal sufficient to take waters from Lake Michigan by gravity, but this was not accomplished, and it became necessary to supply the summit of the canal with waters from the Chicago River by means of pumps and dams.

At first only a small amount of water was pumped into the canal, but this proved insufficient for needs of navigation and sanitation, and the water was not carried into the Mississippi watershed but continued to discharge into the Chicago River. Lake Michigan was the sole source of water supply for the City of Chicago, and the sewage deposited in the river, in times of flood, washed into the lake and contaminated the city's water supply. By the year 1865 the Chicago River had become so offensive from receiving the sewage of the rapidly growing city that the authorities agreed to pump more water into the canal from the Chicago River. By 1871 the canal was enlarged, and in 1872 the summit level was lowered with the hope that this would result in a permanent flow of water from Lake Michigan through the south branch of the Chicago River in an amount sufficient to keep that stream clear and unpolluted. This did not work, and the canal again became badly contaminated. The continuance of this nuisance along the canal resulted in arousing public interest for a better system of sewage disposal and a better water supply.

The result was that many investigations were undertaken and numerous reports filed. In 1887 the Drainage and Water Supply Commission was organized which recommended that the most economical method of sewage disposal was by the discharge of the sewage into the Des Plaines River through a canal across the continental divide. In 1889 the Illinois Legislature authorized the creation of the Sanitary District, and pursuant to such authority the Sanitary District of Chicago was organized. Between the years 1892 and January 17, 1900, the Chicago Drainage Canal was constructed. Under the legislative act, a continuous flow of 20,000 cubic feet of water per second for each 100,000 of population within the Sanitary District was made mandatory. Since the opening of the Chicago Drainage Canal in 1900, the flow of the Chicago River has been reversed, and it now flows away from Lake Michigan, carrying with it waters from Lake Michigan into the Des Plaines and Illinois Rivers.

The opening of the canal in 1900 resulted in a suit by the State of Missouri against the State of Illinois to enjoin the threatened pollution of the waters of the Mississippi River.[59] An injunction was denied by the United States Supreme Court because it was not satisfied that the claims of the State of Missouri that the pollution of the waters of the Mississippi at St. Louis was caused by the introduction of untreated sewage into the Chicago Drainage Canal. The court pointed out that untreated sewage was also placed into the Mississippi River above St. Louis by Missouri cities.

Meanwhile the Great Lakes states and the port cities became alarmed over the abstraction of the waters of the Great Lakes through the Chicago Drainage Canal. They contended that it resulted in a lowering of the levels of the Great Lakes of from 6 to 8 inches for each 10,000 cubic feet per second of diversion. The Federal Government likewise became disturbed because the Sanitary District of Chicago was violating the permit issued by the Secretary of War allowing a diversion of 4,167 cubic feet per second. In 1908 the Federal Government filed a suit in the Federal District Court at Chicago to enjoin the Sanitary District from increasing the flow of waters from Lake Michigan through the Chicago Drainage Canal over and above the amount of 4,167 cubic feet per second authorized by the permit of the Secretary of War. In 1913 the Federal Government filed another suit against the Sanitary District of Chicago to enjoin the diversion of more than 4,167 cubic feet per second from Lake Michigan. These two suits were consolidated and heard as one by the Federal Court, and in 1920 an oral opinion was given in favor of the United States and against the Sanitary District of Chicago. No decree, however, was entered and further arguments were heard and in 1923 the court directed judgment for the relief demanded by the United States. In January 1925 the United States Supreme Court affirmed the decree of the lower court "without prejudice to any permit that may be issued by the Secretary of War according to law."[60]

In 1925 the Secretary of War granted a permit authorizing a diversion of waters from Lake Michigan by the Sanitary District of Chicago not to exceed 8,500 cubic feet per second upon certain conditions. This was a temporary permit only and was to expire on December 31, 1929 if not previously revoked.

In 1922 the State of Wisconsin brought an original action in the United States Supreme Court against the Sanitary District of Chicago and the State of Illinois seeking an injunction against the abstraction of the waters of the Great Lakes through the Chicago Drainage Canal.

[59] 180 U.S. 208, 241 (1901).
[60] Sanitary Dist. of Chicago v. United States, 266 U.S. 405 (1925).

In 1925 and 1926 amended bills were filed and the States of Minnesota, Ohio, Michigan, New York and Pennsylvania joined the State of Wisconsin. The Great Lakes states contended the permit issued by the Secretary of War was ultra vires and void and constituted no authority for the abstraction of the waters of the Great Lakes through the Chicago Drainage Canal. Charles Evans Hughes was appointed Special Master, and after full hearings his report was filed in November 1927, in which he made the finding that a lowering of the levels of the Great Lakes approximately six inches was caused by the abstraction of 8,500 cubic feet per second of water from Lake Michigan through the Chicago Drainage Canal and that this resulted in substantial injuries and damages to navigation and commercial interests of the complaining Great Lakes states, which damages were accentuated in times of low lake levels resulting from natural causes.[61] (The difference between extreme high levels and extreme lows is in excess of six feet, and these extremes occur at approximately 23 year intervals, with lesser intermediate fluctuations).

The United States Supreme Court in January 1929 sustained the findings of the Special Master and held that as a matter of law the permit of the Secretary of War was null and void, and that the Great Lakes states were entitled to a decree which would be "effective in bringing that violation (of the rights of the Great Lakes states) and the unwarranted part of the diversion to an end."[62] The court, however, decided to allow additional time to the Sanitary District and the State of Illinois in which to construct the needed sewage disposal plants and facilities for the disposition of the sewage of the Sanitary District. The matter was again referred to Charles Evans Hughes as Special Master, and he filed his report in December 1929 in which he recommended that the Sanitary District and the State of Illinois be given until December 31, 1938 to reduce the diversion to 1,500 cubic feet per second plus domestic pumpage. The Supreme Court affirmed these findings and entered a decree on April 21, 1930.[63]

In October 1932, the States of Wisconsin, Minnesota, Ohio and Michigan applied to the United States Supreme Court for the appointment of a special officer to execute the decree of April 21, 1930. The four states complained of the delay in the construction and completion of the works and facilities embraced in the program of the Sanitary District of Chicago for the disposal of the sewage of that area. The court enlarged the decree to provide that the State of Illinois be required to take all necessary steps to cause and secure the comple-

[61] Wis. et al v. Illinois et al., 271 U.S. 650 (1926).
[62] Wis et al v. Illinois et al., 278 U.S. 367, 408, 409, 417 (1929).
[63] Wis. et al v. Illinois et al., 281 U.S. 696 (1930).

tion of adequate sewage disposal plants and sewers to the end that the diversion of waters of Lake Michigan be reduced at the times fixed in the decree.[64]

In 1937, Congressman Parsons of Illinois introduced a bill to authorize an increase in the diversion of waters from Lake Michigan through the Chicago Drainage Canal to 5,000 cubic feet per second plus domestic pumpage. This bill was vigorously opposed by the Great Lakes states, certain port cities, and groups residing along the lower Illinois River. This bill never enacted into law.

In 1940 the State of Illinois applied for a modification of the decree entered by the Supreme Court on April 21, 1930 so as to permit a temporary increase in diversion to 5,000 cubic feet per second plus domestic pumpage.[65] A Special Master was appointed to inquire whether the partially treated or untreated sewage deposited in the Illinois Waterway (formerly known as the Chicago Drainage Canal) constituted a menace to the health of the inhabitants of certain communities located on the Waterway and on the Des Plaines and Illinois Rivers. After extensive hearings the Special Master reported that no menace to health existed. The United States Supreme Court affirmed this finding.[66]

Thereafter bills were introduced in each session of Congress which, if enacted into law, would purport to grant authority to increase the diversion of water from Lake Michigan over and above the amount fixed by the decree of April 21, 1930. No such bill was ever enacted into law. In addition to these legislative attempts, the Sanitary District of Chicago and the State of Illinois, and groups residing in the Chicago area have sought to obtain increased diversion of water from Lake Michigan by applications made to the President of the United States, to the War Department, to the Federal Power Commission, and to the War Production Board. All of these petitions and applications were vigorously opposed by the Great Lakes states, the port cities, the Great Lakes Harbors Association and by groups residing along the lower Illinois River.[67]

In 1952 bills were introduced to permit the abstraction of large quantities of water from the Great Lakes through the Chicago Drainage Canal on the theory that this would result in lowered lake levels and thus mitigate damages being caused to shore property by the then current high lake levels. No such bill was adopted by the 1952 Con-

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[64] Wis. et al v. Illinois et al., 289 U.S. 398, 710 (1933).
[65] Wis. et al v. Illinois et al., 309 U.S. 569 (1940).
[66] Wis. et al v. Illinois et al., 313 U.S. 547 (1941).
[67] See Printed Hearings before the Committee on Public Works, H.R., 82d Congress, 2d session, May 27-28, June 4-5, 1952, No. 82-18. Illinois Waterway—Diversion of Water from Lake Michigan.

gress. The fight for increased diversion continues with the introduction of similar bills in the 1953 session of Congress. The proponents of a large diversion of waters from Lake Michigan through the Chicago Drainage Canal have constantly and regularly applied pressure in Washington to obtain some color of authority to increase the diversion of water from Lake Michigan at Chicago.

VIII. History and Present Status of the St. Lawrence Seaway and Power Project

In the controversy regarding the construction of the St. Lawrence Seaway and Power Project, we find that as early as the year 1895 the governments of the United States and Canada appointed a Deep Waterways Commission to investigate the feasibility of a deep water route connecting the Atlantic Ocean with the Great Lakes via the St. Lawrence River. In 1897 this commission reported that the St. Lawrence River route was feasible and recommended that further detailed surveys be made.[68]

In 1902 Congress requested the President to invite Great Britain to join in the formation of an international waterway commission to be composed of three members each from Canada and the United States. This commission was established as the International Joint Waterways Commission in December 1903. Its principal contribution was to pave the way for the so-called Boundary Waters Treaty of 1909. Under the Boundary Waters Treaty of 1909 an International Joint Commission was established to review proposals for the construction of obstructions in and diversions of boundary waters, giving preference to uses of such waters for: domestic and sanitary purposes; for navigation and servicing of canals; and for power and irrigating purposes.

In 1914 the United States government addressed a note to the British Ambassador inquiring as to the views of the Canadian government with regard to the advisability and feasibility of a joint undertaking for the construction of a deep waterway via the St. Lawrence River for ocean-going vessels. No further action was taken due to the beginning of World War I.

Meanwhile, the opening of the Panama Canal on August 14, 1914 seriously weakened the competitive position of the Middle West and brought the East and West Coasts closer together. This led to demands for early construction of the St. Lawrence Seaway to give products from the Great Lakes area lower freight costs to the markets of the world. The increased demand for electric power in Canada and in

[68] See The Great Lakes Outlook, April 1952—*The St. Lawrence Seaway—Political Aspects*, by Naujoks, H.H.

the Northeastern part of the United States sparked a movement to utilize the tremendous potential electric power on the St. Lawrence River. The increase in foreign trade also influenced the Seaway movement. All of these developments created a widespread demand for the improvement of the St. Lawrence River to permit ocean-going vessels to enter the Great Lakes ports.

As a result of these demands for the construction of the Seaway, many organizations and commissions were created to assist in promoting the Great Lakes-St. Lawrence Seaway. The Great Lakes-St. Lawrence Tidewater Association; the Great Lakes Harbors Association, many state deep waterway commissions were all formed after World War I. Comprehensive surveys of the St. Lawrence Seaway project were undertaken and by the year 1932 there were 21 states associated with the Great Lakes-St. Lawrence Tidewater Association. On the Canadian side, interest in the St. Lawrence Seaway movement was also active and aggressive. The Canadian Deep Waterways and Power Association was formed and held many meetings. Many studies were undertaken and in January 1927 the United States Department of Commerce issued a report on the seaway, recommending a 27-foot channel. In 1928 the Canadian Advisory Committee made its report on the seaway. This report was the basis of a note from Canada to the United States January 31, 1928. Meetings on this subject were held throughout the United States and in Canada, and the question was fully debated. Negotiations were carried on in 1930 and 1931 until a treaty was signed July 18, 1932 between representatives of the United States and Canada.

This treaty provided for a 27-foot channel for navigation, and for the construction of power facilities on the St. Lawrence River. Hearings on the treaty were held in the United States Senate in 1932 and 1933. The principal support for the treaty came from states bordering on the Great Lakes and from states west of the Mississippi River. They argued that the cheaper transportation provided by the seaway would greatly aid the export trade of this area. They argued also that the seaway would greatly cheapen the cost of imports into this area of raw materials as well as consumer goods. It would restore, they said, without harming the railroads or existing facilities, the Middle West to a position of economic parity with the states benefitted by the Panama Canal. Many farm organizations supported the treaty.

The opposition to the treaty came principally from these sources: The North Atlantic port cities; the railroad interests; the coal interests and the lake carriers and the canal interests. Opponents of the treaty argued that the cost of transportation would be excessive; that there would be insufficient traffic upon the seaway to warrant any

large expenditure, and that there would be no appreciable reduction in transportation rates, but that harm would be done existing facilities. On the matter of costs it was argued that they were unreliable and should be revised. On the matter of traffic it was asserted that the coal and iron movements were principally between lake ports and that wheat was a declining export commodity. It was stated also that railroad labor would be displaced and that the American ports would suffer in favor of Montreal. It was argued, further, that there was no market for the potential power and that if such power were sold it would reduce consumption of coal by 40 million tons a year. Opposition also came from the ports of Buffalo and New Orleans, the New York Barge Canal, a number of private shippers and the eastern railroads.[69]

In March 1934 the United States Senate voted on the proposal to ratify the treaty and the vote was 46 ayes, 42 nays, 3 paired and 5 not voting. Since a two-thirds affirmative vote was needed, the treaty failed of ratification.

The failure to approve the treaty didn't end the matter. Negotiations carried on between the United States and Canada and many conferences were held to arouse new interest in the St. Lawrence Seaway and Power Project. In May 1938 the United States submitted to Canada a draft of a new treaty on this subject. In January 1940 meetings between representatives of the United States and Canada were held in Ottawa. In October 1940 negotiations were renewed, and on March 19, 1941 the Canadian-American Agreement to Develop the Great Lakes-St. Lawrence Basin was signed in Ottawa, Canada. This agreement provides for the construction of a shipway with 27-foot locks which would be sufficient to admit ninety per cent of ocean shipping from the Atlantic Ocean to the Great Lakes. It further provides for installation of power facilities on the St. Lawrence River for the development of hydro-electric power. In the 1941 session of Congress, resolutions were introduced to grant approval to the Canadian-American St. Lawrence Agreement of March 19, 1941. The resolution was never approved because of Pearl Harbor and the necessity of conserving materials for the war effort. In 1943, and again in 1944 and 1945 bills were introduced in the House and in the Senate to authorize the St. Lawrence Seaway, but they failed of passage. In the 80th and 81st Congresses, other bills were introduced on the St. Lawrence Seaway and Power Project, but none of these bills were ever approved. In June 1952, the Senate of the 82nd Congress

[69] See Fortune Magazine, Dec. 1950, *Battle of the St. Lawrence* by Lincoln. Colliers Magazine, Nov. 3, 1945. *Showdown on the St. Lawrence* by Longmire.

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COMPACTS AND AGREEMENTS BETWEEN STATES AND BETWEEN STATES AND A FOREIGN POWER

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I. INTRODUCTION

During the past three decades, the use of the interstate compact, as authorized by the United States Constitution,[1] has come into prominence as an effective device for the settling of differences between states or regions, and as a means of interstate cooperation in the disputed areas of conservation of natural resources and governmental activities.[2] The Compact Clause is brief and provides in part that "No state shall, without the consent of Congress, . . . enter into any agreement or compact with another state or with a foreign power. . . ."

Today, there are, among others, two outstanding controversies which could be resolved permanently and effectively through the use of the interstate compact.

One of these controversies which has at one time or another involved fourteen states bordering on the Great Lakes and the Mis-

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[1] United States Constitution, Art. I, Sec. 10, provides in Clause 1: "No state shall enter into any treaty, alliance or confederation. . . ." Clause 3 provides: "No state shall, without the consent of Congress, . . . enter into any agreement or compact with another state or with a foreign power. . . ."

[2] For selected material on the history, development and scope of the Compact, see: Frankfurter and Landis *The Compact Clause of the Constitution*, 34 YALE L. J. 685 (1925); Zimmerman and Wendell, *The Interstate Compact Since 1925* (1951); THE BOOK OF STATES, 1943-44 ed. pp. 51-71; 1948-49 ed. pp. 27-52; 1950-51 ed. pp. 26-31; 1952-53 ed. pp. 20-44; Report of the New York Committee on Interstate Cooperation, LEG. DOC. NO. 55, 1952; INTERSTATE COMPACTS, a compilation of articles from various sources, 1946 Colorado Water Resources Board; Dodd, *Interstate Compacts* 70 U.S. L. REV. 557 (1936) and *Interstate Compacts; Recent Developments*, 73 U.S. L. REV. 75 (1939); Bruce, *The Compacts and Agreements of States with one another and with Foreign Powers*, 2 MINN. L. REV. 500 (1918); Clark, *Interstate Compact and Social Legislation*, 50 POL. SCI. Q., 502 (1935) and 51 POL. SCI. Q. 36 (1936); Donovan, *State Compacts as a Method of Settling Problems Common to Several States*, 80 U. OF PENN. L. REV. 5 (1931); Carman, *Sovereign Rights and Relation in the Control and Use of American Waters*, 3 So. CALIF. L. REV. 84, 156, 245 (1929 and 1930); Notes: *Interstate Compacts as a Means of Settling Disputes Between States*, 35 HARV. L. REV. 322 (1922); *The Power of States to Make Compacts*, 31 YALE L. J. 635 (1922); *A Reconsideration of the Nature of Interstate Compacts*, 35 COL. L. REV. 76 (1935).

sissippi River has been the subject of litigation in the federal cour and in the United States Supreme Court for more than fifty years. This controversy likewise has been the subject of congressional atte tion for more than fifty years, and has been under scrutiny by vario public officials and many administrative bodies, including two Pre dents of the United States, various Secretaries of War, the Feder Power Commission, the War Production Board during World War I and others.[4]

In this particular controversy, the differences between the state arose over the alleged right of the Sanitary District of Chicago an the State of Illinois to abstract and permanently withdraw for sewag disposal and power purposes, huge quantities of water from the Grea Lakes-St. Lawrence system into the Mississippi watershed by way of the Chicago Sanitary and Ship Canal and the Illinois Waterway, to the detriment and damage of the peoples of the Great Lakes states. The states of New York, Pennsylvania, Ohio, Michigan, Wisconsin and Minnesota, as well as the port cities bordering on the Great Lakes, have from the beginning consistently opposed and vigorously challenged such alleged right as claimed by the Chicago Sanitary District and the State of Illinois. The United States Supreme Court, under a decree entered April 21, 1930, has limited the diversion of water from the Great Lakes-St. Lawrence water system through the Chicago Drainage Canal to 1500 cubic feet per second, plus domestic pumpage.[5]

The other problem, which has been the subject of heated debate in the Congress of the United States for more than two decades, is the proposal to construct, jointly with Canada, the so-called St. Lawrence Seaway and Power Project.[6]

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[3] Missouri v. Illinois, 180 U.S. 208 (1900); s.c. 200 U.S. 496 (1906); Sanitary District of Chicago v. United States, 266 U.S. 405 (1925); Wisconsin et al v. Illinois et al., 278 U.S. 367 (1929); s.c. 281 U.S. 179 and 696 (1930); 287 U.S. 578 (1932); 289 U.S. 395, 710 (1933); 309 U.S. 569, 636 (1940); 313 U.S. 547 (1941); 340 U.S. 858 (1950).

[4] Naujoks, *The Chicago Water Diversion Controversy*, 30 MARQ. L. REV. 149, 161, 176 (1946).

[5] 281 U.S. 696 (1930). Domestic pumpage averages about 1700 cubic feet per second.

[6] For selected readings on the history, details and present status of the St. Lawrence Seaway and Power Project see: Lincoln, *Battle of the St. Lawrence*, Fortune, Dec. 1950; Report of a Subcommittee to the Committee on Foreign Relations on S.J. 104, a Joint Resolution approving the agreement between the United States and Canada relating to the St. Lawrence Seaway and Power Project, 79th Congress, 2d session, 1946; Longmire, *Showdown on the St. Lawrence*, Colliers Nov. 3, 1945; Gladfelter, *Flying Bombs Add Argument for Seaway to Open Midwest*, Milwaukee Journal, Jan. 14, 1945; Danielian, *The Chips are down on the St. Lawrence Seaway*, Great Lakes Outlook (published by Great Lakes Harbors Association, City Hall, Milwaukee, Wis.) January, 1952; Naujoks, *The St. Lawrence Seaway, Political Aspects*, Great Lakes Outlook, April, 1952; THE ST. LAWRENCE SURVEY, PARTS I-VII, (U.S. Dep't Comm 1941); *St. Lawrence Survey, Message from the President of the United States*, SEN. DOC. No. 110, 73rd Cong., 2d Sess., 1934.

The St. Lawrence Seaway, consisting of a series of lakes and connecting channels linked with the Atlantic Ocean by way of the St. Lawrence River, is more than 90 per cent developed for navigation. The aim of the St. Lawrence Seaway and Power Project is to remove all obstructions to deep water navigation, and at the same time to provide power facilities which will develop more than one million horsepower of hydro-electric energy. The chief aim of the seaway project is to provide a navigable waterway for large ocean-going vessels from the Great Lakes to the Atlantic Ocean. This involves principally the construction of a 27-foot channel in the so-called International Rapids section of the St. Lawrence River to replace the present 14-foot channel which Canada has long maintained on its side of the river. This channel will continue in operation as a Canadian enterprise even after the deepwater channel is created. Some additional work must also be completed in the connecting channels of the Great Lakes, as well as in many lake ports to provide the required navigable depth of 27 feet for the entire Great Lakes-St. Lawrence system.

The construction of the seaway would be on a self-liquidating basis thru the levy of tolls or charges on cargoes and passenger traffic using the new deepwater navigation facilities to be provided. Under one of the latest proposals, a commission would be set up with a fund of $10,000,000, with power to borrow up to $500,000,000 to pay for the United States' share of the cost of this project. The power project contemplates the construction and installation of power facilities in the International Rapids section of the St. Lawrence River for development of hydro-electric power to be divided equally between the United States and Canada. The cost of these power facilities would also be self-liquidating and be paid for over a period of forty years.

The majority of the people living in the Great Lakes states favor the St. Lawrence Seaway and Power Project, while the Atlantic and Gulf port cities, the eastern railroads, some private power utilities, and some coal operators oppose this project because they believe it constitutes a threat to their pocketbooks. Late in September 1951, President Truman and Premier St. Laurent of Canada, discussed the St. Lawrence Seaway and Power Project, and in December 1951 legislation to authorize the construction of the St. Lawrence Seaway Project was unanimously passed by both houses of the Canadian Parliament. Provision was made in the Act to permit the United States to participate in this project if Congressional approval was obtained in the 1952 session of Congress, otherwise Canada planned to "go it alone." Canada is dead serious in its determination to construct, as soon as possible, the St. Lawrence Seaway and Power Project. However,

Canada undoubtedly would still permit United States' participation by the interested Great Lakes states through the medium of an interstate compact with approval of Congress. In June 1952, the United States Senate defeated a proposal to approve the Canadian-United States St. Lawrence Agreement of March 19, 1941 by a vote of 43 to 40.

A study of the use of interstate compacts over the past 175 years indicates that this method of action has been extremely effective in settling differences based on regional economic, social or physical conditions in America. In order to achieve a permanent, lasting and satisfactory solution for the two mentioned perennial problems, as well as for others, it would seem that a re-examination and study by all parties concerned should be made of the interstate compact, its origin, history and past uses, its legality and applicability to the problem of the control of lake levels, the uses of the waters of the Great Lakes, diversions from and into the Great Lakes, and the like, to the end that an earnest and sincere effort be made to employ it in the settlement of the many troublesome problems involving the Great Lakes region and the adjoining states.

II. History and Construction of the Compact Clause of the Constitution

A. History of the Compact Clause

The compact section of the United States Constitution has its roots deep in American colonial history. It is a part of the story of colonial boundary disputes. Almost all of the colonial charters were vague and had to be applied to strange and poorly surveyed lands. The resulting disputes were settled by two peaceful methods. One was negotiation between contending colonies—usually carried on through joint commissions. Usually the Crown approved all such agreements. If negotiations failed or in lieu of a direct settlement, the second method was followed, namely an appeal to the Crown. This was followed by a reference of the controversy to a Royal Commission. From a decision of the Commission an appeal lay to the Privy Council. These two forms of adjustment were common practice for a hundred years preceding the American Revolution. An appeal in a boundary dispute between New York and New Jersey appears in the records of the Privy Council as late as 1773.[7]

The American Revolution found many of these disputes still unsettled. It was a logical step to carry over the old idea of settling these disputes by compacts as had been done in the past.

[7] 5 Acts of Privy Council, Col. Ser. 45.

The Articles of Confederation included a provision which would permit the adjustment of boundary and other disputes. Article VI of the Articles of Confederation prohibited a state, without the consent of Congress, from entering into an agreement, alliance or treaty with any king, prince or state. The Articles then provided that no two or more states shall enter into any alliance between them without the consent of Congress.

The language of Article VI of the Articles of Confederation is interesting and reads as follows:

> "ARTICLE VI. No state without the consent of the United States in congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with any King, prince or state . . . .
>
> "No two or more states shall enter into any treaty, confederation or alliance whatever between them, without the consent of the United States in congress assembled, specifying accurately the purpose for which the same is to be entered into, and how long it shall continue."

In *Rhode Island v. Massachusetts*,[8] the United States Supreme Court pointed out that "at the adoption of the Constitution there were existing controversies between 11 states respecting their boundaries, which arose under their respective charters, and had continued from the first settlement of the colonies."

Historically, the consent of Congress to validate an agreement between states can be traced to the consent of the Crown to agreements among colonies. The colonial records disclose that during the colonial period, at least nine different boundary disputes were settled by agreement, namely:[9]

Connecticut and New Netherlands Boundary Agreement (1656)
Rhode Island and Connecticut Boundary Agreement (1663)
New York and Connecticut Boundary Agreement (1664)
New York and Connecticut Boundary Agreement (1683)
Connecticut and Rhode Island Boundary Agreement (1703)
Massachusetts and Rhode Island Boundary Agreements (1710) and (1719)
New York and Connecticut Boundary Agreement (1725)
North Carolina and South Carolina Boundary Agreement (1735)
New York and Massachusetts Boundary Agreement (1773)

During the era of the Articles of Confederation, the following compacts were entered into under the Articles of Confederation, namely:

[8] 12 Pet. 657, 723 (U.S. 1838).
[9] See Dodd, *Interstate Compacts*, 70 U.S. L. Rev. 557 (1936); Frankfurter, and Landis, *The Compact Clause of the Constitution*, 34 Yale L. J. 685, 691-695 (1925), for discussion of early history, Colonial practices, and background of present Compact Clause.

Pennsylvania and Virginia Boundary Agreement (1780)
Pennsylvania and New Jersey Agreements (1793) and (1786)
Virginia and Maryland Agreement (1785)
South Carolina and Georgia Agreement (1788)

Since the adoption of the Federal Constitution in 1789, compacts with the consent of Congress have been resorted to often in the settlement of problems arising between the states, and have been applied in many fields of legislation, including the following:

(1) Boundaries and cessions of territory.[10]

(2) Control and improvement of navigation, fishing and water rights and uses.[11]

(3) Penal jurisdiction.[12]

(4) Uniformity of legislation.[13]

(5) Interstate accounting.[14]

(6) Conservation of natural resources.[15]

(7) Utility regulation.[16]

(8) Taxation.[17] Relating to jurisdiction to tax, the exchange of tax data, and agreements as to mutual tax exemptions, and the like.

(9) Civil defense and military aid.[18] An interstate civil defense compact was drafted in 1950 by ten northeastern states and the Federal Civil Defense Administration. New York, New Jersey and Pennsylvania entered into a military aid compact in 1951, subject to approval by Congress.

(10) Educational and Institutional Compacts.[19]

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[10] Rhode Island v. Massachusetts, 12 Pet. 657, 723 (1838); Washington v. Oregon, 214 U.S. 205 (1909); Minnesota v. Wisconsin, 252 U.S. 273 (1920).

[11] State ex rel Dyer v. Sims, 58 S.E. 2d 766 (W. Va. 1950) rev'd. in 341 U.S. 22 (1951); New York Port Authority Agreement of 1921; Colorado River Compact of 1921; LaPlata River Compact of 1923; Columbia River Compact of 1925; Atlantic States Marine Fisheries Compact, 1950; New England Water Pollution Compact, 61 STAT. 682 (1947); Canadian River Compact of 1951; Yellow River Compact of 1951; Ohio River Valley Sanitation Compact of 1940.

[12] Crime Compact of 1934—Interstate supervision of parolees and probationers; also agreement as to jurisdiction over crimes committed on Lake Michigan.

[13] National Conference of Commissioners on Uniform State Laws, organized in 1892. See BOOK OF STATES, p. 18 (1952-53).

[14] Virginia v. West Virginia, 220 U.S. 1 (1911) and same parties in 246 U.S. 565 (1918)—settlement and enforcement of financial obligations.

[15] Interstate Oil Compact of 1934; Ohio River Valley Sanitation Compact of 1940 which became effective in 1948, 54 STAT. 752 (1940). New England States Anti-Pollution Agreement of 1947—Interstate Sanitation Compact, 49 STAT. 932 (1935).

[16] National Association of Public Utilities Commissioners.

[17] Kansas-Missouri Mutual Tax Exemption Agreement of 1922; Kansas City v. Fairfax Drainage District, 34 F. 2d 357 (1929); Dixie Wholesale Grocery v. Martin, 278 Ky. 705, 129 S.W. 2d 181 (1939).

[18] See THE BOOK OF STATES, *Interstate Compacts*, pp. 2-24 (1952-1953).

[19] See Note on Regional Education, *A New Use of Interstate Compact*, 34 VA. L. REV. 64 (1948); Southeastern Regional Educational Compact of 1949 as to this kind of cooperation.

B. Construction

(1) *Art. I, Sec. 10, Cl. 3, U. S. Constitution does not prohibit all agreements between states.*

The provision of the United States Constitution relating to interstate compacts or agreements is, in its terms, broad enough to prohibit every interstate compact or agreement made without the consent of Congress. Article I, Section 10, Clause 3 of the United States Constitution as we have noted hereinbefore, provides:

> "No state shall, without the consent of Congress, . . . enter into any agreement or compact with another state or with a foreign power. . . ."

The words "agreement" and "compact" are not defined in the Constitution. Both words were in use before the adoption of our Constitution in 1789 but the precise meaning was not too clear. On occasion, the words "agreement" and "compact" were used as synonyms but at other times one word was given a different shade of meaning from the other. However, it would seem that under the ordinary rules of constitutional construction, the above provision is to be confined to those objects and purposes for which the provision was framed. As so construed, Article I, Section 10, Clause 3 of the Constitution does not apply to every possible agreement or compact between the states, but only to such as might tend to alter the political powers of the states affected, and thus encroach upon or interfere with the supremacy of the United States.[20]

(2) *Some interstate agreements may be effected without Congressional consent.*

Agreements between states which are incapable of altering the political power of the states affected may be made by the states without the consent of Congress. As was pointed out in *State v. Joslin*[21] "some contracts or business arrangements between states may be effected without congressional assent." For example, the administrative agreement does not require Congressional consent because it is not a compact. The administrative agreement is usually an informal (though sometimes formal) arrangement between the administrative officers or departments of several states, or between one or more states and the United States. In the past such administrative agreements have been used by states to provide uniform practices relating to the use of and regulations relating to highways, and in the field of education, and the regulation of the business of insurance. Other interstate agreements which do not require Congressional consent include arrangements which are approved by the state legislatures.

[20] Wharton v. Wise, 153 U.S. 155 (1894); Virginia v. Tennessee, 148 U.S. 503 (1893); Union Branch R. Co. v. East Tenn., etc., 14 Ga. 327 (1853); State ex rel Baird v. Joslin, 116 Kan. 615, 227 Pac. 543 (1924).

[21] 116 Kan. 615, 227 Pac. 543 (1924). See also cases cited in footnote 20, *supra*.

(3) *States may enter into any kind of compact under the U. S. Constitution but cannot thereby surrender sovereign rights of the people.*

Except as limited by the Constitution, the several states may enter into any compact, agreement or other arrangement as they choose, provided, the states cannot limit or surrender by such compact or agreement, the sovereign rights of the people. Such compacts, entered into with the consent of Congress, relating to various fields of interstate cooperation, have been upheld as against numerous constitutional objections, both Federal and state.[22]

In *City of New York v. Willcox*,[23] it was held that the Port of New York Authority,[24] providing for a joint commission of New Jersey and New York authorities for management of the port of New York, etc., is not invalid as creating an unauthorized quasi-political subdivision of the United States, in violation of the United States Constitution.

In the recent case of *State ex rel Dyer v. Sims*,[25] the court, speaking through Mr. Justice Frankfurter, in sustaining the Compact in question, held that the West Virginia Act ratifying into law the Ohio River Valley Sanitation Compact[26] entered into by eight states to control pollution in the Ohio River system is not invalid, either (1) on the ground that the compact delegates police power of West Virginia to other states or to the Federal Government, or (2) on the ground that the compact binds future legislatures to make appropriations for continued activities of the Sanitation Commission and thus violates the West Virginia Constitution limiting purposes for which the state may contract debt.

In *State v. Joslin*[27] it was held that an agreement between the states of Kansas and Missouri ratified by Congress, whereby such states mutually agreed that the water plants located in Kansas City, Kansas, and Kansas City, Missouri, located within their respective territories, should be exempt from taxation, is valid notwithstanding objection on the ground that the subject is not one concerning which the states may enter into an agreement with each other with the consent of Congress.

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[22] West Virginia ex rel Dyer v. Sims, State Auditor, 341 U.S. 22 (1951); New Jersey v. New York, et al., 283 U.S. 336 (1931); Hinderlider v. LaPlata River and C. Creek Ditch Co., 304 U.S. 92 (1938); rehearing denied in 305 U.S. 668 (1938); Wharton v. Wise, 153 U.S. 155 (1894); Parker v. Riley, 18 Cal. 2d 83 (1941). See Note 134 A.L.R. 1417; 49 AM. JUR. STATES § 13.

[23] 115 Misc. 351, 89 N.Y.S. 724 (1921).

[24] New York Laws 1921, c. 154.

[25] 341 U.S. 22 (1951).

[26] 54 STAT. 752 (1940); 33 U.S.C.A. § 567a (1950).

[27] 116 Kan. 615, 227 Pac. 543 (1924); See also, State v. Cunningham 102 Miss. 237, 59 So. 76 (1912).

However, there are limits upon the right of a state to contract with another, even with the consent of Congress.[28]

(4) *An interstate compact may not be amended, modified, altered or changed in any way, without the consent of all the parties to the agreement.*

As in the case of ordinary private agreements, an interstate compact between two or more states or between a state and a foreign power, cannot be amended, modified, altered or changed in any way without the consent of all the parties to the compact. Neither may the terms of the compact be renounced by one of the parties thereto in a unilateral action, in the absence of a provision in the compact for renunciation of the compact by one of the parties thereto. A recent decision of the United States Supreme Court touching on these questions is found in the case of *West Virginia ex rel Dyer v. Sims, State Auditor.*[29]

(5) *State's assent to interstate compact does not require technical terms.*

An Act of each of the legislatures of the states parties to an interstate agreement is needed to create a valid agreement between the states. In making such a contract, no technical terms need be used. It is sufficient to employ terms which would be sufficient ordinarily to give rise to a contract between the state and an individual. The Courts will construe the compact or agreement, as in the case of ordinary private contracts, so as to carry out the intention of the contracting states,[30] with due regard to the fact that sovereign states are parties to the agreement.

(6) *The Consent of Congress to an interstate compact may be informal and may be given after as well as before the making of the agreement.*

Before a compact can attain full legal stature, it must have received Congressional approval. This fact permits Congress to distinguish between a compact and a treaty. Ordinarily, a court would construe as a compact a proposal which had received Congressional approval. It is possible that under unusual circumstances, a court might construe such proposal as a treaty. However, to date this has never occurred.

The consent of Congress, which may be either general or specific, is sometimes given by resolution, and on other occasions by formal

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[28] La Plata River and C. Creek Ditch Co. v. Hinderlider, 93 Colo. 128, 25 P. 2d 87 (1933), appeal dismissed in 291 U.S. 650 (1934). See 11 AM. JUR. CONSTITUTIONAL LAW §254; 16 C.J.S. CONSTITUTIONAL LAW §179.

[29] 341 U.S. 22 (1951); also see Chesapeake etc., Canal Co. v. Baltimore, etc., R. Co., 4 Gill & J. 1 (Md. 1832).

[30] Virginia ex rel Dyer et al., v. Sims, State Auditor, 341 U.S. 22 (1951); Virginia v. West Virginia, 246 U.S. 565 (1918); Kentucky v. Indiana, 281 U.S. 63 (1930).

enactments. In either event, such approval is subject to Presidential veto, since under Article I, Section 7, Clause 3 of the Constitution, "every order, resolution or vote to which the concurrence of the Senate and the House of Representatives may be necessary" is limited by the veto power. It is significant that no compact has ever been vetoed. Congressional consent may be absolute, or it may be limited in some manner.

The consent of Congress to an agreement between states may be given either before or after the making of an interstate compact. Such assent of Congress need not be formal or technical in character or language, but it is sufficient if Congress has expressed its assent to an interstate compact by some positive act in relation to the agreement or by the adoption or approval of the proceedings taken under any such agreement or by sanction of the objects of the compact.[31]

In the leading case of *Chesapeake Canal Co. v. Baltimore etc. R. Co.*[32] it was said: "There is no particular form in which the assent of Congress is required to be given, and it is not material in which form it is given, provided it is done."

In *Virginia v. Tennessee*[33] the court said: "The Constitution does not state when the consent of Congress shall be given, whether it shall precede or may follow the compact made, or whether it shall be express or may be implied."

In *State ex rel Baird v. Joslin,*[34] in upholding an agreement between two states, the Kansas Court stated:

> "The consent of Congress was given by ratification after the two states had acted, but that is not a good ground of objection. 'The Constitution makes no provision respecting the mode or form in which the consent of Congress is to be signified, very properly leaving that matter to the wisdom of that body, to be decided upon according to the ordinary rules of law and of right reason. The only question in cases which involve that point is: Has Congress by some positive act in relation to such agreement, signified the consent of that body to its validity' (Green v. Biddle, 21 U.S. 1, 85)"

The Kansas Supreme Court further pointed out that—

> "The Federal Constitution (Art. I, Sec. 10, Par. 3) by forbidding states to enter into any agreement or compact with each other without the consent of Congress, recognizes their power to do so with that consent. (Poole v. Fleeger, 36 U.S. 185, 209). Moreover, some contracts or business arrangements between states may be effected without Congressional

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[31] Wharton v. Wise, 153 U.S. 155 (1894); Virginia v. Tennessee, 148 U.S. 503 (1893); Virginia v. West Virginia, 11 Wall. 39 (U.S. 1870).
[32] 4 Gill & J. 1, 136 (Md. 1832).
[33] 148 U.S. 503, 521 (1893).
[34] 116 Kan. 615, 227 Pac. 543 (1924).

> consent. (Virginia v. Tennessee, 148 U.S. 503, 518). 'The terms, "compacts" and "agreements", as used in this section, cover all stipulations affecting the conduct or claims of states, whether verbal or written, formal or informal, positive or implied, with each other' (Annotated Constitution, published by authority of the U.S. Senate, p. 365) not forbidden by the Constitution, for even with the consent of Congress, the states may not disobey its injunctions—may not, for instance, do any of the things prohibited by the first paragraph of the section cited (In re Rahrer, 140 U.S. 545, 560), such as entering into a treaty, alliance or confederation. It has been said that the clause 'compacts and agreements' as distinguished from 'treaty, alliance or confederation' may 'very properly apply to such as regarded what might be deemed mere private rights of sovereignty, such as questions of boundary, interests in land situate in the territory of each other, and other internal regulations for the mutual comfort and convenience of states bordering on each other.' (Quoted from Story's Commentaries on the Constitution (Sec. 1403) in Virginia v. Tennessee, 148 U.S. 503, 519)"

Where consent is given in advance by Congress it is often provided that such consent is given subject to the submission of completed compacts for approval by Congress. Consent will be valid even though given after the passage of a number of years. In fact, before 1921, virtually every compact was fully negotiated and formulated before Congressional consent was sought or obtained. A new technique appearing in recent years is a Blanket Consent Act enacted by Congress, sometimes even before any negotiations have been entered into between the states.

Whether silence could be construed to operate as consent is still a moot question. One writer argues that:[35]

> "The consent of Congress may assume the form of any action signifying acquiescence in the terms of the compact. Its silence, however, may not properly be construed as assent."

Some authorities have, however, indicated a contrary view.

A more complicated question, and one upon which authorities are divided, is whether or not all agreements between the states are subject to the Compact Clause of the Constitution and hence require congressional consent to be effective, or whether some agreements are of such a nature as to avoid the Compact Clause requirement of congressional consent. The proponents of the view that congressional consent is not required for all valid agreements entered into between states rely for the most part upon statements found in the leading decision of *Virginia v. Tennessee*,[36] and in cases which cite that deci-

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[35] 35 Col. L. R. 76 (1936).
[36] 148 U.S. 503 (1893).

sion, such as *McHenry County et al. v. Brady et al.*[37] Writers who take the opposite view and who insist that the validity of all compacts and agreements is dependent upon the assent of Congress, find support for this view in the case of *Holmes v. Jennison*,[38] where Mr. Chief Justice Taney declared that all compacts and agreements between states or between a state and a foreign power to be valid must be consented to by Congress.

One writer, in support of this view, argues that:[39]

> "An 'agreement or compact' must be a transaction between states: neither mere similarity of conduct arising from common motives, nor acquiesences of one state in the acts of another will constitute an 'agreement' in the absence of an interstate promise or grant. While the compact clause applies in terms to all consensual transactions between states, the view has been advanced that agreements lacking political implications are valid even in the absence of Congressional consent. Judicial authority for this position consists, however, of the reptition of an erroneous dictum in Virginia v. Tennessee, and a group of cases in state courts which either involve no interstate transactions or are concerned with no state promise or grant. Adherence to the doctrine would require that the conventional distinction between compacts and prohibited treaties, based upon the presence or absence of political consequences, be abandoned. Whatever the practical advantages of upholding certain agreements in the absence of consent, the theory is inconsistent with the apparent purpose of the compact clause; the submission of every interstate agreement to Congressional scrutiny in order to determine whether the extent and nature of its political implications are such that it is objectionable as a 'treaty'."

The view expressed above finds support in the conclusions of a writer whose discussion on this subject is found in an issue of the Yale Law Journal.[40]

As we have indicated hereinbefore some interstate agreements may be effected without Congressional consent, nevertheless a word of caution is warranted. Because almost any compact of importance is bound to affect the power balance between the states and the Federal Government and hence could be considered political in nature, the states contemplating the making of a compact would be wise to include a provision for Congressional consent. A compact on the subject of the regulation of the levels of the Great Lakes and diversions therefrom, or on the subject of the St. Lawrence Seaway and Power Project, would certainly require Congressional consent.

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[37] 37 N.D. 59, 163 N.W. 540 (1917).
[38] 14 Pet. 540 (U.S. 1840).
[39] 35 COL. L. REV. 76 (1936).
[40] 31 YALE L. J. 635 (1922).

III. Distinction Between Compacts and Treaties

The definition of a "treaty" under the United States Constitution is still a relatively unsettled matter of law. In distinguishing a treaty from a compact, under the Constitution, the problem seems political rather than legal. Inasmuch as a compact requires the consent of Congress before it can become effective, the decision is said to be left to Congress to determine in each instance whether the proposal is a treaty or a compact by withholding or granting its consent. Generally the United States Supreme Court has upheld each compact, assented to by Congress, which has come before the high court for review.

As Mr. Justice Brandeis, in considering the nature of a compact, well said in the case of *Hinderlider v. LaPlata River & Cherry Creek Ditch:*[41]

> "The compact—the legislative means—adapts to our Union of Sovereign States, the age-old treaty-making power of independent sovereign nations. Adjustment by compact without a judicial or quasi-judicial determination of existing rights had been practiced in the Colonies, was practiced by the States before the adoption of the Constitution, and had been extensively practiced in the United States for nearly half a century before this Court first applied the judicial means in settling the boundary dispute in State of Rhode Island v. (Commonwealth of) Massachusetts, 12 Pet. 657, 723-725, 9 L.Ed. 1233."

One writer, in considering the distinction between a treaty and a compact, makes the following observation:[42]

> "The distinction which the framers of the Constitution intended to draw between agreements unconditionally prohibited and those permitted with the consent of Congress is not apparent from the language of the Constitution itself. Nor is aid to be derived from literature contemporary with the Constitutional Convention. There was little or no discussion of these two clauses while the Constitution was in making, and the question has never been judicially determined. Story maintained that the terms 'treaty, alliance, and confederation' applied to treaties of a political character, such as 'treaties of alliance for purposes of peace and war; and treaties of confederation, in which the parties are leagued for mutual government; political cooperation, and the exercise of political sovereignty; and treaties of cession of sovereignty, or conferring internal political jurisdiction or external political dependence, or general commercial privileges'. The terms 'agreement' and 'compact' referred, in his opinion, to 'private rights of sovereignty; such as questions of boundary; interests in land situated in the territory of each other; and other

[41] 304 U.S. 92, 104 (1938).
[42] 31 YALE L. J. 635 (1922).

internal regulations for the mutual comfort and convenience of states bordering on each other.' "

Another author notes the reasons behind the distinction made between treaties and compacts in Article I, Section 10 of the United States Constitution, as follows.[43]

> "A distinction may be drawn between the requirements of subdivision 3 of Section 10 and the prohibition contained in subdivision 1 of the same section. . . . In order to establish the sovereignty of the Union for purposes of international relations, it was essential that the states should not enter into any alliance or confederation and that treaties should be entered into only by the Federal Government. A treaty between states would in itself be destructive of national sovereignty. A compact or agreement, however, would not necessarily be destructive of national sovereignty although it might involve issues affecting the entire nation. So it is that, while Congress cannot authorize the state to enter into any treaty, alliance or confederation, agreements between the states may be made, and to protect the national interests it is provided that the consent of Congress must be obtained."

The words "compact and agreement" in Article I, Section 10, Clause 3 of the United States Constitution, it is generally agreed, are used synonymously. In *Virginia v. Tennessee*[44] the Court, through Mr. Justice Field, said:

> "Compacts or agreements—and we do not perceive any difference in the meaning except that the word 'compact' is generally used with reference to more formal and serious engagements than is usually implied in the term 'agreement'—cover all stipulations affecting the conduct of the claims of the parties."

Regardless of the manner in which interstate compacts or agreements are negotiated, entered into and signed on behalf of the signatory states, it is clear that a true compact is not a treaty. If the agreement between the states is a treaty in fact, it could not then be a compact and hence would not be permissible under Article I, Section 10, Clause 1, of the Constitution. A compact, since it does not effect the political balance between the states and the Federal Government, is in essence nothing more than a glorified contract between two or more states or between a state and a foreign power. Accordingly, a compact should be and is generally interpreted in accordance with the rules pertaining to private contracts or agreements. The fact is, however, because of the high character of the parties to the compact (be-

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[43] Donovan, *State Compact As a Method of Settling Problems Common to Several States*, 80 U. OF PENN. L. REV. 5 (1931).
[44] 148 U.S. 503, 520 (1894).

ing quasi-sovereign states), the thinking of the courts in considering compacts is influenced to some extent. This is always the case when states are party litigants in the courts. Thus, the courts will generally follow the interpretation placed upon the particular agreement by the action of Congress in giving its consent to a compact. If the Congress labels the agreement as a compact and hence non-political in character, the courts will generally accept this interpretation as final.

IV. Validity of Compacts With a Foreign Power

In most cases to date, the signatory powers to interstate compacts are quasi-sovereign states of the Union. This is the usual situation as an examination of the interstate compacts entered into to date will disclose. However, under the Constitution, there is nothing to prevent a foreign power, such as Canada, from also participating as a signatory party under a compact. In a case where the foreign power has a significant interest in the subject matter of the agreement, it would be not only desirable but necessary for the foreign power to be a party thereto. This would be true in a matter involving international waters, such as a compact between the adjoining Great Lakes states involving the regulation of the levels of such lakes and their connecting waters. Canada would most certainly be interested because its port cities and commerce would be directly affected by any man made regulation of the levels of the Great Lakes. The same would be true in the matter of the St. Lawrence Seaway and Power Project which project would involve in part international waters.

Some individuals have raised the question whether a compact between one or more states and a foreign power would be constitutional. A reading of Article I, Section 10, Clause 3, of the Constitution would seem to dispel any such doubt. This Section states:

> "No state shall, without the consent of Congress . . . enter into any agreement or compact with another state or with a foreign power."

The above section clearly authorizes a compact with a foreign power. Logic likewise would dictate the view that under the Constitution a compact between one or more states and a foreign power is permissible and is on the same level as an ordinary compact between two states. One writer, who also takes this view, points out that:[45]

> "The constitution makes no distinction between interstate agreements and agreements between the states and foreign governments, and hence any agreement or compact, not a treaty, alliance or confederation, would be valid, provided it is approved by congress."

[45] 31 Yale L. J. 635 (1922).

The present trend toward the use of the compact to obtain cooperation between states and a foreign power is shown by the recent developments in the St. Lawrence Seaway and Power Project.

Former Senator Moody of Michigan, late in the 1952 session of Congress, introduced a bill in the United States Senate, which if enacted into law, would have authorized the states bordering on the Great Lakes by interstate compact to construct jointly with Canada a deep-water channel connecting the Great Lakes and the Atlantic Ocean via the St. Lawrence River.[46] There can be no question but that Senator Moody had a legal opinion to the effect that a compact with Canada would be authorized under the Compact Clause of the Constitution. On January 3, 1953, Representative Dingell of Michigan introduced a joint resolution "To authorize a compact or agreement between the States of Maine, New Hampshire, Vermont, New York, Pennsylvania, Ohio, Indiana, Michigan, Illinois, Wisconsin, Minnesota, and certain other States, and the Dominion of Canada, with respect to the St. Lawrence seaway."

While there is no United States Supreme Court decision directly sustaining a compact with a foreign power, since this point has never been directly involved in litigation, there are several decisions of the courts which suggest that in a proper case a compact with a foreign power would be sustained. In the case of *Holmes v. Jennison,*[47] which involved the legality of the proposed extradition of a fugitive from Vermont to Canada, the United States Supreme Court did suggest that a compact with Canada on this subject might be legal. Mr. Chief Justice Taney, in referring to the possible use of a compact, said:[48]

> "If such an arrangement is deemed desirable, the foresight of the framers of the constitution has provided the way for doing it, without interfering with the powers of foreign intercourse committed to the general government or endangering the peace of the Union. Under the . . . Constitution, any state with the consent of Congress, may enter into such an agreement with the Canadian authorities. The agreement would in that event be made under the supervision of the United States. . . ."

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[46] Senator Wiley of Wisconsin and Representative Dondero of Michigan introduced in the Senate and the House of Representatives similar bills to provide for United States participation with Canada in the St. Lawrence seaway and power project. These bills were introduced in January 1953. On January 23, 1953, the Great Lakes Harbors Association, after vote of its officers and members of the executive committee, endorsed the St. Lawrence project and specifically the principle of the Wiley and Dondero bills. The association is made up of representatives of municipalities, with the exception of Chicago, bordering on the Great Lakes. See Chicago Daily Tribune, Saturday, January 24, 1953.

[47] 14 Pet. 538 (U.S. 1840).

[48] 14 Pet. 538, 578 (U.S. 1840).

In another interesting decision,[49] the North Dakota Supreme Court sustained the action of a North Dakota Board of Drainage Commissioners which had built a drain extending fourteen miles into Canada even though a portion of the drain was vested in a Canadian municipality and no Congressional consent had been sought or obtained. The court ruled that the agreement in question was not a prohibited treaty but was a valid compact even though it lacked Congressional approval, since the compact was one which involved no national interest and hence did not need the consent of Congress.

It is clear that if the question concerning the legality of a compact with a foreign power ever is raised in the courts the ruling will be that such a compact is permissible under the Constitution.

V. Procedure in Negotiating an Interstate Compact

A. In General

The first step in the formulation of any interstate compact is to secure the active interest of the various states involved in controversy or who seek cooperation. After the states concerned become actively interested, each will normally appoint compact commissioners. Ordinarily this will be done pursuant to legislative direction, but this may be carried out by executive act alone. Another plan could have the legislature create a commission to study first the feasibility and desirability of entering into a specific compact. If commissioners are appointed, they will meet with the commissioners of the other states for the purpose of negotiating the proposed compact. The personnel for these commissions, or the chief adviser for such commissions, are most profitably drawn from those who are experts in the field.

After the joint compact commissioners have negotiated the compact, the next step normally is ratification of such agreement by each of the state legislatures concerned. However, it is also possible for the legislatures to have previously provided that the signing by the commissioners shall bind the state. The latter procedure speeds up the final adoption of the compact. The signatory states may consummate a compact by any legislative act manifesting an intent to enter into the transaction and no specific wording or phraseology is required in the enabling act.

A compact may provide that it shall take effect upon a certain date, upon ratification by a stipulated number of states, upon ratification by all of the states, or in some similar manner depending upon the nature and substance of the compact. Ratification by the legislature, whether by statute, joint resolution, statutory offer by one state to another, or parallel legislation incorporating an agreement previously drafted by

[49] McHenry County v. Brady, 37 N.D. 59, 163 N.W. 540 (1917).

the representatives party to the compact, is a legislative act and hence subject to veto by the governor. The compact may include a provision that the agreement may be terminated by mutual consent of the participating states.

B. Reciprocal Legislation

An alternative method of entering into a compact is through reciprocal legislation. One prominent writer on the subject of interstate compacts has the following to say concerning the reciprocal legislation method of entering into compacts:[50]

> "The making of a compact by the method of reciprocal legislation consists of the enactment of a statute which is in effect an offer by one state, and an acceptance evidenced by enactment of the same statute by one or more other states. The typical statute usually provides for exchange of formal ratification by the enacting states. To make it a valid compact within the meaning of the Constitution, there must, of course, be consent on the part of Congress."

In a note by J. P. Chamberlain,[51] the author reaches the conclusion that legislation through compact arrived at by negotiation rather than by reciprocal legislation is apt to be more satisfactory where the issues are important or complex. This conclusion is obviously correct. The use of reciprocal legislation should be limited to an interstate compact between a few states and on matters that do not involve important or complex problems.

Since reciprocal legislation as a method for entering into a compact is of limited value and not ordinarily used, this method must be distinguished from the more usual uses of such legislation.

VI. Enforcement of Compacts

It is well settled that an interstate compact is binding upon all of the signatory states and that one signatory state may not renounce its obligations thereunder by unilateral action. Once a compact has been entered into, has received Congressional assent, such a compact has a legal existence and is binding upon all the parties. The signatory states have a right to expect that each and every member thereto will carry out in good faith all of the duties and obligations imposed thereunder. If the compact provides, as many compacts now do, for some method whereby one member state may terminate its participation in the agreement then such method must be strictly followed. In the absence of such provision for renunciation, the agreement remains binding on all signatory states. However, some persons argue that while theoretically a state may not repudiate an existing agreement.

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[50] Dodd, *Interstate Compacts*, 70 U.S. L. Rev. 557 (1936).
[51] 9 A. B. A. J. 207 (1923).

as a practical matter, there is little than can be done if a state renounces a compact.[52]

The writer does not subscribe to this view. A compact is binding upon all signatory states and if one state renounces the agreement, in the absence of provisions for renunciation, the remaining states may bring suit in the United States Supreme Court to enforce the compact.[53] While the Compact Clause of the Constitution does not have any provisions for enforcement of compacts, other sections of the Constitution confer upon the United States Supreme Court original jurisdiction to entertain suits between states of the Union.[54] When the Supreme Court enters a decree in an action between states the Court has the power to enforce its mandate. Thus, the Court could compel a recalcitrant state to fulfill its obligations under a compact. While there is no direct decision on this point, the Supreme Court has indicated that it has the means to enforce its mandate if this should be required.[55]

Actions between states have been fairly numerous. Nevertheless,

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[52] In Clark, *Interstate Compacts and Social Legislation*, 51 POL. SCI. Q. 36 (1936), the writer suggests that, "In the absence of provisions for renunciation, theory has it that a state may not repudiate an existing compact any more than it may enact legislation controverting its terms. But, as a matter of practical fact, states have on occasion resorted to the last extremity of absolute repudiation and . . . . there is little that can be done about it." The writer of the foregoing article also suggests that if a state decides that a compact violates the state constitution that this in effect abrogates the compact without the consent of the other state. *Cf.* West Virginia ex rel Dyer v. Sims, State Auditor, 341 U.S. 22 (1951).

[53] Virginia v. West Virginia, 246 U.S. 565 (1918); Virginia v. Tennessee, 148 U.S. 163 (1930); West Virginia ex rel Dyer v. Sims, State Auditor, 341 U.S. 22 (1951); Kentucky v. Indiana, 281 U.S. 163 (1930); Delaware River Joint Toll Bridge Comm. v. Colburn, 310 U.S. 419 (1940).

[54] U. S. CONST. ART. III, §2, provides in part:

> "The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, . . . Controversies between two or more States:—between a State and citizens of another State; . . .
>
> In all cases. . . . . in which a State shall be a party, the Supreme Court shall have original jurisdiction, both as to Law and Fact, with such exceptions, and under such regulations as the Congress shall make."

See also Missouri v. Illinois, 180 U.S. 208, 241 (1901); North Dakota v. Minnesota, 263 U.S. 365, 373 (1923); Kansas v. Colorado, 185 U.S. 125, 140 (1902); Minnesota v. Wisconsin, 252 U.S. 273 (1920); Nebraska v. Iowa, 145 U.S. 519 (1892); Arizona v. California, 292 U.S. 341 (1934).

[55] Virginia v. West Virginia, 246 U.S. 565 (1918); Virginia v. Tennessee, 148 U.S. 503 (1893).

In Wisconsin et al v. Illinois, et al., 281 U.S. 179, 197 (1933), the United States Supreme Court, in an opinion written by Mr. Justice Holmes showed its determination to enforce its mandates and decrees by the court's answer to the argument of the State of Illinois, that the Illinois constitution stood in the way of carrying out the court's order with respect to obtaining sufficient money through taxation for constructing the sewage disposal plants for the Chicago Sanitary District required under the Court's orders. The court pointed out it was already decided ". . . the defendants are doing a wrong to the complainants, and that they must stop it. They must find a way out of their peril. We have only to consider what is possible if the state of Illinois devotes all its powers to dealing with an exigency to the magnitude of which it seems not

such actions have always been touchy matters. Ordinarily, suits between states are filed only after all negotiations have failed in an attempt to resolve the differences between the states. States have frequently resorted to suits in the United States Supreme Court to vindicate their rights and to compel performance of obligations under agreements with other states. In *Virginia v. West Virginia,*[56] the Supreme Court reaffirmed its power to enforce its mandate in a suit brought by one state against another. In the case of *Kentucky v. Indiana,*[57] the Supreme Court was not obliged to rule on the question of compelling enforcement of the obligations assumed by one state under an interstate compact. Since it was not absolutely necessary so to do, the Court joined the states involved in assuming that the state of Indiana would perform its obligations under the compact. In this case, as in every other case, the states have adhered to the Court's ruling. Should the occasion require it is clear that the Supreme Court will coerce a recalcitrant state to perform its obligations under a compact.

VII. History and Present Status of Chicago Water Diversion Controversy

A brief review of the history and present status of the fight over diversion of waters from Lake Michigan at Chicago is necessary to understand fully the reasons why the writer believes that the compact method could solve this problem.

The so-called Chicago diversion controversy arose out of the circumstances that between the years 1892 and 1900, the City of Chicago and its suburbs carried out a plan of disposing of the sewage of the Chicago metropolitan area by cutting a canal across the low continental divide which lies about ten miles west of Lake Michigan, and discharging the sewage of that area into the Mississippi watershed by way of the Des Plaines and Illinois Rivers. However, the inception of the Chicago Drainage Canal plan of sewage disposal and protection of water supply really dates back to early Chicago.[58]

Congress in 1822 authorized the State of Illinois to survey and mark through the public lands of the United States, a route for a canal connecting the Illinois River with Lake Michigan, and setting aside ninety feet of land on either side of the proposed canal in aid of such scheme. A further grant of land was made in the year 1827. In 1836

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yet to have fully awakened. *It can base no defenses upon difficulties that it has itself created. If its constitution stands in the way of prompt action, it must amend it or yield to an authority that is paramount to the state.*" (Emphasis ours)

[56] 246 U.S. 565 (1918).

[57] 281 U.S. 163 (1930).

[58] For a detailed discussion of the history, legal problems and present status of the Chicago water diversion problem, see 30 MARQ. L. REV. 149, 228 (1946-7); and 31 MARQ. L. REV. 28 (1947).

the State of Illinois enacted legislation providing for the construction of the canal, which was to be known as the Illinois & Michigan Canal. It was finally completed in 1848, a part of it substantially on the route of the present Chicago Drainage Canal. The Illinois & Michigan Canal crossed the continental divide between the Chicago and Des Plaines Rivers at a level of eight feet above the lake, and then continued on to LaSalle, Illinois, where it entered the Illinois River. It had been planned to provide a depth for this canal sufficient to take waters from Lake Michigan by gravity, but this was not accomplished, and it became necessary to supply the summit of the canal with waters from the Chicago River by means of pumps and dams.

At first only a small amount of water was pumped into the canal, but this proved insufficient for needs of navigation and sanitation, and the water was not carried into the Mississippi watershed but continued to discharge into the Chicago River. Lake Michigan was the sole source of water supply for the City of Chicago, and the sewage deposited in the river, in times of flood, washed into the lake and contaminated the city's water supply. By the year 1865 the Chicago River had become so offensive from receiving the sewage of the rapidly growing city that the authorities agreed to pump more water into the canal from the Chicago River. By 1871 the canal was enlarged, and in 1872 the summit level was lowered with the hope that this would result in a permanent flow of water from Lake Michigan through the south branch of the Chicago River in an amount sufficient to keep that stream clear and unpolluted. This did not work, and the canal again became badly contaminated. The continuance of this nuisance along the canal resulted in arousing public interest for a better system of sewage disposal and a better water supply

The result was that many investigations were undertaken and numerous reports filed. In 1887 the Drainage and Water Supply Commission was organized which recommended that the most economical method of sewage disposal was by the discharge of the sewage into the Des Plaines River through a canal across the continental divide. In 1889 the Illinois Legislature authorized the creation of the Sanitary District, and pursuant to such authority the Sanitary District of Chicago was organized. Between the years 1892 and January 17, 1900, the Chicago Drainage Canal was constructed. Under the legislative act, a continuous flow of 20,000 cubic feet of water per second for each 100,000 of population within the Sanitary District was made mandatory. Since the opening of the Chicago Drainage Canal in 1900, the flow of the Chicago River has been reversed, and it now flows away from Lake Michigan, carrying with it waters from Lake Michigan into the Des Plaines and Illinois Rivers.

The opening of the canal in 1900 resulted in a suit by the State of Missouri against the State of Illinois to enjoin the threatened pollution of the waters of the Mississippi River.[59] An injunction was denied by the United States Supreme Court because it was not satisfied that the claims of the State of Missouri that the pollution of the waters of the Mississippi at St. Louis was caused by the introduction of untreated sewage into the Chicago Drainage Canal. The court pointed out that untreated sewage was also placed into the Mississippi River above St. Louis by Missouri cities.

Meanwhile the Great Lakes states and the port cities became alarmed over the abstraction of the waters of the Great Lakes through the Chicago Drainage Canal. They contended that it resulted in a lowering of the levels of the Great Lakes of from 6 to 8 inches for each 10,000 cubic feet per second of diversion. The Federal Government likewise became disturbed because the Sanitary District of Chicago was violating the permit issued by the Secretary of War allowing a diversion of 4,167 cubic feet per second. In 1908 the Federal Government filed a suit in the Federal District Court at Chicago to enjoin the Sanitary District from increasing the flow of waters from Lake Michigan through the Chicago Drainage Canal over and above the amount of 4,167 cubic feet per second authorized by the permit of the Secretary of War. In 1913 the Federal Government filed another suit against the Sanitary District of Chicago to enjoin the diversion of more than 4,167 cubic feet per second from Lake Michigan. These two suits were consolidated and heard as one by the Federal Court, and in 1920 an oral opinion was given in favor of the United States and against the Sanitary District of Chicago. No decree, however, was entered and further arguments were heard and in 1923 the court directed judgment for the relief demanded by the United States. In January 1925 the United States Supreme Court affirmed the decree of the lower court "without prejudice to any permit that may be issued by the Secretary of War according to law."[60]

In 1925 the Secretary of War granted a permit authorizing a diversion of waters from Lake Michigan by the Sanitary District of Chicago not to exceed 8,500 cubic feet per second upon certain conditions. This was a temporary permit only and was to expire on December 31, 1929 if not previously revoked.

In 1922 the State of Wisconsin brought an original action in the United States Supreme Court against the Sanitary District of Chicago and the State of Illinois seeking an injunction against the abstraction of the waters of the Great Lakes through the Chicago Drainage Canal.

[59] 180 U.S. 208, 241 (1901).
[60] Sanitary Dist. of Chicago v. United States, 266 U.S. 405 (1925).

In 1925 and 1926 amended bills were filed and the States of Minnesota, Ohio, Michigan, New York and Pennsylvania joined the State of Wisconsin. The Great Lakes states contended the permit issued by the Secretary of War was ultra vires and void and constituted no authority for the abstraction of the waters of the Great Lakes through the Chicago Drainage Canal. Charles Evans Hughes was appointed Special Master, and after full hearings his report was filed in November 1927, in which he made the finding that a lowering of the levels of the Great Lakes approximately six inches was caused by the abstraction of 8,500 cubic feet per second of water from Lake Michigan through the Chicago Drainage Canal and that this resulted in substantial injuries and damages to navigation and commercial interests of the complaining Great Lakes states, which damages were accentuated in times of low lake levels resulting from natural causes.[61] (The difference between extreme high levels and extreme lows is in excess of six feet, and these extremes occur at approximately 23 year intervals, with lesser intermediate fluctuations).

The United States Supreme Court in January 1929 sustained the findings of the Special Master and held that as a matter of law the permit of the Secretary of War was null and void, and that the Great Lakes states were entitled to a decree which would be "effective in bringing that violation (of the rights of the Great Lakes states) and the unwarranted part of the diversion to an end."[62] The court, however, decided to allow additional time to the Sanitary District and the State of Illinois in which to construct the needed sewage disposal plants and facilities for the disposition of the sewage of the Sanitary District. The matter was again referred to Charles Evans Hughes as Special Master, and he filed his report in December 1929 in which he recommended that the Sanitary District and the State of Illinois be given until December 31, 1938 to reduce the diversion to 1,500 cubic feet per second plus domestic pumpage. The Supreme Court affirmed these findings and entered a decree on April 21, 1930.[63]

In October 1932, the States of Wisconsin, Minnesota, Ohio and Michigan applied to the United States Supreme Court for the appointment of a special officer to execute the decree of April 21, 1930. The four states complained of the delay in the construction and completion of the works and facilities embraced in the program of the Sanitary District of Chicago for the disposal of the sewage of that area. The court enlarged the decree to provide that the State of Illinois be required to take all necessary steps to cause and secure the comple-

[61] Wis. et al v. Illinois et al., 271 U.S. 650 (1926).
[62] Wis et al v. Illinois et al., 278 U.S. 367, 408, 409, 417 (1929).
[63] Wis. et al v. Illinois et al., 281 U.S. 696 (1930).

tion of adequate sewage disposal plants and sewers to the end that the diversion of waters of Lake Michigan be reduced at the times fixed in the decree.[64]

In 1937, Congressman Parsons of Illinois introduced a bill to authorize an increase in the diversion of waters from Lake Michigan through the Chicago Drainage Canal to 5,000 cubic feet per second plus domestic pumpage. This bill was vigorously opposed by the Great Lakes states, certain port cities, and groups residing along the lower Illinois River. This bill never enacted into law.

In 1940 the State of Illinois applied for a modification of the decree entered by the Supreme Court on April 21, 1930 so as to permit a temporary increase in diversion to 5,000 cubic feet per second plus domestic pumpage.[65] A Special Master was appointed to inquire whether the partially treated or untreated sewage deposited in the Illinois Waterway (formerly known as the Chicago Drainage Canal) constituted a menace to the health of the inhabitants of certain communities located on the Waterway and on the Des Plaines and Illinois Rivers. After extensive hearings the Special Master reported that no menace to health existed. The United States Supreme Court affirmed this finding.[66]

Thereafter bills were introduced in each session of Congress which, if enacted into law, would purport to grant authority to increase the diversion of water from Lake Michigan over and above the amount fixed by the decree of April 21, 1930. No such bill was ever enacted into law. In addition to these legislative attempts, the Sanitary District of Chicago and the State of Illinois, and groups residing in the Chicago area have sought to obtain increased diversion of water from Lake Michigan by applications made to the President of the United States, to the War Department, to the Federal Power Commission, and to the War Production Board. All of these petitions and applications were vigorously opposed by the Great Lakes states, the port cities, the Great Lakes Harbors Association and by groups residing along the lower Illinois River.[67]

In 1952 bills were introduced to permit the abstraction of large quantities of water from the Great Lakes through the Chicago Drainage Canal on the theory that this would result in lowered lake levels and thus mitigate damages being caused to shore property by the then current high lake levels. No such bill was adopted by the 1952 Con-

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[64] Wis. et al v. Illinois et al., 289 U.S. 398, 710 (1933).
[65] Wis. et al v. Illinois et al., 309 U.S. 569 (1940).
[66] Wis. et al v. Illinois et al., 313 U.S. 547 (1941).
[67] See Printed Hearings before the Committee on Public Works, H.R., 82d Congress, 2d session, May 27-28, June 4-5, 1952, No. 82-18. Illinois Waterway—Diversion of Water from Lake Michigan.

gress. The fight for increased diversion continues with the introduction of similar bills in the 1953 session of Congress. The proponents of a large diversion of waters from Lake Michigan through the Chicago Drainage Canal have constantly and regularly applied pressure in Washington to obtain some color of authority to increase the diversion of water from Lake Michigan at Chicago.

VIII. History and Present Status of the St. Lawrence Seaway and Power Project

In the controversy regarding the construction of the St. Lawrence Seaway and Power Project, we find that as early as the year 1895 the governments of the United States and Canada appointed a Deep Waterways Commission to investigate the feasibility of a deep water route connecting the Atlantic Ocean with the Great Lakes via the St. Lawrence River. In 1897 this commission reported that the St. Lawrence River route was feasible and recommended that further detailed surveys be made.[68]

In 1902 Congress requested the President to invite Great Britain to join in the formation of an international waterway commission to be composed of three members each from Canada and the United States. This commission was established as the International Joint Waterways Commission in December 1903. Its principal contribution was to pave the way for the so-called Boundary Waters Treaty of 1909. Under the Boundary Waters Treaty of 1909 an International Joint Commission was established to review proposals for the construction of obstructions in and diversions of boundary waters, giving preference to uses of such waters for: domestic and sanitary purposes; for navigation and servicing of canals; and for power and irrigating purposes.

In 1914 the United States government addressed a note to the British Ambassador inquiring as to the views of the Canadian government with regard to the advisability and feasibility of a joint undertaking for the construction of a deep waterway via the St. Lawrence River for ocean-going vessels. No further action was taken due to the beginning of World War I.

Meanwhile, the opening of the Panama Canal on August 14, 1914 seriously weakened the competitive position of the Middle West and brought the East and West Coasts closer together. This led to demands for early construction of the St. Lawrence Seaway to give products from the Great Lakes area lower freight costs to the markets of the world. The increased demand for electric power in Canada and in

[68] See The Great Lakes Outlook, April 1952—*The St. Lawrence Seaway—Political Aspects*, by Naujoks, H.H.

the Northeastern part of the United States sparked a movement to utilize the tremendous potential electric power on the St. Lawrence River. The increase in foreign trade also influenced the Seaway movement. All of these developments created a widespread demand for the improvement of the St. Lawrence River to permit ocean-going vessels to enter the Great Lakes ports.

As a result of these demands for the construction of the Seaway, many organizations and commissions were created to assist in promoting the Great Lakes-St. Lawrence Seaway. The Great Lakes-St. Lawrence Tidewater Association; the Great Lakes Harbors Association, many state deep waterway commissions were all formed after World War I. Comprehensive surveys of the St. Lawrence Seaway project were undertaken and by the year 1932 there were 21 states associated with the Great Lakes-St. Lawrence Tidewater Association. On the Canadian side, interest in the St. Lawrence Seaway movement was also active and aggressive. The Canadian Deep Waterways and Power Association was formed and held many meetings. Many studies were undertaken and in January 1927 the United States Department of Commerce issued a report on the seaway, recommending a 27-foot channel. In 1928 the Canadian Advisory Committee made its report on the seaway. This report was the basis of a note from Canada to the United States January 31, 1928. Meetings on this subject were held throughout the United States and in Canada, and the question was fully debated. Negotiations were carried on in 1930 and 1931 until a treaty was signed July 18, 1932 between representatives of the United States and Canada.

This treaty provided for a 27-foot channel for navigation, and for the construction of power facilities on the St. Lawrence River. Hearings on the treaty were held in the United States Senate in 1932 and 1933. The principal support for the treaty came from states bordering on the Great Lakes and from states west of the Mississippi River. They argued that the cheaper transportation provided by the seaway would greatly aid the export trade of this area. They argued also that the seaway would greatly cheapen the cost of imports into this area of raw materials as well as consumer goods. It would restore, they said, without harming the railroads or existing facilities, the Middle West to a position of economic parity with the states benefitted by the Panama Canal. Many farm organizations supported the treaty.

The opposition to the treaty came principally from these sources: The North Atlantic port cities; the railroad interests; the coal interests and the lake carriers and the canal interests. Opponents of the treaty argued that the cost of transportation would be excessive; that there would be insufficient traffic upon the seaway to warrant any

large expenditure, and that there would be no appreciable reduction in transportation rates, but that harm would be done existing facilities. On the matter of costs it was argued that they were unreliable and should be revised. On the matter of traffic it was asserted that the coal and iron movements were principally between lake ports and that wheat was a declining export commodity. It was stated also that railroad labor would be displaced and that the American ports would suffer in favor of Montreal. It was argued, further, that there was no market for the potential power and that if such power were sold it would reduce consumption of coal by 40 million tons a year. Opposition also came from the ports of Buffalo and New Orleans, the New York Barge Canal, a number of private shippers and the eastern railroads.[69]

In March 1934 the United States Senate voted on the proposal to ratify the treaty and the vote was 46 ayes, 42 nays, 3 paired and 5 not voting. Since a two-thirds affirmative vote was needed, the treaty failed of ratification.

The failure to approve the treaty didn't end the matter. Negotiations carried on between the United States and Canada and many conferences were held to arouse new interest in the St. Lawrence Seaway and Power Project. In May 1938 the United States submitted to Canada a draft of a new treaty on this subject. In January 1940 meetings between representatives of the United States and Canada were held in Ottawa. In October 1940 negotiations were renewed, and on March 19, 1941 the Canadian-American Agreement to Develop the Great Lakes-St. Lawrence Basin was signed in Ottawa, Canada. This agreement provides for the construction of a shipway with 27-foot locks which would be sufficient to admit ninety per cent of ocean shipping from the Atlantic Ocean to the Great Lakes. It further provides for installation of power facilities on the St. Lawrence River for the development of hydro-electric power. In the 1941 session of Congress, resolutions were introduced to grant approval to the Canadian-American St. Lawrence Agreement of March 19, 1941. The resolution was never approved because of Pearl Harbor and the necessity of conserving materials for the war effort. In 1943, and again in 1944 and 1945 bills were introduced in the House and in the Senate to authorize the St. Lawrence Seaway, but they failed of passage. In the 80th and 81st Congresses, other bills were introduced on the St. Lawrence Seaway and Power Project, but none of these bills were ever approved. In June 1952, the Senate of the 82nd Congress

[69] See Fortune Magazine, Dec. 1950, *Battle of the St. Lawrence* by Lincoln. Colliers Magazine, Nov. 3, 1945, *Showdown on the St. Lawrence* by Longmire.

EXTERNAL AFFAIRS | AFFAIRES EXTÉRIEURES

U.S.A. DIV. 231.1968

Att'n.: ~~USA~~ and Legal Divisions

TO / À: The Under-Secretary of State for External Affairs, Ottawa

FROM / De: The Canadian Embassy, WASHINGTON, D.C.

REFERENCE / Référence: Our letter 1255 of July 2

SUBJECT / Sujet: Great Lakes Compact

SECURITY / Sécurité: UNCLASSIFIED

DATE: July 18, 1968

NUMBER / Numéro: 1390

FILE / DOSSIER
OTTAWA 25-5-1 -1
MISSION 28

ENCLOSURES / Annexes

DISTRIBUTION

EMandR

The bill giving Congressional consent to the Great Lakes compact (S.660 as amended by the Senate) has now passed the House and has thus been cleared for signature by the President. Attached is a excerpt from the Congressional Record (House) for July 17 giving the text of remarks made on this subject and the text of the bill as passed. Also enclosed (one copy only for Legal Division) is the Senate Committee report dated June 10 (Report No. 1178) recommending favourable action on this bill. Your attention is drawn particularly to the letter from William B. Macomber, Assistant Secretary of State for Congressional relations which deals with withholding of Congressional consent to those sections of the Great Lakes Compact purporting to authorize membership in the Compact by the Canadian provinces of Ontario and Quebec and to empower the Commission to recommend or negotiate treaties, agreements or arrangements between the Governments of the United States and Canada.

Dorothy Burwash
for The Embassy.

000750

Ext. 407B/Bil.
(Admin. Services Div.)

2.798

Congressional Record - House July 15, 1968

GREAT LAKES BASIN COMPACT

The Clerk called the bill (S. 660) granting the consent of Congress to a Great Lakes Basin compact, and for other purposes.

The SPEAKER. Is there objection to the present consideration of the bill?

Mr. GROSS. Mr. Speaker, reserving the right to object, I should like to ask someone why we should create this Great Lakes Commission when there is already in existence the Great Lakes Basin Commission?

Mr. ZABLOCKI. Mr. Speaker, will the gentleman yield?

Mr. GROSS. I am glad to yield to the gentleman from Wisconsin.

Mr. ZABLOCKI. It is my understanding it is necessary for Congress to grant consent, with certain limiting qualifications, so that the States can cooperate among themselves. Without this type of permissive legislation, although at the present time there is a commission, they could not enter into certain agreements and arrangements. This bill does not create a new commission. This legislation expresses congressional consent for the Great Lakes States to enter into a compact.

Mr. ADAIR. Mr. Speaker, will the gentleman yield?

Mr. GROSS. I yield to the gentleman from Indiana.

Mr. ADAIR. Would not the gentleman from Wisconsin agree that it also acquiesces in agreements made with a foreign power, to wit Canada, in the establishment of this compact?

Mr. GROSS. Is the present commission a subsidiary of the Water Resources Planning Act, or was it created by that act? What is its relationship to the Water Resources Planning Act?

Mr. ZABLOCKI. Mr. Speaker, if the gentleman will yield, I should like to state the present commission is an advisory body to the Water Commission. As to the Great Lakes Basin compact, I might point out that all eight States in the Great Lakes area have ratified this compact.

Mr. GROSS. That may well be, but I should like to know why we must have two apparently very similar commissions in this field.

Mr. RUMSFELD. Mr. Speaker, will the gentleman yield?

Mr. GROSS. I yield to the gentleman from Illinois.

Mr. RUMSFELD. It is my understanding—and possibly the gentleman from Wisconsin will verify this—that the legislation before us is not to create a new Commission. Rather, this bill is in fact merely the granting of the consent of Congress to a Great Lakes Basin compact as required by article I, section 10 of the Constitution. The bill, similar to some 209 such compacts, grants congressional approval to an agreement among the 8 States of the United States and the Government of Canada. While it provides that the Great Lakes Commission shall be an agency of the compacting States, it is not a duplication in any sense. Congressional consent was first sought in 1956, but due to a variety of delay it has taken 12 years to secure House approval. I do hope the gentleman will not now object.

Mr. GROSS. But I believe it does create the Great Lakes Commission, does it not?

Mr. ADAIR. Mr. Speaker, will the gentleman yield?

Mr. GROSS. I yield to the gentleman from Indiana.

Mr. ADAIR. I would agree with the statement just made by the gentleman from Illinois, that this rather establishes the limits of the authortiy, the authority with which it may act, as between the several States of the United States and with respect to agreements made with Canada.

Mr. GROSS. May I have the assurance of someone who apparently is directly interested in this legislation that eventually there will not be a demand on the Federal Government for the support of this Commission or Commissions?

Mr. ZABLOCKI. Mr. Speaker, will the gentleman yield?

Mr. GROSS. I am glad to yield to the gentleman from Wisconsin.

Mr. ZABLOCKI. The gentleman is pleased to assure the gentleman from Iowa that another Commission is not being authorized by this proposal. Further, it will not cost the Federal Government any money.

Mr. GROSS. I thank the gentleman.

Mr. Speaker, I withdraw my reservation.

Mr. ZABLOCKI. Mr. Speaker, S. 660 grants the consent of Congress, with certain limiting qualifications, to the Great Lakes Basin Compact which has been entered into by the eight States bordering on the Great Lakes: Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania, and Wisconsin.

Article I, section 10, clause 3, of the U.S. Constitution provides:

> No State shall, without the consent of Congress, * * * enter into an agreement or compact with another State, or with a foreign power * * *

As I have advised the gentleman from Iowa, no Federal funds are authorized by the bill, and none are desired.

There is every reason for Congress to consent to this compact. The legislatures of all of the States directly concerned have ratified and, in accordance with the Constitution, they are asking congressional consent.

This bill contains language which has been agreed upon by the various interested parties, some of whom have in the past opposed similar legislation.

The States want it. Those agencies and organizations which have expressed oppositon in the past are satisfied. Congress should give its consent.

Almost the entire text of the bill—from the beginning of page 2 to line 8, page 14—is taken up with the text of the Great Lakes Basin compact.

In a sense, the only real legislative provisions of the bill are sections 2 and 3, beginning on page 14, which withhold consent to certain provisions of the compact.

Assent by the Congress to this compact was originally sought in 1956, and it has been before the Congress, off and on, ever since.

The compact as ratified by the States provides for membership by the Canadian Provinces of Ontario and Quebec, and the Great Lakes Commission is empowered to make recommendations to the Government of Canada as well as to the United States. This was regarded by the Department of State as infringing on the jurisdiction of the Federal Government with respect to dealing with foreign affairs.

The bills considered in previous Congresses and those now pending before the Committee on Foreign Affairs dealt with this issue by specifying that congressional consent is not given to designated provisions of the compact which purport to authorize recommendations to and cooperation with foreign governments or their subdivisions.

In the early days, opposition to the compact was expressed by the representatives of the New York Power Authority, the Buffalo Chamber of Commerce, and the Cleveland Chamber of Commerce—which was before New York and Ohio ratified the compact.

When the committee considered the compact in 1966, all of the earlier objections had been taken care of but the power authority of the State of New York, which has responsibility for the power resources of the Niagara and St. Lawrence Rivers and which operates power facilities in cooperation with the Province of Ontario, objected on the grounds that the restrictions imposed by the legislation on the rights of the Great Lakes Commission to deal with Canada "would constitute the basis for contentions that necessary activities carried on by the power authority in dealing with Canadian entities are unlawful."

Last February, all of the interested parties, including the Federal departments and agencies and the New York Power Authority, got together and agreed on the language contained in sections 2 and 3 of the bill before us.

In view of the fact that the Constitution provides for congressional approval of the compact and that all of the interested parties are satisfied, it makes good sense for the Congress to give assent.

Mr. O'HARA of Illinois. Mr. Speaker, the matter of a Great Lakes Basin compact has been before the House for many years and why the bill to give congressional consent should be pressed in the closing days of this Congress is explained only by the claim that it took time to satisfy the objections of the State of New York and our own State Department.

In November of this year, all the Great Lakes States will hold elections that will make changes in the gubernatorial and legislative offices. I would think it the part of wisdom to await the results of these elections instead of rushing to enactment a measure that has lain dormant for so many years and which, perchance, might not be acceptable to one or more of the new State administrations. While I do not anticipate that such would be the case, nevertheless, I do have a strong sense of caution when life suddenly comes at the legislative midnight to a measure that has been soundly sleeping through many Congresses.

Frankly, I have been opposed to the compact, because when Lake Michigan diversion was so vital to the health and welfare of Chicago and Illinois, the other Great Lakes States turned thumbs down. I do not vision an alert card player willingly going up against a stacked deck. While the matter of Lake Michigan water diversion may or may not be on its way to satisfactory adjustment, other questions of policy and interest will arise and I would feel easier if I knew to a certainty that always Illinois would not be outvoted as it was in the diversion matter; Illinois on one side, all the other Great Lakes States on the other.

Nor am I as certain as are many others that regional rule and sovereignty should

be substituted for State government. I appreciate as much as anyone that there are many serious problems, of which pollution is not the least, that are of common concern to States in the same water area. But whether these problems can reach the wisest and fairest of solutions by the withdrawal of the sovereignty of the individual States and the substitution by compact of a regional supergovernment has not as yet been conclusively demonstrated.

It may be that in time the wisdom of regional supergovernments will be demonstrated so conclusively that another generation will change our Constitution to do away with States altogether and in their stead substitute regional governments. I make no such prediction, but I do most seriously urge upon my colleagues in this Congress and the Members of future Congresses, of which I shall not be a Member, a study in depth.

Section 10, article I, of the Constitution provides:

No State shall, without the consent of the Congress, enter into any Agreement or Compact with another State, or with a foreign Power.

The responsibility placed upon the Congress by the Constitution is not to be treated trivially or discharged lightly and in haste. The increasing number of compacts, and the apparently sound arguments in their behalf, would seem to argue that no new compacts should be approved without the most thoroughgoing for research. In the instant case, one reason given for the delay since 1966 was that objection of the original draft was raised both by the State of New York and by the State Department. The draft was rewritten to meet both objections.

Mr. Speaker, having discussed at perhaps too much length my own views on the Great Lakes Basin compact, and having very earnestly warned against undue haste in the approval of future compacts, I hope I will not be regarded as inconsistent in voting for S. 660. Here are the circumstances and the considerations that are the determining factors in my voting for the bill:

In September 1966, I received the following letter from the Honorable Otto Kerner, then Governor of Illinois and now a member of the Circuit Court of Appeals of the United States.

SEPTEMBER 30, 1966.

DEAR CONGRESSMAN O'HARA: I understand that bills for Congressional consent to the Great Lakes Basin Compact are now pending before the House Foreign Affairs Committee, of which you are an esteemed member. I have been most concerned and an active supporter of the work of the Great Lakes Commission, and have participated in many of its activities to solve the water problems common to the Great Lakes and the eight adjoining states. Our United States Constitution provides for Congressional consent to agreements between states. In accordance with this provision, I am in support of H.R. 937 and the companion bills which grant Congressional ratification to the Great Lakes Compact.

Please bear in mind that these bills will not in any way affect Illinois' position with regard to the diversion problem which is now before the United States Supreme Court pending a decision by the Special Master.

Your support of these bills would be deeply appreciated.

Sincerely,

OTTO KERNER,
Governor.

Governor Kerner is the son of one of the all-time greatest of the judges and public officials of the State of Illinois, a warm friend of mine. He is the son-in-law of another warm friend, a former president of the Cook County board and later mayor of Chicago, truly a great chief executive of the second city in America, Mayor Cermak.

Governor Kerner, himself, has a record of brilliant achievement, second to none in all the Nation, as combat general in time of war, as jurist, as district attorney, and Governor of the great State of Illinois.

I told him that as Governor of Illinois and a participant in many activities to solve the perplexing water problems of our region, he was in a much better position to judge and that, as a Congressman from Illinois, I would give my loyal support to the Governor of Illinois. That was in the fall of 1966.

The matter never came up again in the Committee on Foreign Affairs until last week. Although S. 660 was introduced in the House by a number of Members, no one approached me and, when it came up in the committee of which I had been a member for many years, I was taken completely by surprise.

It was later that I learned that the 2 years from 1966 to halfway in 1968 were used in working out an agreement with the State of New York and in meeting the proper objections of the State Department. This doubtless has resulted in a better bill. It also should stand as a warning in the future against the hasty and casual approval by the Congress of proposed State compacts.

Mr. Speaker, in a long public career now drawing to a close, I have never broken my word. I am happy to keep my word to Governor Kerner in 1966 by voting in 1968 for the Great Lakes Basin compact.

If the fight against pollution is to be won, and all the Great Lakes saved from becoming seas of death, the prayers, the dedication, the brains, the muscle and the handiwork of all our people in all our region must be put unselfishly and tirelessly into the task. The passage of this bill by consent, without one voice raised to stop its enactment, may be a good omen.

My best wishes go to Mr. Meserow and all the others who have worked so diligently for the day when the States of the Great Lakes region could work together as a team, approved by the Federal Government, to remove the dangers, solve the common problems, and advance the welfare of all the great States of our region.

GENERAL LEAVE TO EXTEND

Mr. ZABLOCKI. Mr. Speaker, I ask unanimous consent that all Members may extend their remarks prior to the passage on the Consent Calendar of the bill S. 660, granting the consent of Congress to a Great Lakes Basin Compact, and for other purposes.

The SPEAKER. Is there objection to the request of the gentleman from Wisconsin?

There was no objection.

The SPEAKER. Is there objection to the present consideration of the bill?

There being no objection, the Clerk read the bill as follows:

S. 660

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of Congress is hereby given, to the extent and subject to the conditions hereinafter set forth, to the Great Lakes Basin Compact which has been entered into by the States of Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania and Wisconsin in the form as follows:

"GREAT LAKES BASIN COMPACT

"The party states solemnly agree:

"ARTICLE I

"The purposes of this compact are, through means of joint or cooperative action:

"1. To promote the orderly, integrated, and comprehensive development, use, and conservation of the water resources of the Great Lakes Basin (hereinafter called the Basin).

"2. To plan for the welfare and development of the water resources of the Basin as a whole as well as for those portions of the Basin which may have problems of special concern.

"3. To make it possible for the states of the Basin and their people to derive the maximum benefit from utilization of public works, in the form of navigational aids or otherwise, which may exist or which may be constructed from time to time.

"4. To advise in securing and maintaining a proper balance among industrial, commercial, agricultural, water supply, residential, recreational, and other legitimate uses of the water resources of the Basin.

"5. To establish and maintain an intergovernmental agency to the end that the purposes of this compact may be accomplished more effectively.

"ARTICLE II

"A. This compact shall enter into force and become effective and binding when it has been enacted by the legislatures of any four of the States of Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania, and Wisconsin and thereafter shall enter into force and become effective and binding as to any other of said states when enacted by the legislature thereof.

"B. The Province of Ontario and the Province of Quebec, or either of them, may become states party to this compact by taking such action as their laws and the laws of the Government of Canada may prescribe for adherence thereto. For the purpose of this compact the word 'state' shall be construed to include a Province of Canada.

"ARTICLE III

"The Great Lakes Commission created by Article IV of this compact shall exercise its powers and perform its functions in respect to the Basin which, for the purposes of this compact, shall consist of so much of the following as may be within the party states:

"1. Lakes Erie, Huron, Michigan, Ontario, St. Clair, Superior, and the St. Lawrence River, together with any and all natural or man-made water interconnections between or among them.

"2. All rivers, ponds, lakes, streams, and other watercourses which, in their natural state or in their prevailing conditions, are tributary to Lakes Erie, Huron, Michigan, Ontario, St, Clair, and Superior or any of them or which compromise part of any watershed draining into any of said lakes.

"ARTICLE IV

"A. There is hereby created an agency of the party states to be known as The Great Lakes Commission (hereinafter called the Commission). In that name the Commission may sue and be sued, acquire, hold and convey real and personal property and any interest therein. The Commission shall have a seal with the words 'The Great Lakes Commission' and such other design as it may prescribe engraved thereon by which it shall authenticate its proceedings. Transactions involving real or personal property shall conform to the laws of the state in which the property is located, and the Commission may by by-laws provide for the execution and acknowledgement of all instruments in its behalf.

"B. The Commission shall be composed of not less than three commissioners nor more than five commissioners from each party state designated or appointed in accordance with the law of the state which they represent and serving and subject to removal in accordance with such law.

"C. Each state delegation shall be entitled to three votes in the Commission. The presence of commissioners from a majority of the party states shall constitute a quorum for the transaction of business at any meeting of the Commission. Actions of the Commission shall be by a majority of the votes cast except that any recommendations made pursuant to Article VI of this compact shall require an affirmative vote of not less than a majority of the votes cast from each of a majority of the states present and voting.

"D. The Commissioners of any two or more party states may meet separately to consider problems of particular interest to their states but no action taken at any such meeting shall be deemed an action of the Commission unless and until the Commission shall specifically approve the same.

"E. In the absence of any commissioner, his vote may be cast by another representative or commissioner of his state provided that said commissioner or other representative casting said vote shall have a written proxy in proper form as may be required by the Commission.

"F. The Commission shall elect annually from among its members a chairman and vice-chairman. The Commission shall appoint an Executive Director who shall also act as secretary-treasurer, and who shall be bonded in such amount as the Commission may require. The Executive Director shall serve at the pleasure of the Commission and at such compensation and under such terms and conditions as may be fixed by it. The Executive Director shall be custodian of the records of the Commission with authority to affix the Commission's official seal and to attest to and certify such records or copies thereof.

"G. The Executive Director, subject to the approval of the Commission in such cases as its by-laws may provide, shall appoint and remove or discharge such personnel as may be necessary for the performance of the Commission's functions. Subject to the aforesaid approval, the Executive Director may fix their compensation, define their duties, and require bonds of such of them as the Commission may designate.

"H. The Executive Director, on behalf of, as trustee for, and with the approval of the Commission, may borrow, accept, or contract for the services of personnel from any state or government or any subdivision or agency thereof, from any inter-governmental agency, or from any institution, person, firm or corporation; and may accept for any of the Commission's purposes and functions under this compact any and all donations, gifts, and grants of money, equipment, supplies, materials, and services from any state or government or any subdivision or agency thereof or inter-governmental agency or from any institution, person, firm or corporation and may receive and utilize the same.

"I. The Commission may establish and maintain one or more offices for the transacting of its business and for such purposes the Executive Director, on behalf of, as trustee for, and with the approval of the Commission, may acquire, hold and dispose of real and personal property necessary to the performance of its functions.

"J. No tax levied or imposed by any party state or any political subdivision thereof shall be deemed to apply to property, transactions, or income of the Commission.

"K. The Commission may adopt amend and rescind by-laws, rules and regulations for the conduct of its business.

"L. The organization meeting of the Commission shall be held within six months from the effective date of the compact.

"M. The Commission and its Executive Director shall make available to the party states any information within its possession and shall always provide free access to its records by duly authorized representatives of such party states.

"N. The Commission shall keep a written record of its meetings and proceedings and shall annually make a report thereof to be submitted to the duly designated official of each party state.

"O. The Commission shall make and transmit annually to the legislature and Governor of each party state a report covering the activities of the Commission for the preceding year and embodying such recommendations as may have been adopted by the Commission. The Commission may issue such additional reports as it may deem desirable.

"ARTICLE V

"A. The members of the Commission shall serve without compensation, but the expenses of each commissioner shall be met by the state which he represents in accordance with the law of that state. All other expenses incurred by the Commission in the course of exercising the powers conferred upon it by this compact, unless met in some other manner specifically provided by this compact, shall be paid by the Commission out of its own funds.

"B. The Commission shall submit to the executive head or designated officer of each party state a budget of its estimated expenditures for such period as may be required by the laws of that state for presentation to the legislature thereof.

"C. Each of the Commission's budgets of estimated expenditures shall contain specific recommendations of the amount or amounts to be appropriated by each of the party states. Detailed commission budgets shall be recommended by a majority of the votes cast, and the costs shall be allocated equitably among the party states in accordance with their respective interests.

"D. The Commission shall not pledge the credit of any party state. The Commission may meet any of its obligations in whole or in part with funds available to it under Article IV(H) of this compact, provided that the Commission takes specific action setting aside such funds prior to the incurring of any obligations to be met in whole or in part in this manner. Except where the Commission makes use of funds available to it under Article IV(H) hereof, the Commission shall not incur any obligations prior to the allotment of funds by the party states adequate to meet the same.

"E. The Commission shall keep accurate accounts of all receipts and disbursements. The receipts and disbursements of the Commission shall be subject to the audit and accounting procedures established under the by-laws. However, all receipts and disbursements of funds handled by the Commission shall be audited yearly by a qualified public accountant and the report of the audit shall be included in and become a part of the annual report of the Commission.

"F. The accounts of the Commission shall be open at any reasonable time for inspection by such agency, representative or representatives of the party states as may be duly constituted for that purpose and by others who may be authorized by the Commission.

"ARTICLE VI

"The Commission shall have power to:

"A. Collect, correlate, interpret, and report on data relating to the water resources and the use thereof in the Basin or any portion thereof.

"B. Recommend methods for the orderly, efficient, and balanced development, use and conservation of the water resources of the Basin or any portion thereof to the party states and to any other governments or agencies having interests in or jurisdiction over the Basin or any portion thereof.

"C. Consider the need for and desirability of public works and improvements relating to the water resources in the Basin or any portion thereof.

"D. Consider means of improving navigation and port facilities in the Basin or any portion thereof.

"E. Consider means of improving and maintaining the fisheries of the Basin or any portion thereof.

"F. Recommend policies relating to water resources including the institution and alteration of flood plain and other zoning laws, ordinances and regulations.

"G. Recommend uniform or other laws, ordinances, or regulations relating to the development, use and conservation of the Basin's water resources to the party states or any of them and to other governments, political subdivisions, agencies or intergovernmental bodies having interests in or jurisdiction sufficient to affect conditions in the Basin or any portion thereof.

"H. Consider and recommend amendments or agreements supplementary to this compact to the party states or any of them, and assist in the formulation and drafting of such amendments or supplementary agreements.

"I. Prepare and publish reports, bulletins, and publications appropriate to this work and fix reasonable sales prices therefor.

"J. With respect to the water resources of the Basin or any portion thereof, recommend agreements between the governments of the United States and Canada.

"K. Recommend mutual arrangements expressed by concurrent or reciprocal legislation on the part of Congress and the Parliament of Canada including but not limited to such agreements and mutual arrangements as are provided for by Article XIII of the Treaty of 1909 Relating to Boundary Waters and Questions Arising Between the United States and Canada. (Treaty Series, No. 548.)

"L. Cooperate with the governments of the United States and of Canada, the party states and any public or private agencies or bodies having interests in or jurisdiction sufficient to affect the Basin or any portion thereof.

"M. At the request of the United States, or in the event that a Province shall be a party state, at the request of the Government of Canada, assist in the negotiation and formulation of any treaty or other mutual arrangement or agreement between the United States and Canada with reference to the Basin or any portion thereof.

"N. Make any recommendation and do all things necessary and proper to carry out the powers conferred upon the Commission by this compact, provided that no action of the Commission shall have the force of law in, or be binding upon, any party state.

"ARTICLE VII

"Each party state agrees to consider the action the Commission recommends in respect to:

"A. Stabilization of lake levels.

"B. Measures for combating pollution, beach erosion, floods and shore inundation.

"C. Uniformity in navigation regulations within the constitutional powers of the states.

"D. Proposed navigation aids and improvements.

"E. Uniformity or effective coordinating action in fishing laws and regulations and cooperative action to eradicate destructive and parasitical forces endangering the fisheries, wildlife and other water resources.

"F. Suitable hydroelectric power developments.

"G. Cooperative programs for control of soil and bank erosion for the general improvement of the Basin.

"H. Diversion of waters from and into the Basin.

"I. Other measures the Commission may recommend to the states pursuant to Article VI of this compact.

"ARTICLE VIII

"This compact shall continue in force and remain binding upon each party state until renounced by the act of the legislature of such state, in such form and manner as it may choose and as may be valid and effective to repeal a statute of said state, provided that such renunciation shall not become effective until six months after notice of such action shall have been officially communicated in writing to the executive head of the other party states.

"ARTICLE IX

"It is intended that the provisions of this compact shall be reasonably and liberally construed to effectuate the purposes thereof. The provisions of this compact shall be severable and if any phrase, clause, sentence or provision of this compact is declared to be contrary to the constitution of any party state or of the United States, or in the case of a Province, to the British North America Act of 1867 as amended, or the applicability thereof to any state, agency, person or circumstance is held invalid, the constitutionality of the remainder of this compact and the applicability thereof to any state, agency, person or circumstance shall not be affected thereby, provided further that if this compact shall be held contrary to the constitution of the United States, or in the case of a Province, to the British North America Act of 1867 as amended, or of any party state, the compact shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters."

SEC. 2. The consent herein granted does not extend to paragraph B of article II or to paragraphs J, K, and M of article VI of the compact, or to other provisions of article VI of the compact which purport to authorize recommendations to, or cooperation with, any foreign or international governments, political subdivisions, agencies or bodies. In carrying out its functions under this Act the Commission shall be solely a consulattive and recommendatory agency which will cooperate with the agencies of the United States. It shall furnish to the Congress and to the President, or to any official designated by the President, copies of its reports submitted to the party states pursuant to paragraph O of article IV of the compact.

SEC. 3. Nothing contained in this Act or in the compact consented to hereby shall be construed to affect the jurisdiction, powers, or prerogatives of any department, agency, or officer of the United States Government or of the Great Lakes Basin Committee established under title II of the Water Resources Planning Act, or of any international commission or agency over or in the Great Lakes Basin or any portion thereof, nor shall anything contained herein be construed to establish an international agency or to limit or affect in any way the exercise of the treatymaking power or any other power or right of the United States.

SEC. 4. The right to alter, amend, or repeal this Act is expressly reserved."

The bill was ordered to be read a third time, was read the third time, and passed, and a motion to reconsider was laid on the table.

Legal Division/M.D. Copithorne/sa

EXTERNAL AFFAIRS

AFFAIRES EXTÉRIEURES

TO / À: Co-ordination Division

File on 20-3-1-1

FROM / De: Legal Division

REFERENCE / Référence: Our memorandum of August 26, 1968

SUBJECT / Sujet: Great Lakes Compact

SECURITY / Sécurité: UNCLASSIFIED

DATE: August 29, 1968

NUMBER / Numéro:

FILE / DOSSIER
OTTAWA 20-3-1-1
MISSION 13

ENCLOSURES / Annexes

DISTRIBUTION

U.S.A. Division

Further to our memorandum under reference on this subject, we now attach another letter from Washington No. 1390 of July 18, 1968 which was received only yesterday in this Division.

Legal Division.

Ext. 407A/Bil.

Please Circulate to Dir & Relevant Units

EXTERNAL AFFAIRS AFFAIRES EXTÉRIEURES

Att'n.: U.S.A. & Legal Divisions

TO / À The Under-Secretary of State for External Affairs, Ottawa

FROM / De The Canadian Embassy, WASHINGTON, D.C.

REFERENCE / Référence

SUBJECT / Sujet Great Lakes Compact

SECURITY / Sécurité UNCLASSIFIED

DATE July 2, 1968

NUMBER / Numéro 1255

FILE	DOSSIER
OTTAWA	25-S-2-GREAT LAKES-1
MISSION	WA —

ENCLOSURES / Annexes

DISTRIBUTION

EMandR

Attached is an excerpt from the Congressional Record (Senate) for June 12 which gives the text of the latest bill (S.660) proposing approval of the Great Lakes Compact. This bill, as amended, was passed by the Senate. You may wish to note particularly the following passages which relate to the international aspects of the proposal: Article II B; Article VI J-N; Article IX. These are as amended in the Senate to give much less extended authority to the Great Lakes Commission.

2. The history of the Great Lakes Compact and its consideration by Congress is given on pp. S.7058-9. As you are aware, the legislation has twice been approved by the Senate only to die in the House. The present bill has now been referred to the House Judiciary Committee and in view of the very limited time remaining before dissolution, there is little reason to think that it will be any more fortunate than its successors.

G.H. BLOUIN

The Embassy.

Ext. 407C/Bil.
(Admin. Services Div.)

GREAT LAKES BASIN COMPACT

The bill (S. 660) granting the consent of Congress to a Great Lakes Basin Compact, and for other purposes, was announced as next in order.

Mr. MANSFIELD. Over, Mr. President.

The PRESIDING OFFICER. The bill will be passed over.

Subsequently, the following proceedings were had on this bill.

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the Senate proceed to the consideration of Calendar No. 1157, S. 660.

The PRESIDING OFFICER. The bill will be stated by title.

The LEGISLATIVE CLERK. A bill (S. 660) granting the consent of Congress to a Great Lakes Basin Compact, and for other purposes.

The PRESIDING OFFICER. Is there objection to the present consideration of the bill?

There being no objection, the Senate proceeded to consider the bill which had been reported from the Committee on the Judiciary, with amendments, on page 1, line 3, after the word "given," insert "to the extent and"; in line 4, after the word "to" where it appears the first time, insert "the"; on page 14, after line 7, strike out:

SEC. 2. Nothing contained in this Act or in the compact consented to hereby shall be construed to affect the jurisdiction, powers, or prerogatives of any department, agency, or officer of the United States Government or of any international commission or agency over or in the Great Lakes Basin or any portion thereof, nor shall anything contained herein be construed to establish an international agency or to limit or affect in any way the exercise of the treatymaking power or any other power or right of the United States. In carrying out its functions under this Act the Commission shall be solely a consultative and recommendatory agency which shall cooperate with the agencies of the United States and shall report annually to the Congress and to the President or to any official designated by the President. The consent herein granted does not extend to paragraph B of article II or to paragraphs J and M of article VI of the compact; and consent is granted with respect to paragraph L of article VI of the compact subject to the following conditions: (1) cooperation shall be extended to and carried on with the Government of Canada or any of its subdivisions only through or with the approval of the Department of State; (2) cooperation with an international commission or agency having jurisdiction in the basin shall be extended

through or with the approval of the [illegible]tment of State; and (3) proposals to any such international commission or agency shall be submitted only through the Department of State. The consent herein granted is on condition the recommendations under article VI, paragraphs B, G, and J, shall not be made to any foreign government or subdivision thereof and that recommendations to international bodies or agencies shall be made through the Department of State.

SEC. 3. Nothing in this Act shall be construed to limit in any way or to indicate any intention of Congress to either limit or sanction in any way other relations, working arrangements, or agreements of the participating states with each other or with the Provinces of Ontario and Quebec. The effect of this Act shall be limited solely to the functions and procedures of the Great Lakes Commission.

And, in lieu thereof, insert:

SEC. 2. The consent herein granted does not extend to paragraph B of article II or to paragraphs J, K, and M of article VI of the compact, or to other provisions of article VI of the compact which purport to authorize recommendations to, or cooperation with, any foreign or international governments, political subdivisions, agencies or bodies. In carrying out its functions under this Act the Commission shall be solely a consultative and recommendatory agency which will cooperate with the agencies of the United States. It shall furnish to the Congress and to the President, or to any official designated by the President, copies of its reports submitted to the party states pursuant to paragraph O of article IV of the compact.

SEC. 3. Nothing contained in this Act or in the compact consented to hereby shall be construed to affect the jurisdiction, powers, or prerogatives of any department, agency, or officer of the United States Government or of the Great Lakes Basin Committee established under title II of the Water Resources Planning Act, or of any international commission or agency over or in the Great Lakes Basin or any portion thereof, nor shall anything contained herein be construed to establish an international agency or to limit or affect in any way the exercise of the treatymaking power or any other power or right of the United States.

So as to make the bill read:

S. 660

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of Congress is hereby given, to the extent and subject to the conditions hereinafter set forth, to the Great Lakes Basin Compact which has been entered into by the States of Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania and Wisconsin in the form as follows:

"GREAT LAKES BASIN COMPACT

"The party states solemnly agree:

"ARTICLE I

"The purposes of this compact are, through means of joint or cooperative action:

"1. To promote the orderly, integrated, and comprehensive development, use, and conservation of the water resources of the Great Lakes Basin (hereinafter called the Basin).

"2. To plan for the welfare and development of the water resources of the Basin as a whole as well as for those portions of the Basin which may have problems of special concern.

"3. To make it possible for the states of the Basin and their people to derive the maximum benefit from utilization of public works, in the form of navigational aids or otherwise, which may exist or which may be constructed from time to time.

"4. To advise in securing and maintaining a proper balance among industrial, commercial, agricultural, water supply, residential, recreational, and other legitimate uses of the water resources of the Basin.

"5. To establish and maintain an intergovernmental agency to the end that the purposes of this compact may be accomplished more effectively.

"ARTICLE II

"A. This compact shall enter into force and become effective and binding when it has been enacted by the legislatures of any four of the States of Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania, and Wisconsin and thereafter shall enter into force and become effective and binding as to any other of said states when enacted by the legislature thereof.

"B. The Province of Ontario and the Province of Quebec, or either of them, may become states party to this compact by taking such action as their laws and the laws of the Government of Canada may prescribe for adherence thereto. For the purpose of this compact the word 'state' shall be construed to include a Province of Canada.

"ARTICLE III

"The Great Lakes Commission created by Article IV of this compact shall exercise its powers and perform its functions in respect to the Basin which, for the purposes of this compact, shall consist of so much of the following as may be within the party states:

"1. Lakes Erie, Huron, Michigan, Ontario, St. Clair, Superior, and the St. Lawrence River, together with any and all natural or man-made water interconnections between or among them.

"2. All rivers, ponds, lakes, streams, and other watercourses which, in their natural state or in their prevailing conditions, are tributary to Lakes Erie, Huron, Michigan, Ontario, St. Clair and Superior or any of them or which comprise part of any watershed draining into any of said lakes.

"ARTICLE IV

"A. There is hereby created an agency of the party states to be known as The Great Lakes Commission (hereinafter called the Commission). In that name the Commission may sue and be sued, acquire, hold and convey real and personal property and any interest therein. The Commission shall have a seal with the words 'The Great Lakes Commission' and such other design as it may prescribe engraved thereon by which it shall authenticate its proceedings. Transactions involving real or personal property shall conform to the laws of the state in which the property is located, and the Commission may by by-laws provide for the execution and acknowledgement of all instruments in its behalf.

"B. The Commission shall be composed of not less than three commissioners nor more than five commissioners from each party state designated or appointed in accordance with the law of the state which they represent and serving and subject to removal in accordance with such law.

"C. Each state delegation shall be entitled to three votes in the Commission. The presence of commissioners from a majority of the party states shall constitute a quorum for the transaction of business at any meeting of the Commission. Actions of the Commission shall be by a majority of the votes cast except that any recommendations made pursuant to Article VI of this compact shall require an affirmative vote of not less than a majority of the votes cast from each of a majority of the states present and voting.

"D. The commissioners of any two or more party states may meet separately to consider problems of particular interest to their states, but no action taken at any such meeting shall be deemed an action of the Commission unless and until the Commission shall specifically approve the same.

"E. In the absence of any commissioner, his vote may be cast by another representative or commissioner of his state provided that said commissioner or other representative casting said vote shall have a written proxy in proper form as may be required by the Commission.

"F. The Commission shall elect annually from among its members a chairman and vice-chairman. The Commission shall appoint an Executive Director who shall also act as secretary-treasurer, and who shall be bonded in such amount as the Commission may require. The Executive Director shall serve at the pleasure of the Commission and at such compensation and under such terms and conditions as may be fixed by it. The Executive Director shall be custodian of the records of the Commission with authority to affix the Commission's official seal and to attest to and certify such records or copies thereof.

"G. The Executive Director, subject to the approval of the Commission in such cases as its by-laws may provide, shall appoint and remove or discharge such personnel as may be necessary for the performance of the Commission's functions. Subject to the aforesaid approval, the Executive Director may fix their compensation, define their duties, and require bonds of such of them as the Commission may designate.

"H. The Executive Director, on behalf of, as trustee for, and with the approval of the Commission, may borrow, accept, or contract for the services of personnel from any state or government or any subdivision or agency thereof, from any inter-governmental agency, or from any institution, person, firm or corporation; and may accept for any of the Commission's purposes and functions under this compact any and all donations, gifts, and grants of money, equipment, supplies, materials, and services from any state or government or any subdivision or agency thereof or inter-governmental agency or from any institution, person, firm or corporation and may receive and utilize the same.

"I. The Commission may establish and maintain one or more offices for the transacting of its business and for such purposes the Executive Director, on behalf of, as trustee for, and with the approval of the Commission, may acquire, hold and dispose of real and personal property necessary to the performance of its functions.

"J. No tax levied or imposed by any party state or any political subdivision thereof shall be deemed to apply to property, transactions, or income of the Commission.

"K. The Commission may adopt, amend and rescind by-laws, rules and regulations for the conduct of its business.

"L. The organization meeting of the Commission shall be held within six months from the effective date of the compact.

"M. The Commission and its Executive Director shall make available to the party states any information within its possession and shall always provide free access to its records by duly authorized representatives of such party states.

"N. The Commission shall keep a written record of its meetings and proceedings and shall annually make a report thereof to be submitted to the duly designated official of each party state.

"O. The Commission shall make and transmit annually to the legislature and Governor of each party state a report covering the activities of the Commission for the preceding year and embodying such recommendations as may have been adopted by the Commission. The Commission may issue such additional reports as it may deem desirable.

"ARTICLE V

"A. The members of the Commission shall serve without compensation, but the expenses of each commissioner shall be met by the state which he represents in accordance with the law of that state. All other expenses incurred by the Commission in the course of exercising the powers conferred upon it by

t' pact, unless met in some other manner specifically provided by this compact, shall be paid by the Commission out of its own funds.

"B. The Commission shall submit to the executive head or designated officer of each party state a budget of its estimated expenditures for such period as may be required by the laws of that state for presentation to the legislature thereof.

"C. Each of the Commission's budgets of estimated expenditures shall contain specific recommendations of the amount or amounts to be appropriated by each of the party states. Detailed commission budgets shall be recommended by a majority of the votes cast, and the costs shall be allocated equitably among the party states in accordance with their respective interests.

"D. The Commission shall not pledge the credit of any party state. The Commission may meet any of its obligations in whole or in part with funds available to it under Article IV (H) of this compact, provided that the Commission takes specific action setting aside such funds prior to the incurring of any obligations to be met in whole or in part in this manner. Except where the Commission makes use of funds available to it under Article IV (H) hereof, the Commission shall not incur any obligations prior to the allotment of funds by the party states adequate to meet the same.

"E. The Commission shall keep accurate accounts of all receipts and disbursements. The receipts and disbursements of the Commission shall be subject to the audit and accounting procedures established under the by-laws. However, all receipts and disbursements of funds handled by the Commission shall be audited yearly by a qualified public accountant and the report of the audit shall be included in and become a part of the annual report of the Commission.

"F. The accounts of the Commission shall be open at any reasonable time for inspection by such agency, representative or representatives of the party states as may be duly constituted for that purpose and by others who may be authorized by the Commission.

"ARTICLE VI

"The Commission shall have power to:

"A. Collect, correlate, interpret, and report on data relating to the water resources and the use thereof in the Basin or any portion thereof.

"B. Recommend methods for the orderly, efficient, and balanced development, use and conservation of the water resources of the Basin or any portion thereof to the party states and to any other governments or agencies having interests in or jurisdiction over the Basin or any portion thereof.

"C. Consider the need for and desirability of public works and improvements relating to the water resources in the Basin or any portion thereof.

"D. Consider means of improving navigation and port facilities in the Basin or any portion thereof.

"E. Consider means of improving and maintaining the fisheries of the Basin or any portion thereof.

"F. Recommend policies relating to water resources including the institution and alteration of flood plain and other zoning laws, ordinances and regulations.

"G. Recommend uniform or other laws, ordinances, or regulations relating to the development, use and conservation of the Basin's water resources to the party states or any of them and to other governments, political subdivisions, agencies or inter-governmental bodies having interests in or jurisdiction sufficient to affect conditions in the Basin or any portion thereof.

"H. Consider and recommend amendments or agreements supplementary to this compact to the party states or any of them, and assist in the formulation and drafting of such amendments or supplementary agreements.

"I. Prepare and publish reports, bulletins, and publications appropriate to this work and fix reasonable sales prices therefor.

"J. With respect to the water resources of the Basin or any portion thereof, recommend agreements between the governments of the United States and Canada.

"K. Recommend mutual arrangements expressed by concurrent or reciprocal legislation on the part of Congress and the Parliament of Canada including but not limited to such agreements and mutual arrangements as are provided for by Article XIII of the Treaty of 1909 Relating to Boundary Waters and Questions Arising Between the United States and Canada. (Treaty Series, No. 548).

"L. Cooperate with the governments of the United States and of Canada, the party states and any public or private agencies or bodies having interests in or jurisdiction sufficient to affect the Basin or any portion thereof.

"M. At the request of the United States, or in the event that a Province shall be a party state, at the request of the Government of Canada, assist in the negotiation and formulation of any treaty or other mutual arrangement or agreement between the United States and Canada with reference to the Basin or any portion thereof.

"N. Make any recommendation and do all things necessary and proper to carry out the powers conferred upon the Commission by this compact, provided that no action of the Commission shall have the force of law in, or be binding upon, any party state.

"ARTICLE VII

"Each party state agrees to consider the action the Commission recommends in respect to:

"A. Stabilization of lake levels.

"B. Measures for combating pollution, beach erosion, floods and shore inundation.

"C. Uniformity in navigation regulations within the constitutional powers of the states.

"D. Proposed navigation aids and improvements.

"E. Uniformity or effective coordinating action in fishing laws and regulations and cooperative action to eradicate destructive and parasitical forces endangering the fisheries, wildlife and other water resources.

"F. Suitable hydroelectric power developments.

"G. Cooperative programs for control of soil and bank erosion for the general improvement of the Basin.

"H. Diversion of waters from and into the Basin.

"I. Other measures the Commission may recommend to the states pursuant to Article VI of this compact.

"ARTICLE VIII

"This compact shall continue in force and remain binding upon each party state until renounced by the act of the legislature of such state, in such form and manner as it may choose and as may be valid and effective to repeal a statute of said state, provided that such renunciation shall not become effective until six months after notice of such action shall have been officially communicated in writing to the executive head of the other party states.

"ARTICLE IX

"It is intended that the provisions of this compact shall be reasonably and liberally construed to effectuate the purposes thereof. The provisions of this compact shall be severable and if any phrase, clause, sentence or provision of this compact is declared to be contrary to the constitution of any party state or of the United States, or in the case of a Province, to the British North America Act of 1867 as amended, or the applicability thereof to any state, agency, person or circumstance is held invalid, the constitutionality of the remainder of this compact and the applicability thereof to any state, agency, person or circumstance shall not be affected thereby, provided further that if this compact shall be held contrary to the constitution of the United States, or in the case of a Province, to the British North America Act of 1867 as amended, or of any party state, the compact shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters."

SEC. 2. The consent herein granted does not extend to paragraph B of article II or to paragraphs J, K, and M of article VI of the compact, or to other provisions of article VI of the compact which purport to authorize recommendations to, or cooperation with, any foreign or international governments, political subdivisions, agencies or bodies. In carrying out its functions under this Act the Commission shall be solely a consultative and recommendatory agency which will cooperate with the agencies of the United States. It shall furnish to the Congress and to the President, or to any official designated by the President, copies of its reports submitted to the party states pursuant to paragraph O. of article IV of the compact.

SEC. 3. Nothing contained in this Act or in the compact consented to hereby shall be construed to affect the jurisdiction, powers, or prerogatives of any department, agency, or officer of the United States Government or of the Great Lakes Basin Committee established under title II of the Water Resources Planning Act, or of any international commission or agency over or in the Great Lakes Basin or any portion thereof, nor shall anything contained herein be construed to establish an international agency or to limit or affect in any way the exercise of the treaty-making power or any other power or right of the United States.

SEC. 4. The right to alter, amend, or repeal this Act is expressly reserved.

The amendments were agreed to.

The bill was ordered to be engrossed for a third reading, was read the third time, and passed.

Mr. MANSFIELD. Mr. President, I ask unanimous consent to have printed in the RECORD an excerpt from the report (No. 1178), explaining the purposes of the bill.

There being no objection, the excerpt was ordered to be printed in the RECORD, as follows:

PURPOSE OF AMENDMENTS

The purpose of the amendments is to conform the bills to the suggestions received from interested governmental agencies as set forth in the attachments hereto.

PURPOSE

The purpose of the proposed legislation, as amended, is to grant the consent of Congress, with certain exceptions, to the creation of a Great Lakes Commission. The membership of the commission would comprise representatives of the States of Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania, and Wisconsin. The commission's powers spelled out in article VI include gathering and publication of information, making recommendations with respect to "the orderly, efficient and balanced development, use and conservation of the water resources of the basin or any portion thereof;" considering the means of improving fisheries and navigation; recommending legislation to the parties to the compact and others; and cooperating with the United States and the State governments and other public bodies.

STATEMENT

Legislation of this nature has been before the Congress for a number of years and was the subject of hearings in the 84th and 85th Congresses. In the 84th Congress, on August

27, 29, and 30, 1956, hearings were held on S. 2688 before a subcommittee of the Foreign Relations Committee of the Senate. As a result of those hearings S. 1416 was introduced in the 85th Congress, reported by the Committee on the Judiciary of the Senate, and passed the Senate. The Senate, including the foregoing, has approved this legislation on two occasions.

On September 21, 1967, Senator Hart introduced a resolution, Senate Concurrent Resolution 45, which was intended to be substituted for S. 660 in reference to congressional consent. Thereafter, on February 7, 1968, representatives of the Great Lakes Commission and interested Government agencies met to discuss Senate Concurrent Resolution 45. At that meeting it was decided that the proper approach was by the way of S. 660, with suggested amendments. An amended bill was prepared and sent to all interested parties for their comments. The present draft of the bill is the result of those suggestions.

The compact, as proposed, has the following history:

The Great Lakes Basin compact was approved and ratified in 1955 by five of the eight Great Lakes States—Illinois, Indiana, Michigan, Minnesota, and Wisconsin. By 1963 the other three States—New York, Ohio, and Pennsylvania—had ratified the compact.

The Great Lakes Commission is the operating entity of the Great Lakes Basin compact, and is wholly supported by the eight member States. This commission has been operating as the advisory and recommendatory agency for the Great Lakes States on regional water resources for more than 11 years. The establishment of this compact and commission has been a pioneer effort in bringing about interstate cooperation and coordination. Indicative of the commission's interests in the whole spectrum of water resources matters are the fields of activity of its five standing committees, entitled, first, "Pollution Control"; second, "Water Resources"; third, "Fisheries and Wildlife"; fourth, "Shoreline Use and Recreation"; and, fifth, "Seaway, Navigation, and Commerce." The commission keeps abreast of developments which affect the Great Lakes region, and initiates or responds to actions which occur or which need to be undertaken.

Throughout the past 11 years the commission, with headquarters in Ann Arbor, has been functioning in its advisory and recommendatory capacities, working on the regional approach to the wise use and conservation of the water and related land resources of the Great Lakes Basin. The commission has been a forerunner in recognizing regional problems and getting those problems into action channels before appropriate local, State, or Federal agencies. The commission has contributed significantly toward the recognition and solution of many of the regional water problems, and has been influential in bringing about the present intense effort of all concerned to assure the conservation of our water resources.

The eight States bordering the Great Lakes have recognized the diversity of conditions existing within the broad area of the Great Lakes Basin and the many possible uses and competition for use of the waters in the basin. To achieve the best and fullest use of this invaluable resource, these States have banded together in an interstate compact which has stimulated productive informal discussions of water matters among the States.

The Great Lakes Basin compact, within its role as a consultative and advising agent on water resources matters, has purposes encompassing a broad scope: First, to promote the orderly, integrated, and comprehensive development, use and conservation of the water resources of the Great Lakes Basin; second, to plan for the welfare and development of the water resources of the basin as a whole, as well as for those portions of the basin which may have problems of special concern; third, to make it possible for the States of the basin and their people to derive the maximum benefit from utilization of public works, in the form of navigational aids or otherwise, which may exist or which may be constructed from time to time; fourth, to advise in securing and maintaining a proper balance among industrial, commercial, agricultural, water supply, residential, and other legitimate uses of the water resources of the basin; and fifth, to establish and maintain an intergovernmental agency to the end that the purposes of this compact may be accomplished more effectively.

The Congress and the Nation as a whole have historically favored the establishment of interstate compacts to assist in meeting the needs and solving the problems of interstate matters. The Constitution of the United States, article I, section 10, clause 3, provides that interstate compacts shall have the consent of Congress.

Senator Hart, in a statement made on the floor of the Senate, has indicated that all of the sponsors of this bill urge adoption by the Congress. It may be noted that in its service to the States the commission renders five important functions. These are (1) to serve as a clearinghouse of information pertaining to the development, use, and conservation of the water resources of the Great Lakes Basin; (2) to undertake, encourage, and assist studies and investigations of the water resources and their use in the Great Lakes Basin; (3) to assist in coordinating the viewpoints of the party States on matters relating to these water resources which require policy determination and execution at the Federal or international levels; (4) to assist, upon request, agencies of the party States and their subdivisions, which administer programs pertaining to the development, use, and conservation of water resources of the basin; and (5) to recommend such new programs, or changes in existing programs, for the development, use, and conservation of the water resources of the basin as may be in the interest of the party States.

To support this program each member State contributes $9,000 annually to the commission.

The bill has the bipartisan support of representatives of the member States in Congress and the support of the administration. In addition to giving consent to Congress to the compact, the bill specifies certain procedures and limitations.

The committee notes the fact that it has on two previous occasions passed legislation similar to S. 660, and believes that consent of the Congress should be given to this compact as was indicated by the former approvals. Since the meeting of February 7, 1968, it would appear that all of the objections which heretofore existed to giving consent to the compact have been resolved.

On the basis of all of the foregoing, the committee in its belief that the legislation is meritorious, recommends that the bill, S. 660, as amended, be considered favorably.

EXTERNAL AFFAIRS

AFFAIRES EXTÉRIEURES

File on 20-3-1-1 lcs

TO / À: Co-ordination Division

FROM / De: Legal Division

REFERENCE / Référence:

SUBJECT / Sujet: Great Lakes Compact

SECURITY / Sécurité: UNCLASSIFIED

DATE: August 26, 1968

NUMBER / Numéro:

FILE	DOSSIER
OTTAWA	20-3-1-1
MISSION	13

ENCLOSURES / Annexes

DISTRIBUTION

Mr. Gotlieb
U.S.A. Div.

We attach a copy of letter 1255 of July 2, 1968 from Washington concerning the Great Lakes Compact which was referred direct to this Division by the Embassy.

2. It is our recollection that some years ago this Compact, like the North East Forest Fire Compact, was referred to Legal Division as it raised questions concerning provincial capacity to enter international agreements. We assume that primary responsibility for this subject would now lie with your Division and we are accordingly transferring this material to you.

Legal Division

Ext. 407A/Bil.

file
diary

SL ABRAHAMS/MW

EXTERNAL AFFAIRS

AFFAIRES EXTÉRIEURES

2

TO / À: The Canadian Embassy
Bonn

FROM / De: The Under-Secretary of State for External Affairs
Ottawa

REFERENCE / Référence: Your letter 506 of September 1, 1967

SUBJECT / Sujet: Federal State Cooperation in Germany

SECURITY / Sécurité: CONFIDENTIAL

DATE: March 22, 1968

NUMBER / Numéro: G-101

FILE / DOSSIER
OTTAWA
20-3-1-11
MISSION
4

ENCLOSURES / Annexes

DISTRIBUTION

European Division

Coordination Division

Your study of the treaty-making power of German Laender and the rôle of the Lindau agreement in relations between the Bund and Laender, contained in your letter under reference, was very helpful in the preparation of the paper "Federalism and International Relations".

2 It would also be helpful, in the context of more general studies of federal-provincial relations in Canada, for us to have as much background as possible concerning the mechanisms of Bund-Laender cooperation in the Federal Republic. It would be particularly useful to have your comments on the forms of consultation, any agreements that exist, any institutions, conferences, committees, etc. that have been established for this purpose, and some indication of the effectiveness of each. We have in mind in particular the manner in which such arrangements work out in practice and in day-to-day relations between the two levels of government.

3 We would be grateful if any documents you may be able to send us could be provided in English or French translation.

A. E. GOTLIEB
Under-Secretary of State
for External Affairs

Ext. 407D/Bil.
(Admin. Services Div.)

21.3.58 (A.S.)

000763

EXTERNAL AFFAIRS AFFAIRES EXTÉRIEURES

TO / À: The Under-Secretary of State for External Affairs, Ottawa

20-3-1-1 File log

FROM / De: The Canadian Ambassador, Belgrade, Yugoslavia

SECURITY / Sécurité: Confidential

DATE: March 7, 1968

REFERENCE / Référence: Our tel. no. 1709 of Oct. 25, 1967

NUMBER / Numéro: 163

SUBJECT / Sujet: The Republics and Foreign Affairs

FILE	DOSSIER
OTTAWA	20-3-1-1
MISSION	20-Yugo-1-3 32 20-Yugo-1-4

ENCLOSURES / Annexes

DISTRIBUTION

There seems to be a new impetus to the desire by the Republics in the Yugoslav confederation to flex their muscles in the international sphere. The Chairman of the Foreign Affairs Committee of the Federal Assembly, Mr. Veljko Micunovic, said to me recently that there was a determined effort on the part of the Federal Government "to encourage" the Republics to take an interest in the development of Yugoslav foreign policy and the Federal Executive Council was giving consideration as to how this might more effectively be achieved. He said "to encourage" but I suspect what he ought to have said was "roll with the punch".

2. Mr. Micunovic commented that the Republics had traditionally maintained links with foreign countries over a wide sector of activities. He said, for example, that it would be practically impossible for the Federal Government to police the direct contacts between some of the Republics and their near neighbours -- Slovenia and Croatia with Austria and Italy. He thought, however, that there was no fear of foreign countries misinterpreting the activities of the Republics in the international sphere just so long as no Republican leader tried to imply that he was a Republican notable without first being Yugoslav.

3. As was pointed out in paragraph 5 of our telegram under reference, most of the Republics have set up in recent years republican secretariats or bureaux, which take the form of commissions of the Republican Executive Councils. These secretariats have evolved from the earlier republican protocol sections. Given the accelerating trend towards a much more dynamic role by the constituent republics and their growing awareness of their own particular interests, these commissions may be expected to evolve into a series of mini-ministries. The Federal Government has, I believe, undertaken to consult the Republics through these offices on those matters of direct concern to the individual Republics. In addition most Republican Assemblies now have standing committees to discuss foreign affairs.

... 2

4. While this development has met with general approval, there are, I believe, some Republics which have indicated to the Federal Government that they would wish to be consulted on all matters and not just on those which the Federal Government believes are of direct interest to them. This attitude has not gone too well with some of the members of the Federal Government.

5. I have also heard it rumoured that some of the Republics suggested that they open separate trade offices abroad. Here again, I understand the Federal Government has been unwilling to accept the proposition. I suspect the Federal Government would argue that since the personnel composition of the Yugoslav Embassies takes fully into account the ethnic balance in the country, there is no need for separate representation abroad. Indeed, Mr. Micunovic argued that in Yugoslav offices in foreign countries bordering on Yugoslavia, there is a conscious effort to ensure that the personnel in these offices reflect the interests of the neighbouring Republics.

Ambassador

Direction d'Europe/G. Pelard/cat

c.c. M. Yalden
Aff. Culturelles
Coordination
Juridique
M. Lalonde (PMO)
M. S6aner (PCO)
Eur. (6) (8)

Classez sur
Treaty making powers of provinces.

20-3-1-1
28

DE PARIS FEV19/68 RESTR

A EXTER 586 PRIORITE

INFO BONN

RENCONTRE FRANCO-ALLEMANDE-EDUCATION

NOTRE ATTENTION A ETE ATTIREE PAR LE FAIT QUE LINTERLOCUTEUR ALLEMAND DE M PEYREFITTE MINISTRE DE LEDUCATION NATIONALE,ETAIT M GOPPEL, MINISTRE-PRESIDENT DU LAND DE BAVIERE.M GOPPEL BIEN ENTENDU FAISAIT PARTIE DE LA DEL FEDERALE OUESTALLEMANDE MAIS LE MONDE DECRIT SON ROLE AINSI CIT CHARGE DES QUESTIONS CULTURELLES POUR LENSEMBLE DES LAENDER DE LA REPUBLIQUE FEDERALE FINCIT.

Faculty of Law, University of Toronto
Toronto 5, Canada

M. Gotlieb to see
M. Abraham
N.K.

PERSONAL AND CONFIDENTIAL

January 26, 1968

20-3-1-1
28 | 22

M. F. Yalden, Esq.,
Special Assistant to the Under Secretary,
Department of External Affairs,
East Block,
Ottawa, Ontario

Dear Max:

I attach, as an annex to this letter, a transcript of the rough notes which I transmitted to you by phone last week on the two points which you asked me to check. As you know, this was a hurried job but I think it met your needs.

copy of this letter + Annex to M. Beaulieu + M. Bandeen
N.K.

I also attach copies of my letter of January 19th to the Under Secretary and my letter of January 22 (with expense claim attached) to Angus Matheson, in case they may be useful as convenient reference copies.

Yours sincerely,

Jerry

Gerald L. Morris
Associate Professor

GLM:fmb
Enc.

000767

1.2.35(s)

CONFIDENTIAL

ANNEX

(1) Source of Quote on Page 17 of draft:

As I suggested in Ottawa, the quotation in page 17 appears to have been taken from Article 8 of the constitution of the World Health Organization. The first sentence of Article 8 reads:

"Territories or groups of territories which are not responsible for the conduct of their international relations may be admitted as Associate Members by the Health Assembly upon application made on behalf of such territory or group of territories by the Member or other authority having responsibility for their international relations."

in our text

Except for the inclusion of the words "by the Health Assembly" the passage quoted above is identical with the quotation on page 17 of the draft. A quick check indicates that none of the other specialized agencies uses this wording, although some agencies such as ITU and IMCO use somewhat similar phrases. Several other agencies use quite different terminology, although the net result can be substantially similar. For example, the UPU makes no provision for associate members as such, but lists certain non-sovereign territories that are deemed to be members. The constitution of ICAO states that the membership may consist of signatories to the establishing convention, United Nations members "and States associated with them". It goes on to say that "States other than those" may be admitted. The ICAO constitution makes no reference to non-sovereign territories.

(2) Instances of Parliamentary Legislation Authorizing Agreements between Provinces and States of the United States.

(A) The Campobello-Lubec Bridge Act (Statutes of Canada 1958, c. 23) received royal assent on September 6, 1958. Its long title was "An Act to Authorize the Construction of a Bridge Across Lubec Channel Between the Province of New Brunswick and the State of Maine." Section 2 of the statute read as follows:

... 2

"Subject to this Act, the construction, operation and maintenance of the bridge described in section 3, as provided for by the agreement contemplated by that section, is hereby approved."

Section 3 of the act provided:

"The Province of New Brunswick (hereinafter referred to as "The Province") may enter into an agreement, subject to the approval of the Governor in Council, with the State of Maine for the construction, operation and maintenance of a bridge across Lubec Channel . . . (etc.)."

(B) The Pigeon River Bridge Act (Statutes of Canada 1959, c. 51) received royal assent on July 18, 1959. By its terms an agreement between Ontario and Minnesota was specifically authorized. Except for the necessary changes of place names, the wording of the long title and the text of sections 2 and 3 of the statute were identical to that of the Campobello-Lubec Bridge Act.

(C) The Milltown Bridge Act (Statutes of Canada 1966, c.9) received royal assent on March 31, 1966. Unlike the two earlier statutes, this act made no specific reference to the conclusion of an agreement by New Brunswick, but placed the emphasis completely on authorization of the construction of a bridge across the St. Croix River between Milltown, New Brunswick, and Calais, Maine.

The long title was "An Act to Authorize the Construction of a Bridge Across the St. Croix River Between the Province of New Brunswick and the State of Maine."

Section 2 omitted the clause referring to a contemplated agreement:

"Subject to this Act, the construction, operation and maintenance of the bridge described in section 3 is approved."

The wording of section 3 was quite different:

"The Province of New Brunswick (hereinafter referred to as "The Province") may, either alone or in conjunction with the appropriate public authority in the United States, construct or cause to be constructed and operate and maintain a bridge across the St. Croix River . . . (etc.)."

This legislative approach may have been utilized because the United States Congress, at the time of the Canadian act's adoption, had not taken final action to authorize the State of Maine to conclude an agreement with New Brunswick. It is also quite

... 3

possible that the altered statutory language was related to the Canadian emphasis (mentioned in the draft paper) on the necessity for an exchange of notes between the Canadian and U.S. federal authorities in order to constitute a valid and binding agreement.

(D) The 1962 agreement between Manitoba and Minnesota for the construction of an access highway across a portion of Manitoba into Minnesota's "north-west angle" was not authorized by any legislation of the federal parliament. My impression is that Manitoba allowed procedures to get out of proper channels and did not maintain proper consultation with Ottawa. The records of the Department may show what exchanges took place between the Federal Government and Manitoba and between the Federal Government and the United States Government. The article by Michael Rand in (1967) 25 U. of Toronto Fac. of L. Rev. 75 at page 80, quotes a letter dated August 3, 1966, to Rand from the Minister of Highways of Manitoba which states that following signature of the compact ". . . the agreement was ratified by the Canadian Government after consultation with the Province of Manitoba." I have found no published record of a Canada-United States agreement on the project.

Gerald L. Morris

Faculty of Law, University of Toronto
Toronto 5, Canada

CONFIDENTIAL

January 19, 1968

Marcel Cadieux, Esq.
Under Secretary of State for External Affairs
East Block
Ottawa, Ontario

Dear Mr. Cadieux:

It occurred to me that it would be appropriate for me to provide a brief general evaluation of the Department's paper on "Federalism and International Relations". The draft version which I had an opportunity to review impressed me as an excellent survey that, within the necessary limits of an official paper, effectively blended the legal and policy aspects of the problem.

With a few minor exceptions, my suggestions to your officials concerning the draft related more to the mode of presentation than to the legal substance of the argument. While I understand that there may yet be changes in the draft of both the main paper and the annex, I am generally satisfied that there is little basis for a valid legal attack on the text. During discussion of the paper I pointed out that I was hardly in a position to comment with particular authority on the constitutional practices of some of the federal states referred to in the annex.

May I stress the importance, in my view, of securing publication of this study as a background paper prior to the forthcoming federal-provincial constitutional conference. My experience in Toronto during recent months has caused me considerable uneasiness over the lack of awareness on the part of generally well-informed and influential persons concerning the crucial nature of this issue to the future of the Canadian federation.

Because of the inadequate public attention which the question has received, there is little realization of its potentially explosive nature. In fact I find that a startling number of my acquaintances in the academic and legal professions assume that this is an area in which the federal authorities may readily grant major concessions to the provinces during federal-provincial bargaining on the constitution.

... 2

It seems only fair to add that this attitude has apparently been encouraged by a widespread feeling that the Federal Government has not been unduly concerned over the issue. On a number of occasions I have heard remarks made to the effect that it is hard to believe the federal authorities have firm views of any sense of urgency about the question, when it is necessary to search diligently to find three or four brief official statements of the federal position over the past several years. If my impressions are correct, it may be important to offset by early publication any adverse public reaction that might develop if ill-founded expectations were rejected only at the actual conference sessions.

Yours very truly,

GLM/fmb

Gerald L. Morris

Faculty of Law, University of Toronto
Toronto 5, Canada

January 22nd, 1968

Under Secretary of State for
External Affairs,
Department of External Affairs,
East Block,
OTTAWA, Ontario.

ATTENTION: Angus Matheson, Esq., Head of Finance Division.

Dear Sir:

With reference to the letter to me dated January 12 from the Under Secretary, I wish to submit a claim for my transportation expenses and per diem allowances.

As Mr. Cadieux stated in his letter, my professional fee is $200. Since I was absent from my home in Toronto from 9.15 p.m. on January 12th until 11.45 p.m. on January 15, I believe the per diem allowance payable (at $30 per diem) should total $90. My transportation expenses are shown on the attached annex and total $33.90. Consequently, the total payable to me by the Department would appear to be $323.90.

I attach vouchers relating to the transportation expenses, along with a duplicate copy of this letter and annex. Mr. Yalden or Mr. Gotlieb could provide you with additional information, if necessary.

Yours sincerely,

GLM:nlb

Gerald L. Morris,
Associate Professor.

Encl.

Faculty of Law, University of Toronto
Toronto 5, Canada

January 22nd, 1968

CLAIM FOR TRANSPORTATION EXPENSES

(Claimed by Professor G. L. Morris, Faculty of Law, University of Toronto, for total expenses incurred for return transportation between Toronto and Ottawa to act as legal consultant to the Department of External Affairs. Left residence in Toronto at 9.15 p.m., January 12, and returned to residence in Toronto at 11.45 p.m., January 15.)

1968		
Jan. 12	Taxi from 25 St. Mary St. to Royal York Air Coach Terminal	$ 1.50
Jan. 12	Airport Coach to Toronto Airport	$ 1.75
Jan. 12	Economy Air Fare Toronto to Ottawa (Vouchers 1 and 2)	$19.00
Jan. 12	Limousine from Ottawa Airport to Château Laurier	$ 1.25
Jan. 15	Taxi from Château to Ottawa Railway Station	$ 2.60
Jan. 15	One way coach class rail fare Ottawa to Toronto (Voucher 3 ~~and 4~~)	$ 6.10
Jan. 15	Taxi from Toronto Union Station to 25 St. Mary Street	$ 1.65
Total		$33.90

GLM:nlb

Gerald L. Morris,
Associate Professor.

FOR INFORMATION
POUR INFORMATION

SECRET

DATE
November 1, 1967

TO - À
Mr. Baudouin

- ☐ RETAIN / CONSERVER
- ☐ DESTROY / DÉTRUIRE
- ☐ RETURN / RETOURNER
- ☐ FILE / CLASSER
- ☐ FORWARD TO / FAIRE SUIVRE À

M.F.Y.

000775

SIGNATURE

EXT 575/BIL EXTERNAL AFFAIRS – AFFAIRES EXTÉRIEURES

M. Delisle et classez les
M A Ruhan

EXTERNAL AFFAIRS / AFFAIRES EXTÉRIEURES

TO / À: The Under-Secretary of State for External Affairs, Ottawa

FROM / De: The Canadian Embassy, Vienna

REFERENCE / Référence: Your letter G-(M)-356 of August 11, 1967

SUBJECT / Sujet: State Practice concerning powers of members of a federal union to make treaties

SECURITY / Sécurité: SECRET

DATE: November 28, 1967

NUMBER / Numéro: 680

FILE	DOSSIER
OTTAWA	20-1-2-6
MISSION	20-3-28 (2)

ENCLOSURES / Annexes

DISTRIBUTION

23 Oct 67

20-3-1-1
28 27

We regret that largely because of Mr. Parry's recent illness it has been impossible for us to provide you with the information on Austrian State Practice requested in your multiple letter of August 11. We have been told by the Foreign Ministry that the best person to contact on the subject would be Dr. Erik Nettel of the Ministry's Legal Division who is at present in New York attending the U.N. General Assembly. The Director of the Legal Division, Dr. Paul Wilhelm-Heininger, has recently retired and there seems no other source for this information in the Ministry except Dr. Nettel who will not return to Vienna until Christmas. Pending Dr. Nettel's return we intend to speak with Mr. Pahr of the Constitutional Division of the Federal Chancellery and will send you his comments shortly.

T B Parry
The Embassy

Ext. 407B/Bil.
(Admin. Services Div.)

Copy shld not go to Legal Registry

EXTERNAL AFFAIRS AFFAIRES EXTERIEURES

20-3-1-1

SECURITY / Sécurité: ~~RESTRICTED~~

TO / À: Under-Secretary of State for External Affairs, OTTAWA

FROM / De: The Canadian Embassy, BUENOS AIRES

DATE: December 8, 1967

REFERENCE / Référence: Your Letter G-(M)-357 of Aug.11, 1967

NUMBER / Numéro: 391

SUBJECT / Sujet: State practice concerning the powers of Members of a Federal Union to make Treaties.

FILE / DOSSIER
OTTAWA ~~20-20-1-6~~
MISSION 20-2

ENCLOSURES / Annexes

DISTRIBUTION

The Revolution of June 28, 1966 by which the Argentine Armed Forces, commanded by General Onganía, seized power, naturally usurped the Argentine Constitution, and by subsequent Acts, Decrees and Executive Directives, considerably modified and superseded the Constitution. For purposes of the study under consideration, we may summarize by saying that the constitutional changes concentrated power in the hands of the federal authorities and further accentuated the exclusive prerogative of the central government to conclude international agreements. Our comments, then, will be divided into two parts: first, an elaboration of your correct interpretation of the former Constitution and, second, changes made in the wake of the Revolution.

Old Constitution

2. Article 67, paragraph 19, of the Constitution in force until June 28, 1966, assigned to the Federal Congress the power "to approve or reject treaties concluded with other nations, and Concordats made with the Apostolic See".

3. By Article 104, the provinces "retain all the power not delegated by the Constitution to the Federal Government...". Article 107, however, stipulates that "The Provinces may conclude partial treaties for the purpose of the administration of justice, economic interest, and works of common utility, with the knowledge of the Federal Government...". Article 108 continues: "The Provinces do not exercise the power delegated to the Nation. They may not conclude partial treaties of a political character; or enact laws relating to home or foreign trade or navigation...".

Revolutionary changes

4. The changes in the Argentine power structure following the Revolution of June 28, 1966 that are relevant to the federal-provincial allocation of authority to make treaties are contained in 1) the Act of the Argentine Revolution, July 8, 1966; 2) the Statute of the Argentine Revolution, July 8, 1966; 3) Law No.17,271 describing the competence of the Secretary of State of the Government; and 4) the "Directives for Governors" issued by the Ministry of the Interior in accordance with Instruction No.1/66 of July 1966. Article 3 of the Act of the Argentine Revolution "dissolve the National Congress and

G

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Ext. 407B/Bil. (Admin. Services Div.)

15.12.28(US)

2/.....

the Provincial Legislatures" and the President thereupon assumed the prerogatives and functions, as defined in the National Constitution, of Congress (Article 5 of the Statute of the Argentine Revolution). Furthermore, by Article 9 of the same Statute, the Federal Government was to appoint Governors of the provinces, who in turn were to exercise the legislative and executive functions of the Provincial Governments as defined by the old National Constitution.

5. This centralization of power is further stressed by Sections 5 and 7 of Law No.17,271 which designated the federal Secretary of State for Government as federal liaison with the provincial Governors, and by the "Directives for Governors" which enjoined the provincial Governors to carry out all directives from the central government, to submit all provincial laws to the central Government for authorization, and orient all "public and Government actions ... towards the achievement of the fundamental aim of the Argentine Revolution: national unity".

Conclusion and Summary

6. The limited independence of action allowed the provinces to initiate partial treaties among themselves has thus been restricted by the revolutionary changes in the Argentine power structure which reserves to the Central Government the final authority for all provincial laws.

Edward D. Wilgress

The Embassy

20-5-1-1

EXTERNAL AFFAIRS AFFAIRES EXTÉRIEURES

J. 20

TO / À: The Under-Secretary of State for External Affairs, OTTAWA.

FROM / De: Office of the High Commissioner for Canada, KUALA LUMPUR.

REFERENCE / Référence: Our Letter 364 of October 4, 1967

SUBJECT / Sujet: State Practice Concerning the Powers of Members of a Federal Union to Make Treaties

SECURITY / Sécurité: SECRET

DATE: October 11, 1967

NUMBER / Numéro: 371

FILE / DOSSIER
OTTAWA 20-1-2-6
MISSION 20-20 28

ENCLOSURES / Annexes

DISTRIBUTION

In the paper on Malaysia attached to our letter under reference, we stated that we were not aware of any examples of the federal government coming to Parliament in connection with the introduction of legislation implementing a treaty dealing with matters falling within the jurisdiction of the states, with a statement to the effect that it had consulted the states concerned as provided in Article 76(2) of the Constitution. Since writing that report, however, we have discussed the point with the Permanent Secretary to the Prime Minister's Department, who is equivalent to the Clerk of the Privy Council in Canada, and he has told us that while examples are rare, they do exist. He thought that the last occasion might have been two years' ago, and he promised to look up references for us.

Office of the High Commissioner

Received
OCT 17 1967
Legal Division
Department of External Affairs

TO: MR. BAUDOUIN
FROM REGISTRY
OCT 16 1967
L
FILE CHARGED OUT
TO: W Szymanski

Ext. 4078/Bil.
(Admin. Services Div.)

000779

EXTERNAL AFFAIRS AFFAIRES EXTÉRIEURES

TO / À: The Under-Secretary of State for External Affairs, OTTAWA.

FROM / De: The Office of the High Commissioner for Canada, KUALA LUMPUR.

REFERENCE / Référence: Your Letter G(M)-356 of August 11, 1967

SUBJECT / Sujet: State Practice Concerning the Powers of Members of Federal Union to Make Treaties

SECURITY / Sécurité: SECRET

DATE: October 4, 1967

NUMBER / Numéro: 364

FILE	DOSSIER
OTTAWA	
MISSION	20-20

ENCLOSURES / Annexes: 2

DISTRIBUTION

M. Abraham
To check against
article I gave
draft.

We attach two papers on this subject covering Malaysia and Burma. To the best of our knowledge, the facts presented in them and the interpretations given are accurate as far as they go, although as in most developing societies, institutionalized procedures in Burma and Malaysia are probably less relevant in the exercise of power than they are in more developed societies. Thus extra legal considerations tend to overshadow constitutional provisions. In the case of Burma, for example, the constitution, although not specifically revoked, appears to be quite meaningless at the present time. In Malaysia on the other hand, it is clear that the federal government is becoming increasingly less tolerant of political views diverging from their own, and less prepared to permit constitutional provisions to stand in the way of dealing with dissenters.

2. Thus it would seem to us that while a comparative study of this nature, that is to say one that embraces developing as well as developed countries, is useful in an academic sense, the differing levels of development probably limits the practical application of such an analysis.

Office of the High Commissioner

Ext. 407B/8ll.
(Admin. Services Div.)

000780

B U R M A

Paragraph five of the draft paper concerning Burma appears to be completely accurate with the important qualification that the country, since 1962, has been governed by a Revolutionary Council which conferred on its Chairman all legislative, judicial, and executive powers. While the Revolutionary Council did not specifically repeal or suspend the constitution and it technically would therefore appear to still exist, in practice the constitution would seem to operate only in those areas where the new government has not taken specific action.

In seizing power in Burma, the Revolutionary Council made it clear that it opposed the trend under previous governments towards increased autonomy for the states and the minorities. One of the first acts of the Council was to alter the federal structure considerably in favour of stronger central control. The elected state councils, the state ministers and the appointed head minister of state were all replaced by state supreme councils under the direct control of the Revolutionary Council. In practice, therefore, Burma for the time being at least has lost the quality of a federal state.

M A L A Y S I A

The constitutional position both with regard to the treaty-making and the treaty-implementing power in Malaysia, is quite precise. 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 would appear to embrace all aspects of relations with foreign countries. It reads:

"1. External Affairs, including--

(a) Treaties, agreements and conventions with other countries and all matters which bring the Federation into relations with any other country;

(b) Implementation of treaties, agreements and conventions with other countries;

(c) Diplomatic, consular and trade representation;

(d) International organizations; participation in international bodies and implementation of decisions taken thereat;

(e) Extradition; fugitive offenders; admission into, and emigration and expulsion from, the Federation;

(f) Passports; visas; permits of entry or other certificates; quarantine;

(g) Foreign and extra-territorial jurisdiction; and

(h) Pilgrimages to places outside Malaya."

In addition, the federal Parliament may make laws with respect to any matter enumerated in the state list, inter alia, "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". (Article 76(1)(a). However, no bill may be introduced into either house of Parliament "until the government of any state concerned has been consulted". (Article 76(2). Finally, if any state law is inconsistent with a federal law, the federal law shall prevail and the state law shall, to the extent of the inconsistency, be void. (Article 75).

While the federal government would seem to possess full executive and legislative power for the conduct of foreign affairs, including the making of treaties, how it obtained such power is less certain. The Malaysian Constitution of 1963 succeeded the Malayan Constitution of 1957 and for the purposes of this paper at least, the wording of the earlier Constitution remains unaffected by the amendments enacted in 1963 to give effect to the

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wider federation. The Constitution of the Federation of Malaya was set out as a schedule to the Federation of Malaya Agreement 1957, between Her Majesty the Queen on one hand and the rulers of the Malay states on the other. (1) The 1957 Agreement expressly revoked the Federation of Malaya Agreement 1948, between the Crown and the rulers jointly, and a series of state agreements between the Crown and the nine Malay rulers individually. While federal government in Malaya can be traced back to the 1895 Treaty of Federation between four of the states, that Treaty did not in fact define the powers of the federal and state governments, and it would appear that as late as 1946, each of the Malay states had separate written or unwritten constitutions which in general invested supreme authority in the ruler. It can perhaps be concluded that the treaty-making power which in any event would seem to have been limited by the various treaties between the Crown and the Malay rulers, passed to the federal government first under the Federation of Malaya Agreement of 1948, and again under the Federation of Malaya Agreement of 1957.

The 1957 Constitution was based on the report of the Federation of Malaya Constitutional Commission of that year, otherwise known as the Reid Commission. The Commission was expressly enjoined to provide for "the establishment of a strong central government with the States and Settlements enjoying a measure of autonomy...." In Section 113 of its report, the Reid Commission stated:

> "External affairs and defence must be federal subjects and we so recommend (List I, Heads 1 and 2). The effect of our recommendations would be that the powers of the Federation to deal with these matters would be comprehensive and would enable the Federation to take action on all subjects, including subjects in the State List to such extent as might be necessary for these purposes. In particular the Federation should be entitled to take all action necessary to implement future treaties and existing treaties which continue in force and to provide for visiting forces (Article 72)." (2)

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(1) Under the Constitutions of the States of Johore, Pahang, Kedah, Perlis, Kelantan and Trengganu, it was unlawful for the Ruler to enter into any negotiation relating to the cession or surrender of the State or any part thereof. In consequence it was necessary, in order to make it clear that the Ruler of each of these States had authority to enter into this Agreement, to amend the State Constitutions to that effect. These amendments came into force on August 5, 1957 (the Agreement itself being signed on that date) and in general provided that it should not be "unlawful for the Ruler to enter into an agreement with Her Majesty and Their Highnesses the Rulers of the Malay Stat revoking the Federation of Malaya Agreement and the State Agreement, of 1948, and providing for the constitution and government of a new and independent federation, within the British Commonwealth of Nations, of the Malay States and Settlements of Malacca and Penang and such further territories as may from time to time be admitted to such federation".

(2) In fact, the Reid Commission recommended somewhat stronger wording than was eventually adopted. Their proposal was as follows: "Parliament shall have power to make laws for implementing any treaty, agreement or convention between the Federation and any other country, or any decision taken by any international body if such decision was accepted by the Federal Government, notwithstanding that the law deals with a matter which is within the exclusive legislative authority of a State." In addition, the Reid Commission made no provision for consultation with the states.

The drafters of the 1957 Constitution appear to have been completely successful and at least to date, there have been no suggestions as far as we have been able to trace that loopholes exist. The only relevant court action that has come to our attention was that instituted by the State of Kelantan against the Federal Government in 1963, five days before the new Federation of Malaysia was to come into existence. The State had sought a declaration that the Malaysia Agreement and the subsequent Malaysia Act were null and void or alternatively not binding on the State of Kelantan on the grounds that the Act would in effect abolish the Federation of Malaya, contrary to the 1957 Agreement, and that in any event the proposed changes required the consent of each of the constituent states and that this had not been obtained, that the Ruler of Kelantan should have been a party to the Malaysia Agreement which he was not, that there was a constitutional convention the rulers of the individual states should be consulted regarding any substantial changes in the Constitution, and that the Federal Government had no power to legislate for the State of Kelantan in respect of any matter regarding which the State had its own legislation. In denying the State's application for a restraining order, the Chief Justice of Malaya declared that under the constitution of Malaya, Parliament had the power to admit other states to the Federation as well as to make laws relating to external affairs, including the making of treaties and agreements, and that Parliament in admitting new states to the Federation and in the changing of its name, was acting within its powers to amend the Constitution. The Chief Justice then observed "by Article 80(i) the executive authority of the Federation extends to all matters with respect to which Parliament may make laws which, as has been seen, includes external affairs, including treaties and agreements.... There is nothing whatsoever in the Constitution requiring consultation with any State Government or the Ruler of any State." (3)

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(3) The Government of the State of Kelantan v The Government of the Federation of Malaya and Tunku Abdul Rahman Putra Al-Haji, 1963 29 M.L.J. 355. The State subsequently abandoned its original action, and did not appeal the decision on its motion.

Controversy has also arisen concerning the constitutional prohibition on the borrowing of money by the states from other than the federal government, a prohibition which may extend to any guarantee involving a financial liability (Article III). Again, it has been the government of Kelantan, controlled by an opposition political party, which has become involved in litigation with the federal government. This time the federal government has challenged the power of the state to lease a substantial tract of land to a foreign company, arguing that the required prepayment of royalties was not to be regarded as a deposit as claimed by the state government, but as a loan proscribed by the constitution. The court has not yet brought down its decision in the case.

Turning now to the form of consultation between the federal and state governments on treaty matters falling within the jurisdiction of the states, it is evident that the constitutional requirement for consultation with them where their interests are involved before implementing legislation is introduced in the federal parliament, rides lightly on the federal government. To begin with, in general terms the state list is confined to such matters as Malay custom and Muslim religion, land, agriculture and forestry, and local works and services. While we understand that attempts by the federal government to secure the co-operation of the states in promoting uniform national development in areas within their competence have not always been successful, we are not aware of cases in which the treaty making and treaty implementing power have been directly involved. Thus, for example, we are not aware of any examples of the federal government coming to parliament and stating on the introduction of legislation implementing a treaty dealing with matters falling within the state jurisdiction, that it had consulted the states concerned. The closest recent example is perhaps the case of a regional economic survey of the State of Trengganu being undertaken by The Netherlands government. We understand that the state government has been quite prepared to have the federal government carry out all the negotiations with The Netherlands and has not in practise questioned its right to do so. In this connection it is relevant to note that all but one of the states are dependent on federal government subsidies to cover even their current expenditures, that most of the chief ministers are federal appointees, and that many of the senior civil servants in most of the states are on loan from the federal civil service. In these circumstances, it is perhaps understandable that the federal government is rarely contradicted or permits any sustained contradiction unless, of course, as is the case with only one state at the moment, the state government is controlled by an opposition political party.

EXTERNAL AFFAIRS AFFAIRES EXTÉRIEURES

TO / À: Under-Secretary of State for External Affairs, Ottawa.

FROM / De: Canadian Embassy, Berne, Switzerland

DATE: September 5, 1967.

REFERENCE / Référence: Your G- (M) 356 of August 11, 1967.

NUMBER / Numéro: 315

SUBJECT / Sujet: Treaty-making Jurisdiction of Component Units of Federal Countries.

FILE / DOSSIER
OTTAWA 20-1-2-6
MISSION 281

ENCLOSURES / Annexes: 1

DISTRIBUTION

The questions raised in your letter under reference were discussed to-day with Mr. Emanuel Diez, Head of the Legal Division of the Federal Political Department. Mr. Diez has been involved in departmental legal and treaty work over the past 20 years and has led numerous Swiss delegations to negotiate questions affecting the Swiss Confederation and the cantons. He is, therefore, undoubtedly one of the best qualified people in Switzerland to comment knowledgeably on the questions you raise from a practical as well as a formal constitutional point of view.

2. We would propose to deal with your enquiry in two parts: namely, commenting on the facts set out in your paper and the interpretation given them; secondly dealing with the practice followed by the Swiss authorities in the negotiation of international treaties within the formal constitutional framework. For simplicity's sake and easy reference, we have copied Section 3 of your paper which deals with Switzerland and numbered the paragraphs of this extract which is attached hereto.

I. Constitutional Provisions and Interpretation thereof, following Departmental Paper.

3. Paragraph 1 of the attached extract from the Departmental paper is factually accurate. Practice also follows the constitution very closely without strained interpretations: in other words, questions directly negotiated by cantons with foreign countries are of a very limited, almost banal, nature.

4. A few examples will illustrate this: Switzerland is extremely sensitive, because of its well-known position on neutrality, in allowing entry to uniformed personnel from other countries' military or para-military forces. However, when a

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German customs officer plying on a ferryboat across Lake Constance expressed the desire to stretch his legs and fortify himself occasionally at a local beer garden on the Swiss side, the cantonal authorities, after clearing with the Federal Political Department, worked out local arrangement in this respect with the German authorities. A similar arrangement to enable the French customs officer to visit a local bistro was made by the cantonal authorities of Basel with respect to the trains coming into that city from France with a uniformed French customs officer aboard. Another example is the case of the drainage from a couple of German border villages which goes into the Basel drainage system. The Basel authorities (after consultations) worked out arrangements with the local German authorities to be compensated for the use of their drainage canals. Finally, there is a gas works in Germany which supplies gas to certain small Swiss villages on the other side of the border and has done so for many years. (Even during World War II when Germany was short of fuel, the arrangement was preserved.) This local arrangement was worked out directly by the cantonal authority after consultation and approval from the centre.

5. Mr. Diez told us that such hands-across-the-border arrangements need not even be written. They could be worked out in the way the local cantonal authority thought best but only after consultation with and approval from Berne, for, minor though they were, they did constitute mini-acts of sovereignty.

6. Apart from cantonal agreements of a very limited nature negotiated by cantonal authorities, there are cantonal agreements, or more accurately, international agreements which happen to affect only one canton in the case of Switzerland, which are negotiated by the Swiss government guided by the advice of the canton. Such agreements are very rare indeed as, we are told, most agreements, even border agreements, nowadays, involve both the Federal and the Cantonal governments. One of the big things to-day for instance, are road tunnels through the Alps. At first this might seem to affect merely the canton through which the tunnel goes and the local district on the other side of the border, but further reflection would reveal that the Federal Government is also deeply involved in the matter of customs, visa control points and construction standards and safety matters, and even timing since the building of a superhighway network and its connection with other superhighways at the border points demands a long programme of advance planning. Another common type of border agreement nowadays in Switzerland, we were told, involved dams and hydro-electric projects. Here again the questions surrounding the implementation of these projects involve federal as well as purely local jurisdictions.

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There is for instance the problem of the backup of the water which usually involves some border rectification, swapping so many square miles here for so many square miles there and agreeing as to the most convenient location for customs houses and border control. While, as will be noted in Section II of this report, the local canton authorities have their full say in the negotiation of such agreements, the agreements themselves are more than local in scope and the prime negotiation is therefore done by the federal authority.

7. Paragraphs 2 and 3 of the Department's paper are not entirely accurate and should, we suggest, be re-arranged. We would put it that, under Article 102 (7) the Federal Council examines the treaties which cantons make with foreign countries and sanctions them if they are allowable. Under Article 85 (5) the Federal Assembly (not the Federal Council as stated in the paper) sanctions treaties which the cantons may make with foreign countries, but a limited cantonal treaty is only to be brought before the Federal Assembly if the Federal Council or another canton raises objection to it. In other words, it is the Federal Council (or Executive) which, in the first instance, examines cantonal treaties and sanctions them, and the legislative branch or Federal Assembly, being composed of the National Council and the Council of States, only gets involved if the Federal Council or another canton objects to the treaty which the canton has negotiated.

8. Mr. Diez's only comment was that these articles, to his knowledge, deal with hypothetical cases since in practice he has not known any cantonal treaty dis-allowed by the Federal Government and brought into the forum of debate of the Federal Assembly. Any thrashing out between the cantons and the Federal Council will have been done at a preliminary stage when the canton discusses with the Federal authorities its desire to negotiate a local agreement and clears it with the Federal authorities before proceeding to negotiation.

9. Paragraphs 4, 5 and 6 of the Department memorandum are accurate although the reference to Basel and Argau is, of course an intercantonal and not an international agreement since both Basel and Argau are in Switzerland. The general propositions set out in these paragraphs are developed more fully in our Section II below.

10. With reference to paragraphs 7, 8 and 9 of the Departmental paper concerning the legal nicety of whether a canton has an international personality at all, Mr. Diez had little to say as he concentrated his remarks on actual practice rather than theory of jurisprudence. He did say that while Article 3 of the Federal Constitution stated that cantons were

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sovereign subject to the constitution in the exercise of all powers not transferred to the Federal Government, the constitution made it clear that the Confederation has the sole right of concluding treaties and that, in practice, this has been recognized and followed. Christopher Hughes' commentary on the Federal Constitution of Switzerland (Oxford Clarendon Press 1954), comments with reference to Article 3 of the constitution "it is probable, but not quite certain, that the cantons have no personality in international law" (Page 6). It is clear, in any case, that Article 2 of the transitory provisions of the Swiss constitution (that cantonal constitutions and laws cease to have effect when the federal constitution or federal laws under it come into force) has greatly limited the sovereignty of the cantons as proclaimed in Article 3 of the constitution. The legal tag "Federal law breaks Cantonal law" is generally accepted by the Federal Tribunal to-day in daily application of the law here (see Hughes op.cit. page 139). In this connection, we wonder whether in the second line of paragraph 8 of the Departmental paper the word "central" should not read "cantonal". As it stands this sentence is rather meaningless whereas if the word "cantonal" is substituted the thought falls into the general argument.

II Swiss Practice in Treaty Negotiation

11. Mr. Diez said that, happily, in Switzerland there is a complete public acceptance of the principle of the primacy of the Federal authority in treaty making matters. This sprang, he thought, basically from the existence of a strong concept of Swiss national identity and perhaps a degree of political maturity in this respect. There was universal recognition of the proposition that if the cantons ran off in different directions in international affairs the disintegration of the Swiss Nation was at hand. Four quite different tribes banding together to form a small nation surrounded by much larger powers demanded complete unanimity on this point for national survival. This did not mean, Mr. Diez said, that there were not the most lively discussions, to put it mildly, between the cantons and the Federal Government regarding the division of power and jurisdiction within the country. But these domestic debates, it was generally accepted, had to stop there. Outside powers could not be invoked to support a cantonal position without threatening integrity of the nation.

12. Diez then gave a number of examples. Some little time ago Basel was very disappointed that the United States scaled down its Consulate General there to the status of a Consulate. It asked the Federal authority to make represent-

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ations in Washington which the Federal authority did, without success, receiving a reply that this was purely a matter of internal American administration in the running of the State Department. Basel, however, was not satisfied with this and sent a special delegation to Washington to plead its case. This came to the attention of Berne which addressed a stinging letter to the Basel authorities, who duly humbly apologized for intervening in foreign affairs.

13. On the carpet right now, Diez adds, is the fact that the Gotthard Road tunnel to Italy has been held up partly because of a lack of federal funds and the cantonal authorities of Uri were extremely disappointed about this. They were fully aware, however, that any attempts by them to bring Italian pressure to bear on Swiss central government to give priority to this tunnel would raise a storm throughout the country and be counter-productive.

14. We asked if Swiss authorities would look with a favourable eye on the establishment by cantons of agents-general abroad to pursue non-political issues such as economic and cultural objectives on behalf of their cantons. Diez said quite categorically that this would not be tolerated by the central government nor would any canton have the bad judgement to propose the establishment of such an office. No matter how it was sliced the establishment of a mission abroad by a canton was in fact an intervention in the field of foreign relations which the constitution put formally in the hands of the Confederation.

15. A final example mentioned by Mr. Diez was the case of the claims of the Jurassiens. There was a lot of sympathy in Swiss Romandy for their claims at one time, and this existed indeed even among some of the non-Bernese Allemanic population. Since the Jurassien movement, however, made overtures to France for support from that quarter, this general sympathy for their cause was sharply reduced even in Swiss Romandy and the Jurassien leaders were now aware that they had made a political mistake.

16. Given the general acceptance of the constitutional ground rules that the Federal Government was sovereign in the field of foreign affairs, the problem became essentially an administrative one of finding the best way of consulting with the cantons to be sure that their interests were taken into account in any international negotiations affecting them. The technique most widely used, Mr. Diez said, was that of the mixed commission. In practical matters like the connection of

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superhighways with main road arteries of neighbouring countries, tunnels, dams and hydro-electric projects, such mixed commissions abounded. Some of the experts were federal officials, others cantonal. Diez added that in the negotiating teams which he took abroad on such questions there was always one and sometimes several cantonal experts as part of the delegation and they all worked together as a Swiss team.

17. Another type of negotiation, he said, that was most important for Switzerland was the double taxation agreement. Here all the cantons were affected because of concurrent powers in the field of taxation. The technique here, he said, was to have a meeting of the cantonal finance ministers to discuss Swiss objectives and tactics and to have a cantonal representative, usually a finance minister, as an integrated member of the Swiss delegation. This, he said, had enormous advantages. Sometimes a cantonal representative in delegation caucus would say that a proposal was simply unacceptable to the cantons and the Swiss position would, in the circumstances, no doubt have to be altered to meet the cantonal interests. On the other hand if the cantonal representative went along, he was in an ideal position to defend in his own cantonal assembly what had been done and to support the Swiss position vis-a-vis possible objections of other cantons. When we asked whether there was not some difficulty in choosing a single cantonal representative from the 22 cantons to attach to a Swiss delegation, we were told that there always seemed to be a logical person to go. If it was a negotiation with the Germans on a financial matter the cantons would generally agree that the Finance Minister from Zurich was the logical man, or perhaps some other outstanding representative from another of the German-speaking cantons even though he represented a less important financial centre than Zurich. Similarly if the negotiation was with France, there would usually be an outstanding name in Swiss Romandy who, by general acquiescence, would seem to be the best representative. Naturally a certain amount of politics was involved here and Swiss practice in so far aswas possible was to choose "à tour de rôle".

18. Sometimes, Mr. Diez conceded, the Federal Government would drop its plans in the face of cantonal opposition. Recently there was a proposal, which the Swiss Federal Government favoured, to exempt from Swiss taxation, charity or foundation bequests coming from other countries. The cantons, however, were so fractious on this question that the Swiss Government decided not to pursue it. As an example in the other direction, Mr. Diez said that "procédure civile" (civil law? or civil administration?) was clearly a matter falling within cantonal

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jurisdiction. On the other hand, the Swiss government felt that it should go ahead with a proposed international agreement at the Hague which touched on this subject and did so even though all the cantons were not happy about it.

19. It is realized that some of the references to specific agreements and negotiations set out above lack, perhaps, the precision which you require. Mr. Diez, however, spoke to us so freely and flowingly on a subject obviously close to his heart that we thought it best not to punctuate his delivery with too many specific questions about dates and places. If it is your wish, however, to pursue any particular question further, we would be glad to obtain the information you require.

René Jamay
Ambassador

SWITZERLAND

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

> "In specific cases the cantons retain the right of concluding treaties with foreign powers upon the subjects of public economic regulation, cross-frontier intercourse and police relations; but such treaties shall contain nothing repugnant to the Federation or to the rights of other cantons."
>
> Article 10 provides:
>
> "Official relations between a canton and a foreign government or its representatives take place through the intermediary of the Federal Council. Nevertheless, upon the subjects mentioned in Article 9 the cantons may correspond directly with the inferior authorities or officials of a foreign state."

2. Under the federal constitution the cantons are sovereign subject to the constitution and exercise all powers that have not been transferred to the federal government (Article 3). The Federal Council, under Article 85 (5) "examines the treaties which cantons make with each other or with foreign governments and sanction them if they are allowable." The federal authorities can examine a proposed treaty of a canton if the Federal Council or other cantons raise objections to it.

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

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

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

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

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

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

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

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

(b) through initiating a constitutional amendment;

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

9. 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.

EXTERNAL AFFAIRS | AFFAIRES EXTÉRIEURES

TO / À: THE UNDER SECRETARY OF STATE FOR EXTERNAL AFFAIRS, OTTAWA

FROM / De: THE CANADIAN EMBASSY, BONN

REFERENCE / Référence: Your Letter No. C-(M)-356

SUBJECT / Sujet: State Practice Concerning the Powers of Members of a Federal Union to make Treaties.

SECURITY / Sécurité: SECRET

DATE: September 1, 1967

NUMBER / Numéro: 506

FILE / DOSSIER
OTTAWA: 20-1-2-6
MISSION: 28/20-1-2/3

ENCLOSURES / Annexes

DISTRIBUTION

USSEA
Mr. Gotlieb
Legal Div
European

In response to your request we have discussed the power of the German Laender to make treaties with foreign states with Ministerialrat Wellenkamp, who is the senior officer concerned with this subject in the Ministry for Bundesrat and Laender Affairs. In general, Dr. Wellenkamp confirmed the facts stated in the paper attached to your letter under reference, and your interpretation of them, and he provided certain supplementary information which will be of interest to you. As well, however, he pointed out one or two important qualifications which make the practice of treaty making by the Federal Republic and the Laender somewhat different from that which you have inferred from the terms of the West German Constitution.

2. The Basic Law of the Federal Republic of Germany assigns the conduct of relations with foreign states to the federal authority, with the qualifications, (a) that the Laender must be consulted in sufficient time if a proposed treaty affects their special interests, and (b) that the Laender may, with the consent of the Federal Government, themselves conclude treaties respecting subjects within their legislative competence with foreign states. We were somewhat surprised to learn from Dr. Wellenkamp that the consultation by the Federal Government of the Laender and the obtaining by the Laender of the Federal Government's consent take place not, as we had assumed, through his ministry (the Canadian equivalent of which would be a Department of Federal-Provincial Relations) but rather through the Foreign Office. In the case of a treaty desired by a Land or Laender, moreover, the negotiation of its terms with whatever foreign state may be concerned is conducted by the Land or Laender which then merely submit(s) its agreed text to the Foreign Office for approval.

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TO: MR. SCOTT
FROM REGISTRY
SEP 12 1967
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FILE CHARGED OUT
TO: MR SCOTT

J 14

Ext. 407B/Bil.
(Admin. Services Div.)

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3. As is pointed out in your paper, their treaty making power has not been used extensively by the Laender, and its use has been restricted almost entirely to agreements concerning cultural affairs, education and, in a very few instances, religion. One of the examples cited on page 10 of your paper is not apparently a treaty entered into by Laender. The legal department of the Foreign Office has confirmed that on April 13, 1966 a treaty was signed with the Governments of Austria and Switzerland governing the withdrawal of water from Lake Constance, but has informed us that this treaty was signed by the Federal Government and not by the Laender of Bavaria and Baden-Wurtemburg. This treaty has been ratified by Austria and Switzerland, and German ratification is anticipated within the next few weeks.

4. In terms of the delimitation of the respective jurisdictions of the Federal Government and those of the Laender in treaty making, the conclusion in 1957 of the Lindau Agreement (an office translation of it is attached) was crucial, and it is important that its nature and its consequences should be clearly understood. This was not an agreement formally concluded by the Federal Government and the Laender, but rather an administrative arrangement between the Ministry for Bundesrat and Laender Affairs and the Foreign Office intended to forestall disputes between the Federal and Laender Governments which could arise from the vagueness of Article 32 of the Basic Law. It is made clear in the Agreement that the Federal Government abandons none of its constitutional prerogative to conduct relations with foreign states, but it represents nonetheless a tacit suspension of part of that prerogative. The practical effect of the Lindau Agreement, which was, of course, accepted by the Laender since it increased their voice in foreign affairs, was no less than to amend Article 32 (2) of the Basic Law. In return for the acquiesence of the Laender in the extension of federal treaty making power in certain fields, the Federal Government undertook not merely to consult the Laender about treaties affecting their special interests, but to obtain their consent to such treaties before concluding them. This has meant the establishment of a right of veto for the Laender over any proposed treaties to which they object. All treaties involving Laender interests must be referred to a Treaty Commission, including representatives of the Laender as well as of the Federal Government, then to the Laender executives concerned and finally to their parliaments for approval. It is, needless to say, an inordinately time-consuming process.

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5. Dr. Wellenkamp told us that there has been increasing dissatisfaction within the Federal Government with the consequences of the Lindau Agreement, and that consideration is being given, particularly by his Minister, Dr. Carlo Schmid, to repudiating it. It is recognized that this alone would not be sufficient, since mere repudiation of the Agreement would only result in a proliferation of the disputes it was intended to avoid. Dr. Schmid, according to Wellenkamp, wants, in place of the unsatisfactory Agreement, nothing less than a revision of Article 32 of the Basic Law assigning unequivocally all treaty making power to the Federal Government, and thus confirming the statement in the first clause of that article that the conduct of relations with foreign states is solely the concern of the Federal Government. Since any amendment of the Basic Law requires the approval of three-fourths of the Bundesrat, which is, after all, composed of representatives of the Laender, we doubt that Dr. Schmid will succeed in obtaining the revision he wants in the near future.

6. Reference is made in the paper attached to your letter to the Reichskonkordat Case (1957) which is cited as an example of the possibility of a Land enacting legislation (subsequently upheld by the Federal Constitutional Court) which is inconsistent with a treaty binding on the Federal Government. We raised this case and its implications with Dr. Wellenkamp, and while the position he took seems out of keeping with generally accepted international law, we think it worth reporting to you. According to Wellenkamp, the Reichskonkordat and disputes arising out of it can not be regarded as established precedents for disputes concerning "real" treaties. It is universally accepted legal opinion in Germany, he said, that the Vatican does not constitute a foreign state as such and that agreements with it are not, therefore, treaties in the usual sense of the term. It is only for reasons of "courtesy", he maintained, that the Federal Republic accredits an Ambassador to the Holy See and accepts the Vatican's membership in international organizations. Moreover, although the Federal Government does not regard the Reichskonkordat as an international treaty proper, it does, also for reasons of "courtesy" apparently, attempt to abide by it as though it were a treaty in the full sense of the term. This approach is rather too jesuitical for us to follow, but it does suggest perhaps that the Reichskonkordat Case should not be emphasized in the paper you have under preparation.

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7. We are attaching, as you requested, translations of those Articles, and parts of Articles, which are quoted in the draft paper attached to your letter under reference. Our translations are taken from the English version of the Basic Law of the Federal Republic of Germany prepared by the German Information Centre in New York.

for The Embassy

TEXT OF THE LINDAU AGREEMENT

(Office Translation)

1. The Federation and the Laender uphold their known legal positions on the power of conclusion and negotiation concerning treaties, in terms of international law, which affect the exclusive power of the Laender.

2. An accommodating approach in applying Article 73 (1) and (5) and Article 74 (4) of the Basic Law is considered possible by the Laender according to which the power to legislate of the Federation in cases of

   A. Consular agreements,

   B. Commercial and navigation agreements, agreements on the establishment of aliens as well as agreements on the exchange of goods and payments with foreign countries,

   C. Agreements on membership of or on the foundation of international organizations might also be accepted in cases, where from the terms of such agreements it would appear doubtful whether, in terms of international practice, they are within the exclusive power of the Laender if these terms

      (a) are typical for the treaties and normally part of these treaties or

      (b) constitute a subordinate part of the treaty with its central part being, beyond doubt, within the power of the Federation.

   This relates to provisions on privileges for foreign countries and international organizations concerning laws regarding taxation, police and expropriation (immunities) as well as to specified provisions on the rights of aliens in commercial, navigation and establishment agreements.

3. As to the conclusion of state treaties which, in the view of the Laender, affect their exclusive power and which are not covered by the power of the Federation pursuant to Article 32 (2), i.e. with a particular view to cultural agreements, the procedure shall be as follows:

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Insofar as treaties in terms of international law relating to fields within the exclusive power of the Laender are to commit either the Federation or the Laender, the consent of the Laender shall be obtained. This consent must have been obtained before the commitment is binding in terms of international law. In cases where the Federal Government in pursuance of Article 59 (2) of the Basic Law submits such a draft treaty to the Bundesrat, it shall request the approval of the Laender by that time at the latest. In cases of treaties as referred to in Article 1, clause 2, arrangements for participation of Laender in the preparation of the conclusion at the earliest possible stage but at any rate well in time before laying down the final wording of the text of the treaty shall be made.

4. It is further agreed, that in cases of treaties affecting essential interests of the Laender - regardless of these treaties affecting or not affecting exclusive powers of the Laender - that:

   (a) the Laender shall be informed on the intended conclusion of such treaties as early as possible so that they may express their special wishes in sufficient time,

   (b) a standing body of representatives of the Laender shall be set up to be available as interlocutor for the Foreign Office or alternative appropriate technical departments of the Federation at the time of negotiating international treaties,

   (c) notification of the above body or declaration made by it respectively shall not affect the arrangements made under (3) above.

5. The special case of Article 32 (2) of the Basic Law is not affected by (4) above.

ENGLISH TRANSLATION OF ARTICLES OF THE BASIC LAW OF THE FEDERAL REPUBLIC OF GERMANY

Article 32

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

(2) Before the conclusion of a treaty affecting the special interests of a Land, this Land must be consulted in sufficient time.

(3) Insofar as the Laender have power to legislate, they may, with the consent of the Federal Government, conclude treaties with foreign states.

Article 59

(1) 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.

Article 73

The Federation has the exclusive power to legislate in: -

(1) Foreign affairs as well as defense....

FM DELHI SEP25/67 SECRET

TO EXTER 2237 PRIORITY

REF MULTIPLE LET G(M) 356 AUG11

TREATY-MAKING POWERS IN FEDERAL STATES

IN THE ABSENCE OF MORE SENIOR OFFICERS OF LEGAL AND TREATIES DIV, MEA, WE CALLED TODAY ON KL SARMA, LAW OFFICER IN THAT DIV TO DISCUSS TREATY-MAKING POWERS UNDER INDIAN CONSTITUTION. AS INSTRUCTED WE DID NOT RPT NOT SHOW SARMA YOUR NOTE DEALING WITH INDIAN SITUATION, NOR DID WE MENTION YOU WERE PREPARING A PAPER FOR POSSIBLE PUBLICATION. WE SIMPLY REF TO OUR GENERAL INTEREST IN OTHER FEDERAL SYSTEMS, CITED RELEVANT ARTICLES FROM INDIAN CONSTITUTION, AND INVITED SARMA TO COMMENT(WE SHOULD POINT OUT THAT ARTICLE 253 IS GOVERNING CLAUSE IN CONSTITUTION OF INDIA AND NOT RPT NOT SECTION 263 AS CITED BY YOU).

2. SARMA CONFIRMED THAT INDIAN PRACTICE IS PRECISELY AS SET OUT IN CONSTITUTION PARTICULARLY IN ARTICLE 253 AND IN ENTRY 14 OF LIST 1, SEVENTH SCHEDULE(QUOTE ENTERING INTO TREATIES AND AGREEMENTS WITH FOREIGN COUNTRIES AND IMPLEMENTING OF TREATIES, AGREEMENTS AND CONVENTIONS WITH FOREIGN COUNTRIES UNQUOTE). ENTRY 13 OF LIST 1, HE SAID WAS ALSO RELEVANT IN THIS CONTEXT AS IT RESERVED TO THE UNION GOVT THE POWER OF QUOTE PARTICIPATION IN INTERNATL CONFERENCES, ASSOCIATIONS AND OTHER BODIES AND IMPLEMENTING OF DECISIONS MADE THEREAT UNQUOTE. THUS, HE SAID, IT WAS CLEAR THAT THE UNION GOVT HAS THE EXCLUSIVE POWER BOTH TO ENTER INTO TREATIES AND TO MAKE LAWS FOR THEIR IMPLEMENTATION. THIS POSITION,

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ACCORDING TO SARMA, HAD NEVER BEEN CHALLENGED AND HAD NEVER OCCASIONED A REF TO SUPREME COURT OF INDIA. CONSTITUTIONAL PROVISIONS, HE SAID, HAD NEVER BEEN SUPPLEMENTED BY LEGISLATION BY UNION PARLIAMENT.

3. REGARDING POINTS RAISED IN PARA2 OF YOUR REFLET, SARMA SAID HE KNEW OF NO RPT NO ESTABLISHED PRACTICE IN INDIA WHEREBY CENTRE CONSULTED WITH STATES WHEN PARTICULAR TREATY AFFECTED STATES INTERESTS. NOR WAS THERE ANY STANDARD PRECEDENT OR PRACTICE WHEREBY STATES SUGGESTED TREATY INITIATIVES IN FIELDS WHICH INTEREST THEM PRIMARILY OR WHERE THEIR INTEREST IS SHARED WITH CENTRE. ON THE OTHER HAND, HE SAID, THERE WAS NOTHING TO PREVENT STATES FROM MAKING SUGGESTIONS OF THIS KIND.

4. WE SUSPECT THAT ONE REASON WHY CONSTITUTIONAL POSITION IN INDIA IS SO HAPPILY CUT-AND-DRIED AND UNCONTROVERSIAL IS THAT UNTIL RECENTLY CONGRESS PARTY WAS IN POWER IN CENTRE AND IN ALL STATES. INTEREST OF STATES COULD BE CONSULTED AND POLICY DIFFERENCES, IF ANY, COULD BE COMPOSED INFORMALLY THROUGH PARTY CHANNELS AND CONTACTS. WITH ADVENT OF RADICAL OPPOSITION GOVTS IN WEST BENGAL AND KERALA, FOR INSTANCE, CONTROVERSY MAY ARISE IF SPECIFIC OCCASION PRESENTS ITSELF. KERALA GOVT HAS ALREADY RAISED QUESTION OF WHETHER STATE AUTHORITIES SHOULD BE FREE TO NEGOTIATE RICE PURCHASES DIRECTLY WITH FOREIGN GOVTS SUCH AS BURMA AND THAILAND INSTEAD OF RELYING ON DELHI FOR SUPPLIES. NEVERTHELESS CONSTITUTIONAL

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PROVISIONS ARE SO CLEAR CUT AND UNAMBIGUOUS IT SEEMS DIFFICULT TO ENVISAGE SITUATION IN WHICH THEY COULD BE CHALLENGED AT LAW. CHALLENGE IN POLITICAL TERMS AND BY POLITICAL MEANS IS OF COURSE ANOTHER QUESTION AND IF CONFLICT EVER CAME TO A HEAD BETWEEN CENTRE AND KERALA, FOR INSTANCE, IN RESPECT OF SOME TREATY MATTER, CONSTITUTIONAL CLARITY WOULD DO LITTLE TO DAMPEN FIREWORKS WHICH WOULD PROBABLY RESULT. WE TRIED, INDIRECTLY AND MOST CAREFULLY, TO DRAW SARMA OUT ON DISTINCTION BETWEEN CONSTITUTIONAL AND POLITICAL SITUATION BUT HE WOULD NOT RPT NOT RISE TO BAIT. INDEED HE WAS GENERALLY CAUTIOUS AND NON-COMMITAL THROUGHOUT MTG AND HESITATED TO DO ANYTHING MORE THAN REF US WHAT WAS SET OUT IN CONSTITUTION ITSELF.

5. IT WOULD APPEAR THEREFORE THAT YOUR UNDERSTANDING OF INDIAN SITUATION IN THIS FIELD IS CORRECT (SECTION 263 BEING CHANGED TO READ ARTICLE 253). WE ARE LOOKING FOR STUDIES PUBLISHED ON SUBJ IN INDIAN LAW AND POLITICAL SCIENCE JOURNALS WHICH WOULD BE OF INTEREST TO YOU.

EXTERNAL AFFAIRS AFFAIRES EXTÉRIEURES

TO / À: The Under-Secretary of State for External Affairs, OTTAWA

FROM / De: The Canadian Embassy, MEXICO CITY

REFERENCE / Référence: Your letter G-(M)-356 of August 11

SECURITY / Sécurité: SECRET

DATE: October 3, 1967

NUMBER / Numéro: 345

FILE / DOSSIER
OTTAWA 20-1-2-6
MISSION 28

SUBJECT / Sujet: STATE PRACTICE CONCERNING THE POWERS OF MEMBERS OF A FEDERAL UNION TO MAKE TREATIES

ENCLOSURES / Annexes

DISTRIBUTION

We consulted with the Legal Advisor to the Foreign Ministry concerning the possible rights of the constituent states of the Mexican Republic to conclude treaties with foreign powers. He confirmed our understanding that the conduct of foreign affairs, both under the Constitution and in practice, is the exclusive prerogative of the Federal Government. He immediately pointed to Article 117 of the Constitution, forbidding a State to conclude a treaty with a foreign power. This was quoted in the section on Mexico (paragraph 7) in the paper attached to your letter under reference. He also drew our attention to Section X of Article 89, which 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, and Section I of Article 76, which provides that the Senate must approve treaties and agreements concluded by the President with foreign powers.

2. In fact, Mexico is not a confederation in the Canadian sense of the term. Power is concentrated in the hands of the President, and the States are more akin to municipal governments in Canada than our Provinces.

3. State Governors along the United States border are allowed to cultivate personal relations with neighbouring United States Governors. Careful watch is maintained, however, to ensure that this decorative role does not trespass on matters of foreign policy. State Governments are also allowed to issue temporary passports, but this is through a delegation of power from the Foreign Ministry which could be withdrawn at any time.

The Embassy

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(Admin. Services Div.)

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EXTERNAL AFFAIRS AFFAIRES EXTÉRIEURES

TO / À: The Under-Secretary of State for External Affairs
OTTAWA

FROM / De: The Canadian Embassy
CARACAS, Venezuela

REFERENCE / Référence: Your letter G-(M)-356 of August 11, 1967

SUBJECT / Sujet: State Practice Concerning the Powers of Members of a Federal Union to make Treaties - Interim Reply

SECURITY / Sécurité: SECRET

DATE: September 5, 1967

NUMBER / Numéro: 291

FILE / DOSSIER
OTTAWA 20-1-7-6
MISSION 20-3 281

ENCLOSURES / Annexes

DISTRIBUTION

On examining the articles quoted in paragraph 9 of the attachment to your letter under reference we have concluded that your remarks concerning the Venezuelan Treaty-Making Power were based upon a Venezuelan Constitution which is no longer valid. We have therefore acquired an English translation of the 1961 Venezuelan Constitution and are preparing a reply based upon the relevant articles. We also plan to discuss the Venezuelan Treaty-Making Power in general terms with a constitutional lawyer at the Central University of Venezuela as soon as possible. Our reply hopefully will go forward in the next bag.

John S. Blackwood
Chargé d'Affaires a.i.

TO: MR. SCOTT
FROM REGISTRY
SEP 12 1967
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TO: MR SCOTT
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EXTERNAL AFFAIRS AFFAIRES EXTÉRIEURES

M. Abrahams
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TO / À: The Under-Secretary of State for External Affairs
OTTAWA

FROM / De: The Canadian Embassy
CARACAS

REFERENCE / Référence: Your Letter G-(M)-356 of August 11, 1967

SUBJECT / Sujet: State Practice Concerning the Powers of Members of a Federal Union to Make Treaties

SECURITY / Sécurité: SECRET

DATE: October 17, 1967

NUMBER / Numéro: 332

FILE	DOSSIER
OTTAWA	
MISSION	20-3

ENCLOSURES / Annexes: 1

DISTRIBUTION

The States of the Federal Republic of Venezuela are bound as follows by Article 16 of the Constitution: "They obligate themselves to comply and enforce compliance with the Constitution and the laws of the Republic. They shall attest to the public acts emanating from the national authorities...." In addition to complying with, and enforcing laws of the Republic, the Venezuelan States, according to Article 17(7) have no jurisdiction in laws negotiated with foreign countries. Article 190(5) states the attribution and duty of the President of the Republic to include the direction of "the foreign relations of the Republic and (to) make and ratify international treaties agreements and resolutions". ("Countersigned for the validity thereof by the respective minister or ministers" - 1,90(22)) "Article 150 permits the Senate to initiate the discussion of projects of law relating to international treaties and agreements."

Part I: Constitutional Provisions

2. The conduct of the international relations of Venezuela would appear to be reserved for the jurisdiction of the National Power (Article 136(1)). The States are apparently excluded from this field by inference from their positive and negative attributions (Articles 17 and 18) and in particular Article 17(7) in the light of Article 136(1). (Municipal organization falls within the legislative competence of the States (Articles 17(2), (5) and 26) and in any case their constitutional attributions are limited to "local government" - Articles 25, 27 to 34.) Article 16 appears to cover the wording of Article 12 quoted in your paper.

3. Within the scope of the National Power, both the President (Article 190(5)) and the Senate (Article 150(1)) are provided with jurisdiction in the field of international affairs. The Chamber of Deputies acquires legislative authority in this field through the provisions relating to the "Formation of Laws" (Article 167) and laws relating to international treaties and agreement come into force without further review through the provisions of Articles 173 to 176.

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4. The President alone would appear to have authority to make and ratify international treaties (Article 190(5)) subject to Article 128. The role of Congress would seem to be the same whether the law merely approves the treaty or provides the necessary legislation within Venezuela which the signing of the treaty or agreement may call for (i.e. implementation). In this connection your quotation, "The President of the Republic in the Council of Ministers..." would appear to be superseded by Article 190(22). We would conclude from this latter article that the President does not exercise the attribute of making and ratifying international treaties in the Council of Ministers, but only requires the countersignature of the Minister of External Relations.

5. We would draw your attention to Article 137 whereby Congress can delegate to the States or Municipalities "specific matters of national competence". Such delegation requires a positive act by Congress.

Part II: Treaty Making Power in Practice

6. We called on Dr. Elpidio Franco Z., Senator, President of the Senate Finance Committee, and a well known Venezuelan lawyer to discuss in general terms the above analysis. Dr. Franco said that jurisdiction to make and implement international treaties was exclusively held by the National Executive Power without any requirement to consult with the constituent parts. He said that the only real difference between the present and former constitution in this field was that the present one spelled out more clearly the reservation of this field to the National Power which had in fact been the former practice. The congressional power to delegate matters to the constituent parts (Article 137) had never been used for the implementation of treaties and was not intended for that purpose.

7. Nevertheless, there is some consultation between the National authority and the constituent parts but this appears more in the way of administrative details rather than policy formation. However, it was our impression that while Venezuelan delegations to international meetings of, for example, specialized agencies, included other than National Executive Power personnel, this was on the basis of personal prestige or expertise rather than an effort to include representatives of the constituent parts.

John D. Blackwood

John D. Blackwood
Chargé d'Affaires

ACTION COPY

G Mr Abrahams

FM MCOW NOV4/67 CONFD

TO EXTER 3972 PRIORITY

INFO TT WASHDC JUSTICE(HEAD)PCO(BEETZ)DE OTT

REF YOURTEL G420 NOV1

SOVIET CONSTITUTIONAL PRACTICE

MY LETTER 799 OCT10 COMMENTED IN GENERAL TERMS ON ATTACHMENT TO YOUR LETTER F-356 AUG11/67,AND I THINK ANSWERED YOUR QUERIES.HOWEVER FOLLOWING ADDITIONAL REMARKS MAY BE USEFUL.

2.TO THE BEST OF MY KNOWLEDGE,NO RPT NO NON-COMMUNIST STATE MAINTAINS DIPLO OR CONSULAR RELATIONS WITH ANY OF THE SOVIET REPUBLICS OR HAS EVER ENTERED INTO A BILATERAL AGREEMENT WITH ONE.THERE ARE,HOWEVER, EXAMPLES OF SEPARATE REPRESENTATION OF A REPUBLIC OUTSIDE AS WELL AS WITHIN THE UN SYSTEM;AND OF SEPARATE SIGNATURE OF BILATERAL AND MULTILATERAL AGREEMENTS,OTHER THAN JUST UN AGREEMENTS,BY A REPUBLIC.

3.BASICALLY,HOWEVER,PROVISION OF SOVIET CONSTITUTION TO WHICH YOU REFER WAS ADOPTED ON FEB1 1944,TO ALLOW BYELORUSSIA AND THE UKRAINE TO BE SEPARATELY REPRESENTED AT THE UN.THIS WAS NECESSARY BECAUSE, WHEN THE FIRST UNION CONSTITUTION WAS ADOPTED IN 1923,THE REPUBLICS SURRENDERED RIGHT TO SEPARATE REPRESENTATION AND CONSTITUTION CONFIRMED THIS ARRANGEMENT.REPRESENTATION OF ONLY TWO OF THE REPUBLICS IS AN ANOMALY FROM CONSTITUTIONAL POINT OF VIEW.ALL REPUBLICS ARE EQUAL,AND THERE IS NO RPT NO MORE NOR RPT NOR LESS REASON FOR BYELORUSSIA AND THE UKRAINE TO BE REPRESENTED THAN THE OTHERS.ORIGINAL SOVIET DEMAND AT DUMBARTON OAKS WAS THAT ALL REPUBLICS SHOULD BE REPRESENTED.AT YALTA,AGREEMENT WAS REACHED ADMITTING ONLY TWO.

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4.BEFORE 1923 CONSTITUTION WAS ADOPTED,REPUBLICS HAD SEPARATE FOREIGN SERVICES AND WERE SEPARATELY REPRESENTED AT INTERNATL CONFERENCES ON OCCASION.THE UKRAINE AND GEORGIA WERE SEPARATELY REPRESENTED AT THE LAUSANNE CONFERENCE IN 1923,FOR EXAMPLE.FROM 1923 TO 1944 REPUBLICS DID NOT RPT NOT HAVE THE RIGHT TO SEPARATE REPRESENTATION.FOREIGN COUNTRIES HAVING BUSINESS WITH THE REPUBLICS HAD TO TRANSACT IT THROUGH PREDECESSOR OF PRESENT MFA IN MCOW,WHICH WAS CHARGED WITH CONDUCT OF FOREIGN RELATIONS FOR USSR AS A WHOLE.

5.AMENDMENT OF 1944 HAS BROUGHT NO RPT NO SIGNIFICANT CHANGE. BYELORUSSIA AND UKRAINE HAVE PLAYED ROLE IN UN BODIES OF WHICH YOU ARE AWARE.QUOTE FOREIGN MINISTERS UNQUOTE OF UZBEK,KAZAKH AND RUSSIAN REPUBLICS HAVE BEEN MEMBERS OF SOVIET DELS TO UN BODIES. THE UKRAINE HAS SIGNED A BILATERAL AGREEMENT WITH A COMMUNIST COUNTRY (THE UKRAINIAN-POLISH AGREEMENT OF SEP9 1944),AS WELL AS A NUMBER OF MULTILATERAL TREATIES OUTSIDE THE UN(THE PARIS PEACE TREATIES OF FEBIO 1947 WITH ITALY,RUMANIA,HUNGARY,BULGARIA AND FINLAND;THE DANUBE CONVENTION OF 1948).REPUBLICAN FOREIGN MINISTRIES SEEM ALSO TO HAVE SOME LTD RESPONSIBILITY FOR CULTURAL RELATIONS,PARTICULARLY IN RECEIVING VISITING FOREIGN DELS WITHIN THEIR TERRITORIES.BUT THESE QUOTE MINISTRIES UNQUOTE HAVE A TENUOUS AND SHADOWY EXISTENCE.THEIR LTD PERS ALONE IS A SIGN THAT THEIR FUNCTIONS ARE NOMINAL:QUOTE CEREMONIAL,ORNAMENTAL AND SYMBOLIC UNQUOTE IN THE WORDS OF ONE AUTHORITY. BRIT AMBASSADOR HAS DESCRIBED TO ME RECENT CONVERSATION WITH FOREIGN MINISTER OF GEORGIA,WHO HAS A TINY STAFF MAINLY FOR PROTOCOL PURPOSES, ALL OF WHOM APPARENTLY HAVE ONLY PART-TIME JOBS IN THE GEORGIAN

QUOTE FOREIGN MINISTRY UNQUOTE AND WHOSE REAL WORK IS ELSEWHERE. FOREIGN MINISTER CLAIMED TO BE KEPT INFORMED OF EVENTS OF INTEREST TO GEORGIA IN NEIGHBOURING STATES LIKE TURKEY AND IRAN, BUT SEEMED TO BE HARD PUT TO IT TO EXPLAIN HOW HE ACTUALLY FILLED HIS DAY.

6. OCCASIONALLY, IN SPECIAL CIRCUMSTANCES, A NON-COMMUNIST COUNTRY WILL TREAT ONE OF THE SOVIET REPUBLICS AS A SEPARATE ENTITY WITH SOME GENUINE DEGREE OF INDEPENDENT EXISTENCE. FOR INSTANCE, PRESIDENT OF FINLAND HAS PAID STATE VISIT TO ESTONIA TRAVELLING DIRECTLY FROM HSNKI TO TALLIN WITHOUT PASSING THROUGH MCOW. HE WAS RECEIVED BY GROUP OF DIGNITARIES WHICH INCLUDED REPS OF CENTRAL GOVT OF AN APPROPRIATE LEVEL, BUT TURNED THE TABLES ON THESE RUSSIAN-SPEAKING NOTABLES BY SPEAKING IN FINNISH. SINCE FINNISH AND ESTONIAN ARE RELATED AND MUTUALLY COMPREHENSIBLE LANGUAGES, HIS ESTONIAN HOSTS UNDERSTOOD HIM WHILE HIS RUSSIAN HOSTS DID NOT RPT NOT - AND HE MADE HIS POLITICAL POINT. MAIN PURPOSE OF THIS VISIT WAS HOWEVER TO GAIN ACCEPTANCE FOR INCORPORATION OF ESTONIA IN USSR.

7. THIS SORT OF EXAMPLE IS UNDERSTANDABLY RARE; IN GENERAL IT IS FAIR TO SAY THAT NON-C OMMUNIST GOVTS DO NOT RPT NOT TREAT THE REPUBLICAN REGIMES AS RESPECTABLE SOVEREIGN ENTITIES, NOR RPT NOR WOULD THE RUSSIANS PERMIT THEM TO DO SO EVEN IF THEY WISHED TO. THERE HAVE BEEN SEVERAL WESTERN ATTEMPTS TO TEST, OR TO GIVE SOME SUBSTANCE TO, THE SUPPOSEDLY INDEPENDENT EXISTENCE OF THE UKRAINE, BUT THESE HAVE COME TO NOTHING BECAUSE THE RUSSIANS WOULD NOT RPT NOT PERMIT ANY EXPRESSION OF UKRAINIAN INDEPENDENCE WHICH CARRIED REAL WEIGHT. WHILE SOME NON-COMMUNIST COUNTRIES MAINTAIN CONSULATES IN PROVINCIAL

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CENTRES IN THE USSR,THESE EXIST BY AGREEMENT WITH THE AUTHORITIES OF THE CENTRAL GOVT,NOT RPT NOT AS A RESULT OF AN AGREEMENT WITH THE REPUBLICAN GOVT ON WHOSE TERRITORY THE CONSULATE IS LOCATED.

8.WITH OUR LTD RESEARCH FACILITIES,I AM AFRAID WE COULD NOT RPT NOT EASILY PRODUCE A LIST OF ALL THE AGREEMENTS WHICH REPUBLICS HAVE ENTERED INTO AS SEPARATE ENTITIES.ONE GOOD AUTHORITY FOR FURTHER STUDY IS ASPATURIANS BOOK QUOTE THE UNION REPUBLICS IN SOVIET DIPLOMACY UNQUOTE(GNEVA 1960)WHICH UNFORTUNATELY IS NOT RPT NOT AVAILABLE HERE.I WOULD HOPE,HOWEVER,THAT INFO IN THIS TEL AND MY LETTER 799 WOULD BE SUFFICIENT FOR YOUR PURPOSES

FORD

EXTERNAL AFFAIRS AFFAIRES EXTÉRIEURES

TO / À: Under-Secretary of State for External Affairs, Ottawa

FROM / De: Canadian Embassy, Moscow

REFERENCE / Référence: Your letter G-(M)-356 of August 11, 1967

SUBJECT / Sujet: State practice concerning the powers of members of a federal union to make treaties.

SECURITY / Sécurité: SECRET

DATE: October 10, 1967

NUMBER / Numéro: 799

FILE / DOSSIER
OTTAWA 20-1-2-6
MISSION 28/20-3

ENCLOSURES / Annexes

DISTRIBUTION

Your request for comments on the Soviet practice was drawn to my attention on my return to Moscow. What I can say is in fact obvious.

2. The Soviet Constitution is on paper a wonderful document guaranteeing a very great number of rights to the constituent republics. In practice, however, the USSR is a highly centralized state in which every matter of principle, no matter how insignificant, is determined in Moscow. The right to enter into direct relations with foreign states, conclude agreements with them, and exchange diplomatic representatives, has of course never been implemented. Direct representation of the Ukraine and Byelorussia at the U.N. was the result of the almost total isolation of the USSR in the incipient organization. As I recall, in fact, Molotov refused to consider the admission of Argentina to the organization unless the Ukraine and Byelorussia were also accepted. This is the only exception to general practice and it bore no relationship to the application of the Soviet Constitution. It was solely a device to increase Soviet voting strength in the UN. There is of course no known occasion in which the representatives of these republics have deviated from the Soviet line nor could there be.

3. You seem to imply in your study that the reason for a failure to establish direct relations between the Soviet republics and foreign states is due to the fact that "few states have been willing to treat with them and so regard them". Although this is true, the main reason is that the USSR would almost certainly not permit their republics to develop direct relations with foreign states.

4. The extent to which all this is pure fiction can be seen from two Canadian experiences with the Ukraine. Up until August 1953 no foreign diplomat living in Moscow

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was permitted to visit Kiev although it was the capital of a state represented in the UN. I was in fact the first foreign diplomat to do so. The second is the panic caused in the Soviet Foreign Ministry when we attempted to include in our consular agreement permission to open a consulate in Kiev.

5. The Soviet Constitution therefore can be conceived to all intents and purposes as pure window-dressing, and Soviet practice as having no relevance to Canadian needs.

R.A.D. Ford
Ambassador

EXTERNAL AFFAIRS AFFAIRES EXTÉRIEURES

TO / À: The Under-Secretary of State for External Affairs, OTTAWA

FROM / De: The Canadian Embassy, WASHINGTON, D.C.

REFERENCE / Référence: Your letter G(M)-356

SUBJECT / Sujet: "State Practice Concerning the Powers of Members of a Federal Union to make Treaties"

SECURITY / Sécurité: CONFIDENTIAL

DATE: September 5, 1967

NUMBER / Numéro: 1332

FILE / DOSSIER
OTTAWA: 20-1-2-6
MISSION: 28 1 13

ENCLOSURES / Annexes

DISTRIBUTION

We are grateful for the invitation to comment on Section IV of the paper attached to your letter under reference. As you know we have for some time been in touch with the Office of the Legal Adviser in State Department on a variety of matters involving agreements or possible agreements between States of the Union and Provinces of Canada. Our discussions have occasionally strayed from the particular to the general and have touched on the principles and procedures applicable to the conclusion of agreements or compacts by States of the Union with each other and foreign powers or sub-divisions thereof. However your letter provided us with a welcome opportunity to pull together some of the observations and opinions which have been reported piecemeal and to do some independent if superficial research on this subject. The results of this research and of the pulling together of the relevant fragments of our conversations with members of the State Department Legal Adviser's office are set out below. In sum they produce a picture of the law and practice regarding the conclusion of agreements by individual states which is, we regret to say, full of uncertainty and controversy.

2. We attach (Annex A) for your examination an extract (pages 374 and 415-419) of Senate Document No. 39 of the 88th Congress, First Session. This is an analysis and interpretation of the U.S. Constitution prepared by the Legislative Reference Service of the Library for Congress and represents a piece of official scholarship which is, we are told, highly regarded both in governmental and academic circles. Some of the interpretations set forth in this document are not necessarily those with which the Executive Branch of the U.S. Government or this particular Administration would agree. There is no question, however, that the scholarship reflected in this document is respected. We also attach (Annex B) a copy of the report of hearings by the House Foreign Affairs Committee in September and October 1966 on bills to give the Consent of Congress to the Great

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(Admin. Services Div.)

Lakes Basin Compact. We shall be making frequent reference below to arguments and documents contained in that report. Finally there are attached (Annex C) the texts of three Joint Resolutions of Congress to which reference is also made.

3. A Constitution which allows the federal authorities to authorize agreements between the constituent parts and foreign sovereign states (The United States of America). (Description of Part IV)

Comment While the point is hardly of major significance we wonder whether Section IV which discusses and interprets Article 1, Section 10 of the U.S. Constitution is correctly described as dealing with "a constitution which allows the federal authorities to authorize agreements...". It is quite true that that section of the Constitution does appear to contemplate the possibility of agreements being concluded by constituent States among themselves and with foreign powers. However the authority to decide whether such agreements will be concluded is reserved to the Congress of the United States (which is not quite the same as "the federal authorities") and the section is essentially prohibitory. It therefore occurs to us that this introductory sentence might perhaps be amended to read:

> "A constitution which contemplates the possibility of agreements between constituent parts of a federal state and foreign powers subject to their receiving appropriate federal consent".

Incidentally, the Constitution speaks of the "consent of Congress" and it is an open question whether an agreement entered into by a State, either with another State or with a foreign power, requires the approval of the President. Congressional consent has always, so far as we have been able to discover, been granted by Act of Congress or Joint Resolution which acquires the force of law when approved by the President. However, it might be argued that consent could equally be given by a Concurrent Resolution (which the President does not sign) or by an Act of Congress or Joint Resolution which the President refused to sign.

4. "No State shall enter into any Treaty, Alliance or confederation". "No State shall, without the consent of Congress...enter into any Agreement or Compact with another State or with a foreign Power...".

Comment The quotation of Article 1, Section 10 of the U.S. Constitution given in your paper is not accurate. The quotation given above is. Specifically, the only reference in Article 1, Section 10 to "contracts" is in relation to the prohibition against any State passing a "Law impairing the Obligation of Contracts". The section (clause 3) speaks of "Agreement or

Compact with another State, or with a foreign power...", not "agreement, compact or contract with any other state or with a foreign power".

5. According to the advice given by the Attorney-General of the United States to the Secretary of State of 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".

Comment With a possible qualification as to the timing of the consent (see below) the advice given by the Attorney-General in 1909 would probably be given again today. It is a logical inference from the terms of the article and from the interpretation given the "agreement or compact" clause of Article 1, Section 10 of the Constitution in Holmes v. Jennison (1840). The dictum of Chief Justice Taney of the Supreme Court in that case (it was not the opinion of the court), while possibly qualified by dicta in Virginia v. Tennessee (1893) with respect to inter-state compacts has not been challenged in any Supreme Court decisions relating to agreements with "a foreign Power". (See pages 415-416 of Annex A).

There is, however, one phrase in the Attorney-General's statement which might, indeed probably would be disputed. The quotation concludes with the words "to which Congress shall have given its consent". This clearly implies that the Consent of Congress shall have been given before an agreement is concluded between a State and a foreign Power. In this connection we refer you to page 417 of the attachment (Annex A) which notes that "The Constitution makes no provision as to the time when the consent of Congress shall be given or the mode or form by which it shall be signified. While the consent will usually precede the compact or agreement, it may be given subsequently where the agreement relates to a matter which could not be well considered until its nature is fully developed. The required consent is not necessarily an expressed consent; it may be inferred from circumstances. It is sufficiently indicated, when not necessary to be made in advance, by the approval of proceedings taken under it." This position is supported by a letter signed by the Deputy Attorney-General of the United States which appears on pages 10-13 of Annex B.

6. It would appear that agreements of the type requiring the consent of Congress have never been authorized with the exception of inter-state compacts open to accession by Canadian provinces, for example, bridge agreements. Three cases where Congressional consent was or is being sought are the Northeast Inter-State Forest Fire Protection Compact of 1951, the Great Lakes Basin Compact of 1955 between several states of the Union, and the Minnesota-Manitoba Highway Agreement of 1962.

Comment It is assumed that the "agreements of the type requiring the consent of Congress" referred to in this paragraph are agreements between States and "a foreign power". If this assumption is correct then the first sentence may be somewhat misleading. It is quite true that Congress gave its consent to the Northeast Interstate Forest Fire Protection Compact. Indeed Congressional consent was given twice. In 1949 it was granted subject to the reservation that "before any province of the Dominion of Canada shall be made a party to such compact, the further consent of Congress shall be obtained". According to a letter of October 4, 1966 from the Assistant Secretary of State for Congressional Relations to the Chairman of the House Committee on Foreign Affairs "three years later Congress approved the participation of any such contiguous province" (page 112, Annex B). The other agreements to which reference is made are agreements between a particular state and "a foreign Power". These generally have been, to be sure, with a Province of Canada. For example Congress has given its express consent to the negotiation of the Manitoba-Minnesota Highway Agreement and a bill is now before Congress seeking consent to the agreement itself. However, Congress has also expressly consented "to New York to negotiate and enter into a compact or agreement with the Government of Canada for the operation of a bridge by the Buffalo and Fort Erie Public Bridge Authority, established thereby". (See Annex C and further comments on this "agreement" below).

The second sentence of the paragraph quoted above is accurate. It should be noted however that express Congressional consent has not been given to the Maine-New Brunswick agreement relating to the construction of the Milltown Bridge or, so far as we know, to any Michigan-Ontario agreement concerning the Blue Water Bridge. Congressional consent has been sought for the Great Lakes Basin Compact but that part of the compact which provides for the accession of the Provinces of Ontario and Quebec is expressly excluded in the consent legislation before Congress. (In this connection we refer you to the Statement of the Chairman of the New York Power Authority which appears on pages 66-83 of Annex B. In this statement it is strenuously argued that the consent of Congress is not required, and if it is required, it should not be given in the form in which it is sought (excluding participation by Ontario and Quebec) because of the impairment which might result to long-standing and important relationships between e.g. P.A.S.N.Y. and Ontario Hydro.)

A further point that you will wish to bear in mind in relation to the question of Congressional consent is that of the manner in which Congressional consent can be given. You will note from the observations on page 417 of the attached analysis and interpretation of the Constitution (Annex A) that there is room for argument as to when and in what manner the

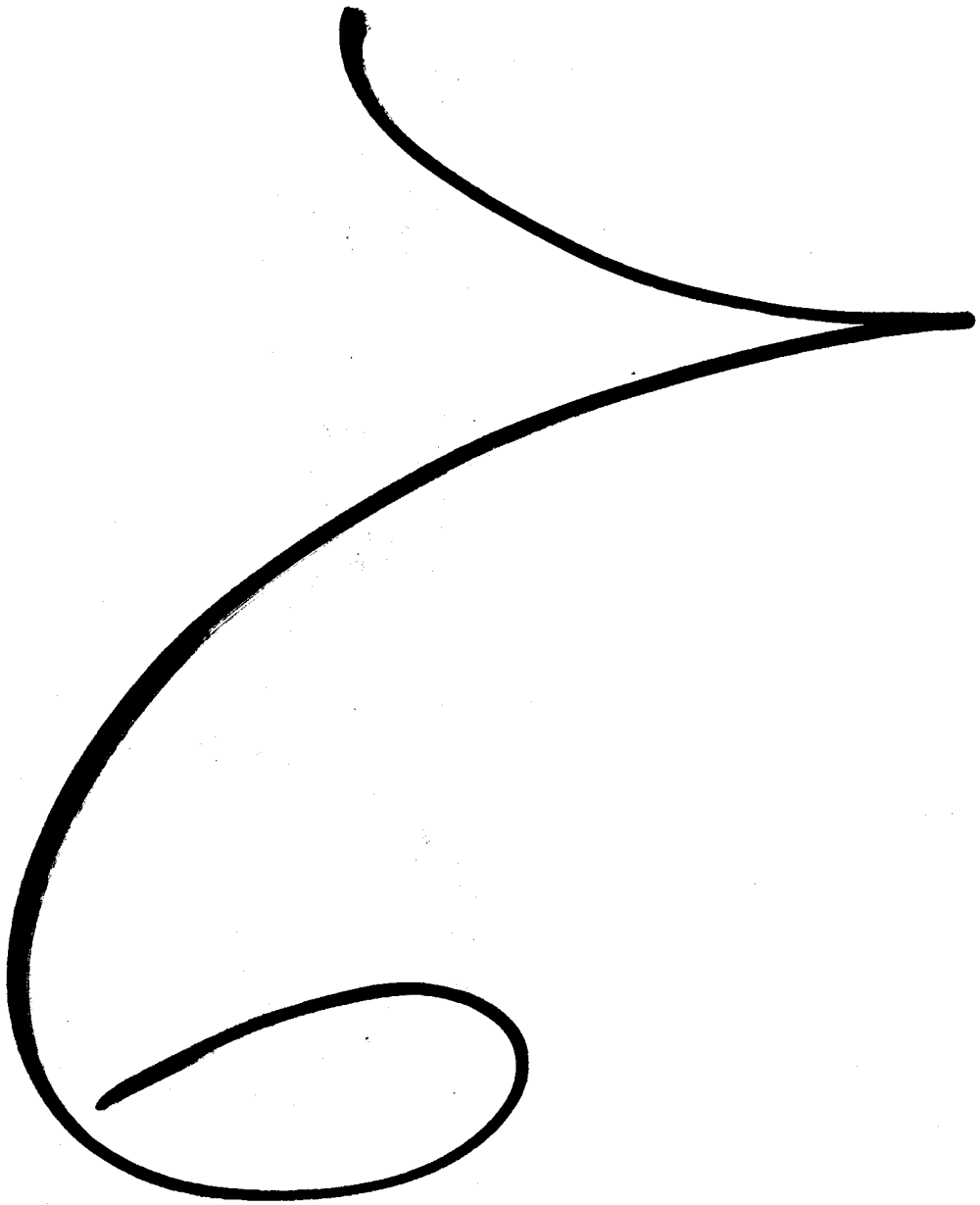
Again, the Deputy Attorney General's letter of May 1962 deals with this question by noting that "no doubt there are many forms of cooperation between states which do not rise to the dignity of a compact or agreement within the meaning of Article I, Section 10, Cl. 3." It goes on to give a few examples, viz: mutual assistance in dealing with damage from a natural disaster; arrangements for exchange of tax information; arrangements for joint consultation such as the Council of State Governments. However, it argues that it is for Congress to decide whether a particular agreement between states (or between a state and a foreign power) is one which is prohibited, is one which requires Congressional consent or is one which does not require Congressional consent. This argument is supported by citing the case of Petty v. Tennessee-Missouri Commission (389 U.S. 275, 382) in which the U.S. Supreme Court quoted with approval from an article in the 34 Yale Law Journal (1925) by Justice Frankfurter and Landis, "The Compact Clause, a Study in Interstate Adjustments." The quotation is as follows:

> "But the Constitution plainly had two very practical objectives in view in conditioning agreement by States upon consent of Congress. For only Congress is the appropriate organ for determining what arrangements between States might fall within the prohibited class of 'Treaty, Alliance, or Confederation', and what arrangements come within the permissive agreements may affect the interests of States other than those parties to the agreement: the national, and not merely a regional, interest may be involved. Therefore, Congress must exercise national supervision through its power to grant or withhold consent, or to grant it under appropriate conditions. The framers thus astutely created a mechanism of legal control over affairs that are projected beyond State lines and yet may not call for, nor be capable of, national treatment. They allowed interstate adjustments but duly safeguarded the national interest."

We have gone into this at some length to suggest that you might wish to consider reformulating this paragraph to cite authority other than that of the Supreme Court of North Dakota in McHenry County v. Brady. That decision, like the Virginia v. Tennessee decision from which it would appear to stem is a controversial one not accepted as authoritative by the U.S. Administration. Incidentally reference should be made to "compact" when quoting the relevant section of the U.S. Constitution.

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

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



consent of Congress can be given. It appears that depending on circumstances consent may be given before or after the conclusion of the inter-state compact or agreement. It may either be express consent (by Act of Congress or Joint Resolution or, possibly, otherwise) or it may be inferred from circumstances. "It is sufficiently indicated when not necessary to be made in advance, by the approval or proceedings taken under it."

The leading and most frequently cited case in relation to this proposition is Virginia v. Tennessee (148 U.S. 503, 519 (1893)) which is relied upon as authority for the view that some inter-state agreements do not require the consent of Congress and also that consent may be implied by subsequent Congressional action. In that particular case the Court would seem to have gone even further, expressing the opinion that a boundary between the two states which had been fixed by agreement between them (without express Congressional consent) was established by prescription, it having been acquiesced in for some 90 years. (However see letter of May 1962 from Deputy Attorney-General Katzenbach, pages 10-13 of Annex B and the letter of August 15, 1967 from the Deputy Legal Adviser of the State Department to Wade Martin, Secretary of State of Louisiana attached to our letter 1305 of August 29, 1967).

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

Comment The letter of May 1962 from the then Deputy Attorney-General referred to above might for your purposes serve as a better authority in relation to the question of when a compact is not a compact, than the Supreme Court of North Dakota in McHenry County v. Brady (1917). The Court in that case appears to have been relying on the opinion (obiter dicta) of the U.S. Supreme Court in Virginia v. Tennessee (1893) in finding that the agreement did not violate the "compact clause" of the Constitution because it did not "affect the supremacy of the United States, or its political rights, or increase the power of the states as against the United States or between themselves." However, in his letter of May 1962, the Deputy Attorney-General dismisses the "political balance doctrine" which is supposed (wrongly he avers) to have been established by Virginia v. Tennessee.

presumably be governed by international law. 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 with a foreign jurisdiction or whether any such agreement would be governed by international law.

(b) Without the consent of Congress, it would appear that states can enter into informal arrangements of a more minor character which would not be governed by international law, i.e. the agreement would be in the nature of a contract governed by private international law.

Comment The suggestion here seems to be that there are two types of agreement into which individual States may enter with a foreign power. These are (a) "non-political agreements" and (b) "informal arrangements of a more minor character". Apart from the difficulties inherent in the use of an expression like "non-political agreements" we wonder whether the situation would not be better and more accurately described in negative rather than positive terms. The relevant section of the Constitution is at best permissive and imposes an outright prohibition on the conclusion by a state of any "treaty, alliance or confederation." While this prohibition was more relevant to the situation which obtained at the time the Constitution was drafted it could still be relevant today in the sense that the form of an agreement into which a State might seek to enter might be more important and "political" than its substance.

Thus, while not disagreeing with the sense of this paragraph we wonder whether consideration could be given to amending it to treat the circumstances in which it would appear that agreements, otherwise prohibited, might be entered into by individual states. In this connection reference should again be made to the paragraph on pages 415 and 416 of the analysis and interpretation of the Constitution (Annex A) which gives background to the "Compacts Clause". Reference is made in that paragraph to the conflicting opinions (or dicta) in Holmes vs. Jennison (1873) and Virginia v. Tennessee (1893) both of which have been described to us as "maverick opinions" frequently quoted out of the limited context in which they were expressed. As the author of that paragraph notes in its final sentence "this divergence of doctrine may conceivably have interesting consequences".

We agree with the statement that there appears to be no clear authority on whether it is the federal government or the individual state that is bound by an agreement entered into with a foreign jurisdiction. We touched on this question obliquely in conversation some time ago with Richard Kearney,

then Deputy Legal Adviser in the State Department. At that time, Kearney seemed to be of the view that much could depend on the manner and timing of giving consent to the agreement entered into by a State. Thus, if Congressional consent were simply inferred from subsequent Congressional action, e.g. the appropriation of funds in connection with the construction of a bridge, the measure of the federal government's responsibility under an agreement to which it had not been a party might be less than it would have been if the agreement relating to the construction of the bridge had been authorized beforehand by an Act of Congress or a Joint Resolution signed by the President. It might be argued that in the first case the agreement might be regarded as akin to a contract governed by private international law (conflict of laws) while in the second the rules of public international law might be applicable. This however, is pure speculation.

As for compacts which are not regarded as "compacts" for purposes of Article 1:10:3 of the Constitution there seems to be no disagreement that it is possible for states to enter into "informal arrangements" the validity of which do not depend on consent being granted by Congress either expressly or by implication. However, as noted in the Deputy Attorney General's letter of May 1962 (Annex B) "the few judicial decisions under the compact clause do not indicate a clear line of demarcation between such informal working arrangements and those agreements which come within the compact clause of the Constitution and hence require the consent of Congress. And the practice of the states and Congress has not been wholly consistent". In this connection it might be interesting to examine the nature of the apparently extensive working arrangements between the Power Authority of the State of New York and Ontario Hydro (see pages 78-79 of the House Foreign Affairs Committee Hearings on the Great Lakes Basin Compact - Annex B). At the same time it should be borne in mind that in any conscious demarcation of the line between arrangements that do and those that do not require the consent of Congress the Administration (and probably Congress as well) is apt to apply a different and more restrictive standard to arrangements between a State and a foreign Power than to inter-state arrangements.

9. Notwithstanding these exceptional powers existing in the states, the United States Congress has never authorized any agreement between a state and a foreign sovereign power. 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. This is the effect of the decision of the

of the Supreme Court in the case of Missouri vs. Holland in 1920. The Curtiss-Wright Case of 1936 goes further: the federal government's powers in the foreign affairs field are virtually unrestricted.

Comment If you are disposed to rephrase the previous paragraph along the lines we have suggested you may find it follows logically to rephrase the first sentence of this paragraph as well. In any event, you may wish to reconsider the assertion (both in Part IV and in the Conclusion of your paper) that "the United States Congress has never authorized any agreement between a state and a foreign sovereign power". In this connection we refer you to Congressional Joint Resolutions passed in 1934, 1956 and 1957 by which consent was given to agreements or compacts between New York and Canada in connection with corporate reorganizations of the entity or entities which owned and operated the Peace Bridge between Fort Erie and Buffalo. We do not know whether in fact any agreement was concluded between the Governments of Canada and of New York and a reading of the relevant Canadian legislation (24-25 George V. Chap. 63) is not helpful in this regard. However for present purposes the important point would seem to be that Congress has, on three separate occasions, consented to an agreement or compact between the State of New York and the Government of Canada.

We have no comment on the remainder of this paragraph save perhaps to pass on a cryptic remark made to us some time ago in relation to the Curtiss-Wright Case to which reference is made as support for the assertion that "the federal government's powersin the foreign affairs field are virtually unrestricted". The remark was simply that "Curtiss-Wright" was a "hard case". We wonder whether we were supposed to infer that it therefore made "bad law".

The Embassy

ANNEX H

83D CONGRESS, 1st Session } SENATE { DOCUMENT No. 39

THE CONSTITUTION

OF THE

UNITED STATES OF AMERICA

ANALYSIS AND INTERPRETATION

ANNOTATIONS OF CASES DECIDED BY THE
SUPREME COURT OF THE UNITED STATES
TO JUNE 22, 1964

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In 1871 the Attorney General of the United States ruled that: "A minister of the United States abroad is not prohibited by the Constitution from rendering a friendly service to a foreign power, even that of negotiating a treaty for it, provided he does not become an officer of that power * * *, but the acceptance of a formal commission, as minister plenipotentiary, creates an official relation between the individual thus commissioned and the government which in this way accredits him as its representative," which is prohibited by this clause of the Constitution.[81]

SECTION 10. No State Shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

POWERS DENIED TO THE STATES

Treaties, Alliances, or Confederations

At the time of the Civil War this clause was one of the provisions upon which the Court relied in holding that the Confederation formed by the seceding States could not be recognized as having any legal existence.[82] Today, its practical significance lies in the limitations which it implies upon the power of the States to deal with matters having a bearing upon international relations. In the early case of Holmes *v.* Jennison,[83] Chief Justice Taney invoked it as a reason for holding that a State had no power to deliver up a fugitive from justice to a foreign State. Recently the kindred idea that the responsibility for the conduct of foreign relations rests exclusively with the Federal Government prompted the Court to hold that, since the oil under the three mile marginal belt along the California coast might well become the subject of international dispute and since the ocean, including this three mile belt, is of vital consequence to the nation in its desire to engage in commerce and to live in peace with the world, the Federal Government has paramount rights in and power over that belt, including full dominion over the resources of the soil under the

[81] 13 Ops. Att'y. Gen. 538 (1871).
[82] Williams *v.* Bruffy, 96 U.S. 176, 183 (1878).
[83] 14 Pet. 540 (1840).

may not levy a tonnage duty to defray the expenses of its quarantine system,[7] but it may exact a fixed fee for examination of all vessels passing quarantine.[8] A State license fee for ferrying on a navigable river is not a tonnage tax, but rather is a proper exercise of the police power, and the fact that a vessel is enrolled under federal law does not exempt it.[9] In the State Tonnage Tax Cases,[10] an annual tax on steamboats measured by their registered tonnage was held invalid despite the contention that it was a valid tax on the steamboat as property.

Keeping Troops

This provision contemplates the use of the State's military power to put down an armed insurrection too strong to be controlled by civil authority;[11] and the organization and maintenance of an active State militia is not a keeping of troops in time of peace within the prohibition of this clause.[12]

Interstate Compacts

Background of clause.—Except for the single limitation that the consent of Congress must be obtained, the original inherent sovereign rights of the States to make compacts with each other was not surrendered under the Constitution.[13] "The compact," as the Supreme Court has put it, "adapts to our Union of sovereign States the age-old treaty-making power of independent sovereign nations."[14] In American history the compact technique can be traced back to the numerous controversies which arose over the ill-defined boundaries of the original colonies. These disputes were usually resolved by negotiation, with the resulting agreement subject to approval by the Crown.[15] When the political ties with Britain were broken, the Articles of Confederation provided for appeal to Congress in all disputes

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[7] Peete v. Morgan, 19 Wall. 581 (1874).

[8] Morgan v. Louisiana, 118 U.S. 455, 462 (1886).

[9] Wiggins Ferry Co. v. East St. Louis, 107 U.S. 365 (1883). *See also* Gloucester Ferry Co. v. Pennsylvania, 114 U.S. 196, 212 (1885); Philadelphia Steamship Co. v. Pennsylvania, 122 U.S. 326, 338 (1887); Osborne v. Mobile, 16 Wall. 479, 481 (1873).

[10] State Tonnage Tax Cases, 12 Wall. 204, 217 (1871).

[11] Luther v. Borden, 7 How. 1, 45 (1849).

[12] Presser v. Illinois, 116 U.S. 252 (1886).

[13] Poole v. Fleeger, 11 Pet. 185, 209 (1837).

[14] Hinderlider v. La Plata Co., 304 U.S. 92, 104 (1938).

[15] Frankfurter and Landis, The Compact Clause of the Constitution—A Study in Interstate Adjustments, 34 Yale L.J. 685, 691 (1925).

between two or more States over boundaries or "any cause whatever" [16] and required the approval of Congress for any "treaty confederation or alliance" to which a State should be a party.[17] The framers of the Constitution went further. By the first clause of this section they laid down an unqualified prohibition against "any treaty, alliance or confederation"; and by the third clause they required the consent of Congress for "any agreement or compact." The significance of this distinction was pointed out by Chief Justice Taney in Holmes *v.* Jennison.[18] "As these words ('agreement or compact') could not have been idly or superfluously used by the framers of the Constitution, they cannot be construed to mean the same thing with the word treaty. They evidently mean something more, and were designed to make the prohibition more comprehensive. * * * The word 'agreement,' does not necessarily import and direct any express stipulation; nor is it necessary that it should be in writing. If there is a verbal understanding, to which both parties have assented, and upon which both are acting, it is an 'agreement.' And the use of all of these terms, 'treaty,' 'agreement,' 'compact,' show that it was the intention of the framers of the Constitution to use the broadest and most comprehensive terms; and that they anxiously desired to cut off all connection or communication between a State and a foreign power; and we shall fail to execute that evident intention, unless we give to the word 'agreement' its most extended signification: and so apply it as to prohibit every agreement, written or verbal, formal or informal, positive or implied, by the mutual understanding of the parties." [19] But in Virginia *v.* Tennessee,[20] decided more than a half century later, the Court shifted position, holding that the unqualified prohibition of compacts and agreements between States without the consent of Congress did not apply to agreements concerning such minor matters as adjustments of boundaries, which have no tendency to increase the political powers of the contractant States or to encroach upon the just supremacy of the United States. This divergence of doctrine may conceivably have interesting consequences.[21]

Subject matter of interstate compacts.—For many years after the Constitution was adopted, boundary disputes continued to pre-

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[16] Article IX.

[17] Article VI.

[18] 14 Pet. 540 (1840).

[19] Ibid. 570, 571, 572.

[20] 148 U.S. 503, 518 (1893). *See also* Stearns *v.* Minnesota, 179 U.S. 223, 244 (1900); *also* reference in next note, at pp. 761–762.

[21] *See* Dunbar, Interstate Compacts and Congressional Consent, 36 Va.L. Rev., 753 (October, 1950).

dominate as the subject matter of agreements among the States. Since the turn of the twentieth century, however, the interstate compact has been used to an increasing extent as an instrument for State cooperation in carrying out affirmative programs for solving common problems. The execution of vast public undertakings, such as the development of the Port of New York by the Port Authority created by compact between New York and New Jersey, flood control, the prevention of pollution, and the conservation and allocation of water supplied by interstate streams, are among the objectives accomplished by this means.[22] Another important use of this device was recognized by Congress in the act of June 6, 1934,[23] whereby it consented in advance to agreements for the control of crime. The first response to this stimulus was the Crime Compact of 1934, providing for the supervision of parolees and probationers, to which forty-five States had given adherence by 1949.[24] Subsequently Congress has authorized, on varying conditions, compacts touching the production of tobacco, the conservation of natural gas, the regulation of fishing in inland waters, the furtherance of flood and pollution control, and other matters. Moreover, since 1935 at least thirty-six States, beginning with New Jersey, have set up permanent commissions for interstate cooperation, which have led to the formation of a Council of State Governments, the creation of special commissions for the study of the crime problem, the problem of highway safety, the trailer problem, problems created by social security legislation, etc., and the framing of uniform State legislation for dealing with some of these.[25]

Consent of Congress.—The Constitution makes no provision as to the time when the consent of Congress shall be given or the mode or form by which it shall be signified.[26] While the consent will usually precede the compact or agreement, it may be given subsequently where the agreement relates to a matter which could not be well considered until its nature is fully developed.[27] The required consent is not necessarily an expressed consent; it may be inferred from circumstances.[28] It is sufficiently indicated, when not necessary to be made in advance, by the approval of proceedings taken under it.[29] The

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[22] Frankfurter and Landis, The Compact Clause of the Constitution—A Study in Interstate Adjustments, 34 Yale L. J., 685, 735 (1925); Zimmerman and Wendell, *Interstate Compacts Since 1925*, 2–29 (1951).

[23] 48 Stat. 909 (1934).

[24] Zimmerman and Wendell, op. cit., p. 91.

[25] 7 U.S.C. 515; 15 U.S.C. 717j; 16 U.S.C. 552; 33 U.S.C. 11, 567–567b.

[26] Green v. Biddle, 8 Wheat. 1, 85 (1823).

[27] Virginia v. Tennessee, 148 U.S. 503 (1893).

[28] Virginia v. West Virginia, 11 Wall. 39 (1871).

[29] Wharton v. Wise, 153 U.S. 155, 173 (1894).

consent of Congress may be granted conditionally "upon terms appropriate to the subject and transgressing no constitutional limitations." [30] And in a recent instance it has not been forthcoming at all. In Sipuel *v.* Board of Regents,[31] decided in 1948, the Supreme Court ruled that the equal protection clause of Amendment 14 requires a State maintaining a law school for white students to provide legal education for a Negro applicant, and to do so as soon as it does for applicants of any other group. Shortly thereafter the governors of 12 Southern States convened to canvass methods for meeting the demands of the Court. There resulted a compact to which 13 State legislatures have consented and by which a Board of Control for Southern Regional Education is set up. Although some early steps were taken toward obtaining Congress's consent to the agreement, the effort was soon abandoned, but without affecting the cooperative educational program, which to date has not been extended to the question of racial segregation.[32] Finally, Congress does not, by giving its consent to a compact, relinquish or restrict its own powers, as for example, its power to regulate interstate commerce.[33]

Grants of franchise to corporations by two States.—It is competent for a railroad corporation organized under the laws of one State, when authorized so to do by the consent of the State which created it, to accept authority from another State to extend its railroad into such State and to receive a grant of powers to own and control, by lease or purchase, railroads therein, and to subject itself to such rules and regulations as may be prescribed by the second State. Such legislation on the part of two or more States is not, in the absence of inhibitory legislation by Congress, regarded as within the constitutional prohibition of agreements or compacts between States.[34]

Legal effect of interstate compacts.—Whenever, by the agreement of the States concerned and the consent of Congress, an interstate compact comes into operation, it has the same effect as a treaty between sovereign powers. Boundaries established by such compacts

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[30] James *v.* Dravo Contracting Co., 302 U.S. 134 (1937). *See also* Arizona *v.* California, 292 U.S. 341, 345 (1934). When it approved the New York-New Jersey Waterfront Compact (67 Stat. 541), Congress, for the first time, expressly gave its consent to the subsequent adoption of implementing legislation by the participating States. De Veau *v.* Braisted, 363 U.S. 144, 151 (1960).

[31] 332 U.S. 631 (1948).

[32] On the activities of the Board, in which representatives of both races participate and from which both races have benefited, *see* remarks of Hon. Spessard L. Holland of Florida. 96 Cong. Rec., 465–470 (1950).

[33] Pennsylvania *v.* Wheeling & Belmont Bridge Co., 18 How. 421, 433 (1856).

[34] St. Louis & San Francisco Railway *v.* James, 161 U.S. 545, 562 (1896).

become binding upon all citizens of the signatory States and are conclusive as to their rights.[35] Private rights may be affected by agreements for the equitable apportionment of the water of an interstate stream, without a judicial determination of existing rights.[36] Valid interstate compacts are within the protection of the obligation of contracts clause;[37] and a "sue and be sued" provision therein operates as a waiver of immunity from suit in federal courts otherwise afforded by the Eleventh Amendment.[38] Congress also has authority to compel compliance with such compacts.[39] Nor may a State read herself out of a compact which she has ratified and to which Congress has consented by pleading that under the State's constitution as interpreted by the highest State court she had lacked power to enter into such an agreement and was without power to meet certain obligations thereunder. The final construction of the State constitution in such a case rests with the Supreme Court.[40]

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[35] Poole *v.* Fleeger, 11 Pet. 185, 209 (1837); Rhode Island *v.* Massachusetts, 12 Pet. 657, 725 (1838).

[36] Hinderlider *v.* La Plata Co., 304 U.S. 92, 104, 106 (1938).

[37] Green *v.* Biddle, 8 Wheat. 1, 13 (1823); Virginia *v.* West Virginia, 246 U.S. 565 (1918). *See also* Pennsylvania *v.* Wheeling & Belmont Bridge Co., 13 How. 518, 566 (1852); Olin *v.* Kitzmiller, 259 U.S. 260 (1922).

[38] Petty *v.* Tennessee-Missouri Comm'n, 359 U.S. 275 (1959). Justices Frankfurter, Harlan, and Whittaker dissented.

[39] Virginia *v.* West Virginia, 246 U.S. 565, 601 (1918).

[40] Dyer *v.* Sims, 341 U.S. 22 (1951). The case stemmed from mandamus proceedings brought to compel the auditor of West Virginia to pay out money to a commission which had been created by a compact between West Virginia and other States to control pollution of the Ohio River. The decision of the Supreme Court of Appeals of West Virginia denying mandamus was reversed by the Supreme Court, and the case remanded. The opinion of the Court, by Justice Frankfurter, reviews and revises the West Virginia Court's interpretation of the State constitution, thereby opening up, temporarily at least, a new field of power for judicial review. Justice Reed, challenging this extension of judicial review, thought the issue determined by the supremacy clause. Justice Jackson urged that the compact power was "inherent in sovereignty" and hence was limited only by the requirement of congressional consent. Justice Black concurred in the result without opinion.

ANNEX C

(Chapter 196)

Joint Resolution

May 3, 1934
(H.J.Res. 315)
(Pub.Res. No. 22)

Granting consent of Congress to an agreement or compact entered into by the State of New York with the Dominion of Canada for the establishment of the Buffalo and Fort Erie Public Bridge Authority with power to take over, maintain and operate the present highway bridge over the Niagara River between the city of Buffalo, New York, and the village of Fort Erie, Canada.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of the Congress of the United States be, and it is hereby, given to the State of New York to enter into the agreement or compact with the Dominion of Canada set forth in chapter 824 of the laws of New York, 1933, and an act respecting the Buffalo and Fort Erie Public Bridge Authority passed at the fifth session, Seventeenth Parliament, Dominion of Canada (24 George V 1934), assented to March 28, 1934, for the establishment of the Buffalo and Fort Erie Public Bridge Authority as a municipal corporate instrumentality of said State and with power to take over, maintain and operate the present highway bridge over the Niagara River between the city of Buffalo, in the State of New York, and the village of Fort Erie, in the Dominion of Canada.

Approved May 3, 1934.

Public Law 824 Chapter 758

Joint Resolution July 27, 1956
(H.J. Res. 549)

Granting the consent of Congress to the State of New York to negotiate and enter into an agreement or compact with the Government of Canada for the establishment of the Niagara Frontier Port Authority with power to take over, maintain and operate the present highway bridge over the Niagara River between the city of Buffalo, New York, and the city of Fort Erie, Ontario, Canada.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress hereby consents to the negotiations and entering into of a compact or agreement between the State of New York and the Government of Canada providing for (1) the establishment of the Niagara Frontier Port Authority substantially in accordance with the provisions of chapter 870 of the laws of 1955 of the State of New York as amended or supplemented; (2) the transfer of the operation, control, and maintenance of the present highway bridge (the Peace Bridge) over the Niagara River between the city of Buffalo, New York and the city of Fort Erie, Ontario, Canada, to the Niagara Frontier Port Authority; (3) the transfer of all of the property, rights, powers and duties of the Buffalo and Fort Erie Public Bridge Authority acquired by such authority under the compact consented to by the Congress in Public Resolution 22 of the Seventy-third Congress, approved May 3, 1934 (48 Stat. 662), to the Niagara Frontier Port Authority; and (4) the consolidation of the Buffalo and Fort Erie Public Bridge Authority with the Niagara Frontier Port Authority and the termination of the corporate existence of the Buffalo and Fort Erie Public Bridge Authority.

Sec. 2. The right to alter, amend or repeal this joint resolution is hereby expressly reserved.

Approved July 27, 1956.

Public Law 85-145

Joint Resolution

August 14, 1957
(H.J. Res. 342)

Granting the consent of Congress to an agreement or compact between the State of New York and the Government of Canada providing for the continued existence of the Buffalo and Fort Erie Public Bridge Authority, and for other purposes.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of Congress is given to the State of New York to enter into the agreement or compact with the Government of Canada, which is set forth in Chapter 259 of the laws of New York, 1957, and provides for the continuation of the Buffalo and Fort Erie Public Bridge Authority as a municipal instrumentality of such State, with power to maintain and operate the highway bridge over the Niagara River between the city of Buffalo in such State and the city of Fort Erie, Ontario, Canada.

Sec. 2. The joint resolution entitled "Joint resolution granting the consent of Congress to the State of New York to negotiate and enter into an agreement or compact with the Government of Canada for the establishment of the Niagara Frontier Port Authority with power to take over, maintain, and operate the present highway bridge over the Niagara River between the city of Buffalo, New York, and the city of Fort Erie, Ontario, Canada", approved July 27, 1956 (70 Stat. 701), is repealed.

Sec. 3. The right to alter, amend, or repeal this joint resolution is expressly reserved.

Approved August 14, 1957.

A. Abrahams

ACTION COPY

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FM BGRAD OCT25/67 CONFD

TO TT EXTER 1709 PRIORITY DE PARIS

REF YOURLET G(M)356 AUG11

TREATY MAKING IN YUGOSLAV FEDERATION

REGRET PRESSURES OF URGENT WORK HAVE PREVENTED EARLIER REPLY TO YOUR REFLET.

2. JUDGING FROM REFS TO CONSTITUTION ARTICLES PP4 AND 5 OF DRAFT STUDY ATTACHED REFLET YOU ARE NOT RPT NOT WORKING FROM YUGOSLAV CONSTITUTION ADOPTED APR7/63 WHICH IS OPERATIVE. COPY OF CONSTITUTION OF 1963 FOLLOWS BY BAG.

3. RELEVANT ARTICLES OF 1963 CONSTITUTION ARE(1)ARTICLE 115 PARTICULAR PARAS 2 AND 4 CLEARLY ASSIGNING COMPETENCE IN INTERNATL RELATIONS TO FEDERAL GOVT(2)ARTICLE 160 PARTICULARLY CLAUSE 3 ASSIGNING INTERNATL AGREEMENTS TO FEDERAL JURISDICTION(3)ARTICLE 164 CLAUSE 4 ASSIGNING TO FEDERAL ASSEMBLY RESPONSIBLITY FOR FOREIGN POLICY AND(4)ARTICLE 215 GIVING TO PRESIDENT OF REPUBLIC(AND THEREFORE HIS FEDERAL ADMIN)DUTY OF QUOTE REPRESENTING UNQUOTE YUGOSLAVIA ABROAD. ALL OF THESE ARTICLES ACCORDING TO LEGAL DEPT MFA CONSTITUTE FOUNDATION OF EXCLUSIVE FEDERAL COMPETENCE IN YUGOSLAV TREATY MAKING.

4. RECENT TREND OF DECENTRALIZATION OF POWER FROM CENTRAL GOVT TO COMPONENT REPUBLIC HAS NEVERTHRELESS AFFECTED CONDUCT OF FOREIGN RELATIONS AND TREATY MAKING AS IT HAS OTHER AREAS OF FORMER EXCLUSIVE FEDERAL COMPETENCE. SINCE EACH REPUBLIC GENERALLY HAS A DISTINCTIVE NATIONAL COMPOSITION AND THESE NATIONALITIES HAVE TIES ABROAD(EG MACEDONIA WITH BULGARIA-PROVINCE OF

24.10.3(U.S.)

VOJVODINA WITH HUNGARY AND ROUMANIA-PROVINCE OF KOSMENT WITH ALBANIA) PRACTICE IS MORE FLEXIBLE THAN IS IMPLIED BY CONSTITUTION. SIMILARILY YUGOSLAVIA SHARES BORDERS WITH SEVEN OTHER COUNTRIES THEREBY GENERATING NUMBER OF PROBLEMS OF LOCAL CONCERN EG BORDER TRADE WITH ITALY IN TRIESTE REGION WHICH NONETHELESS REQUIRE FEDERAL TREATY ACTION. FURTHERMORE YUGOSLAVIA HAS MANY WATERWAYS NOW BEING DEVELOPED AND SOME OF THESE ARE INTERNATL(EG DJERDAP HYDRO AND SHIPPING ON DANUBE BEING CONDUCTED AS JOINT YUGOSLAV-ROUMANIAN VENTURE) ALTHOUGH INVESTMENT AND ULTIMATE BENEFITS OF SUCH DEVELOPMENT WILL BE TO ONE REPUBLIC ONLY. IN THESE CIRCUMSTANCES THERE IS CONSIDERABLE CONSULTATION WITH REPUBLICS AND AN INCREASING AMOUNT OF INITIATION OF TREATIES BY THEM.

5. THERE IS HOWEVER NO RPT NO FORMAL PROVISION FOR CONSULTATION NOR DO REPUBLICS PARTICIPATE AS REPUBLICS IN RATIFICATION OF TREATIES. RESLN OF CONFLICTING INTERESTS TAKES PLACE PRIOR TO SIGNING THROUGH INFORMAL CONSULTATION OR THROUGH INCLUSION OF REPUBLIC REPS ON NEGOTIATING TEAM. PROCESS OF INITIATING TREATIES BY REPUBLICS IS BECOMING MORE FORMALIZED THOUGH. MOST REPUBLICS NOW HAVE SECRETARIATS OR SERVICES FOR INTERNATL RELATION WHICH HAVE EVOLVED FROM EARLIER REPUBLICAN PROTOCOL DEPTS AND BECUASE OF INCREASING FEEL OF RESPONSIBILITIES FROM CENTRE(EG CONSULAR MATTERS) ARE BECOMING LARGER AND MORE AMBITIOUS. THESE PROTO-MFAS ARE NOT RPT NOT YET FULLY BLOWN DEPTS OF REPUBLICAN GOVT COMPLETE WITH MINISTER BUT AT THIS STAGE ARE MORE OFTEN SECS OF REPUBLICAN EXECUTIVE COUNCIL(CABINET). TREND OF EVOLUTION NEVERTHELESS IS CLEARLY TOWARDS MINISTRY STATUS.

EVEN AT PRESENT TIME CERTAIN TREATIES WILL BE WORKED OUT AND DRAFTED ALMOST EXCLUSIVELY BY THESE REPUBLICAN BODIES AND THEN PRESENTED TO FEDERAL GOVT FOR APPROVAL, SIGNING AND RATIFICATION. THERE IS NO RPT NO JOINT SIGNING OF TREATIES BY FEDERAL AND REPUBLIC GOVTS. SIMILARLY IN MATTERS OF FOREIGN INVESTMENT PRELIMINARY WORK WILL BE VIRTUALLY WHOLLY PERFORMED IN REPUBLIC WITH FEDERATION SIGNING NECESSARY BILATERAL FINANCIAL GUARANTEES.

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M. Abrahams Cour

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FM BGRAD OCT25/67 CONF D

TO TT EXTER 1709 PRIORITY DE PARIS

REF YOURLET G(M)356 AUG11

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Copy shld. be sent to Legal Registry Off.
M. Abrahams
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EXTERNAL AFFAIRS AFFAIRES EXTÉRIEURES

TO / À: The Under-Secretary of State for External Affairs
OTTAWA

FROM / De: The Canadian Embassy
CARACAS

REFERENCE / Référence: Your Letter G-(M)-356 of August 11, 1967

SUBJECT / Sujet: State Practice Concerning the Powers of Members of a Federal Union to Make Treaties

20-3-1-1
28 | 27

SECURITY / Sécurité: SECRET

DATE: October 17, 1967

NUMBER / Numéro: 332

FILE / DOSSIER
OTTAWA
~~20-20-1-6~~
MISSION
20-3

ENCLOSURES / Annexes
1

DISTRIBUTION

The States of the Federal Republic of Venezuela are bound as follows by Article 16 of the Constitution: "They obligate themselves to comply and enforce compliance with the Constitution and the laws of the Republic. They shall attest to the public acts emanating from the national authorities...." In addition to complying with, and enforcing laws of the Republic, the Venezuelan States, according to Article 17(7) have no jurisdiction in laws negotiated with foreign countries. Article 190(5) states the attribution and duty of the President of the Republic to include the direction of "the foreign relations of the Republic and (to) make and ratify international treaties agreements and resolutions". ("Countersigned for the validity thereof by the respective minister or ministers" - 1,90(22)) "Article 150 permits the Senate to initiate the discussion of projects of law relating to international treaties and agreements."

Part I: Constitutional Provisions

2. The conduct of the international relations of Venezuela would appear to be reserved for the jurisdiction of the National Power (Article 136(1)). The States are apparently excluded from this field by inference from their positive and negative attributions (Articles 17 and 18) and in particular Article 17(7) in the light of Article 136(1). (Municipal organization falls within the legislative competence of the States (Articles 17(2), (5) and 26) and in any case their constitutional attributions are limited to "local government" - Articles 25, 27 to 34.) Article 16 appears to cover the wording of Article 12 quoted in your paper.

3. Within the scope of the National Power, both the President (Article 190(5)) and the Senate (Article 150(1)) are provided with jurisdiction in the field of international affairs. The Chamber of Deputies acquires legislative authority in this field through the provisions relating to the "Formation of Laws" (Article 167) and laws relating to international treaties and agreement come into force without further review through the provisions of Articles 173 to 176.

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23.10.23(05)

4. The President alone would appear to have authority to make and ratify international treaties (Article 190(5)) subject to Article 128. The role of Congress would seem to be the same whether the law merely approves the treaty or provides the necessary legislation within Venezuela which the signing of the treaty or agreement may call for (i.e. implementation). In this connection your quotation, "The President of the Republic in the Council of Ministers..." would appear to be superseded by Article 190(22). We would conclude from this latter article that the President does not exercise the attribute of making and ratifying international treaties in the Council of Ministers, but only requires the countersignature of the Minister of External Relations.

5. We would draw your attention to Article 137 whereby Congress can delegate to the States or Municipalities "specific matters of national competence". Such delegation requires a positive act by Congress.

Part II: Treaty Making Power in Practice

6. We called on Dr. Elpidio Franco Z., Senator, President of the Senate Finance Committee, and a well known Venezuelan lawyer to discuss in general terms the above analysis. Dr. Franco said that jurisdiction to make and implement international treaties was exclusively held by the National Executive Power without any requirement to consult with the constituent parts. He said that the only real difference between the present and former constitution in this field was that the present one spelled out more clearly the reservation of this field to the National Power which had in fact been the former practice. The congressional power to delegate matters to the constituent parts (Article 137) had never been used for the implementation of treaties and was not intended for that purpose.

7. Nevertheless, there is some consultation between the National authority and the constituent parts but this appears more in the way of administrative details rather than policy formation. However, it was our impression that while Venezuelan delegations to international meetings of, for example, specialized agencies, included other than National Executive Power personnel, this was on the basis of personal prestige or expertise rather than an effort to include representatives of the constituent parts.

John D. Blackwood
Chargé d'Affaires

EXTERNAL AFFAIRS AFFAIRES EXTÉRIEURES

20-3-1-1

J. 20

TO / À: The Under-Secretary of State for External Affairs, OTTAWA.

FROM / De: Office of the High Commissioner for Canada, KUALA LUMPUR.

REFERENCE / Référence: Our Letter 364 of October 4, 1967

SUBJECT / Sujet: State Practice Concerning the Powers of Members of a Federal Union to Make Treaties

SECURITY / Sécurité: SECRET

DATE: October 11, 1967

NUMBER / Numéro: 371

FILE / DOSSIER
OTTAWA 20-1-2-6
MISSION 20-20-38

ENCLOSURES / Annexes

DISTRIBUTION

In the paper on Malaysia attached to our letter under reference, we stated that we were not aware of any examples of the federal government coming to Parliament in connection with the introduction of legislation implementing a treaty dealing with matters falling within the jurisdiction of the states, with a statement to the effect that it had consulted the states concerned as provided in Article 76(2) of the Constitution. Since writing that report, however, we have discussed the point with the Permanent Secretary to the Prime Minister's Department, who is equivalent to the Clerk of the Privy Council in Canada, and he has told us that while examples are rare, they do exist. He thought that the last occasion might have been two years' ago, and he promised to look up references for us.

Office of the High Commissioner

Received
OCT 17 1967
In Legal Division
Department of External Affairs

TO: MR. BAUDOUIN
FROM REGISTRY
OCT 16 1967
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TO: W Lyneruski

Ext. 407B/Bil.
(Admin. Services Div.)

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TO: MR BAGGOULEY
FROM REGISTRY
OCT 18 1967
FILE CHARGED OUT
TO: Registry

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EXTERNAL AFFAIRS

AFFAIRES EXTÉRIEURES

20-3-1-1

28 | 27

TO / À: Under-Secretary of State for External Affairs, Ottawa

FROM / De: Canadian Embassy, Moscow

REFERENCE / Référence: Your letter G-(M)-356 of August 11, 1967

SUBJECT / Sujet: State practice concerning the powers of members of a federal union to make treaties.

SECURITY / Sécurité: SECRET

DATE: October 10, 1967

NUMBER / Numéro: 799

FILE / DOSSIER: ~~20-20-1-6~~

OTTAWA: ~~20-1-2-6~~

MISSION: 28/20-3

ENCLOSURES / Annexes

DISTRIBUTION

Your request for comments on the Soviet practice was drawn to my attention on my return to Moscow. What I can say is in fact obvious.

2. The Soviet Constitution is on paper a wonderful document guaranteeing a very great number of rights to the constituent republics. In practice, however, the USSR is a highly centralized state in which every matter of principle, no matter how insignificant, is determined in Moscow. The right to enter into direct relations with foreign states, conclude agreements with them, and exchange diplomatic representatives, has of course never been implemented. Direct representation of the Ukraine and Byelorussia at the U.N. was the result of the almost total isolation of the USSR in the incipient organization. As I recall, in fact, Molotov refused to consider the admission of Argentina to the organization unless the Ukraine and Byelorussia were also accepted. This is the only exception to general practice and it bore no relationship to the application of the Soviet Constitution. It was solely a device to increase Soviet voting strength in the UN. There is of course no known occasion in which the representatives of these republics have deviated from the Soviet line nor could there be.

Received
OCT 18 1967
In Legal Division
Department of External Affairs

3. You seem to imply in your study that the reason for a failure to establish direct relations between the Soviet republics and foreign states is due to the fact that "few states have been willing to treat with them and so regard them". Although this is true, the main reason is that the USSR would almost certainly not permit their republics to develop direct relations with foreign states.

4. The extent to which all this is pure fiction can be seen from two Canadian experiences with the Ukraine. Up until August 1953 no foreign diplomat living in Moscow

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Ext. 407B/Bil.
(Admin. Services Div.)

was permitted to visit Kiev although it was the capital of a state represented in the UN. I was in fact the first foreign diplomat to do so. The second is the panic caused in the Soviet Foreign Ministry when we attempted to include in our consular agreement permission to open a consulate in Kiev.

5. The Soviet Constitution therefore can be conceived to all intents and purposes as pure window-dressing, and Soviet practice as having no relevance to Canadian needs.

R.A.D. Ford
Ambassador

J-51

Legal Division fonction

EXTERNAL AFFAIRS AFFAIRES EXTÉRIEURES

12/10/67

TO / À: The Under-Secretary of State for External Affairs.

FROM / De: The Office of the High Commissioner for Canada, NEW DELHI, India.

REFERENCE / Référence: Our telegram 2237 of September 25,1967.

SUBJECT / Sujet: Treaty-Making Powers in Federal States.

SECURITY / Sécurité: UNCLASSIFIED

DATE: OCTOBER 5, 1967

NUMBER / Numéro: 802

FILE	DOSSIER
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MISSION	20-1-4-IND.

Corr.

20-3-1-1

28

ENCLOSURES / Annexes: 1

DISTRIBUTION

... We attach a copy of a book entitled "Treaties and Federal Constitutions: Their Mutual Impact" by Mr. R. C. Ghosh, which we have come upon in our search for material which might be useful in your study of treaty-making powers in the federal states. We trust this publication will of interest, and we will forward any others we may come across.

TO: H. Bouchard
FROM REGISTRY
OCT 16 1967
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for Office of the High Commissioner.

TO:
FROM REGISTRY
OCT 11 1967
FILE CHARGED OUT
TO:
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Ext. 407B/Bil.
(Admin. Services Div.)

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Corr.

20-3-1-1

EXTERNAL AFFAIRS AFFAIRES EXTÉRIEURES

TO / À: The Under-Secretary of State for External Affairs, OTTAWA.

FROM / De: The Office of the High Commissioner for Canada, KUALA LUMPUR.

REFERENCE / Référence: Your Letter G(M)-356 of August 11, 1967

SUBJECT / Sujet: State Practice Concerning the Powers of Members of Federal Union to Make Treaties

SECURITY / Sécurité: ~~SECRET~~ 28 | 27

DATE: October 4, 1967

NUMBER / Numéro: 364

FILE	DOSSIER
OTTAWA 20-1-2-6	
MISSION 20-20 281	

ENCLOSURES / Annexes: 2

DISTRIBUTION

Mr. Abraham
To check against whole Paper
dft.

We attach two papers on this subject covering Malaysia and Burma. To the best of our knowledge, the facts presented in them and the interpretations given are accurate as far as they go, although as in most developing societies, institutionalized procedures in Burma and Malaysia are probably less relevant in the exercise of power than they are in more developed societies. Thus extra legal considerations tend to overshadow constitutional provisions. In the case of Burma, for example, the constitution, although not specifically revoked, appears to be quite meaningless at the present time. In Malaysia on the other hand, it is clear that the federal government is becoming increasingly less tolerant of political views diverging from their own, and less prepared to permit constitutional provisions to stand in the way of dealing with dissenters.

2. Thus it would seem to us that while a comparative study of this nature, that is to say one that embraces developing as well as developed countries, is useful in an academic sense, the differing levels of development probably limits the practical application of such an analysis.

Office of the High Commissioner

000849

Ext. 407B/Bil.
(Admin. Services Div.)

11.10.46(00)

BURMA

Paragraph five of the draft paper concerning Burma appears to be completely accurate with the important qualification that the country, since 1962, has been governed by a Revolutionary Council which conferred on its Chairman all legislative, judicial, and executive powers. While the Revolutionary Council did not specifically repeal or suspend the constitution and it technically would therefore appear to still exist, in practice the constitution would seem to operate only in those areas where the new government has not taken specific action.

In seizing power in Burma, the Revolutionary Council made it clear that it opposed the trend under previous governments towards increased autonomy for the states and the minorities. One of the first acts of the Council was to alter the federal structure considerably in favour of stronger central control. The elected state councils, the state ministers and the appointed head minister of state were all replaced by state supreme councils under the direct control of the Revolutionary Council. In practice, therefore, Burma for the time being at least has lost the quality of a federal state.

M A L A Y S I A

The constitutional position both with regard to the treaty-making and the treaty-implementing power in Malaysia, is quite precise. 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 would appear to embrace all aspects of relations with foreign countries. It reads:

"1. External Affairs, including--

(a) Treaties, agreements and conventions with other countries and all matters which bring the Federation into relations with any other country;

(b) Implementation of treaties, agreements and conventions with other countries;

(c) Diplomatic, consular and trade representation;

(d) International organizations; participation in international bodies and implementation of decisions taken thereat;

(e) Extradition; fugitive offenders; admission into, and emigration and expulsion from, the Federation;

(f) Passports; visas; permits of entry or other certificates; quarantine;

(g) Foreign and extra-territorial jurisdiction; and

(h) Pilgrimages to places outside Malaya."

In addition, the federal Parliament may make laws with respect to any matter enumerated in the state list, inter alia, "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". (Article 76(1)(a). However, no bill may be introduced into either house of Parliament "until the government of any state concerned has been consulted". (Article 76(2). Finally, if any state law is inconsistent with a federal law, the federal law shall prevail and the state law shall, to the extent of the inconsistency, be void. (Article 75).

While the federal government would seem to possess full executive and legislative power for the conduct of foreign affairs, including the making of treaties, how it obtained such power is less certain. The Malaysian Constitution of 1963 succeeded the Malayan Constitution of 1957 and for the purposes of this paper at least, the wording of the earlier Constitution remains unaffected by the amendments enacted in 1963 to give effect to the

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wider federation. The Constitution of the Federation of Malaya was set out as a schedule to the Federation of Malaya Agreement 1957, between Her Majesty the Queen on one hand and the rulers of the Malay states on the other. (1) The 1957 Agreement expressly revoked the Federation of Malaya Agreement 1948, between the Crown and the rulers jointly, and a series of state agreements between the Crown and the nine Malay rulers individually. While federal government in Malaya can be traced back to the 1895 Treaty of Federation between four of the states, that Treaty did not in fact define the powers of the federal and state governments, and it would appear that as late as 1946, each of the Malay states had separate written or unwritten constitutions which in general invested supreme authority in the ruler. It can perhaps be concluded that the treaty-making power which in any event would seem to have been limited by the various treaties between the Crown and the Malay rulers, passed to the federal government first under the Federation of Malaya Agreement of 1948, and again under the Federation of Malaya Agreement of 1957.

The 1957 Constitution was based on the report of the Federation of Malaya Constitutional Commission of that year, otherwise known as the Reid Commission. The Commission was expressly enjoined to provide for "the establishment of a strong central government with the States and Settlements enjoying a measure of autonomy...." In Section 113 of its report, the Reid Commission stated:

> "External affairs and defence must be federal subjects and we so recommend (List I, Heads 1 and 2). The effect of our recommendations would be that the powers of the Federation to deal with these matters would be comprehensive and would enable the Federation to take action on all subjects, including subjects in the State List to such extent as might be necessary for these purposes. In particular the Federation should be entitled to take all action necessary to implement future treaties and existing treaties which continue in force and to provide for visiting forces (Article 72)." (2)

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(1) Under the Constitutions of the States of Johore, Pahang, Kedah, Perlis, Kelantan and Trengganu, it was unlawful for the Ruler to enter into any negotiation relating to the cession or surrender of the State or any part thereof. In consequence it was necessary, in order to make it clear that the Ruler of each of these States had authority to enter into this Agreement, to amend the State Constitutions to that effect. These amendments came into force on August 5, 1957 (the Agreement itself being signed on that date) and in general provided that it should not be "unlawful for the Ruler to enter into an agreement with Her Majesty and Their Highnesses the Rulers of the Malay States revoking the Federation of Malaya Agreement and the State Agreement, of 1948, and providing for the constitution and government of a new and independent federation, within the British Commonwealth of Nations, of the Malay States and Settlements of Malacca and Penang and such further territories as may from time to time be admitted to such federation".

(2) In fact, the Reid Commission recommended somewhat stronger wording than was eventually adopted. Their proposal was as follows: "Parliament shall have power to make laws for implementing any treaty, agreement or convention between the Federation and any other country, or any decision taken by any international body if such decision was accepted by the Federal Government, notwithstanding that the law deals with a matter which is within the exclusive legislative authority of a State." In addition, the Reid Commission made no provision for consultation with the states.

The drafters of the 1957 Constitution appear to have been completely successful and at least to date, there have been no suggestions as far as we have been able to trace that loopholes exist. The only relevant court action that has come to our attention was that instituted by the State of Kelantan against the Federal Government in 1963, five days before the new Federation of Malaysia was to come into existence. The State had sought a declaration that the Malaysia Agreement and the subsequent Malaysia Act were null and void or alternatively not binding on the State of Kelantan on the grounds that the Act would in effect abolish the Federation of Malaya, contrary to the 1957 Agreement, and that in any event the proposed changes required the consent of each of the constituent states and that this had not been obtained, that the Ruler of Kelantan should have been a party to the Malaysia Agreement which he was not, that there was a constitutional convention the rulers of the individual states should be consulted regarding any substantial changes in the Constitution, and that the Federal Government had no power to legislate for the State of Kelantan in respect of any matter regarding which the State had its own legislation. In denying the State's application for a restraining order, the Chief Justice of Malaya declared that under the constitution of Malaya, Parliament had the power to admit other states to the Federation as well as to make laws relating to external affairs, including the making of treaties and agreements, and that Parliament in admitting new states to the Federation and in the changing of its name, was acting within its powers to amend the Constitution. The Chief Justice then observed "by Article 80(i) the executive authority of the Federation extends to all matters with respect to which Parliament may make laws which, as has been seen, includes external affairs, including treaties and agreements.... There is nothing whatsoever in the Constitution requiring consultation with any State Government or the Ruler of any State." (3)

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(3) The Government of the State of Kelantan v The Government of the Federation of Malaya and Tunku Abdul Rahman Putra Al-Haji, 1963 29 M.L.J. 355. The State subsequently abandoned its original action, and did not appeal the decision on its motion.

Controversy has also arisen concerning the constitutional prohibition on the borrowing of money by the states from other than the federal government, a prohibition which may extend to any guarantee involving a financial liability (Article III). Again, it has been the government of Kelantan, controlled by an opposition political party, which has become involved in litigation with the federal government. This time the federal government has challenged the power of the state to lease a substantial tract of land to a foreign company, arguing that the required prepayment of royalties was not to be regarded as a deposit as claimed by the state government, but as a loan proscribed by the constitution. The court has not yet brought down its decision in the case.

Turning now to the form of consultation between the federal and state governments on treaty matters falling within the jurisdiction of the states, it is evident that the constitutional requirement for consultation with them where their interests are involved before implementing legislation is introduced in the federal parliament, rides lightly on the federal government. To begin with, in general terms the state list is confined to such matters as Malay custom and Muslim religion, land, agriculture and forestry, and local works and services. While we understand that attempts by the federal government to secure the co-operation of the states in promoting uniform national development in areas within their competence have not always been successful, we are not aware of cases in which the treaty making and treaty implementing power have been directly involved. Thus, for example, we are not aware of any examples of the federal government coming to parliament and stating on the introduction of legislation implementing a treaty dealing with matters falling within the state jurisdiction, that it had consulted the states concerned. The closest recent example is perhaps the case of a regional economic survey of the State of Trengganu being undertaken by The Netherlands government. We understand that the state government has been quite prepared to have the federal government carry out all the negotiations with The Netherlands and has not in practise questioned its right to do so. In this connection it is relevant to note that all but one of the states are dependent on federal government subsidies to cover even their current expenditures, that most of the chief ministers are federal appointees, and that many of the senior civil servants in most of the states are on loan from the federal civil service. In these circumstances, it is perhaps understandable that the federal government is rarely contradicted or permits any sustained contradiction unless, of course, as is the case with only one state at the moment, the state government is controlled by an opposition political party.

EXTERNAL AFFAIRS | AFFAIRES EXTÉRIEURES

TO / À: The Under-Secretary of State for External Affairs, OTTAWA

FROM / De: The Canadian Embassy, MEXICO CITY

REFERENCE / Référence: Your letter G-(M)-356 of August 11

SUBJECT / Sujet: STATE PRACTICE CONCERNING THE POWERS OF MEMBERS OF A FEDERAL UNION TO MAKE TREATIES

SECURITY / Sécurité: SECRET

DATE: October 3, 1967

NUMBER / Numéro: 345

20-3-1-1
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FILE / DOSSIER
OTTAWA 20-1-2-6
MISSION 28 / 1-1-1

ENCLOSURES / Annexes

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We consulted with the Legal Advisor to the Foreign Ministry concerning the possible rights of the constituent states of the Mexican Republic to conclude treaties with foreign powers. He confirmed our understanding that the conduct of foreign affairs, both under the Constitution and in practice, is the exclusive prerogative of the Federal Government. He immediately pointed to Article 117 of the Constitution, forbidding a State to conclude a treaty with a foreign power. This was quoted in the section on Mexico (paragraph 7) in the paper attached to your letter under reference. He also drew our attention to Section X of Article 89, which 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, and Section I of Article 76, which provides that the Senate must approve treaties and agreements concluded by the President with foreign powers.

2. In fact, Mexico is not a confederation in the Canadian sense of the term. Power is concentrated in the hands of the President, and the States are more akin to municipal governments in Canada than our Provinces.

3. State Governors along the United States border are allowed to cultivate personal relations with neighbouring United States Governors. Careful watch is maintained, however, to ensure that this decorative role does not trespass on matters of foreign policy. State Governments are also allowed to issue temporary passports, but this is through a delegation of power from the Foreign Ministry which could be withdrawn at any time.

The Embassy

Mr. Baudouin
I understood Co-ord. Div. is acting on these replies. Is this correct?

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Ext. 4078/Bil.
(Admin. Services Div.)

Mr Gotlieb
Mr Yalden

ACTION COPY

Legal Div

FM CNBRA SEP7/67 CONFD

TO EXTER 1373 PRIORITY

INFO TT GNEVA PERMISNY PRIORITY DE OTT

REF YOURTEL G365 AUG25

COMPOSITION OF DELS TO UN MTGS

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Mr Fowler

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REGRET DELAY IN RESPONDING TO YOUR REQUEST.INTERVIEW WITH LEGAL ADVISER,WHICH WE FELT DESIRABLE,COULD NOT RPT NOT BE ARRANGED EARLIER THAN TODAY.

2.SHORT ANSWER TO YOUR ENQUIRY IS THAT AUSTRALIAN AUTHORITIES DO NOT RPT NOT REGARD STATES AS HAVING ANY STATUS IN INTERNATL FORM.THIS IS NOT RPT NOT TO SAY THAT IT WOULD NOT RPT NOT BE REGARDED AS FAIR AND REASONABLE OR EVEN DESIRABLE TO INCLUDE STATE REPS ON OCCASION BUT THIS WOULD BE AN EXCEPTION TO RULE.IT SEEMS TO BE REASONABLY COMMON PRACTICE IN THIS REGARD TO INCLUDE STATE REPS IN DELS TO ILO AND UNESCO.WHILE DELS TO CONFERENCES OF OTHER SPECIALIZED AGENCIES ARE USUALLY MADE UP OF ADMINISTRATORS DRAWN FROM COMWEL SOURCES,DISTINGUISHED CITIZENS ARE SOMETIMES INVITED TO SERVE ON THEM BUT NOT RPT NOT AS REPRESENTING STATE INTERESTS.

3.IN ANSWERING OUR QUESTIONS LEGAL ADVISER REFERRED IMMEDLY TO STATEMENT OF AUSTRALIAN POSITION REGARDING POWER TO NEGOTIATE TREATIES WHICH APPEARS IN UN LEGISLATIVE SERIES PUBLICATION DOCU ST/LEG/SER B/3 ENTITLED QUOTE LAWS AND PRACTICES CONCERNING CONCLUSION OF TREATIES UNQUOTE IN WHICH AUSTRALIAN CONTRIBUTION MAKES IT CLEAR THAT STATES HAVE NO RPT NO INTERNATL STATUS AND THAT MAKING OF TREATIES IS A FUNCTION OF FEDERAL EXECUTIVE POWER ALONE.

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4.FOLLOWING REVIEW OF CONCERSATION WITH LEGAL ADVISER IS NOT RPT NOT ENTIRELY TO POINT BUT MAY BE OF INTEREST:REFERRING TO QUOTE FEDERAL-STATES UNQUOTE CLAUSE WHICH UN DIV DEA HAS APPARENTLY CONCLUDED IS A LOST CAUSE,LEGAL ADVISER NOTED THAT A FEDERAL-STATES CLAUSE EXISTED IN REGARD TO ILO BUT THAT NO RPT NO USE IS MADE OF THIS CLAUSE IN AUSTRALIA.IN REGARD TO ILO CONVENTIONS AND OTHER CONVENTIONS DEALING WITH MATTERS NORMALLY FALLING WITHIN STATES POWERS,COMWEL GOVT PRIOR TO RATIFICATION CONSULTS WITH STATES TO ENSURE THAT EXISTING LAWS AND PRACTICES ARE IN LINE WITH CONVENTION OR CAN BE BROUGHT INTO LINE PRIOR TO RATIFICATION.NATURALLY AUSTRALIAN DELS HAVE IN MIND STATE LAWS AND PRACTICES DURING INTERNATL CONFERENCES AND AUSTRALIAN VOTES IN FAVOUR OR EVEN SIGNATURE OF CONVENTIONS ARE NOT RPT NOT PROCEEDED WITH IN DISREGARD OF STATES INTERESTS.HOWEVER CONSULTATION IN DETAIL SEEMS NORMALLY TO FOLLOW DRAWING UP OF CONVENTION BUT BEFORE RATIFICATION IS EFFECTED.CHANNELS FOR COMMUNICATION BETWEEN COMWEL AND STATE GOVTS IN REGARD TO THESE MATTERS DO NOT RPT NOT SEEM TO BE FIRMLY OR FORMALLY ESTABLISHED EXCEPT FOR TOP LEVEL CONSULTATION WHICH IS BETWEEN PM AND STATE PREMIERS OR THEIR DEPTS.BELOW THIS LEVEL PRACTICE VARIES.IN REGARD TO ILO MATTERS DEPT OF LABOUR AND NATL SVC COMMUNICATES DIRECTLY WITH APPROPRIATE AUTHORITIES IN EACH STATE.A FAIRLY RECENT ADDITIONAL CHANNEL HAS BEEN STANDING CTTEE OF ATTORNEY-GEN OF COMWEL AND STATES WHICH HAS BEEN USED TO CARRY OUT SOME STAGES OF COMWEL-STATE CONSULTATION ON INTERNATL AGREEMENTS.(THIS CHANNEL,WE WOULD COMMENT,

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CAN BE FULLY EFFECTIVE SO LONG AS ONLY LEGAL MATTERS ARE UP FOR DISCUSSION;THAT ATTORNEYS-GEN CAN FIND DIFFICULTY IN ACHIEVING AGREEMENT WHERE POLICY MATTERS MUST BE DECIDED IS CLEAR FROM DELAYS IN PREPARING COMMON COMWEL-STATE LEGISLATION COVERING EXPLORATION AND EXPLOITATION OF OFF-SHORE MINERAL RESOURCES.)

5.LEGAL ADVISER QUOTED EXAMPLE HUMAN RIGHTS CONVENTIONS WHERE TOP LEVEL CONSULTATION WITH PROMISE OF LATER DISCUSSION IN DEPTH WILL BE RESPONSIBILITY OF APPROPRIATE FORUM,PROBABLY STANDING CTTEE ATTORNEYS-GEN.

6.WE ASKED ABOUT CONSTITUTIONAL PROVISION UNDER WHICH COMWEL GOVT MAY ASSUME LEGISLATIVE POWER REQUIRED TO IMPLEMENT TREATIES IT HAS NEGOTIATED OR ACCEPTED.LEGAL ADVISER AGREED THAT THIS PROVISION EXISTED BUT EXTENT TO WHICH IT COULD BE IMPLEMENTED HAS BEEN DECIDED AS MATTER OF POLICY BY GOVT OF DAY.HE COMMENTED THAT JUDGING BY HIS STATEMENT MADE TO HIGH COURT IN REGARD TO IPEC CASE TWO YEARS OR SO AGO THE THEN ATTORNEY-GEN STOOD FIRMLY ON VALIDITY OF AIR NAV-IGATION REGS INVOLVED BUT DECLARED THAT THIS DID NOT RPT NOT MEAN THAT COMWEL GOVT CLAIMED PLENARY POWER TO IMPLEMENT ITS AUTHORITY IN ALL CIRCUMSTANCES.BY REF TO SPECIFIC MATTERS HE DEMONSTRATED THAT COMWEL WOULD ACT ONLY IF MATTER WAS INTRINSICALLY INTERNATL. ALTHOUGH PRESENT GOVT HAS NOT RPT NOT DECLARED ITSELF IN THIS REGARD IT SEEMS LIKELY THAT THEY WOULD DRAW A SIMILAR LINE.

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FM DELHI SEP25/67 SECRET

TO EXTER 2237 PRIORITY

REF MULTIPLE LET G(M) 356 AUG11

TREATY-MAKING POWERS IN FEDERAL STATES

IN THE ABSENCE OF MORE SENIOR OFFICERS OF LEGAL AND TREATIES DIV, MEA, WE CALLED TODAY ON KL SARMA, LAW OFFICER IN THAT DIV TO DISCUSS TREATY-MAKING POWERS UNDER INDIAN CONSTITUTION. AS INSTRUCTED WE DID NOT RPT NOT SHOW SARMA YOUR NOTE DEALING WITH INDIAN SITUATION, NOR DID WE MENTION YOU WERE PREPARING A PAPER FOR POSSIBLE PUBLICATION. WE SIMPLY REF TO OUR GENERAL INTEREST IN OTHER FEDERAL SYSTEMS, CITED RELEVANT ARTICLES FROM INDIAN CONSTITUTION, AND INVITED SARMA TO COMMENT (WE SHOULD POINT OUT THAT ARTICLE 253 IS GOVERNING CLAUSE IN CONSTITUTION OF INDIA AND NOT RPT NOT SECTION 263 AS CITED BY YOU).

2. SARMA CONFIRMED THAT INDIAN PRACTICE IS PRECISELY AS SET OUT IN CONSTITUTION PARTICULARLY IN ARTICLE 253 AND IN ENTRY 14 OF LIST 1, SEVENTH SCHEDULE (QUOTE ENTERING INTO TREATIES AND AGREEMENTS WITH FOREIGN COUNTRIES AND IMPLEMENTING OF TREATIES, AGREEMENTS AND CONVENTIONS WITH FOREIGN COUNTRIES UNQUOTE). ENTRY 13 OF LIST 1, HE SAID WAS ALSO RELEVANT IN THIS CONTEXT AS IT RESERVED TO THE UNION GOVT THE POWER OF QUOTE PARTICIPATION IN INTERNATL CONFERENCES, ASSOCIATIONS AND OTHER BODIES AND IMPLEMENTING OF DECISIONS MADE THEREAT UNQUOTE. THUS, HE SAID, IT WAS CLEAR THAT THE UNION GOVT HAS THE EXCLUSIVE POWER BOTH TO ENTER INTO TREATIES AND TO MAKE LAWS FOR THEIR IMPLEMENTATION. THIS POSITION,

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ACCORDING TO SARMA, HAD NEVER BEEN CHALLENGED AND HAD NEVER OCCASIONED A REF TO SUPREME COURT OF INDIA. CONSTITUTIONAL PROVISIONS, HE SAID, HAD NEVER BEEN SUPPLEMENTED BY LEGISLATION BY UNION PARLIAMENT.

3. REGARDING POINTS RAISED IN PARA2 OF YOUR REFLET, SARMA SAID HE KNEW OF NO RPT NO ESTABLISHED PRACTICE IN INDIA WHEREBY CENTRE CONSULTED WITH STATES WHEN PARTICULAR TREATY AFFECTED STATES INTERESTS. NOR WAS THERE ANY STANDARD PRECEDENT OR PRACTICE WHEREBY STATES SUGGESTED TREATY INITIATIVES IN FIELDS WHICH INTEREST THEM PRIMARILY OR WHERE THEIR INTEREST IS SHARED WITH CENTRE. ON THE OTHER HAND, HE SAID, THERE WAS NOTHING TO PREVENT STATES FROM MAKING SUGGESTIONS OF THIS KIND.

4. WE SUSPECT THAT ONE REASON WHY CONSTITUTIONAL POSITION IN INDIA IS SO HAPPILY CUT-AND-DRIED AND UNCONTROVERSIAL IS THAT UNTIL RECENTLY CONGRESS PARTY WAS IN POWER IN CENTRE AND IN ALL STATES. INTEREST OF STATES COULD BE CONSULTED AND POLICY DIFFERENCES, IF ANY, COULD BE COMPOSED INFORMALLY THROUGH PARTY CHANNELS AND CONTACTS. WITH ADVENT OF RADICAL OPPOSITION GOVTS IN WEST BENGAL AND KERALA, FOR INSTANCE, CONTROVERSY MAY ARISE IF SPECIFIC OCCASION PRESENTS ITSELF. KERALA GOVT HAS ALREADY RAISED QUESTION OF WHETHER STATE AUTHORITIES SHOULD BE FREE TO NEGOTIATE RICE PURCHASES DIRECTLY WITH FOREIGN GOVTS SUCH AS BURMA AND THAILAND INSTEAD OF RELYING ON DELHI FOR SUPPLIES. NEVERTHELESS CONSTITUTIONAL

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PROVISIONS ARE SO CLEAR CUT AND UNAMBIGUOUS IT SEEMS DIFFICULT TO ENVISAGE SITUATION IN WHICH THEY COULD BE CHALLENGED AT LAW. CHALLENGE IN POLITICAL TERMS AND BY POLITICAL MEANS IS OF COURSE ANOTHER QUESTION AND IF CONFLICT EVER CAME TO A HEAD BETWEEN CENTRE AND KERALA, FOR INSTANCE, IN RESPECT OF SOME TREATY MATTER, CONSTITUTIONAL CLARITY WOULD DO LITTLE TO DAMPEN FIREWORKS WHICH WOULD PROBABLY RESULT. WE TRIED, INDIRECTLY AND MOST CAREFULLY, TO DRAW SARMA OUT ON DISTINCTION BETWEEN CONSTITUTIONAL AND POLITICAL SITUATION BUT HE WOULD NOT RPT NOT RISE TO BAIT. INDEED HE WAS GENERALLY CAUTIOUS AND NON-COMMITAL THROUGHOUT MTG AND HESITATED TO DO ANYTHING MORE THAN REF US WHAT WAS SET OUT IN CONSTITUTION ITSELF.

5. IT WOULD APPEAR THEREFORE THAT YOUR UNDERSTANDING OF INDIAN SITUATION IN THIS FIELD IS CORRECT (SECTION 263 BEING CHANGED TO READ ARTICLE 253). WE ARE LOOKING FOR STUDIES PUBLISHED ON SUBJ IN INDIAN LAW AND POLITICAL SCIENCE JOURNALS WHICH WOULD BE OF INTEREST TO YOU.

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EXTERNAL AFFAIRS AFFAIRES EXTÉRIEURES

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TO / À: The Under-Secretary of State for External Affairs
OTTAWA

FROM / De: The Canadian Embassy
CARACAS, Venezuela

REFERENCE / Référence: Your letter G-(M)-356 of August 11, 1967

SUBJECT / Sujet: State Practice Concerning the Powers of Members of a Federal Union to make Treaties - Interim Reply

SECURITY / Sécurité: SECRET

DATE: September 5, 1967

NUMBER / Numéro: 291

FILE / DOSSIER
OTTAWA 20-1-2-6
MISSION 20-3-261 15

ENCLOSURES / Annexes

DISTRIBUTION

On examining the articles quoted in paragraph 9 of the attachment to your letter under reference we have concluded that your remarks concerning the Venezuelan Treaty-Making Power were based upon a Venezuelan Constitution which is no longer valid. We have therefore acquired an English translation of the 1961 Venezuelan Constitution and are preparing a reply based upon the relevant articles. We also plan to discuss the Venezuelan Treaty-Making Power in general terms with a constitutional lawyer at the Central University of Venezuela as soon as possible. Our reply hopefully will go forward in the next bag.

John S. Blackwood
Chargé d'Affaires a.i.

TO: MR. SCOTT
FROM REGISTRY
SEP 12 1967
FILE CHARGED OUT
TO: MR SCOTT
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Ext. 407B/Bil.

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EXTERNAL AFFAIRS

AFFAIRES EXTÉRIEURES

TO: MR SCOTT
FROM REGISTRY
SEP 12 1967
FILE CHARGED OUT
TO: MR SCOTT

TO / À: The Under-Secretary of State for External Affairs, OTTAWA

FROM / De: The Canadian Embassy, WASHINGTON, D.C.

REFERENCE / Référence: Your letter G(M)-356

SUBJECT / Sujet: "State Practice Concerning the Powers of Members of a Federal Union to make Treaties"

SECURITY / Sécurité: CONFIDENTIAL

DATE: September 5, 1967

NUMBER / Numéro: 1332

FILE / DOSSIER
OTTAWA 20-1-26
MISSION 28 | 13

ENCLOSURES / Annexes

DISTRIBUTION

We are grateful for the invitation to comment on Section IV of the paper attached to your letter under reference. As you know we have for some time been in touch with the Office of the Legal Adviser in State Department on a variety of matters involving agreements or possible agreements between States of the Union and Provinces of Canada. Our discussions have occasionally strayed from the particular to the general and have touched on the principles and procedures applicable to the conclusion of agreements or compacts by States of the Union with each other and foreign powers or sub-divisions thereof. However your letter provided us with a welcome opportunity to pull together some of the observations and opinions which have been reported piecemeal and to do some independent if superficial research on this subject. The results of this research and of the pulling together of the relevant fragments of our conversations with members of the State Department Legal Adviser's office are set out below. In sum they produce a picture of the law and practice regarding the conclusion of agreements by individual states which is, we regret to say, full of uncertainty and controversy.

2. We attach (Annex A) for your examination an extract (pages 374 and 415-419) of Senate Document No. 39 of the 88th Congress, First Session. This is an analysis and interpretation of the U.S. Constitution prepared by the Legislative Reference Service of the Library for Congress and represents a piece of official scholarship which is, we are told, highly regarded both in governmental and academic circles. Some of the interpretations set forth in this document are not necessarily those with which the Executive Branch of the U.S. Government or this particular Administration would agree. There is no question, however, that the scholarship reflected in this document is respected. We also attach (Annex B) a copy of the report of hearings by the House Foreign Affairs Committee in September and October 1966 on bills to give the Consent of Congress to the Great

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Lakes Basin Compact. We shall be making frequent reference below to arguments and documents contained in that report. Finally there are attached (Annex C) the texts of three Joint Resolutions of Congress to which reference is also made.

3. A Constitution which allows the federal authorities to authorize agreements between the constituent parts and foreign sovereign states (The United States of America). (Description of Part IV)

Comment While the point is hardly of major significance we wonder whether Section IV which discusses and interprets Article 1, Section 10 of the U.S. Constitution is correctly described as dealing with "a constitution which allows the federal authorities to authorize agreements...". It is quite true that that section of the Constitution does appear to contemplate the possibility of agreements being concluded by constituent States among themselves and with foreign powers. However the authority to decide whether such agreements will be concluded is reserved to the Congress of the United States (which is not quite the same as "the federal authorities") and the section is essentially prohibitory. It therefore occurs to us that this introductory sentence might perhaps be amended to read:

> "A constitution which contemplates the possibility of agreements between constituent parts of a federal state and foreign powers subject to their receiving appropriate federal consent".

Incidentally, the Constitution speaks of the "consent of Congress" and it is an open question whether an agreement entered into by a State, either with another State or with a foreign power, requires the approval of the President. Congressional consent has always, so far as we have been able to discover, been granted by Act of Congress or Joint Resolution which acquires the force of law when approved by the President. However, it might be argued that consent could equally be given by a Concurrent Resolution (which the President does not sign) or by an Act of Congress or Joint Resolution which the President refused to sign.

4. "No State shall enter into any Treaty, Alliance or confederation". "No State shall, without the consent of Congress...enter into any Agreement or Compact with another State or with a foreign Power...".

Comment The quotation of Article 1, Section 10 of the U.S. Constitution given in your paper is not accurate. The quotation given above is. Specifically, the only reference in Article 1, Section 10 to "contracts" is in relation to the prohibition against any State passing a "Law impairing the Obligation of Contracts". The section (clause 3) speaks of "Agreement or

Compact with another State, or with a foreign power...", not "agreement, compact or contract with any other state or with a foreign power".

5. According to the advice given by the Attorney-General of the United States to the Secretary of State of 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".

Comment With a possible qualification as to the timing of the consent (see below) the advice given by the Attorney-General in 1909 would probably be given again today. It is a logical inference from the terms of the article and from the interpretation given the "agreement or compact" clause of Article 1, Section 10 of the Constitution in Holmes v. Jennison (1840). The dictum of Chief Justice Taney of the Supreme Court in that case (it was not the opinion of the court), while possibly qualified by dicta in Virginia v. Tennessee (1893) with respect to inter-state compacts has not been challenged in any Supreme Court decisions relating to agreements with "a foreign Power". (See pages 415-416 of Annex A).

There is, however, one phrase in the Attorney-General's statement which might, indeed probably would be disputed. The quotation concludes with the words "to which Congress shall have given its consent". This clearly implies that the Consent of Congress shall have been given before an agreement is concluded between a State and a foreign Power. In this connection we refer you to page 417 of the attachment (Annex A) which notes that "The Constitution makes no provision as to the time when the consent of Congress shall be given or the mode or form by which it shall be signified. While the consent will usually precede the compact or agreement, it may be given subsequently where the agreement relates to a matter which could not be well considered until its nature is fully developed. The required consent is not necessarily an expressed consent; it may be inferred from circumstances. It is sufficiently indicated, when not necessary to be made in advance, by the approval of proceedings taken under it." This position is supported by a letter signed by the Deputy Attorney-General of the United States which appears on pages 10-13 of Annex B.

6. It would appear that agreements of the type requiring the consent of Congress have never been authorized with the exception of inter-state compacts open to accession by Canadian provinces, for example, bridge agreements. Three cases where Congressional consent was or is being sought are the Northeast Inter-State Forest Fire Protection Compact of 1951, the Great Lakes Basin Compact of 1955 between several states of the Union, and the Minnesota-Manitoba Highway Agreement of 1962.

Comment It is assumed that the "agreements of the type requiring the consent of Congress" referred to in this paragraph are agreements between States and "a foreign power". If this assumption is correct then the first sentence may be somewhat misleading. It is quite true that Congress gave its consent to the Northeast Interstate Forest Fire Protection Compact. Indeed Congressional consent was given twice. In 1949 it was granted subject to the reservation that "before any province of the Dominion of Canada shall be made a party to such compact, the further consent of Congress shall be obtained". According to a letter of October 4, 1966 from the Assistant Secretary of State for Congressional Relations to the Chairman of the House Committee on Foreign Affairs "three years later Congress approved the participation of any such contiguous province" (page 112, Annex B). The other agreements to which reference is made are agreements between a particular state and "a foreign Power". These generally have been, to be sure, with a Province of Canada. For example Congress has given its express consent to the negotiation of the Manitoba-Minnesota Highway Agreement and a bill is now before Congress seeking consent to the agreement itself. However, Congress has also expressly consented "to New York to negotiate and enter into a compact or agreement with the Government of Canada for the operation of a bridge by the Buffalo and Fort Erie Public Bridge Authority, established thereby". (See Annex C and further comments on this "agreement" below).

The second sentence of the paragraph quoted above is accurate. It should be noted however that express Congressional consent has not been given to the Maine-New Brunswick agreement relating to the construction of the Milltown Bridge or, so far as we know, to any Michigan-Ontario agreement concerning the Blue Water Bridge. Congressional consent has been sought for the Great Lakes Basin Compact but that part of the compact which provides for the accession of the Provinces of Ontario and Quebec is expressly excluded in the consent legislation before Congress. (In this connection we refer you to the Statement of the Chairman of the New York Power Authority which appears on pages 66-83 of Annex B. In this statement it is strenuously argued that the consent of Congress is not required, and if it is required, it should not be given in the form in which it is sought (excluding participation by Ontario and Quebec) because of the impairment which might result to long-standing and important relationships between e.g. P.A.S.N.Y. and Ontario Hydro.)

A further point that you will wish to bear in mind in relation to the question of Congressional consent is that of the manner in which Congressional consent can be given. You will note from the observations on page 417 of the attached analysis and interpretation of the Constitution (Annex A) that there is room for argument as to when and in what manner the

consent of Congress can be given. It appears that depending on circumstances consent may be given before or after the conclusion of the inter-state compact or agreement. It may either be express consent (by Act of Congress or Joint Resolution or, possibly, otherwise) or it may be inferred from circumstances. "It is sufficiently indicated when not necessary to be made in advance, by the approval or proceedings taken under it."

The leading and most frequently cited case in relation to this proposition is Virginia v. Tennessee (148 U.S. 503, 519 (1893)) which is relied upon as authority for the view that some inter-state agreements do not require the consent of Congress and also that consent may be implied by subsequent Congressional action. In that particular case the Court would seem to have gone even further, expressing the opinion that a boundary between the two states which had been fixed by agreement between them (without express Congressional consent) was established by prescription, it having been acquiesced in for some 90 years. (However see letter of May 1962 from Deputy Attorney-General Katzenbach, pages 10-13 of Annex B and the letter of August 15, 1967 from the Deputy Legal Adviser of the State Department to Wade Martin, Secretary of State of Louisiana attached to our letter 1305 of August 29, 1967).

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

Comment The letter of May 1962 from the then Deputy Attorney-General referred to above might for your purposes serve as a better authority in relation to the question of when a compact is not a compact, than the Supreme Court of North Dakota in McHenry County v. Brady (1917). The Court in that case appears to have been relying on the opinion (obiter dicta) of the U.S. Supreme Court in Virginia v. Tennessee (1893) in finding that the agreement did not violate the "compact clause" of the Constitution because it did not "affect the supremacy of the United States, or its political rights, or increase the power of the states as against the United States or between themselves." However, in his letter of May 1962, the Deputy Attorney-General dismisses the "political balance doctrine" which is supposed (wrongly he avers) to have been established by Virginia v. Tennessee.

Again, the Deputy Attorney General's letter of May 1962 deals with this question by noting that "no doubt there are many forms of cooperation between states which do not rise to the dignity of a compact or agreement within the meaning of Article I, Section 10, Cl. 3." It goes on to give a few examples, viz: mutual assistance in dealing with damage from a natural disaster; arrangements for exchange of tax information; arrangements for joint consultation such as the Council of State Governments. However, it argues that it is for Congress to decide whether a particular agreement between states (or between a state and a foreign power) is one which is prohibited, is one which requires Congressional consent or is one which does not require Congressional consent. This argument is supported by citing the case of Petty v. Tennessee-Missouri Commission (389 U.S. 275, 382) in which the U.S. Supreme Court quoted with approval from an article in the 34 Yale Law Journal (1925) by Justice Frankfurter and Landis, "The Compact Clause, a Study in Interstate Adjustments," The quotation is as follows:

> "But the Constitution plainly had two very practical objectives in view in conditioning agreement by States upon consent of Congress. For only Congress is the appropriate organ for determining what arrangements between States might fall within the prohibited class of 'Treaty, Alliance, or Confederation', and what arrangements come within the permissive agreements may affect the interests of States other than those parties to the agreement: the national, and not merely a regional, interest may be involved. Therefore, Congress must exercise national supervision through its power to grant or withhold consent, or to grant it under appropriate conditions. The framers thus astutely created a mechanism of legal control over affairs that are projected beyond State lines and yet may not call for, nor be capable of, national treatment. They allowed interstate adjustments but duly safeguarded the national interest."

We have gone into this at some length to suggest that you might wish to consider reformulating this paragraph to cite authority other than that of the Supreme Court of North Dakota in McHenry County v. Brady. That decision, like the Virginia v. Tennessee decision from which it would appear to stem is a controversial one not accepted as authoritative by the U.S. Administration. Incidentally reference should be made to "compact" when quoting the relevant section of the U.S. Constitution.

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

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

presumably be governed by international law. 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 with a foreign jurisdiction or whether any such agreement would be governed by international law.

(b) Without the consent of Congress, it would appear that states can enter into informal arrangements of a more minor character which would not be governed by international law, i.e. the agreement would be in the nature of a contract governed by private international law.

Comment The suggestion here seems to be that there are two types of agreement into which individual States may enter with a foreign power. These are (a) "non-political agreements" and (b) "informal arrangements of a more minor character". Apart from the difficulties inherent in the use of an expression like "non-political agreements" we wonder whether the situation would not be better and more accurately described in negative rather than positive terms. The relevant section of the Constitution is at best permissive and imposes an outright prohibition on the conclusion by a state of any "treaty, alliance or confederation." While this prohibition was more relevant to the situation which obtained at the time the Constitution was drafted it could still be relevant today in the sense that the form of an agreement into which a State might seek to enter might be more important and "political" than its substance.

Thus, while not disagreeing with the sense of this paragraph we wonder whether consideration could be given to amending it to treat the circumstances in which it would appear that agreements, otherwise prohibited, might be entered into by individual states. In this connection reference should again be made to the paragraph on pages 415 and 416 of the analysis and interpretation of the Constitution (Annex A) which gives background to the "Compacts Clause". Reference is made in that paragraph to the conflicting opinions (or dicta) in Holmes vs. Jennison (1873) and Virginia v. Tennessee (1893) both of which have been described to us as "maverick opinions" frequently quoted out of the limited context in which they were expressed. As the author of that paragraph notes in its final sentence "this divergence of doctrine may conceivably have interesting consequences".

We agree with the statement that there appears to be no clear authority on whether it is the federal government or the individual state that is bound by an agreement entered into with a foreign jurisdiction. We touched on this question obliquely in conversation some time ago with Richard Kearney,

then Deputy Legal Adviser in the State Department. At that time, Kearney seemed to be of the view that much could depend on the manner and timing of giving consent to the agreement entered into by a State. Thus, if Congressional consent were simply inferred from subsequent Congressional action, e.g. the appropriation of funds in connection with the construction of a bridge, the measure of the federal government's responsibility under an agreement to which it had not been a party might be less than it would have been if the agreement relating to the construction of the bridge had been authorized beforehand by an Act of Congress or a Joint Resolution signed by the President. It might be argued that in the first case the agreement might be regarded as akin to a contract governed by private international law (conflict of laws) while in the second the rules of public international law might be applicable. This however, is pure speculation.

As for compacts which are not regarded as "compacts" for purposes of Article 1:10:3 of the Constitution there seems to be no disagreement that it is possible for states to enter into "informal arrangements" the validity of which do not depend on consent being granted by Congress either expressly or by implication. However, as noted in the Deputy Attorney General's letter of May 1962 (Annex B) "the few judicial decisions under the compact clause do not indicate a clear line of demarcation between such informal working arrangements and those agreements which come within the compact clause of the Constitution and hence require the consent of Congress. And the practice of the states and Congress has not been wholly consistent". In this connection it might be interesting to examine the nature of the apparently extensive working arrangements between the Power Authority of the State of New York and Ontario Hydro (see pages 78-79 of the House Foreign Affairs Committee Hearings on the Great Lakes Basin Compact - Annex B). At the same time it should be borne in mind that in any conscious demarcation of the line between arrangements that do and those that do not require the consent of Congress the Administration (and probably Congress as well) is apt to apply a different and more restrictive standard to arrangements between a State and a foreign Power than to inter-state arrangements.

9. Notwithstanding these exceptional powers existing in the states, the United States Congress has never authorized any agreement between a state and a foreign sovereign power. 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. This is the effect of the decision of the

of the Supreme Court in the case of Missouri vs. Holland in 1920. The Curtiss-Wright Case of 1936 goes further: the federal government's powers in the foreign affairs field are virtually unrestricted.

Comment If you are disposed to rephrase the previous paragraph along the lines we have suggested you may find it follows logically to rephrase the first sentence of this paragraph as well. In any event, you may wish to reconsider the assertion (both in Part IV and in the Conclusion of your paper) that "the United States Congress has never authorized any agreement between a state and a foreign sovereign power". In this connection we refer you to Congressional Joint Resolutions passed in 1934, 1956 and 1957 by which consent was given to agreements or compacts between New York and Canada in connection with corporate reorganizations of the entity or entities which owned and operated the Peace Bridge between Fort Erie and Buffalo. We do not know whether in fact any agreement was concluded between the Governments of Canada and of New York and a reading of the relevant Canadian legislation (24-25 George V. Chap. 63) is not helpful in this regard. However for present purposes the important point would seem to be that Congress has, on three separate occasions, consented to an agreement or compact between the State of New York and the Government of Canada.

We have no comment on the remainder of this paragraph save perhaps to pass on a cryptic remark made to us some time ago in relation to the Curtiss-Wright Case to which reference is made as support for the assertion that "the federal government's powersin the foreign affairs field are virtually unrestricted". The remark was simply that "Curtiss-Wright" was a "hard case". We wonder whether we were supposed to infer that it therefore made "bad law".

The Embassy

ANNEX A

88TH CONGRESS } SENATE { DOCUMENT
1st Session } { No. 39

THE CONSTITUTION

OF THE

UNITED STATES OF AMERICA

ANALYSIS AND INTERPRETATION

ANNOTATIONS OF CASES DECIDED BY THE
SUPREME COURT OF THE UNITED STATES
TO JUNE 22, 1964

PREPARED BY THE
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In 1871 the Attorney General of the United States ruled that: "A minister of the United States abroad is not prohibited by the Constitution from rendering a friendly service to a foreign power, even that of negotiating a treaty for it, provided he does not become an officer of that power * * *, but the acceptance of a formal commission, as minister plenipotentiary, creates an official relation between the individual thus commissioned and the government which in this way accredits him as its representative," which is prohibited by this clause of the Constitution.[81]

SECTION 10. No State Shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

POWERS DENIED TO THE STATES

Treaties, Alliances, or Confederations

At the time of the Civil War this clause was one of the provisions upon which the Court relied in holding that the Confederation formed by the seceding States could not be recognized as having any legal existence.[82] Today, its practical significance lies in the limitations which it implies upon the power of the States to deal with matters having a bearing upon international relations. In the early case of Holmes *v.* Jennison,[83] Chief Justice Taney invoked it as a reason for holding that a State had no power to deliver up a fugitive from justice to a foreign State. Recently the kindred idea that the responsibility for the conduct of foreign relations rests exclusively with the Federal Government prompted the Court to hold that, since the oil under the three mile marginal belt along the California coast might well become the subject of international dispute and since the ocean, including this three mile belt, is of vital consequence to the nation in its desire to engage in commerce and to live in peace with the world, the Federal Government has paramount rights in and power over that belt, including full dominion over the resources of the soil under the

[81] 13 Ops. Att'y. Gen. 538 (1871).
[82] Williams *v.* Bruffy, 96 U.S. 176, 183 (1878).
[83] 14 Pet. 540 (1840).

may not levy a tonnage duty to defray the expenses of its quarantine system,[7] but it may exact a fixed fee for examination of all vessels passing quarantine.[8] A State license fee for ferrying on a navigable river is not a tonnage tax, but rather is a proper exercise of the police power, and the fact that a vessel is enrolled under federal law does not exempt it.[9] In the State Tonnage Tax Cases,[10] an annual tax on steamboats measured by their registered tonnage was held invalid despite the contention that it was a valid tax on the steamboat as property.

Keeping Troops

This provision contemplates the use of the State's military power to put down an armed insurrection too strong to be controlled by civil authority;[11] and the organization and maintenance of an active State militia is not a keeping of troops in time of peace within the prohibition of this clause.[12]

Interstate Compacts

Background of clause.—Except for the single limitation that the consent of Congress must be obtained, the original inherent sovereign rights of the States to make compacts with each other was not surrendered under the Constitution.[13] "The compact," as the Supreme Court has put it, "adapts to our Union of sovereign States the age-old treaty-making power of independent sovereign nations."[14] In American history the compact technique can be traced back to the numerous controversies which arose over the ill-defined boundaries of the original colonies. These disputes were usually resolved by negotiation, with the resulting agreement subject to approval by the Crown.[15] When the political ties with Britain were broken, the Articles of Confederation provided for appeal to Congress in all disputes

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[7] Peete *v.* Morgan, 19 Wall. 581 (1874).

[8] Morgan *v.* Louisiana, 118 U.S. 455, 462 (1886).

[9] Wiggins Ferry Co. *v.* East St. Louis, 107 U.S. 365 (1883). *See also* Gloucester Ferry Co. *v.* Pennsylvania, 114 U.S. 196, 212 (1885); Philadelphia Steamship Co. *v.* Pennsylvania, 122 U.S. 326, 338 (1887); Osborne *v.* Mobile, 16 Wall. 479, 481 (1873).

[10] State Tonnage Tax Cases, 12 Wall. 204, 217 (1871).

[11] Luther *v.* Borden, 7 How. 1, 45 (1849).

[12] Presser *v.* Illinois, 116 U.S. 252 (1886).

[13] Poole *v.* Fleeger, 11 Pet. 185, 209 (1837).

[14] Hinderlider *v.* La Plata Co., 304 U.S. 92, 104 (1938).

[15] Frankfurter and Landis, The Compact Clause of the Constitution—A Study in Interstate Adjustments, 34 Yale L.J. 685, 691 (1925).

between two or more States over boundaries or "any cause whatever" [16] and required the approval of Congress for any "treaty confederation or alliance" to which a State should be a party.[17] The framers of the Constitution went further. By the first clause of this section they laid down an unqualified prohibition against "any treaty, alliance or confederation"; and by the third clause they required the consent of Congress for "any agreement or compact." The significance of this distinction was pointed out by Chief Justice Taney in Holmes *v.* Jennison.[18] "As these words ('agreement or compact') could not have been idly or superfluously used by the framers of the Constitution, they cannot be construed to mean the same thing with the word treaty. They evidently mean something more, and were designed to make the prohibition more comprehensive. * * * The word 'agreement,' does not necessarily import and direct any express stipulation; nor is it necessary that it should be in writing. If there is a verbal understanding, to which both parties have assented, and upon which both are acting, it is an 'agreement.' And the use of all of these terms, 'treaty,' 'agreement,' 'compact,' show that it was the intention of the framers of the Constitution to use the broadest and most comprehensive terms; and that they anxiously desired to cut off all connection or communication between a State and a foreign power; and we shall fail to execute that evident intention, unless we give to the word 'agreement' its most extended signification: and so apply it as to prohibit every agreement, written or verbal, formal or informal, positive or implied, by the mutual understanding of the parties." [19] But in Virginia *v.* Tennessee,[20] decided more than a half century later, the Court shifted position, holding that the unqualified prohibition of compacts and agreements between States without the consent of Congress did not apply to agreements concerning such minor matters as adjustments of boundaries, which have no tendency to increase the political powers of the contractant States or to encroach upon the just supremacy of the United States. This divergence of doctrine may conceivably have interesting consequences.[21]

Subject matter of interstate compacts.—For many years after the Constitution was adopted, boundary disputes continued to pre-

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[16] Article IX.

[17] Article VI.

[18] 14 Pet. 540 (1840).

[19] Ibid. 570, 571, 572.

[20] 148 U.S. 503, 518 (1893). *See also* Stearns *v.* Minnesota, 179 U.S. 223, 244 (1900); *also* reference in next note, at pp. 761–762.

[21] *See* Dunbar, Interstate Compacts and Congressional Consent, 36 Va.L. Rev., 753 (October, 1950).

dominate as the subject matter of agreements among the States. Since the turn of the twentieth century, however, the interstate compact has been used to an increasing extent as an instrument for State cooperation in carrying out affirmative programs for solving common problems. The execution of vast public undertakings, such as the development of the Port of New York by the Port Authority created by compact between New York and New Jersey, flood control, the prevention of pollution, and the conservation and allocation of water supplied by interstate streams, are among the objectives accomplished by this means.[22] Another important use of this device was recognized by Congress in the act of June 6, 1934,[23] whereby it consented in advance to agreements for the control of crime. The first response to this stimulus was the Crime Compact of 1934, providing for the supervision of parolees and probationers, to which forty-five States had given adherence by 1949.[24] Subsequently Congress has authorized, on varying conditions, compacts touching the production of tobacco, the conservation of natural gas, the regulation of fishing in inland waters, the furtherance of flood and pollution control, and other matters. Moreover, since 1935 at least thirty-six States, beginning with New Jersey, have set up permanent commissions for interstate cooperation, which have led to the formation of a Council of State Governments, the creation of special commissions for the study of the crime problem, the problem of highway safety, the trailer problem, problems created by social security legislation, etc., and the framing of uniform State legislation for dealing with some of these.[25]

Consent of Congress.—The Constitution makes no provision as to the time when the consent of Congress shall be given or the mode or form by which it shall be signified.[26] While the consent will usually precede the compact or agreement, it may be given subsequently where the agreement relates to a matter which could not be well considered until its nature is fully developed.[27] The required consent is not necessarily an expressed consent; it may be inferred from circumstances.[28] It is sufficiently indicated, when not necessary to be made in advance, by the approval of proceedings taken under it.[29] The

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[22] Frankfurter and Landis, The Compact Clause of the Constitution—A Study in Interstate Adjustments, 34 Yale L. J., 685, 735 (1925); Zimmerman and Wendell, *Interstate Compacts Since 1925*, 2–29 (1951).

[23] 48 Stat. 909 (1934).

[24] Zimmerman and Wendell, op. cit., p. 91.

[25] 7 U.S.C. 515; 15 U.S.C. 717j; 16 U.S.C. 552; 33 U.S.C. 11, 567–567b.

[26] Green *v.* Biddle, 8 Wheat. 1, 85 (1823).

[27] Virginia *v.* Tennessee, 148 U.S. 503 (1893).

[28] Virginia *v.* West Virginia, 11 Wall. 39 (1871).

[29] Wharton *v.* Wise, 153 U.S. 155, 173 (1894).

consent of Congress may be granted conditionally "upon terms appropriate to the subject and transgressing no constitutional limitations." [30] And in a recent instance it has not been forthcoming at all. In Sipuel *v.* Board of Regents,[31] decided in 1948, the Supreme Court ruled that the equal protection clause of Amendment 14 requires a State maintaining a law school for white students to provide legal education for a Negro applicant, and to do so as soon as it does for applicants of any other group. Shortly thereafter the governors of 12 Southern States convened to canvass methods for meeting the demands of the Court. There resulted a compact to which 13 State legislatures have consented and by which a Board of Control for Southern Regional Education is set up. Although some early steps were taken toward obtaining Congress's consent to the agreement, the effort was soon abandoned, but without affecting the cooperative educational program, which to date has not been extended to the question of racial segregation.[32] Finally, Congress does not, by giving its consent to a compact, relinquish or restrict its own powers, as for example, its power to regulate interstate commerce.[33]

Grants of franchise to corporations by two States.—It is competent for a railroad corporation organized under the laws of one State, when authorized so to do by the consent of the State which created it, to accept authority from another State to extend its railroad into such State and to receive a grant of powers to own and control, by lease or purchase, railroads therein, and to subject itself to such rules and regulations as may be prescribed by the second State. Such legislation on the part of two or more States is not, in the absence of inhibitory legislation by Congress, regarded as within the constitutional prohibition of agreements or compacts between States.[34]

Legal effect of interstate compacts.—Whenever, by the agreement of the States concerned and the consent of Congress, an interstate compact comes into operation, it has the same effect as a treaty between sovereign powers. Boundaries established by such compacts

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[30] James *v.* Dravo Contracting Co., 302 U.S. 134 (1937). *See also* Arizona *v.* California, 292 U.S. 341, 345 (1934). When it approved the New York-New Jersey Waterfront Compact (67 Stat. 541), Congress, for the first time, expressly gave its consent to the subsequent adoption of implementing legislation by the participating States. De Veau *v.* Braisted, 363 U.S. 144, 154 (1960).

[31] 332 U.S. 631 (1948).

[32] On the activities of the Board, in which representatives of both races participate and from which both races have benefited, *see* remarks of Hon. Spessard L. Holland of Florida. 96 Cong. Rec., 465–470 (1950).

[33] Pennsylvania *v.* Wheeling & Belmont Bridge Co., 18 How. 421, 433 (1856).

[34] St. Louis & San Francisco Railway *v.* James, 161 U.S. 545, 562 (1896).

become binding upon all citizens of the signatory States and are conclusive as to their rights.[35] Private rights may be affected by agreements for the equitable apportionment of the water of an interstate stream, without a judicial determination of existing rights.[36] Valid interstate compacts are within the protection of the obligation of contracts clause;[37] and a "sue and be sued" provision therein operates as a waiver of immunity from suit in federal courts otherwise afforded by the Eleventh Amendment.[38] Congress also has authority to compel compliance with such compacts.[39] Nor may a State read herself out of a compact which she has ratified and to which Congress has consented by pleading that under the State's constitution as interpreted by the highest State court she had lacked power to enter into such an agreement and was without power to meet certain obligations thereunder. The final construction of the State constitution in such a case rests with the Supreme Court.[40]

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[35] Poole *v.* Fleeger, 11 Pet. 185, 209 (1837); Rhode Island *v.* Massachusetts, 12 Pet. 657, 725 (1838).

[36] Hinderlider *v.* La Plata Co., 304 U.S. 92, 104, 106 (1938).

[37] Green *v.* Biddle, 8 Wheat. 1, 13 (1823); Virginia *v.* West Virginia, 246 U.S. 565 (1918). *See also* Pennsylvania *v.* Wheeling & Belmont Bridge Co., 13 How. 518, 566 (1852); Olin *v.* Kitzmiller, 259 U.S. 260 (1922).

[38] Petty *v.* Tennessee-Missouri Comm'n, 359 U.S. 275 (1959). Justices Frankfurter, Harlan, and Whittaker dissented.

[39] Virginia *v.* West Virginia, 246 U.S. 565, 601 (1918).

[40] Dyer *v.* Sims, 341 U.S. 22 (1951). The case stemmed from mandamus proceedings brought to compel the auditor of West Virginia to pay out money to a commission which had been created by a compact between West Virginia and other States to control pollution of the Ohio River. The decision of the Supreme Court of Appeals of West Virginia denying mandamus was reversed by the Supreme Court, and the case remanded. The opinion of the Court, by Justice Frankfurter, reviews and revises the West Virginia Court's interpretation of the State constitution, thereby opening up, temporarily at least, a new field of power for judicial review. Justice Reed, challenging this extension of judicial review, thought the issue determined by the supremacy clause. Justice Jackson urged that the compact power was "inherent in sovereignty" and hence was limited only by the requirement of congressional consent. Justice Black concurred in the result without opinion.

ANNEX C

(Chapter 196)

Joint Resolution

May 3, 1934
(H.J.Res. 315)
(Pub.Res. No. 22)

Granting consent of Congress to an agreement or compact entered into by the State of New York with the Dominion of Canada for the establishment of the Buffalo and Fort Erie Public Bridge Authority with power to take over, maintain and operate the present highway bridge over the Niagara River between the city of Buffalo, New York, and the village of Fort Erie, Canada.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of the Congress of the United States be, and it is hereby, given to the State of New York to enter into the agreement or compact with the Dominion of Canada set forth in chapter 824 of the laws of New York, 1933, and an act respecting the Buffalo and Fort Erie Public Bridge Authority passed at the fifth session, Seventeenth Parliament, Dominion of Canada (24 George V 1934), assented to March 28, 1934, for the establishment of the Buffalo and Fort Erie Public Bridge Authority as a municipal corporate instrumentality of said State and with power to take over, maintain and operate the present highway bridge over the Niagara River between the city of Buffalo, in the State of New York, and the village of Fort Erie, in the Dominion of Canada.

Approved May 3, 1934.

Public Law 824 Chapter 758

Joint Resolution July 27, 1956
(H.J. Res. 549)

Granting the consent of Congress to the State of New York to negotiate and enter into an agreement or compact with the Government of Canada for the establishment of the Niagara Frontier Port Authority with power to take over, maintain and operate the present highway bridge over the Niagara River between the city of Buffalo, New York, and the city of Fort Erie, Ontario, Canada.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress hereby consents to the negotiations and entering into of a compact or agreement between the State of New York and the Government of Canada providing for (1) the establishment of the Niagara Frontier Port Authority substantially in accordance with the provisions of chapter 870 of the laws of 1955 of the State of New York as amended or supplemented; (2) the transfer of the operation, control, and maintenance of the present highway bridge (the Peace Bridge) over the Niagara River between the city of Buffalo, New York and the city of Fort Erie, Ontario, Canada, to the Niagara Frontier Port Authority; (3) the transfer of all of the property, rights, powers and duties of the Buffalo and Fort Erie Public Bridge Authority acquired by such authority under the compact consented to by the Congress in Public Resolution 22 of the Seventy-third Congress, approved May 3, 1934 (48 Stat. 662), to the Niagara Frontier Port Authority; and (4) the consolidation of the Buffalo and Fort Erie Public Bridge Authority with the Niagara Frontier Port Authority and the termination of the corporate existence of the Buffalo and Fort Erie Public Bridge Authority.

Sec. 2. The right to alter, amend or repeal this joint resolution is hereby expressly reserved.

Approved July 27, 1956.

Public Law 85-145

Joint Resolution August 14, 1957
(H.J. Res. 342)

Granting the consent of Congress to an agreement or compact between the State of New York and the Government of Canada providing for the continued existence of the Buffalo and Fort Erie Public Bridge Authority, and for other purposes.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of Congress is given to the State of New York to enter into the agreement or compact with the Government of Canada, which is set forth in Chapter 259 of the laws of New York, 1957, and provides for the continuation of the Buffalo and Fort Erie Public Bridge Authority as a municipal instrumentality of such State, with power to maintain and operate the highway bridge over the Niagara River between the city of Buffalo in such State and the city of Fort Erie, Ontario, Canada.

Sec. 2. The joint resolution entitled "Joint resolution granting the consent of Congress to the State of New York to negotiate and enter into an agreement or compact with the Government of Canada for the establishment of the Niagara Frontier Port Authority with power to take over, maintain, and operate the present highway bridge over the Niagara River between the city of Buffalo, New York, and the city of Fort Erie, Ontario, Canada", approved July 27, 1956 (70 Stat. 701), is repealed.

Sec. 3. The right to alter, amend, or repeal this joint resolution is expressly reserved.

Approved August 14, 1957.

EXTERNAL AFFAIRS

AFFAIRES EXTÉRIEURES

Corr

TO: MR. SCOTT
FROM REGISTRY
SEP 12 1967
FILE CHARGED OUT
L

20-3-1-1
SECURITY / Sécurité
SECRET MR SCOTT

TO / À: Under-Secretary of State for External Affairs, Ottawa.

FROM / De: Canadian Embassy, Berne, Switzerland

DATE: September 5, 1967.

REFERENCE / Référence: Your G- (M) 356 of August 11, 1967.

NUMBER / Numéro: 315

SUBJECT / Sujet: Treaty-making Jurisdiction of Component Units of Federal Countries.

FILE	DOSSIER
OTTAWA	20-1-2-6
MISSION	20-1-2

ENCLOSURES / Annexes: 1

DISTRIBUTION

The questions raised in your letter under reference were discussed to-day with Mr. Emanuel Diez, Head of the Legal Division of the Federal Political Department. Mr. Diez has been involved in departmental legal and treaty work over the past 20 years and has led numerous Swiss delegations to negotiate questions affecting the Swiss Confederation and the cantons. He is, therefore, undoubtedly one of the best qualified people in Switzerland to comment knowledgeably on the questions you raise from a practical as well as a formal constitutional point of view.

2. We would propose to deal with your enquiry in two parts: namely, commenting on the facts set out in your paper and the interpretation given them; secondly dealing with the practice followed by the Swiss authorities in the negotiation of international treaties within the formal constitutional framework. For simplicity's sake and easy reference, we have copied Section 3 of your paper which deals with Switzerland and numbered the paragraphs of this extract which is attached hereto.

I. Constitutional Provisions and Interpretation thereof, following Departmental Paper.

3. Paragraph 1 of the attached extract from the Departmental paper is factually accurate. Practice also follows the constitution very closely without strained interpretations: in other words, questions directly negotiated by cantons with foreign countries are of a very limited, almost banal, nature.

4. A few examples will illustrate this: Switzerland is extremely sensitive, because of its well-known position on neutrality, in allowing entry to uniformed personnel from other countries' military or para-military forces. However, when a

....2

Ext. 407B/Bil.
(Admin. Services Div.)

German customs officer plying on a ferryboat across Lake Constance expressed the desire to stretch his legs and fortify himself occasionally at a local beer garden on the Swiss side, the cantonal authorities, after clearing with the Federal Political Department, worked out local arrangement in this respect with the German authorities. A similar arrangement to enable the French customs officer to visit a local bistro was made by the cantonal authorities of Basel with respect to the trains coming into that city from France with a uniformed French customs officer aboard. Another example is the case of the drainage from a couple of German border villages which goes into the Basel drainage system. The Basel authorities (after consultations) worked out arrangements with the local German authorities to be compensated for the use of their drainage canals. Finally, there is a gas works in Germany which supplies gas to certain small Swiss villages on the other side of the border and has done so for many years. (Even during World War II when Germany was short of fuel, the arrangement was preserved.) This local arrangement was worked out directly by the cantonal authority after consultation and approval from the centre.

5. Mr. Diez told us that such hands-across-the-border arrangements need not even be written. They could be worked out in the way the local cantonal authority thought best but only after consultation with and approval from Berne, for, minor though they were, they did constitute mini-acts of sovereignty.

6. Apart from cantonal agreements of a very limited nature negotiated by cantonal authorities, there are cantonal agreements, or more accurately, international agreements which happen to affect only one canton in the case of Switzerland, which are negotiated by the Swiss government guided by the advice of the canton. Such agreements are very rare indeed, as, we are told, most agreements, even border agreements, nowadays, involve both the Federal and the Cantonal governments. One of the big things to-day for instance, are road tunnels through the Alps. At first this might seem to affect merely the canton through which the tunnel goes and the local district on the other side of the border, but further reflection would reveal that the Federal Government is also deeply involved in the matter of customs, visa control points and construction standards and safety matters, and even timing since the building of a super-highway network and its connection with other superhighways at the border points demands a long programme of advance planning. Another common type of border agreement nowadays in Switzerland, we were told, involved dams and hydro-electric projects. Here again the questions surrounding the implementation of these projects involve federal as well as purely local jurisdictions.

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There is for instance the problem of the backup of the water which usually involves some border rectification, swapping so many square miles here for so many square miles there and agreeing as to the most convenient location for customs houses and border control. While, as will be noted in Section II of this report, the local canton authorities have their full say in the negotiation of such agreements, the agreements themselves are more than local in scope and the prime negotiation is therefore done by the federal authority.

7. Paragraphs 2 and 3 of the Department's paper are not entirely accurate and should, we suggest, be re-arranged. We would put it that, under Article 102 (7) the Federal Council examines the treaties which cantons make with foreign countries and sanctions them if they are allowable. Under Article 85 (5) the Federal Assembly (not the Federal Council as stated in the paper) sanctions treaties which the cantons may make with foreign countries, but a limited cantonal treaty is only to be brought before the Federal Assembly if the Federal Council or another canton raises objection to it. In other words, it is the Federal Council (or Executive) which, in the first instance, examines cantonal treaties and sanctions them, and the legislative branch or Federal Assembly, being composed of the National Council and the Council of States, only gets involved if the Federal Council or another canton objects to the treaty which the canton has negotiated.

8. Mr. Diez's only comment was that these articles, to his knowledge, deal with hypothetical cases since in practice he has not known any cantonal treaty dis-allowed by the Federal Government and brought into the forum of debate of the Federal Assembly. Any thrashing out between the cantons and the Federal Council will have been done at a preliminary stage when the canton discusses with the Federal authorities its desire to negotiate a local agreement and clears it with the Federal authorities before proceeding to negotiation.

9. Paragraphs 4, 5 and 6 of the Department memorandum are accurate although the reference to Basel and Argau is, of course an intercantonal and not an international agreement since both Basel and Argau are in Switzerland. The general propositions set out in these paragraphs are developed more fully in our Section II below.

10. With reference to paragraphs 7, 8 and 9 of the Departmental paper concerning the legal nicety of whether a canton has an international personality at all, Mr. Diez had little to say as he concentrated his remarks on actual practice rather than theory of jurisprudence. He did say that while Article 3 of the Federal Constitution stated that cantons were

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sovereign subject to the constitution in the exercise of all powers not transferred to the Federal Government, the constitution made it clear that the Confederation has the sole right of concluding treaties and that, in practice, this has been recognized and followed. Christopher Hughes' commentary on the Federal Constitution of Switzerland (Oxford Clarendon Press 1954), comments with reference to Article 3 of the constitution "it is probable, but not quite certain, that the cantons have no personality in international law" (Page 6). It is clear, in any case, that Article 2 of the transitory provisions of the Swiss constitution (that cantonal constitutions and laws cease to have effect when the federal constitution or federal laws under it come into force) has greatly limited the sovereignty of the cantons as proclaimed in Article 3 of the constitution. The legal tag "Federal law breaks Cantonal law" is generally accepted by the Federal Tribunal to-day in daily application of the law here (see Hughes op.cit. page 139). In this connection, we wonder whether in the second line of paragraph 8 of the Departmental paper the word "central" should not read "cantonal". As it stands this sentence is rather meaningless whereas if the word "cantonal" is substituted the thought falls into the general argument.

II Swiss Practice in Treaty Negotiation

11. Mr. Diez said that, happily, in Switzerland there is a complete public acceptance of the principle of the primacy of the Federal authority in treaty making matters. This sprang, he thought, basically from the existence of a strong concept of Swiss national identity and perhaps a degree of political maturity in this respect. There was universal recognition of the proposition that if the cantons ran off in different directions in international affairs the disintegration of the Swiss Nation was at hand. Four quite different tribes banding together to form a small nation surrounded by much larger powers demanded complete unanimity on this point for national survival. This did not mean, Mr. Diez said, that there were not the most lively discussions, to put it mildly, between the cantons and the Federal Government regarding the division of power and jurisdiction within the country. But these domestic debates, it was generally accepted, had to stop there. Outside powers could not be invoked to support a cantonal position without threatening integrity of the nation.

12. Diez then gave a number of examples. Some little time ago Basel was very disappointed that the United States scaled down its Consulate General there to the status of a Consulate. It asked the Federal authority to make represent-

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ations in Washington which the Federal authority did, without success, receiving a reply that this was purely a matter of internal American administration in the running of the State Department. Basel, however, was not satisfied with this and sent a special delegation to Washington to plead its case. This came to the attention of Berne which addressed a stinging letter to the Basel authorities, who duly humbly apologized for intervening in foreign affairs.

13. On the carpet right now, Diez adds, is the fact that the Gotthard Road tunnel to Italy has been held up partly because of a lack of federal funds and the cantonal authorities of Uri were extremely disappointed about this. They were fully aware, however, that any attempts by them to bring Italian pressure to bear on Swiss central government to give priority to this tunnel would raise a storm throughout the country and be counter-productive.

14. We asked if Swiss authorities would look with a favourable eye on the establishment by cantons of agents-general abroad to pursue non-political issues such as economic and cultural objectives on behalf of their cantons. Diez said quite categorically that this would not be tolerated by the central government nor would any canton have the bad judgement to propose the establishment of such an office. No matter how it was sliced the establishment of a mission abroad by a canton was in fact an intervention in the field of foreign relations which the constitution put formally in the hands of the Confederation.

15. A final example mentioned by Mr. Diez was the case of the claims of the Jurassiens. There was a lot of sympathy in Swiss Romandy for their claims at one time, and this existed indeed even among some of the non-Bernese Allemanic population. Since the Jurassien movement, however, made overtures to France for support from that quarter, this general sympathy for their cause was sharply reduced even in Swiss Romandy and the Jurassien leaders were now aware that they had made a political mistake.

16. Given the general acceptance of the constitutional ground rules that the Federal Government was sovereign in the field of foreign affairs, the problem became essentially an administrative one of finding the best way of consulting with the cantons to be sure that their interests were taken into account in any international negotiations affecting them. The technique most widely used, Mr. Diez said, was that of the mixed commission. In practical matters like the connection of

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superhighways with main road arteries of neighbouring countries, tunnels, dams and hydro-electric projects, such mixed commissions abounded. Some of the experts were federal officials, others cantonal. Diez added that in the negotiating teams which he took abroad on such questions there was always one and sometimes several cantonal experts as part of the delegation and they all worked together as a Swiss team.

17. Another type of negotiation, he said, that was most important for Switzerland was the double taxation agreement. Here all the cantons were affected because of concurrent powers in the field of taxation. The technique here, he said, was to have a meeting of the cantonal finance ministers to discuss Swiss objectives and tactics and to have a cantonal representative, usually a finance minister, as an integrated member of the Swiss delegation. This, he said, had enormous advantages. Sometimes a cantonal representative in delegation caucus would say that a proposal was simply unacceptable to the cantons and the Swiss position would, in the circumstances, no doubt have to be altered to meet the cantonal interests. On the other hand if the cantonal representative went along, he was in an ideal position to defend in his own cantonal assembly what had been done and to support the Swiss position vis-a-vis possible objections of other cantons. When we asked whether there was not some difficulty in choosing a single cantonal representative from the 22 cantons to attach to a Swiss delegation, we were told that there always seemed to be a logical person to go. If it was a negotiation with the Germans on a financial matter the cantons would generally agree that the Finance Minister from Zurich was the logical man, or perhaps some other outstanding representative from another of the German-speaking cantons even though he represented a less important financial centre than Zurich. Similarly if the negotiation was with France, there would usually be an outstanding name in Swiss Romandy who, by general acquiescence, would seem to be the best representative. Naturally a certain amount of politics was involved here and Swiss practice in so far as was possible was to choose "à tour de rôle".

18. Sometimes, Mr. Diez conceded, the Federal Government would drop its plans in the face of cantonal opposition. Recently there was a proposal, which the Swiss Federal Government favoured, to exempt from Swiss taxation, charity or foundation bequests coming from other countries. The cantons, however, were so fractious on this question that the Swiss Government decided not to pursue it. As an example in the other direction, Mr. Diez said that "procédure civile" (civil law? or civil administration?) was clearly a matter falling within cantonal

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jurisdiction. On the other hand, the Swiss government felt that it should go ahead with a proposed international agreement at the Hague which touched on this subject and did so even though all the cantons were not happy about it.

19. It is realized that some of the references to specific agreements and negotiations set out above lack, perhaps, the precision which you require. Mr. Diez, however, spoke to us so freely and flowingly on a subject obviously close to his heart that we thought it best not to punctuate his delivery with too many specific questions about dates and places. If it is your wish, however, to pursue any particular question further, we would be glad to obtain the information you require.

Ambassador

SWITZERLAND

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

> "In specific cases the cantons retain the right of concluding treaties with foreign powers upon the subjects of public economic regulation, cross-frontier intercourse and police relations; but such treaties shall contain nothing repugnant to the Federation or to the rights of other cantons."
>
> Article 10 provides:
>
> "Official relations between a canton and a foreign government or its representatives take place through the intermediary of the Federal Council. Nevertheless, upon the subjects mentioned in Article 9 the cantons may correspond directly with the inferior authorities or officials of a foreign state."

2. Under the federal constitution the cantons are sovereign subject to the constitution and exercise all powers that have not been transferred to the federal government (Article 3). The Federal Council, under Article 85 (5) "examines the treaties which cantons make with each other or with foreign governments and sanction them if they are allowable." The federal authorities can examine a proposed treaty of a canton if the Federal Council or other cantons raise objections to it.

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

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

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

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

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

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

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

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

(b) through initiating a constitutional amendment;

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

9. 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.

Copy to A.J.M.E. J. McLeod

EXTERNAL AFFAIRS

AFFAIRES EXTÉRIEURES

Corr. 20-3-1-1

TO / À: Under-Secretary of State for External Affairs, OTTAWA

SECURITY / Sécurité: SECRET

DATE: September 5, 1967

FROM / De: Office of the High Commissioner for Canada, LAGOS

NUMBER / Numéro: 500

REFERENCE / Référence: Your letter G-(M)-356 of August 11, 1967

SUBJECT / Sujet: Practice in Federal States Concerning Treaty-making Powers

FILE	DOSSIER
OTTAWA	20-1-2-6
MISSION	281

ENCLOSURES / Annexes

DISTRIBUTION

The information about Nigeria contained in the attachment to your letter under reference has been rendered irrelevant by the emergence in January, 1966, of a Military Government which, with variations in personnel, is still in power in Lagos. Parts of the Federal Constitution, the authority cited in your paper, have been suspended; these portions include those concerning Parliament, which no longer exists. The Federal Military Government governs by decree.

2. If and when constitutional rule is restored (the FMG speaks of 1969 as a target date) it will certainly be under a quite different constitutional structure than existed prior to January, 1966. We would suggest, therefore, that there is little point for the foreseeable future in including Nigeria in any study of treaty-making practices of federal states.

3. The situation at the moment is that no comprehensive consultation with component parts of the Federation could take place, since two of the four former Regions are under the control of regimes in rebellion against the Federal Military Government. These areas comprise four of the twelve states which the FMG has by recent decree declared to be the components of the Federal Republic of Nigeria.

Paul McIlone
Office of the High Commissioner for Canada.

TO: MR. SCOTT
FROM REGISTRY
SEP 15 1967
FILE CHARGED OUT
TO: MR. SCOTT

Ext. 407B/Bil.
(Admin. Services Div.)

000891

EXTERNAL AFFAIRS AFFAIRES EXTÉRIEURES

TO / À: THE UNDER SECRETARY OF STATE FOR EXTERNAL AFFAIRS, OTTAWA Conf.

FROM / De: THE CANADIAN EMBASSY, BONN

REFERENCE / Référence: Your Letter No. G-(M)-356

SUBJECT / Sujet: State Practice Concerning the Powers of Members of a Federal Union to make Treaties.

SECURITY / Sécurité: SECRET

DATE: September 1, 1967

NUMBER / Numéro: 506

20-3-1-1
28 | 27

FILE / DOSSIER
OTTAWA 20-1-2-6
MISSION 28/36-1-2-3

ENCLOSURES / Annexes

DISTRIBUTION

USSEA
Mr. Gotlieb
Legal Div
European

In response to your request we have discussed the power of the German Laender to make treaties with foreign states with Ministerialrat Wellenkamp, who is the senior officer concerned with this subject in the Ministry for Bundesrat and Laender Affairs. In general, Dr. Wellenkamp confirmed the facts stated in the paper attached to your letter under reference, and your interpretation of them, and he provided certain supplementary information which will be of interest to you. As well, however, he pointed out one or two important qualifications which make the practice of treaty making by the Federal Republic and the Laender somewhat different from that which you have inferred from the terms of the West German Constitution.

2. The Basic Law of the Federal Republic of Germany assigns the conduct of relations with foreign states to the federal authority, with the qualifications, (a) that the Laender must be consulted in sufficient time if a proposed treaty affects their special interests, and (b) that the Laender may, with the consent of the Federal Government, themselves conclude treaties respecting subjects within their legislative competence with foreign states. We were somewhat surprised to learn from Dr. Wellenkamp that the consultation by the Federal Government of the Laender and the obtaining by the Laender of the Federal Government's consent take place not, as we had assumed, through his ministry (the Canadian equivalent of which would be a Department of Federal-Provincial Relations) but rather through the Foreign Office. In the case of a treaty desired by a Land or Laender, moreover, the negotiation of its terms with whatever foreign state may be concerned is conducted by the Land or Laender which then merely submit(s) its agreed text to the Foreign Office for approval.

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3. As is pointed out in your paper, their treaty making power has not been used extensively by the Laender, and its use has been restricted almost entirely to agreements concerning cultural affairs, education and, in a very few instances, religion. One of the examples cited on page 10 of your paper is not apparently a treaty entered into by Laender. The legal department of the Foreign Office has confirmed that on April 13, 1966 a treaty was signed with the Governments of Austria and Switzerland governing the withdrawal of water from Lake Constance, but has informed us that this treaty was signed by the Federal Government and not by the Laender of Bavaria and Baden-Wurtemburg. This treaty has been ratified by Austria and Switzerland, and German ratification is anticipated within the next few weeks.

4. In terms of the delimitation of the respective jurisdictions of the Federal Government and those of the Laender in treaty making, the conclusion in 1957 of the ... Lindau Agreement (an office translation of it is attached) was crucial, and it is important that its nature and its consequences should be clearly understood. This was not an agreement formally concluded by the Federal Government and the Laender, but rather an administrative arrangement between the Ministry for Bundesrat and Laender Affairs and the Foreign Office intended to forestall disputes between the Federal and Laender Governments which could arise from the vagueness of Article 32 of the Basic Law. It is made clear in the Agreement that the Federal Government abandons none of its constitutional prerogative to conduct relations with foreign states, but it represents nonetheless a tacit suspension of part of that prerogative. The practical effect of the Lindau Agreement, which was, of course, accepted by the Laender since it increased their voice in foreign affairs, was no less than to amend Article 32 (2) of the Basic Law. In return for the acquiesence of the Laender in the extension of federal treaty making power in certain fields, the Federal Government undertook not merely to consult the Laender about treaties affecting their special interests, but to obtain their consent to such treaties before concluding them. This has meant the establishment of a right of veto for the Laender over any proposed treaties to which they object. All treaties involving Laender interests must be referred to a Treaty Commission, including representatives of the Laender as well as of the Federal Government, then to the Laender executives concerned and finally to their parliaments for approval. It is, needless to say, an inordinately time-consuming process.

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5. Dr. Wellenkamp told us that there has been increasing dissatisfaction within the Federal Government with the consequences of the Lindau Agreement, and that consideration is being given, particularly by his Minister, Dr. Carlo Schmid, to repudiating it. It is recognized that this alone would not be sufficient, since mere repudiation of the Agreement would only result in a proliferation of the disputes it was intended to avoid. Dr. Schmid, according to Wellenkamp, wants, in place of the unsatisfactory Agreement, nothing less than a revision of Article 32 of the Basic Law assigning unequivocally all treaty making power to the Federal Government, and thus confirming the statement in the first clause of that article that the conduct of relations with foreign states is solely the concern of the Federal Government. Since any amendment of the Basic Law requires the approval of three-fourths of the Bundesrat, which is, after all, composed of representatives of the Laender, we doubt that Dr. Schmid will succeed in obtaining the revision he wants in the near future.

6. Reference is made in the paper attached to your letter to the Reichskonkordat Case (1957) which is cited as an example of the possibility of a Land enacting legislation (subsequently upheld by the Federal Constitutional Court) which is inconsistent with a treaty binding on the Federal Government. We raised this case and its implications with Dr. Wellenkamp, and while the position he took seems out of keeping with generally accepted international law, we think it worth reporting to you. According to Wellenkamp, the Reichskonkordat and disputes arising out of it can not be regarded as established precedents for disputes concerning "real" treaties. It is universally accepted legal opinion in Germany, he said, that the Vatican does not constitute a foreign state as such and that agreements with it are not, therefore, treaties in the usual sense of the term. It is only for reasons of "courtesy", he maintained, that the Federal Republic accredits an Ambassador to the Holy See and accepts the Vatican's membership in international organizations. Moreover, although the Federal Government does not regard the Reichskonkordat as an international treaty proper, it does, also for reasons of "courtesy" apparently, attempt to abide by it as though it were a treaty in the full sense of the term. This approach is rather too jesuitical for us to follow, but it does suggest perhaps that the Reichskonkordat Case should not be emphasized in the paper you have under preparation.

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7. We are attaching, as you requested, translations of those Articles, and parts of Articles, which are quoted in the draft paper attached to your letter under reference. Our translations are taken from the English version of the Basic Law of the Federal Republic of Germany prepared by the German Information Centre in New York.

for The Embassy

ENGLISH TRANSLATION OF ARTICLES OF THE BASIC LAW OF THE FEDERAL REPUBLIC OF GERMANY

Article 32

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

(2) Before the conclusion of a treaty affecting the special interests of a Land, this Land must be consulted in sufficient time.

(3) Insofar as the Laender have power to legislate, they may, with the consent of the Federal Government, conclude treaties with foreign states.

Article 59

(1) 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.

Article 73

The Federation has the exclusive power to legislate in: -

(1) Foreign affairs as well as defense....

Insofar as treaties in terms of international law relating to fields within the exclusive power of the Laender are to commit either the Federation or the Laender, the consent of the Laender shall be obtained. This consent must have been obtained before the commitment is binding in terms of international law. In cases where the Federal Government in pursuance of Article 59 (2) of the Basic Law submits such a draft treaty to the Bundesrat, it shall request the approval of the Laender by that time at the latest. In cases of treaties as referred to in Article 1, clause 2, arrangements for participation of Laender in the preparation of the conclusion at the earliest possible stage but at any rate well in time before laying down the final wording of the text of the treaty shall be made.

4. It is further agreed, that in cases of treaties affecting essential interests of the Laender - regardless of these treaties affecting or not affecting exclusive powers of the Laender - that:

   (a) the Laender shall be informed on the intended conclusion of such treaties as early as possible so that they may express their special wishes in sufficient time,

   (b) a standing body of representatives of the Laender shall be set up to be available as interlocutor for the Foreign Office or alternative appropriate technical departments of the Federation at the time of negotiating international treaties,

   (c) notification of the above body or declaration made by it respectively shall not affect the arrangements made under (3) above.

5. The special case of Article 32 (2) of the Basic Law is not affected by (4) above.

TEXT OF THE LINDAU AGREEMENT

(Office Translation)

1. The Federation and the Laender uphold their known legal positions on the power of conclusion and negotiation concerning treaties, in terms of international law, which affect the exclusive power of the Laender.

2. An accommodating approach in applying Article 73 (1) and (5) and Article 74 (4) of the Basic Law is considered possible by the Laender according to which the power to legislate of the Federation in cases of

   A. Consular agreements,

   B. Commercial and navigation agreements, agreements on the establishment of aliens as well as agreements on the exchange of goods and payments with foreign countries,

   C. Agreements on membership of or on the foundation of international organizations might also be accepted in cases, where from the terms of such agreements it would appear doubtful whether, in terms of international practice, they are within the exclusive power of the Laender if these terms

      (a) are typical for the treaties and normally part of these treaties or

      (b) constitute a subordinate part of the treaty with its central part being, beyond doubt, within the power of the Federation.

   This relates to provisions on privileges for foreign countries and international organizations concerning laws regarding taxation, police and expropriation (immunities) as well as to specified provisions on the rights of aliens in commercial, navigation and establishment agreements.

3. As to the conclusion of state treaties which, in the view of the Laender, affect their exclusive power and which are not covered by the power of the Federation pursuant to Article 32 (2), i.e. with a particular view to cultural agreements, the procedure shall be as follows:

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diary

MF YALDEN/MW

EXTERNAL AFFAIRS

AFFAIRES EXTERIEURES

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TO / A: Multiple letter to posts listed below

FROM / De: Under-Secretary of State for External Affairs
Ottawa

REFERENCE / Référence:

SUBJECT / Sujet: State practice concerning the powers of members of a federal union to make treaties

SECURITY / Sécurité: SECRET

DATE: August 14 1967

NUMBER / Numéro: G - (M) - 356

FILE / DOSSIER
OTTAWA 20-3-1-1
MISSION 28

ENCLOSURES / Annexes
one

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cc: USSEA
Mr. Gotlieb
Legal Div.
Commonwealth
European
Latin Am.
USA
A & ME
Far Eastern

.. Attached is a paper prepared in the Department on "State Practice concerning the Powers of Members of a Federal Union to Make Treaties". In several instances the material contained in it is based on reports from our missions concerning the practice followed in the countries to which they are accredited. In others it comes from public sources; We wish, however, in the case of all missions to which this letter is addressed, to ensure that the facts stated in the attached paper, and the interpretation given them, are accurate in terms of the procedures actually followed by the countries concerned.

2 In addition, we are interested in learning about the manner in which various federal states exercise their authority in the field of treaty making and treaty implementation in relation to the responsibilities and interests of the constituent parts. In particular, we would like to know more about the practice which is followed by the federal authorities in consulting with or (in cases where this may be applicable) receiving the assent of the constituent parts of the state regarding treaties or international agreements which affect their interests. Conversely, we would also be interested in any information you can let us have concerning the practice followed by the constituent parts in dealing with the federal authority when they wish to see agreements reached in fields which interest them primarily or where their interest is shared with the federal authority.

3 For your own information, our reason for wishing these additional comments is to assist us with the preparation of a government White Paper which will set forth the federal position on a wide variety of questions concerning the

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000899

Ext. 407D/Bil.
(Admin. Services Div.)

(1.8.17(US))

relations between the federal government and the provinces in the field of foreign affairs. The Government has not yet taken a decision regarding publication of the paper and in any event it will require redrafting in some respects before that stage is reached; in addition, it would evidently not be desirable for officials with whom you may speak to feel that they had been asked to comment on material which they might later see in print. As a result, we would not wish you to show the extract dealing with the country to which you are accredited to local officials, or to refer to the fact that we are preparing a paper for possible publication. Rather, we believe it will be sufficient for you to make a general reference to our interest in other federal systems and to our understanding of the position in the country to which you are accredited, perhaps citing relevant articles from its constitution, and to enquire whether our understanding is correct.

4 Various local considerations will of course influence the way in which you seek the information requested and we will leave these matters to your judgment. It may be in some cases that officials with whom you raise the above questions will not consider themselves competent to reply, or will be reluctant to respond at any length if they are a source of domestic controversy. In other cases, for example our Embassy in Moscow, you may not consider it worth while to approach either the Foreign Ministry or other sources. We would nevertheless appreciate your own comments on the points set out in the attached paper, together with any additional material you may be able to obtain.

5 The preparation of the White Paper referred to above has become a matter of priority and we would therefore be grateful if you could let us have whatever information you may be able to obtain as soon as possible.

M. CADIEUX

Under-Secretary of State
for External Affairs

ACTION COPY

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file

20-3-1-1
28 | 27

20-1-2-6
28 | 17

sent by hand by Mr. Bailey

FM KLMPR AUG25/67 SECRET

TO EXTER 885

REF YOURLET G356 AUG11

TREATY MAKING POWER IN FEDERAL STATES

IN PAPER ATTACHED TO YOUR REFLET BURMA BUT NOT RPT NOT MALAYSIA IS COVERED. IN FACT MALAYSIA IS MUCH MORE OF A FEDERATION THAN BURMA EVER WAS LEAST IN PRACTICE. COMMENTS ON BURMA WILL FOLLOW BY LET BUT IN MEANTIME GRATEFUL FOR INDICATION OF WHETHER YOU WISH US TO SUBMIT DRAFT SECTION COVERING MALAYSIA.

28.8.2(U.S.)

MESSAGE

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AUG 29/67	20-1-2-6 28	SECRET

FM/DE EXTERNAL OTT

NO	PRECEDENCE
G-367	ROUTINE

TO/A KUALA LUMPUR

INFO

20-3-1-1 28

REF YOURTEL 885 AUG 25

SUB/SUJ TREATY MAKING POWER IN FEDERAL STATES

THANK YOU FOR YOUR SUGGESTION. GRATEFUL IF YOU WOULD PREPARE DRAFT SECTION ON MALAYSIA.

DISTRIBUTION
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cc: Mr. Gotlieb (o/r)
Far Eastern Division (refs done in div)

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(COMMUNICATIONS DIV)

Mr. de Gaumont
Legal Division

EXTERNAL AFFAIRS AFFAIRES EXTÉRIEURES

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TO À Multiple letter to posts listed below

FROM De Under-Secretary of State for External Affairs
Ottawa

DATE August 11, 1967

REFERENCE Référence

NUMBER Numéro G - (M) - 356

FILE DOSSIER
OTTAWA 20-1-2-6
MISSION

SUBJECT Sujet State practice concerning the powers of members of a federal union to make treaties

ENCLOSURES Annexes
one

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cc: USSEA
Mr. Gotlieb
Legal Div.
Commonwealth
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..

Attached is a paper prepared in the Department on "State Practice concerning the Powers of Members of a Federal Union to Make Treaties". In several instances the material contained in it is based on reports from our missions concerning the practice followed in the countries to which they are accredited. In others it comes from public sources. We wish, however, in the case of all missions to which this letter is addressed, to ensure that the facts stated in the attached paper, and the interpretation given them, are accurate in terms of the procedures actually followed by the countries concerned.

2 In addition, we are interested in learning about the manner in which various federal states exercise their authority in the field of treaty making and treaty implementation in relation to the responsibilities and interests of the constituent parts. In particular, we would like to know more about the practice which is followed by the federal authorities in consulting with or (in cases where this may be applicable) receiving the assent of the constituent parts of the state regarding treaties or international agreements which affect their interests. Conversely, we would also be interested in any information you can let us have concerning the practice followed by the constituent parts in dealing with the federal authority when they wish to see agreements reached in fields which interest them primarily or where their interest is shared with the federal authority.

3 For your own information, our reason for wishing these additional comments is to assist us with the preparation of a government White Paper which will set forth the federal position on a wide variety of questions concerning the

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Ext. 407A/Bil.
(Admin. Services Div.)

relations between the federal government and the provinces in the field of foreign affairs. The Government has not yet taken a decision regarding publication of the paper and in any event it will require redrafting in some respects before that stage is reached; in addition, it would evidently not be desirable for officials with whom you may speak to feel that they had been asked to comment on material which they might later see in print. As a result, we would not wish you to show the extract dealing with the country to which you are accredited to local officials, or to refer to the fact that we are preparing a paper for possible publication. Rather, we believe it will be sufficient for you to make a general reference to our interest in other federal systems and to our understanding of the position in the country to which you are accredited, perhaps citing relevant articles from its constitution, and to enquire whether our understanding is correct.

4 Various local considerations will of course influence the way in which you seek the information requested and we will leave these matters to your judgment. It may be in some cases that officials with whom you raise the above questions will not consider themselves competent to reply, or will be reluctant to respond at any length if they are a source of domestic controversy. In other cases, for example our Embassy in Moscow, you may not consider it worth while to approach either the Foreign Ministry or other sources. We would nevertheless appreciate your own comments on the points set out in the attached paper, together with any additional material you may be able to obtain.

5 The preparation of the White Paper referred to above has become a matter of priority and we would therefore be grateful if you could let us have whatever information you may be able to obtain as soon as possible.

Under-Secretary of State
for External Affairs

SECRET

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

Table of Contents

I Introduction

The constitutions of most federal states reserve to the federal government the responsibility for the conclusion of international agreements and make it clear that the constituent parts (provinces, states) do not possess this right. There are, however, other federal states, for example, Switzerland, United States, Federal Republic of Germany and the USSR, concerning which it is argued that constitutional practice allows the constituent parts to enter into certain types of agreement with foreign sovereign states. In fact, 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 federal authorities may authorize agreements between the constituent parts and foreign sovereign states, but this congressional power has never been exercised; finally the constitutions of both the Federal Republic of Germany and the Soviet Union authorize the constituent parts to make international agreements in some areas but they are subject to overall federal direction or control.

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II Constitutions of federal states which do not allow the constituent parts to conclude international agreements (examples: Argentina, Australia, Austria, Brazil, Burma, India, Mexico, Nigeria, Venezuela, Yugoslavia)

1. Argentina

The constitution of the Argentine Republic assigns twenty-eight express powers to the Federal Congress General. Authority to make all laws and regulations needed to execute the express powers is also granted. To the Federal Congress is reserved "all power to approve or reject treaties signed with other nations, and agreements with the Vatican..." (Article 68, para. 19) The component provinces, each of which has its own constituion, "retain all power not delegated by this Constitution to the Federal Government..." (Article 97) However, all that is allowed the provinces by way of treaty-making power concerns their right to enter into partial treaties among themselves, with the knowledge of the Federal Congress.

2. Australia

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

The Commonwealth Parliament has powers to make laws respecting "external affairs". 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. But the precise limit of these powers has not yet been decided and their nature and extent is disputed by some of the Australian states.

3. Austria

The Austrian Constitution reserves to the "Bund", or federal authority, "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)

4. Brazil

The United States of Brazil similarly assigns to its federal government "power to maintain relations with foreign states and to make treaties and conventions with them." (Article 5 of the Constitution of Brazil)

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5. Burma

The Republic of Burma's Constitution includes a Union Legislative List. Subjects enumerated in this List shall, according to Article 92 of the Burmese Constitution "not 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." In Section 2, paragraph 5 of the List the Parliament of Burma is designated as having 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 provincial governments or both. The "Union List" assigns to the federal government the power of "entering into treaties, agreements and conventions with foreign countries." Thus the Union Parliament has the exclusive power in India both to enter into treaties and to make laws respecting them.

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

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

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

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

7. Mexico

The Constitution of the Federal Representative Republic of Mexico is unequivocal in withholding 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."

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8. Nigeria

Article 69(2) of the constitution of the Nigerian Federal Republic provides that "The power of Parliament to make laws for the peace, order and good government of the Regions with respect to any matter included in the Exclusive Legislative List shall (save as provided in section 78 of this Constitution) be to the exclusion of the legislatures of the Regions." (Section 78 deals with laws with respect to banking.)

The Exclusive Legislative List appears as Part I of the Annex to the Constitution. Item 15 of the list is External Affairs. The Federal Parliament of Nigeria may therefore be said to have exclusive authority for the conduct of External Affairs.

In addition, the Federal Government is given the right to enact laws for any part of Nigeria with reference to matters not enumerated in the Legislative Lists in order to implement treaties conventions or agreements between Nigeria and a foreign state on decisions of international organizations. This power is, however, limited by the requirement that the Governor of a Region must give his consent before the law enacted comes into operation in his Region. This proviso appears as Article 74 of the Constitution:

"Parliament may make laws for Nigeria or any part thereof with respect to matters not included in the Legislative Lists for the purpose of implementing any treaty, convention or agreement between the Federation and any other country or any arrangement with, or decision of, an international organization of which the Federation is a member: Provided that any provision of law enacted in pursuance of this section shall not come into operation in a Region unless the Governor of that Region has consented to its having effect."

9. Venezuela

The states of the Federal Republic of Venezuela are bound as follows by Article 12 of the Constitution: "The States are obligated to comply with, and enforce, the Constitution and the laws of the Republic and any provisions enacted by the national power." In addition to complying with, and enforcing, laws of the Republic, the Venezuelan States, according to Article 108 have no jurisdiction in laws negotiated with foreign countries: "The President of the Republic in the Council of Ministers shall negotiate treaties, conventions and agreements with other States and adhere to multilateral treaties of advantage to the Nation."

10. Yugoslavia

The federally organized Republic of Yugoslavia, according to Article 9 of its Constitution, reserves to its federal government, "the right and duty to maintain and regulate international relations."

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Article 15 is more specific and stipulates that the federal jurisdiction in this sphere is complete and exclusive: "The Federal Peoples' Assembly has the exclusive competence for federal legislation on questions of national defence, foreign relations and other questions within the sphere of exclusive competence of the Federation."

III 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 sole right of "concluding alliances and treaties with foreign powers and in particular treaties concerning customs duties and trade." But Article 9 states:

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

Article 10 provides:

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

Under the federal constitution the cantons are sovereign subject to the constitution and exercise all powers that have not been transferred to the federal government (Article 3). The Federal Council, under Article 85(5) "examines the treaties which cantons make with each other or with foreign governments and sanction them if they are allowable." The federal authorities can examine a proposed treaty of a canton if the Federal Council or other cantons raise objections to it.

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

If negotiations are to take place on a matter falling within the legal rights of the cantons, prior discussions first take place between federal and cantonal authorities and an agreed Swiss position

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is reached. Negotiations are then undertaken with a foreign power (under the auspices of the Federal Council) by the Federal Political Department.

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

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

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

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

The Confederation has the power to <u>make</u> treaties with regard to matters falling within the central legislative competence. The Confederation also has or can acquire powers to <u>implement</u> the treaty:

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

(b) through initiating a constitutional amendment;

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

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.

IV A constitution which allows the federal authorities to authorize agreements between the constituent parts and foreign sovereign states (the United States of America)

<u>The United States of America</u>

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

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"shall, without the consent of Congress...enter into any agreement, compact or contract with any other state or with a foreign power."

According to the advice given by the Attorney-General of the United States to the Secretary of State of 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 agreements of the type requiring the consent of Congress have never been authorized with the exception of inter-state 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, according to United States jurisprudence, the states can, without the consent of Congress, enter into agreements which are not considered to be "an agreement or contract...with a foreign power." For example, the Supreme Court of North Dakota held that an agreement between counties of North Dakota and a Canadian municipality for constructing a drain from North Dakota into Canada was not an agreement or a contract within the meaning of Article 1 (10) of the Constitution.

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

(a) With the consent of Congress, individual states can enter into non-political agreements; these would presumably be governed by international law. There appears to be no clear authority on whether it is the federal government or the the individual state that is bound by any agreement entered into with a foriegn jurisdiction or whether any such agreement would be governed by international law.

(b) Without the consent of Congress, it would appear that states can enter into informal arrangements of a more minor character which would not be governed by international law, i.e. the agreement would be in the nature of a contract governed by private international law.

Notwithstanding these exceptional powers existing in the states, the United States Congress has never authorized any agreement between a state and a foreign sovereign power. 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

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

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

1. The Union of Soviet Socialist Republics

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

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

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

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

Under Article 68 of the Constitution

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

As a result of discussion 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 U.N. or a specialized agency. Articles 15b and 16a, applicable to these two Union Republics, are similar in content:

> The Ukrainian Soviet Socialist Republic (for Article 16a read: The Byelorussian Soviet Socialist Republic) has the right to enter

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> into direct relations with foreign states, to conclude agreements with them, and to exchange with them diplomatic and consular representatives. (Article 15b)

Thus according to the Soviet Constitution the Union Republics appear to have the right to become parties to treaties on any subject and to be considered as internationally responsible and partially sovereign subjects of international law although few states have been willing to treat with them and so regard them.

It is doubtful, in any case, whether the Soviet experience has much relevance from the standpoint of the practical problems of treaty-making in a federal state. There are, in the first place, other means by which central control can be exercised in the USSR over the constituent republics. In addition, the Constitution expressly provides (Article 14 (a)) that the All-Union government has exclusive authority to regulate "the establishment of the general character of relations between the Union Republics and other states."

3. 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: /Bonn Embassy to check translations/

> "32 (1) The maintenance of relations with foreign states shall be the affair of the Federation.
>
> "59 The Federal President shall represent the Federation in matters concerning international law. He shall conclude treaties with foreign states on behalf of the Federation. He shall accredit and receive envoys."

Moreover, Article 73 provides that "The Federation shall have exclusive legislation 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, first, that:

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

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The Federal and Laender 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 Laender (e.g. cultural agreements).

Only consultation with the Land is required, not its consent. The Federal Government therefore would have the power to enter into treaties dealing with matters that fall within the constitutional competence of the Lander without obtaining the consent of the Länder. However, the Federal Government cannot, by means of entering into a treaty commitment, acquire powers in an area otherwise reserved to the Laender, and the Federal Government might find itself without the power to implement the treaty. In the Reichskonkordat Case (1957) the Federal Constitutional Court of West Germany upheld legislation enacted by a Land which was inconsistent with a treaty binding on the Federal Government.

Second, the Bonn Constitution gives to the Laender 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 Laender is subject to the approval of the Federal Government.

> "32 (3) Insofar as the Laender 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 Laender. Some recent examples of treaties entered into by the Laender are:

> (a) between Bavaria and Baden-Wurtemburg on the one hand, and Austria and Switzerland on the other concerning certain matters arising from the joint use of Lake Constance (not yet signed? Embassy Bonn to check.)
>
> (b) concordat between Lower Saxony and the Vatican signed on February 26, 1965;
>
> (c) unilateral accession of Lower Saxony to a UNESCO agreement against discrimination in education;
>
> (d) Cultural Convention between the Saar and France January, 1966.

The agreements achieved are binding only on the Land or Laender signing them.

In summary, it appears that the conduct of external relations is the responsibility of the Federal Government in Germany. The Laender, however, have a right to be consulted when treaties affect

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their fundamental interests or fall within their exclusive constitutional jurisdiction, and a right to enter treaties on a limited number of matters falling within their jurisdiction. In the latter case, however, Federal consent is necessary and it is therefore clear that the Laender are not autonomous in the treaty-making field.

VI Conclusion

It may be concluded that the constitutions of the great majority of federal states do not authorize the constituent parts of the state to enter into any form of international agreements. In most, although not all, of these cases, the constitution also provides the federal parliament with powers to implement through legislation the terms of the agreements.

The constitutions of other federal states which appear to authorize constituent parts to enter into international agreements in certain fields all provide that this authority must be exercised either under federal direction or control or through the intermediary of the federal government. No constitution of a federal state authorizes the constituent parts to enter freely and independently into international agreements with sovereign states: in the United States, Congress has never authorized a state to enter into an agreement with a sovereign foreign power; in the USSR and in the Federal Republic of Germany, the constitution makes express provision for federal direction or control; in Switzerland, the federal authorities must approve the agreement to be entered into by the canton and it is the federal authorities that negotiate the agreement on behalf of the canton. There are no other examples of federal states in which constituent parts can make international agreements.

Mr. Robertson
MR. GOTLIEB
LEGAL

20-3-1-1
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CONFIDENTIAL

RECORD OF CABINET DECISION

REVISED

20-3-1-13
28

Meeting of August 10th, 1967

The Provinces And The Treaty-Making Power

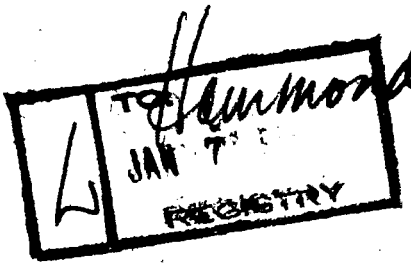
The Cabinet:

(a) approved the conclusions and recommendations on the Provinces and the Treaty-Making Power as set out on pages 12, 13, 14 and 15 of Cab. Doc. 480/67, and

(b) agreed that authority be given for the drafting of a White Paper based on the outline in the Appendix to Cab. Doc. 479/67, which would be considered by the Steering Committee on the Constitution prior to its submission to the Cabinet.

D.J. Leach,
Supervisor of Cabinet Documents.

August 16th, 1967.



Henry J. Budnitsky,
c/o Faculty of Law,
University of Alberta,
Edmonton, Alberta.

January 4, 1966.

RC
20-3-1-1
2e

cc 20-3-1-3-1

External Affairs Department,
Enquiries General,
East Block,
OTTAWA, Ontario.

Dear Sir:

I am preparing a paper for an International Law seminar on the capacity to negotiate international treaties and would greatly appreciate any assistance your department may give me on the subject and specifically in answering the following questions:

1. Is the federal government of Canada the only body in Canada which can represent all of Canada or any part thereof in the international community and in so doing negotiate and conclude agreements or treaties of a binding character in international law?

2. What is the source of the federal government's power and authority to negotiate treaties, etc. with foreign countries?

3. Can it be said that the federal government can negotiate, sign and ratify any form of treaty in any field recognized in international law (overlooking for the present time the limitation created by the division of legislative power embodied in sections 91 and 92 of the British North America Act)?

4.(a) The federal government is limited in practice in its capacity to negotiate treaties which deal with subject matter covered by section 92 of the British North America Act and which would require provincial legislation to give it the force of law. When it is desirable for the welfare of Canada as a whole that certain international treaties should become the law of Canada but the federal government is prevented from so doing for constitutional reasons, what procedure is adopted by the federal government to introduce such treaties into the laws of as great a number of provinces as possible?

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considered by a constitutional conference, presumably on external affairs. (at the official level)

4. After some toing and froing, the Prime Minister summed up as follows:

a) External Affairs should proceed to write the paper;

b) After it was completed, it could be considered by Cabinet with a view to determining whether it would be wise to send it to the provinces (presumably prior to its being tabled in the House);

c) Whether a conference should be convened to discuss external affairs without a White Paper. The Prime Minister doubted the wisdom of this idea.

5. As matters stand, the Department is accordingly proceeding with the preparation of the White Paper.

A.E. Gotlieb

cc. Mr. Lalonde
Mr. Yalden
Mr. Beesley
Mr. de Goumois

CONFIDENTIAL

August 10, 1967.

MEMORANDUM FOR UNDER-SECRETARY (on return)
(through Mr. Robinson)

Treaty-making powers - Cabinet decision

At its meeting on August 7, the Cabinet Committee on Federal-Provincial Relations approved without change the recommendations concerning treaty-making powers submitted to it by the Steering Committee on Constitutional Questions. It is expected that Cabinet will approve the decision of the Cabinet Committee.

2. The recommendations of the Steering Committee received little comment. Mr. Sauvé expressed some reservations about periodic meetings between federal-provincial officials on treaty matters. He put forward the view, emanating from Mr. A.W. Johnson, that the holding of regular conferences of this nature would tend to create cadres in all provinces of individuals with a vested interest in external affairs. However, the recommendation put forward by the Steering Committee in favour of consideration being given to the institution of such machinery was approved. Mr. Sauvé thought that the list of provincial activities abroad was not sufficiently comprehensive and complete. Mr. Sauvé apparently thought that we had neglected to include some of Ontario's activities in the field of external aid. We pointed out these were dealt with in the External Aid paper approved by Cabinet. Mr. Martin, however, informed Mr. Sauvé that the paper would be expanded to include a complete list of provincial activities abroad.

3. The proposal for a White Paper received rather rough passage. Mr. Pickersgill thought that the government should go ahead with its policies but not broadcast them. The White Paper, in his opinion, was a political mistake. Mr. Martin seemed to share this view notwithstanding his prior approval of the idea of a White Paper. Mr. Sauvé thought that the paper should be sent to the provinces and

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10.8.28 (US)

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FOR LEGAL DIVISION

ARTICLE ON THE PROVINCES AND TREATY MAKING-STENO ASSISTANCE NO RPT NO BILINGUAL STENO BEING AVAILABLE AT MISSION TO ASSIST MCKINNON WITH ARTICLE HE HAS BEEN RELYING ON PART TIME BASIS ON SERVICES OF MISS LALONDE WHO IS ON TD IN GNEVA WITH ECOSOC DEL. SINCE MISS LALONDES TIME WILL BE FROM NOW ON TAKEN UP MOSTLY WITH HER WORK AT ECOSOC DEL WOULD YOU APPROACH PERS AND OBTAIN AUTHORIZATION FOR MISS LALONDE TO EXTEND HER STAY IN GNEVA BY ONE WEEK AFTER COMPLETION OF ECOSOC CONFERENCE ON AUG11.MCKINNON BELIEVES THAT INTERVAL BETWEEN AUG11 AND AUG18 WOULD BE SUFFICIENT FOR MISS LALONDE TO COMPLETE TYPING OF ARTICLE IN FINAL FORM AND SHE COULD THEN TAKE IT WITH HER TO OTT FOR YOUR PERUSAL AND APPROVAL. PLEASE LET US HAVE PERSANSWER AS SOON AS POSSIBLE SINCE MISS LALONDE WILL HAVE TO MAKE APPROPRIATE ARRANGEMENTS IF HER STAY IN GNEVA IS TO BE EXTENDED.

(b) What are some specific examples of attempts by the federal government to gain the cooperation of the provinces in introducing international treaties into the laws of Canada? In these examples of attempts please mention failures as well as successes and the reasons for the outcome.

5. Has the federal government or any of its agencies negotiated agreements, etc. with any states of a foreign country?

6. If the federal government represents all of Canada in the international community why are the provinces permitted to negotiate "agreements" with foreign countries and states of foreign countries?

7. When one of the provinces negotiates an "agreement" with a foreign country etc. does your department require that the province negotiate only by acting through it?

8. If a province can negotiate directly with the representative of a foreign country must consent be obtained from the federal government to conclude the "agreement"?

9. In what fields and under what circumstances can provinces negotiate "agreements" with foreign countries?

10. Could such "agreements" give rise to international litigation or in any way implicate the federal government?

11. Please explain and comment on the nature and purport of the "agreements" which the Province of Quebec negotiated with the Government of France in 1963 and 1965 and why they were permitted?

12. If any other provinces have negotiated "agreements" with foreign countries or states of foreign countries please explain and comment on them.

A prompt reply will be greatly appreciated.

Yours very truly,

Henry J. Budnitsky

HJB/a

Henry J. Budnitsky.

MESSAGE

DATE	FILE/DOSSIER	SECURITY SECURITE
SEP 3/65	20-3-1-1	CONFD

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REF YOUR TEL 1613 MAY14/64

SUB/SUJ RHODESIAN TREATY MAKING POWER

WE ARE ABOUT TO INSTRUCT OUR TRADE COMMISSIONER IN SALISBURY TO INFORM MALAWI, ZAMBIAN AND RHODESIAN AUTHORITIES THAT WE ARE READY TO EXCHANGE LETS WITH THEM TO CONFIRM CONTINUATION IN FORCE OF PROVISIONS OF THE 1958 TRADE AGREEMENT BETWEEN CDA AND FEDERATION OF RHODESIA AND NYASALAND WITH EACH OF THESE THREE SUCCESSOR STATES.

2. RHODESIANS REQUESTED SUCH EXCHANGES IN 1964. RHODESIANS AGREED WITH OUR VIEW THAT 1958 TRADE AGREEMENT, IN SO FAR AS IT RELATED TO SOUTHERN RHODESIA, DEVOLVED UPON RHODESIA WHEN THE FEDERATION WAS DISSOLVED, BUT RHODESIANS WISHED TO MAKE THE POSITION CLEAR QUOTE BEYOND ANY POSSIBILITY OF FURTHER DOUBT UNQUOTE AND THUS STILL SAW MERIT IN A FORMAL EXCHANGE OF LETS AFFIRMING THAT THE AGREEMENT CONTINUED IN FORCE. RHODESIAN OFFICIALS HAVE EXPLAINED THAT THE EXCHANGE WAS NECESSARY TO CONFORM WITH RHODESIAN LEGAL REQUIREMENTS CONCERNING FORMAL RELATIONS WITH OTHER COUNTRIES.

3. AS YOU KNOW ZAMBIA HAS DECLARED PUBLICLY THAT IT WOULD HONOUR AGREEMENTS ENTERED INTO BY THE FEDERATION AND MALAWI HAS INDICATED ITS INTENTION OF REVIEWING ALL SUCH AGREEMENTS BEFORE 1966. WE THEREFORE CONSIDER IT DESIRABLE TO OFFER ALL THREE SUCCESSOR STATES THE OPPORTUNITY

..2

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000922

OF CONFIRMING, IF THEY SO WISH, CONTINUATION IN FORCE OF THE 1958 TRADE AGREEMENT.

4. ASSUME EVENTS SINCE YOUR REPTEL WILL NOT RPT NOT AFFECT CRO VIEWS ON RHODESIAN ABILITY TO ENTER INTO AN EXCHANGE OF LETS OF KIND WE NOW PLAN BUT, AS A PRECAUTION IN VIEW OF TIME LAPSE AND POLITICAL UNCERTAINTIES CONCERNING RHODESIA'S FUTURE, WE WOULD LIKE YOU TO CHECK IMMEDIATELY WITH CRO TO CONFIRM THIS. PERHAPS BRIT HAVE HAD SIMILAR EXCHANGES WITH RHODESIA.

5. WOULD MUCH APPRECIATE EARLY REPLY TO OUR INQUIRY SINCE WE ARE ANXIOUS TO PROCEED WITH THIS MATTER VERY SOON.

Mr Robertson
What does Mr 2 mean?
RR

MESSAGE

DATE	FILE/DOSSIER	SECURITY SECURITE
SEP8/65	~~20-SR-1-3~~ 20-3-1-1 RR 25	CONFD

FM/DE EXTERNAL OTT

NO	PRECEDENCE
E-1880	PRIORITY

TO/A SALISBURY

INFO TANDCOTT

Treaty Series

Mr. Heath for info

REF OURTEL E1834 SEP1

SUB/SUJ 1958 TRADE AGREEMENT

FOLLOWING FOR SMYTH:

YOU MAY NOW PROCEED WITH OFFER OF EXCHANGES OF LETS WITH RHODESIA, MALAWI AND ZAMBIA. AS INDICATED IN OUR TEL E1807 AUG26 INSTRUMENTS OF FULL POWER ARE NOT RPT NOT NECESSARY IN VIEW OF COMWEL MEMBERSHIP OF COUNTRIES CONCERNED AND WE WOULD PREFER TO COMPLETE THESE EXCHANGES WITHOUT SUCH INSTRUMENTS. SHOULD RHODESIANS OR OTHERS INSIST ON INSTRUMENTS, PLEASE REPORT ACCORDINGLY BEFORE PROCEEDING TO EXCHANGES OF LETS.

2. IN APPROACHING MALAWIANS AND ZAMBIANS, YOU SHOULD AVOID ANY INDICATION THAT ~~WE CONSIDER THEM TO HAVE EQUIVALENT INTERNATIONAL STATUS AS RHODESIA.~~ OUR PROPOSED EXCHANGE OF LETS WITH THE THREE GOVTS IN ANY WAY INDICATES THAT WE CONSIDER THEM TO HAVE EQUIVALENT INTERNATIONAL STATUS.

RR 2 not cleared with us: it means that Smyth should tell the already independent M's & Z's that we consider S.R. is also independent

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(COMMUNICATIONS DIV)

Mr Robertson
An interesting question.

FM LDN SEP7/65 CONFD

TO EXTERNAL 3526 PRIORITY

INFO TANDC OTT

REF YOURTEL ME387 SEP3

RHODESIA TREATY-MAKING POWER

WE TOOK UP THIS SUBJECT SEP7 WITH NEALE HEAD OF RHODESIA DEPT CRO. HE INFORMED US THAT ENTRUSTMENTS HAVE NEVER BEEN FORMALLY TRANSFERRED TO RHODESIA BECAUSE OF LACK OF AGREEMENT WITH RHODESIAN GOVT ON DETAILS. BRIT GOVT HAS HOWEVER ACQUIESCED IN RHODESIAS ACTING AS THOUGH ENTRUSTMENTS HAD BEEN TRANSFERRED. THEY WOULD THEREFORE NOT RPT NOT RAISE ANY OBJECTION TO PROPOSED ACTION AS OUTLINED IN YOUR REFTEL.