*United Nations Legislative Series*

# LAWS AND PRACTICES

*concerning*

# THE CONCLUSION OF TREATIES

*with*

## A SELECT BIBLIOGRAPHY ON THE LAW OF TREATIES

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## INTRODUCTION

In the report on its second session, held in 1950 (*General Assembly, Official Records: Fifth Session, Supplement No. 12, A/1316*, p. 10), the International Law Commission observed that "precise knowledge of constitutional provisions of other countries is essential to those who in any country are engaged in negotiating treaties". The present volume, prepared by the Division for the Development and Codification of International Law of the Legal Department of the Secretariat of the United Nations, seeks to provide such information in as reasonably complete a form as possible, so far as such information was available at the end of 1952.

In January 1951, the Secretary-General addressed a circular letter to governments requesting information relative to their national laws and practices in the matter of the conclusion of treaties. In reply, a number of governments provided memoranda by way of comment on their constitutional rules; others transmitted, either in the original or in English or French translations, copies of the relevant provisions of their constitutions. Some governments did not reply; and in such cases the Secretariat translated the constitutional provisions from the best original text available. These texts reproduced here are in English or in French; if the original was in a language other than English or French it has been translated into English. In every case, the source from which the translation was made has been indicated.

From the above it will be seen that the scheme followed in presenting the material is not entirely uniform; nevertheless, so far as possible, the method adopted in previous volumes of the *United Nations Legislative Series* has been followed. Indeed, as there are countries—particularly of the British Commonwealth—where custom rather than written law governs the position, it has been inevitable that memoranda describing, and commenting upon, such customs should be appropriate.

In addition to the texts and memoranda, it has been thought useful to include a bibliography on the law of treaties. As will be seen, this bibliography is not confined to literature regarding the conclusion of treaties, but takes in all aspects of the subject.

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*Article 7.* The King has the following prerogatives:

... he declares war, concludes peace and all treaties.

. . .

*Article 46.* The conclusion of conventions and treaties, the granting of concessions (monopolies) whether commercial, industrial, agricultural, or of any other kind, and whether for the benefit of nationals or foreigners, shall be approved by the National Consultative Assembly.

## 2. Albania

CONSTITUTION OF 4 JULY 1950. "BASHKIMI" NO. 1747, 28 JULY 1950. TRANSLATION BY THE SECRETARIAT OF THE UNITED NATIONS

*Article 58.* The Presidium of the People's Convention has the following powers:

. . .

(9) It ratifies and denounces international treaties, except when it considers it necessary that ratification or denunciation should be made by the People's Convention.

## 3. Argentina

*(a)* CONSTITUTION OF 11 MARCH 1949. TEXT FURNISHED BY THE PERMANENT DELEGATION OF ARGENTINA. TRANSLATION BY THE SECRETARIAT OF THE UNITED NATIONS

. . .

*Article 19.* The Federal Government is bound to consolidate its relations for peace and trade with foreign Powers by means of treaties that are in conformity with the principles of public law laid down by this Constitution.

. . .

*Article 22.* This Constitution, the laws of the Nation enacted by Congress in consequence thereof, and the treaties with foreign Powers are the supreme law of the Nation; and the authorities of each province are obliged to conform thereto, notwithstanding any provision to the contrary which the provincial laws or constitutions may contain, with the exception, so far as the province of Buenos Aires is concerned, of the treaties ratified following the Pact of 11 November 1859.

. . .

*Article 68.* Congress shall have power: ... to approve or withhold approval of treaties concluded with other nations and of concordats concluded with the Holy See....

. . .

*Article 83.* The President of the Nation has the following powers:

. . .

(14) He concludes and signs treaties of peace, of trade, of navigation, of alliance, of boundaries and of neutrality, concordats with the Holy See, and conducts other negotiations required for the maintenance of good relations with foreign nations.

*(b)* MEMORANDUM OF 13 SEPTEMBER 1951 FROM THE PERMANENT DELEGATION OF ARGENTINA. TRANSLATION BY THE SECRETARIAT OF THE UNITED NATIONS

1. Not only treaties, but also the general principles of international law form part of the internal legislation of Argentina. Under articles 95 and 96 of the Constitution, the Supreme Court of Justice has jurisdiction over cases relating to treaties or foreign diplomats and consuls.

*Article 95* reads as follows: "The Supreme Court of Justice and the subsidiary courts of the Nation shall have jurisdiction over all cases turning upon points governed by the Constitution, by the laws of the Nation, with the reservations specified in article 68, paragraph 11, and by treaties with foreign nations; and over all suits concerning ambassadors, ministers plenipotentiary and foreign consuls;"

. . .

*Article 96* reads as follows: "The Supreme Court of Justice shall have original and exclusive jurisdiction in cases arising between the Nation or a province, or its inhabitants, and a foreign State"...

2. In the Argentine Republic, treaties may not derogate from any precept of the Constitution. It is on this understanding that the Government has acted in its contractual relations with foreign States, particularly in its treaties of arbitration and conciliation, which contain the reservation known as the "Argentine formula" making the provisions of such treaties subject to the precepts of the Constitution.

3. The courts must, in the first instance, apply the provisions of the Constitution and the laws of the Nation. Only in cases relating to diplomatic privileges or maritime prizes does international law prevail. Article 21 of Act No. 48 of 25 August 1863 establishes the order of priority in the legislation to be applied by the courts. It states:

"In the exercise of their functions, the courts and judges of the Nation shall apply the Constitution as the supreme law of the Nation, the Acts approved or which may be approved by Congress, the treaties with foreign countries, the individual laws of the provinces, the general laws applied in the country in the past and the principles of international law, in the order of priority hereby established."

4. The ratification or acceptance of an international instrument is carried out by both Houses of Congress which are empowered under Article 68, sub-paragraph 19, set out above, "to approve or withhold

approval of treaties concluded with other Nations, and of concordats concluded with the Holy See".

5. Congress does not confine itself to approving or withholding approval of treaties; it may introduce amendments (see, for example, the Treaty of Arbitration with Bolivia of 3 February 1902, which was adopted by Act of Congress No. 4090, with an amendment to article 16; this amendment was subsequently accepted by the Bolivian Congress). A treaty which is left in abeyance, or which fails to receive approval, does not come into force. Any amendment is considered by the two contracting parties, and in the interval the treaty does not come into force.

6. Legislative ratification is not required for all international agreements. For example, protocols concluded in accordance with the terms of an already ratified treaty do not themselves require ratification, provided that they do not alter the substance of the treaty. The same applies to treaties to preserve the *status quo* (the Protocol of 5 January 1910 between Argentina and Uruguay on the River Plate; the Protocol of June 1888 between Argentina and Bolivia on boundaries; the *modus vivendi* of 27 January 1936 between Argentina and Bolivia barring territorial changes).

7. In the Argentine Republic, ratification is essential for any international agreement which, either directly or indirectly, affects a constitutional principle, involves a new international commitment, or appertains to the public revenue.

8. As regards the power to negotiate treaties, the appointment of plenipotentiaries, the deposit or exchange of ratifications, and the denunciation of agreements concluded, the Argentine Republic follows the rules established by international usage and practice.

## 4. Australia

MEMORANDUM OF 26 JULY 1951 FROM THE AUSTRALIAN MISSION TO THE UNITED NATIONS

*Introductory observations*

1. This statement describes the procedure or formalities of the treaty-making process in Australian practice. It will assist in the understanding of this practice if some general observations are first made on the constitutional basis of the treaty-making process itself. These observations are as follows:

*(a)* Although the Australian Constitution [1] is federal, and on the United States model, it does not give to the Senate any role whatever in the making or ratification of treaties.

*(b)* The Constitution does not deal expressly at all with the making of treaties. The Queen is in contemplation of law the Head of the State in Australia, and the power to make treaties is by virtue of the common law part of the Queen's prerogative. The power to make treaties in Australia is, therefore, exercisable by the Executive Government of the Commonwealth, at common law and without express statutory provision.

[1] Commonwealth of Australia Constitution Act, 1900, as amended (an Act of the Parliament of the United Kingdom).

*(c)* Although the Queen is the Head of the State in Australia, her executive powers in Australia are exercisable by the Governor-General, and whereas, prior to the Second World War, it was customary to obtain from the Queen in London full powers for Australian plenipotentiaries in treaty-making of a formal kind, the constitutional conventions of the British Commonwealth of Nations have altered by reason of the increased international status of the member nations, and it is now customary for the Governor-General to confer the necessary authority on Australian representatives.

*(d)* Although the Australian Constitution is federal in character, the component States have no international status, and the making of treaties is a function of the Federal Executive alone.

*(e)* In Australian public law there is no distinction drawn, in matters of legal status, operation or effect, between the formal treaty strictly so-called and the less formal categories of international agreement.

*(f)* There are no judicial decisions on the treaty-making process in Australia, the attention of the High Court having been directed only to the constitutional competence of the Commonwealth to make laws implementing treaties and the like. This the Court discussed in the case of *The King against Burgess*, ex parte *Henry* (1936) 55 C.L.R. 608.

*Treaty-making formalities*

2. *Negotiation.* Australian practice governing the negotiation of international agreements varies according to the significance of the agreement. There are, in Australia, no laws, regulations or judicial decisions having any bearing on this matter, and the course to be followed in the negotiation of any particular agreement is determined largely by the circumstances of the case.

In the case of bilateral agreements, negotiation often takes place by correspondence, although this course is generally limited to agreements of comparatively minor significance. In other cases, the negotiation takes place at an inter-governmental conference. Likewise, multilateral conventions are usually negotiated at international conferences.

Australian representatives to these conferences are normally provided with credentials issued by the Minister for External Affairs.

3. *Signature.* There are no Australian laws, regulations or judicial decisions dealing with signature but there is a well-established practice in this matter. Before an Australian representative may sign an international agreement for Australia, he is issued with appropriate full powers. These full powers are issued by the Minister for External Affairs with the approval of the Governor-General, acting with the advice of the Federal Executive Council. Before the full powers are issued, it is usual to obtain the approval of either Parliament or Cabinet if the agreement is one of considerable political significance, or of the Minister of State concerned if the agreement is one of a less important nature. The several State Governments are also often consulted in matters concerning them before signature is authorized.

4. *Ratification.* The approval of the Federal Executive Council is necessary before any international agreement is ratified. Matters of this nature are placed before the Executive Council by the Minister for External Affairs. It is the general practice, however, for agreements of major

political significance to be submitted to Parliament for approval before ratification, but the act of ratification nevertheless is an executive act. Reference to Parliament is, of course, also necessary where legislation is required to give effect to the agreement. State Governments are also often consulted before agreements are ratified.

Once Executive approval for ratification has been given, an appropriate instrument of ratification is prepared and signed by the Minister for External Affairs. This instrument is then exchanged with the other government in the case of bilateral agreements or deposited with the depository government or authority in the case of multilateral agreements.

5. *Accession.* The practice in regard to accession by Australia to international agreements is similar to that in regard to ratification. Here again established practice governs the procedure in the absence of any relevant laws or judicial decisions.

## 5. Austria

*(a)* CONSTITUTION OF 1 OCTOBER 1920. TEXT FURNISHED BY THE AUSTRIAN FEDERAL CHANCERY. TRANSLATION BY THE SECRETARIAT OF THE UNITED NATIONS

*Article 10.* (1) The federal authorities are competent to enact and execute legislation in the following matters:

. . .

(ii) Forcign affairs, including political and economic representation abroad and especially the conclusion of all international treaties;...

. . .

*Article 16.* (1) The *Laender* are bound, within the limits of their independent competence, to take such measures as are necessary for the execution of international treaties. Should a *Land* fail to comply in due time with this obligation, its competence in the matter, and particularly in the enactment of the necessary legislation, will pass to the Federation.

(2) In the execution of treaties with foreign States, the Federation enjoys supervisory rights, even in those matters which fall under the jurisdiction of the *Laender.* In such matters, the Federation has the same rights in relation to the *Laender* as in matters which fall ultimately under Federal administration *(mittelbare Bundesverwaltung).* See article 102.[1]

. . .

*Article 50.* All international political treaties and all other treaties, in so far as they contain provisions modifying existing laws, require for their validity the approval of the National Council.

*Article 65* (1): The Federal President represents the Republic in external matters, receives and accredits diplomatic agents, approves the appointment of foreign consuls, appoints the consular representatives of the Republic abroad and concludes international treaties.

*Article 66* (2): The Federal President may empower the Federal Government, or the competent members thereof, to conclude certain categories of international treaties not covered by the provisions of article 50.

[1] This article deals with the matters which fall respectively under the authority of the Federation and that of the *Laender.*

*(b)* MEMORANDUM OF 6 JUNE 1951 FROM THE AUSTRIAN FEDERAL CHANCERY, DEPARTMENT OF FOREIGN AFFAIRS. TRANSLATION BY THE SECRETARIAT OF THE UNITED NATIONS

*Section I. Legislative provisions*

*General*

1. The legislative provisions which in Austria govern the conclusion and execution of international treaties are contained in the Austrian Federal Constitution Act of 1 October 1920, as revised in 1929. This Act was revalidated by the Constitution (Revision of 1929) Revalidation Act of 1 May 1945. *(Staatsgesetzblatt* No. 4.)

*Federal law and international law*

2. It should be mentioned, first of all, that article 9 of the Federal Constitution Act determines the relationship between domestic law and international law. This article provides as follows: "The generally recognized rules of international law form an integral part of the law of the Federation."

The generally recognized rules of international law, therefore, have immediate force in domestic matters, and must be applied by all Austrian authorities, including the Courts, as if they were rules of municipal law.

*Delimitation of competence between the Federation and the Provinces regarding the conclusion and execution of international treaties*

3. According to the Austrian Constitution, Austria is a federal State.

Article 10, paragraph 1, sub-paragraph 2, and article 16 of the Federal Constitution Act, which are quoted below, deal with the division of competence, as between the Federation and the *Laender*, regarding the conclusion and execution of State treaties. Article 16 also gives the Federation a supervisory right over the *Laender* with regard to the execution of State treaties.

Article 10 of the Federal Constitution Act enumerates the matters in which the Federal authorities are competent so far as the enactment and execution of legislation are concerned:

"(1) The Federal authorities are competent to enact and execute legislation in the following matters:

" '(ii) Foreign affairs, including political and economic representation abroad, and especially the conclusion of all international treaties;...' "

Article 16 deals with the execution of State treaties, in so far as this comes within the competence of the *Laender*, and the supervisory rights of the Federation. The article reads as follows:

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

"(2) In the execution of treaties with foreign States, the Federation enjoys supervisory rights, even in those matters which fall under the jurisdiction

of the *Laender*. In such matters the Federation has the same rights in relation to the *Laender* as in matters which fall ultimately under Federal Administration (see article 102)."

*The conclusion of State treaties*

4. Under article 65, paragraph 1, of the Federal Constitution Act it is one of the functions of the Federal President of Austria to conclude State treaties. This reads as follows:

"(1) The Federal President represents the Republic in external matters, receives and accredits Ministers, approves the appointment of foreign consuls, appoints the consular representatives of the Republic abroad, and concludes international treaties."

The conclusion of treaties is interpreted to include their ratification.

The Federal President participates in the conclusion of State treaties by conferring, in virtue of the powers vested in him by article 65 (1), on each person who is to sign the treaty the full powers necessary for signature. The Federal Constitution also authorizes the Federal President, in certain circumstances, to transfer the authority to conclude State treaties to specified supreme organs of the Federation.

Article 66 reads as follows:

"The Federal President may empower the Federal Government, or the competent members thereof, to conclude certain categories of international treaties not covered by the provisions of article 50."

(As regards article 50, see paragraph 5 below.)

In virtue of article 66 (2) the Federal President's "Decision" *(Entschliessung)* of 31 December 1920 was promulgated, empowering the Federal Government and the competent members of the Federal Government to conclude certain categories of State treaties. (*Bundesgesetzblatt* No. 49 of 1921.)

The Decision reads as follows:

"Pursuant to article 66 (2) of the Act of 1 October, 1920 (Federal Constitution Act) I hereby empower the authorities enumerated below to conclude State treaties which do not require the approval of the National Council under article 50 of the Federal Constitution Act, in so far as such treaties are not expressly described as State treaties, and in so far as their conclusion does not take place by the exchange of instruments of ratification:

"'*(a)* The Federal Government, if such treaties are concluded in the form of Government agreements;

"'*(b)* The competent Federal Minister, in consultation with the Federal Minister for Foreign Affairs, and, in cases where the Federal Ministry of Foreign Affairs is competent, the Federal Minister of Foreign Affairs, if such treaties are concluded in the form of departmental agreements;

"'*(c)* The competent Federal Minister, if such treaties are in the nature of purely administrative agreements.' "

*Participation of the National Council and the Federal Assembly in the conclusion of State treaties*

5. In connexion with the participation of Parliament in the conclusion of State treaties, article 50 of the Federal Constitution Act provides as follows:

"(1) All international political treaties, and other treaties in so far as they contain provisions modifying existing laws, require for their validity the approval of the National Council.

"(2) The provisions of article 42, paragraphs (1) to (4), and, if a constitutional law be modified by an international treaty, those of article 44, paragraph (1), are applicable, *mutatis mutandis*, to decisions of the National Council regarding the approval of international treaties."

Paragraphs 1 to 4 of article 42 as amended in 1945 provide:

"(1) Every law passed by the National Council shall be communicated without delay by the President of the Council to the Federal Chancellor, who shall immediately communicate it to the Federal Council.

"(2) In so far as the Constitution contains no contrary stipulation, no law passed may be authenticated and promulgated unless the Federal Council has refrained from raising any reasoned objection thereto.

"(3) Such an objection must be communicated in writing to the National Council through the agency of the Federal Chancellor within eight weeks of the laying of the law before the Federal Council.

"(4) Should the National Council confirm its original decision in the presence of at least half its members, it shall be authenticated and promulgated. Should the Federal Council decide to raise no objection, or should no reasoned objection be raised within the period prescribed by paragraph (3), the law shall be authenticated and promulgated."

Paragraph 1 of article 44 reads as follows:

"(1) Constitutional laws or constitutional provisions incorporated in ordinary laws may not be passed by the National Council except in the presence of at least one-half of its members, and by a majority of two-thirds of the votes cast; they shall be expressly designated as such ('constitutional law'; 'constitutional provision')."

Accordingly, the assemblies which, in Austria, represent the people, are enabled to decide whether a State treaty which is likely to lead to the amendment of existing legislation, or is of a political nature, should be concluded or not.

*Classification of State treaties according to Austrian law*

6 Briefly it may be said that, under the relevant legislative provisions, Austrian law recognizes *for domestic purposes* the following categories of international treaties:

*(A)* Treaties the conclusion of which is reserved for the Federal President. They comprise:

(i) Treaties which involve amendments to existing legislation. The question whether the provisions of a State treaty involve such amendments is one to be decided by the competent Federal Minister.

(ii) Political treaties. The decision as to whether a treaty is of a political nature or not is reserved for the Council of Ministers.

(iii) Treaties the terms of which require that they shall be ratified by the Federal President.

As already stated in the preceding paragraphs of this memorandum, the conclusion of the treaties referred to under (i) and (ii) above requires the approval of the National Council.

*(B)* Treaties for the conclusion of which the Federal President has given a general authorization to certain supreme organs of the Federation. (See the Decision quoted in paragraph 4 of this Memorandum.) These are:

(i) "Government agreements"—that is to say, treaties which are not of a political nature and do not involve amendments to existing legislation, the conclusion of which is not reserved to the Federal President (either because they are described as "State treaties", or because their terms require that they shall be ratified by the Federal President) and the negotiation of which concerns more than one Federal Ministry.

These are concluded by the Federal Government, which empowers the Federal Chancellor or one of the Federal Ministers, as the case may be, to proceed to the formal conclusion of the treaty.

(ii) "Departmental agreements", that is to say treaties the conclusion of which is not reserved to the Federal President, which do not involve amendments to existing legislation, and are not of a political nature, and which are concluded by a single Federal Ministry in consultation with the Office of the Federal Chancellor Foreign Affairs Section, or by the Federal Minister of Foreign Affairs if the latter is competent.

(iii) "Administrative agreements", that is to say, treaties the conclusion of which is not reserved to the Federal President, and which, furthermore, do not involve amendments to existing legislation, and are not of a political nature, and are concluded by a Federal Ministry as being within the scope of its administrative functions. These are taken to include agreements of a purely technical nature, concluded by individual Federal Ministries, in respect of the services for which they are responsible, for example, railway, postal and telegraph agreements of purely local importance.

*Entry into force of State treaties for the purposes of municipal law*

7. With regard to the entry into force of State treaties which are to become part of Austrian municipal law, article 49 (1) of the Federal Constitution Act provides as follows:

"(1) Federal laws and the international treaties specified in article 50 shall be promulgated by the Federal Chancellor in the *Bundesgesetzblatt*. In the absence of any specific decision to the contrary, they enter into force on the day following that on which the issue of the *Bundesgesetzblatt* containing the promulgation is published and, in the absence of any specific decision to the contrary, they are applicable throughout the entire Federal territory.

"(2) A special Federal law shall be issued regarding the *Bundesgesetzblatt*."

*Publication of State treaties in the* Bundesgesetzblatt

8. The Federal legislation regarding the *Bundesgesetzblatt* referred to in paragraph 7 of this Memorandum contains the following provisions relating to the publication of State treaties:

Federal Act of 7 December 1920, BGBl. No. 33, regarding the *Bundesgesetzblatt* (as amended by the Federal Act of 4 July 1922, BGBl. Nr. 435, and article 14 of the Administrative Indemnity Act of 21 July 1925, BGBl. Nr. 257). This provides:

Article 2 (1) "The *Bundesgesetzblatt* is intended for the publication of:

"*(b)* State treaties approved by the National Council, including declarations of accession to multilateral international treaties."

. . .

(3) "State treaties which do not require the approval of the National Council may also be published in the *Bundesgesetzblatt.* The same applies to declarations, made in similar circumstances, of accession to multilateral international treaties..."

*Section II. Practice observed in the conclusion of State treaties*

*General*

Treaty negotiations begin when it has been established that a foreign State is prepared in principle to conclude a treaty with Austria on some question.

*Conclusion of treaties by exchange of notes*

1. The treaty negotiations may be conducted through an exchange of notes. These negotiations may lead up to a formal record announcing the common desire of the two States to conclude a treaty.

*Conclusion of treaties by representatives*

2. When more important matters are being dealt with, the treaty negotiations are conducted orally by representatives.

For this, the following procedure has been developed:

*(a)* In the case of economic matters the representatives of the two parties usually conduct negotiations without written authorization and initial the results of their negotiations. The head of the Austrian delegation reports on the results of the treaty negotiations, whereupon the competent Federal Ministry submits a proposal to the Council of Ministers requesting the latter to approve the agreement, and to appoint a plenipotentiary to sign the treaty on behalf of the Federal Government. If the negotiations are conducted in a place where Austria maintains a diplomatic mission, the rule is that the head of this diplomatic mission is authorized to sign.

*(b)* In the case of negotiations with a State on other matters, and when representatives are to be sent to a diplomatic conference of States for the conclusion of a multilateral treaty, the competent Federal Minister, before the beginning of the treaty negotiations, submits a proposal to the Council of Ministers to the effect that it shall resolve to send repre-

sentatives to attend the negotiations. At the same time, the Federal Minister applies for authorization from the person competent in the particular case to obtain full powers for the representatives to participate in the negotiations, and, if necessary, to sign the treaty. (The person competent will be the Federal President or the competent Federal Minister, as the case may be; see paragraph 3 below.)

*The issuing of the full powers*

3. The fact that Austrian constitutional law recognizes several different categories of State treaties, must be taken into account even at the early stage when an application is made to the Council of Ministers, for the purpose of authorizing negotiations for a treaty.

If the treaty is one the conclusion of which falls within the competence of the Federal President, then the full powers are issued by him. In the case of government agreements, the full powers are issued by the Federal Chancellor; in the case of departmental agreements, by the competent Federal Minister after consultation with the Federal Minister of Foreign Affairs; and, in the case of administrative agreements, by the competent Federal Minister.

In this connexion it is relevant to note the terms of article 67 (2) of the Federal Constitution Act, with respect to the Federal President's signature:

"(2) All acts of the Federal President, unless otherwise specified by the terms of the Constitution, require for their validity the countersignature of the Federal Chancellor or of the competent Federal Minister."

Accordingly, the full powers issued by the Federal President must be countersigned by the Federal Chancellor or by the competent Federal Minister.

*Reservations to treaties*

4. Reservations to treaties, if any, are for the most part made in pursuance of internal departmental instructions at the time of the signature of the treaty in question.

*Special procedure for treaties under article 50 of the Federal Constitution Act, submission to the National Council and ratification*

5. If the treaty is one which, according to article 50 of the Federal Constitution Act, must be submitted to the approval of the National Council, the competent Federal Ministry, when the treaty has been signed, introduces a further proposal in the Council of Ministers requesting the Council of Ministers to submit the signed treaty to the National Council for approval. The proposal to the Council of Ministers must also contain a request for a proposal to the Federal President that, after signature, he should, by his ratification, give effect to the approval of the treaty by the National Council.

The requirement of ratification is as a rule contained in the text of the treaty itself. If in an exceptional case there should be no ratification clause in such a treaty, the treaty must nevertheless be ratified in accordance with Austrian law. The effect of such ratification is, however, merely domestic.

When the treaty has been ratified by the parties, the instruments of ratification are exchanged.

*Publication in the* Bundesgesetzblatt

6. After completion of all the prescribed formalities, the treaty must (or may, as the case may be) be published in the *Bundesgesetzblatt* (see section I, paragraph 8).

Departmental and administrative agreements are not usually published in the *Bundesgesetzblatt.*

*Accession to multilateral treaties*

7. Accessions to multilateral treaties take place in conformity with the accession clause contained in the text of the treaty. Internally, the same procedure is observed in Austria for accessions to multilateral treaties as for accession to bilateral treaties. In both cases, a proposal must be introduced in the Council of Ministers specifying the category of treaty which is to be the subject of accession. If the treaty involves amendments to existing legislation, or is of a political nature, the agreement which is to be the subject of accession must be submitted to the National Council. After the latter has given its approval, the Federal President signs the instrument of accession countersigned by the Federal Chancellor, in which, on behalf of the Republic of Austria, he announces its accession to the agreement and promises faithfully to give effect to the terms thereof. This step completes the ratification procedure required by Austrian law. The Austrian representative is thereupon instructed to deposit the instrument of accession with the depositary named in the treaty.

If, however, the treaty in question is a Government agreement as defined by Austrian law, the Austrian instrument of accession requires the signature of the Federal Chancellor.

## 6. Belgium

*(a)* Constitution of 7 February 1831. Text furnished by the Belgian Government

*Article 68:* — « Le Roi fait les traités de paix, d'alliance et de commerce. Il en donne connaissance aux Chambres aussitôt que l'intérêt et la sûreté de l'Etat le permettent, en y joignant les communications convenables.

« Les traités de commerce et ceux qui pourraient grever l'Etat ou lier individuellement des Belges, n'ont d'effet qu'après avoir reçu l'assentiment des Chambres.

« Nulle cession, nul échange, nulle adjonction de territoire ne peut avoir lieu qu'en vertu d'une loi. Dans aucun cas, les articles secrets d'un traité ne peuvent être destructifs des articles patents. »

*(b)* Memorandum of 6 March 1951 from the Belgian Government

1. Les questions relatives à la conclusion et à la mise en vigueur des traités et conventions conclus par la Belgique ont, jadis, fait l'objet d'études qui ont abouti à la mise sur pied d'une procédure dont les grandes lignes

ont été rappelées à plusieurs reprises à l'attention des services du Département et des agents en poste à l'étranger.

Depuis 1939, la mobilisation et la guerre, en éloignant de nombreux fonctionnaires au courant de cette procédure, en rendant indispensable, après la libération, la conclusion hâtive d'un très grand nombre de nouvelles conventions, ont fait que trop de ces règles de procédure ont été oubliées ou négligées. Il est indispensable de revenir à leur stricte application.

2. Les actes administratifs se rapportant à la conclusion des Traités relèvent de la compétence du Service des Traités, du Service Juridique et des autres services du Département, conformément à la répartition des attributions résultant des règles rappelées ci-après.

Si, dans le cadre de ses attributions et de son activité, un service estime que la conclusion d'une convention internationale s'impose, il lui appartient de mener les négociations avec les gouvernements étrangers, soit sous forme orale, soit sous forme écrite, pour tout ce qui concerne le fond de la matière. Il rédigera également les documents destinés aux autres services (dont le Service Juridique), aux postes à l'étranger, aux autres Départements ministériels, aux Chambres (notamment l'exposé des motifs du projet de loi approbatif), pour autant qu'ils touchent à la matière même de la convention.

Par contre, tous les actes administratifs touchant à l'aspect formel de la convention incombent au Service des Traités, qu'il s'agisse de l'exécution de « pleins pouvoirs », des clauses de style, de la procédure d'approbation des Chambres, de la ratification, de l'enregistrement au Secrétariat de l'O.N.U., de la publication au Moniteur.

La conclusion d'une convention internationale est une matière complexe et souvent de longue haleine. Pour être menée à bien, elle exige la coopération constante des services intéressés en vue de s'éclairer mutuellement, d'éviter les fausses manœuvres, les négligences et les erreurs dans une matière dont l'importance ne peut les souffrir. Mais il reste que la responsabilité du contenu de la convention incombe au service qui l'a négociée (parfois de concert avec un autre Département ministériel), tandis que toute la procédure formelle est du ressort du Service des Traités.

3. En vertu de l'art. 68 de la Constitution, « le Roi... fait les traités de paix, d'alliance et de commerce. Il en donne connaissance aux Chambres aussitôt que l'intérêt et la sûreté de l'Etat le permettent, en y joignant les communications convenables.

« Les traités de commerce et ceux qui pourraient grever l'Etat ou lier individuellement des Belges, n'ont d'effet qu'après avoir reçu l'assentiment des Chambres.

« Nulle cession, nul échange, nulle adjonction de territoire ne peut avoir lieu qu'en vertu d'une loi. Dans aucun cas, les articles secrets d'un traité ne peuvent être destructifs des articles patents. »

Il résulte de ces dispositions que la conclusion des conventions internationales est une prérogative du pouvoir exécutif, exercée comme les autres attributions de ce pouvoir, par le Roi sous la responsabilité d'un Ministre. Par conséquent, tous les actes relatifs à la conclusion d'une convention internationale: établissement de pleins pouvoirs, signature, ratification, mise en vigueur etc. — sont soumis à la procédure normale des actes du pouvoir exécutif, c'est-à-dire à la signature du Roi et au contreseing d'un Ministre.

Toutefois, le deuxième paragraphe de l'art. 68 stipule que pour sortir leurs effets — et, par comparaison avec le paragraphe premier, il ne peut s'agir que de leurs effets en droit interne belge — certaines catégories de conventions internationales (les traités de commerce, ceux qui grèvent l'Etat et ceux qui lient individuellement les Belges) doivent être sanctionnées par l'assentiment des Chambres. Jusqu'à présent, la forme dans laquelle l'assentiment des Chambres a été donné est celle de la procédure législative. Cette forme a l'avantage de ne pas laisser de doute sur le caractère obligatoire, en droit belge, des dispositions d'une convention internationale; elle a, par contre, l'inconvénient de soumettre la mise en vigueur de ces dispositions à une procédure lente et compliquée. Lorsque l'assentiment des Chambres est requis pour que la convention sorte ses effets, la ratification du Chef de l'Etat n'intervient généralement que lorsque cet assentiment est acquis. Cette précaution est prise pour éviter l'impasse où conduirait le refus des Chambres d'approuver une convention qui lierait la Belgique vis-à-vis d'autres Etats; elle n'est cependant pas nécessaire en droit international, et en certains cas urgents la ratification a été donnée avant l'approbation des Chambres.

4. Le Ministre qualifié pour contresigner les actes du Roi en matière de conclusion de conventions internationales est le Ministre des Affaires Etrangères. Il est admis, en outre, que ce Ministre a une délégation permanente du Chef de l'Etat pour agir en ce domaine dans les limites de sa compétence administrative. C'est à ce titre que le Ministre des Affaires Etrangères, de même que les chefs de poste diplomatique, engagent l'Etat envers d'autres Etats étrangers, sous forme de lettres, d'échange de notes et même de conventions qui ne portent que leur signature. Les limites entre cette catégorie d'attributions et celles réservées par l'art. 68 de la Constitution au pouvoir exécutif complet, c'est-à-dire au Roi agissant sous la responsabilité ministérielle, ne sont pas clairement définies. Il est constant que les conventions internationales qui touchent à des matières importantes, celles qui ont un caractère multilatéral, celles qui requièrent l'assentiment des Chambres, doivent, en tous cas, être soumises à la procédure solennelle.

## II

### *Procédure préalable à la conclusion d'un accord international*

5. Lorsqu'une négociation internationale est appelée à revêtir la forme solennelle, il y a lieu d'établir des « pleins pouvoirs », signés par le Roi et contresignés par le Ministre des Affaires Etrangères. Ces « pleins pouvoirs » peuvent porter l'autorisation de négocier sur un certain objet avec un Gouvernement étranger, de signer la convention réglant cet objet et, dans ce cas, avec ou sans réserve de ratification par le Roi. Toutefois, il est de règle de ne pas exiger de plein pouvoir pour le Ministre des Affaires Etrangères.

Les pleins pouvoirs autorisant les délégués de la Belgique à signer, au nom de celle-ci, une convention internationale sont demandés au Service des Traités par le service technique compétent, dès l'instant où les pourparlers se précisent et où ils prennent la forme d'une négociation concrète.

Le Service des Traités rédige les pleins pouvoirs et les soumet à la signature du Chef de l'Etat dans les formes voulues. Ce Service se sera

mis, au préalable, en rapport avec les divers services compétents en vue de s'assurer de l'exactitude des divers renseignements devant figurer dans les pleins pouvoirs et l'arrêté royal qui les confirme (titre des Chefs d'Etat; pays contractants; nom, titre, qualité des plénipotentiaires) et de la portée des pouvoirs qui doivent être conférés.

6. La désignation des délégués ou plénipotentiaires de la Belgique doit se faire à l'intervention du Ministre des Affaires Etrangères; lorsque les délégations comportent une représentation technique, c'est l'administration compétente qui choisit ces délégués et experts et en propose la désignation au Ministre des Affaires Etrangères qui, à son tour, la soumet à l'approbation du Chef de l'Etat.

Les documents de pleins pouvoirs sont soumis au contreseing du Ministre des Affaires Etrangères puis à la signature du Chef de l'Etat. Lorsqu'ils font retour au Service des Traités, ils sont datés et revêtus du Sceau de l'Etat. C'est au Service des Traités qu'il incombe soit de mettre les délégués en possession des pleins pouvoirs soit de les transmettre, pour remise, à nos agents diplomatiques lorsque les négociations se déroulent à l'étranger. Les instructions relatives à la signature et à l'éventualité de réserves touchant l'application de l'accord à intervenir aux territoires du Congo belge et du Ruanda-Urundi sont également tracées aux Plénipotentiaires par le Service des Traités, qui prendra à ce sujet l'avis des services compétents.

## III

### *Rédaction d'une convention internationale*

7. Deux cas sont à envisager: accord multilatéral ou accord bilatéral.

Dans le cas des accords multilatéraux, la rédaction incombe en général à un comité ad hoc lequel, le plus souvent, comprend des spécialistes. En cas de conférence internationale réunie à Bruxelles, le Service des Traités doit être associé au Secrétariat de la conférence. Le Service des Traités est chargé de dresser et d'établir les originaux de tous les engagements internationaux signés en Belgique, y compris les lettres ou contre-lettres jointes ou tenant lieu d'accord.

8. En cas de la conclusion d'un acte bilatéral, l'accord doit être établi en double exemplaire, soit uniquement en français soit en français et dans la langue nationale du pays contractant, les deux textes faisant également foi. Certains pays exigent que les conventions qu'ils signent soient rédigées dans leur langue nationale, non seulement lorsque la signature a lieu sur leur propre territoire, mais également lorsque cette formalité est accomplie à l'étranger par leurs représentants accrédités ou par des délégations expressément habilitées à cet effet, d'où la nécessité de veiller à la concordance scrupuleuse entre le texte français original et sa traduction.

Le texte original destiné à la Belgique doit toujours faire mention en premier lieu de la Belgique et de son Souverain.

Il va sans dire que l'alternat est observé dans le document original destiné au pays co-contractant.

9. Il est d'usage de terminer les conventions par plusieurs articles dits de style:

*(a)* Un article vise l'éventualité de la ratification et l'échange des instruments de ratification: l'usage veut que la signature ait lieu dans la capitale

de l'un des pays contractants et l'échange des instruments de ratification dans la capitale de l'autre;

*(b)* Un article stipule les modalités de mise en vigueur soit au moment de la signature, soit au moment de la ratification par tous les signataires, ou certains d'entre eux, soit un certain temps après l'échange des instruments de ratification;

*(c)* Un article dispose de l'application éventuelle aux territoires non métropolitains, coloniaux, sous tutelle etc.

*(d)* Un article fixe la durée de la convention, les conditions dans lesquelles il pourra être procédé à la dénonciation et la manière dont celle-ci sortira ses effets;

*(e)* Enfin un article stipule éventuellement quels sont les actes internationaux antérieurs qui sont abrogés et remplacés en tout ou en partie par l'acte nouveau.

10. Avant de procéder à la signature d'un acte international, les plénipotentiaires belges déposent leurs pleins pouvoirs entre les mains des co-contractants et reçoivent, en échange, les pleins pouvoirs des plénipotentiaires étrangers.

Le document original destiné à la Belgique est signé à gauche par les délégués belges et à droite par les délégués du pays co-contractant; l'alternat est observé sur l'autre document original.

## IV

### *Ratifications*

11. Une convention étant signée, il y a lieu de veiller à sa mise en vigueur. Celle-ci peut intervenir:

*(a)* par le seul effet de la signature;

*(b)* par la ratification par le Chef de l'Etat.

12. Il se pose à propos des conventions internationales une question primordiale: doivent-elles, pour sortir leurs effets, être soumises à l'assentiment des Chambres par application des dispositions de l'alinéa 2 de l'art. 68 de la Constitution? Cette question soulève de délicats problèmes de droit public. Il appartient au Service Juridique de se prononcer à ce sujet, à la lumière d'une interprétation autorisée et en maintenant l'unité de jurisprudence. Dès avant la signature d'une convention internationale son texte sera, si possible, soumis à l'avis du Service Juridique à l'effet de déterminer s'il y a lieu de recourir à l'assentiment des Chambres.

Il est recommandable en effet de prendre l'avis du Service Juridique dès avant la signature de la convention à l'effet d'examiner si une rédaction appropriée ne pourrait, dans certains cas, aboutir à une mise en vigueur immédiate et éventuellement partielle, des dispositions envisagées sans devoir recourir à l'approbation parlementaire. Par ailleurs, l'avis du Service Juridique sera sollicité lorsqu'une ratification du traité n'est pas envisagée et ce afin d'examiner si certaines clauses rendent l'approbation législative nécessaire, auquel cas la mise en vigueur dès la signature ne pourrait être convenue.

13. Le Service Juridique fait connaître sa décision au service techniquement compétent qui est chargé de fournir l'exposé des motifs du projet de loi portant approbation, éventuellement avec le concours du département

ministériel intéressé. Les services transmettent l'exposé des motifs au Service des Traités.

Dès ce moment, le Service des Traités est responsable vis-à-vis du Ministre des Affaires Etrangères de l'acheminement des documents en temps voulu. C'est le Service des Traités qui soumet l'ensemble des documents aux délibérations du Conseil des Ministres, après en avoir assuré la traduction en flamand et parfois en français. Le Conseil ayant marqué son accord, les documents sont ensuite envoyés au Conseil d'Etat: en possession de l'avis de ce dernier, le Service des Traités demande au Souverain l'autorisation pour le Ministre des Affaires Etrangères d'effectuer le dépôt du projet de loi sur le bureau de l'une des Chambres législatives. Enfin, c'est le Service des Traités qui met le Ministre des Affaires Etrangères en possession des documents originaux qui doivent être remis au Parlement.

Selon un usage constant, c'est le Service des Traités qui vérifie et collationne les documents parlementaires. Ce Service suit le développement des discussions parlementaires au point de vue de l'avancement de la procédure, mais il va de soi que le service technique reste seul compétent pour s'occuper du fond de la question, notamment à l'occasion des demandes formulées par le rapporteur ou lorsque le Ministre doit être documenté en séance au cours des débats ou d'une interpellation.

14. Lorsque le Service Juridique estime que l'assentiment des Chambres n'est pas requis, le Service des Traités porte cette décision à la connaissance du service techniquement compétent et demande des instructions en vue de la ratification.

15. Quel que soit l'objet de l'acte international, c'est au Ministre des Affaires Etrangères seul qu'il appartient d'en promouvoir la ratification. Sur instructions du Service technique au Service des Traités, celui-ci rédige et soumet au Ministre, puis au Chef de l'Etat, les instruments de ratification et l'arrêté royal qui les confirme. Ces documents sont revêtus du sceau de l'Etat. Les instruments de ratification sont envoyés par le Service des Traités au chef de mission belge chargé de procéder à l'échange. Dans le cas où cette formalité a lieu à Bruxelles, le Service des Traités demande au Ministre de fixer jour et heure et convoque alors le chef de mission étranger accrédité. Un procès-verbal d'échange des instruments de ratification est dressé par le Service des Traités.

Il va sans dire que les services intéressés seront tenus au courant de toutes les difficultés qui viendraient à surgir dans la procédure d'approbation parlementaire ou de ratification.

## V

### *Publication au « Moniteur belge »*

16. Le Service des Traités s'occupe de la publication au Moniteur belge des lois approbatives des traités et conventions ainsi que du texte de ces actes internationaux.

Dans le cas de conventions multilatérales, ce Service publie au Moniteur Belge les avis relatant les ratifications ou adhésions ultérieures à l'engagement de la Belgique. Lorsqu'il y a lieu et d'accord avec le service compétent le Service des Traités annonce également par la voie du journal

officiel la fin des actes internationaux: abrogation, dénonciation, remplacement, modification etc.

En outre, le Service des Traités examine de concert avec le service compétent quelles sont les conséquences résultant de la fin d'un acte international, dans les rapports entre la Belgique et le ou les pays qui étaient partie à cet acte: retour à une convention précédente non abrogée ou remise en vigueur, application du droit commun, possibilité de se prévaloir d'un traité avec une tierce puissance etc. etc.

S'il y a doute, il prend l'avis du Service Juridique.

## VI

### *Enregistrement*

17. Conformément aux dispositions de la Charte des Nations Unies, le Service des Traités assure l'enregistrement au Secrétariat général de l'Organisation des Nations Unies des actes internationaux conclus par la Belgique. Il délivre les copies conformes exigées par l'O. N. U. ainsi que la déclaration concernant l'intégralité des textes, l'absence de réserves etc. Ce Service fait connaître au Service compétent les informations concernant l'accomplissement de cette formalité.

## VII

### *Conservation et copies conformes*

18. Le Service des Traités assure la conservation des documents originaux: les pleins pouvoirs, les engagements internationaux de toute nature: traités, conventions, protocoles, avenants, modus vivendi, arrangements, accords, même lorsque ceux-ci résultent d'un échange de lettres ou de notes, instruments de ratification, procès-verbal d'échange des ratifications, certificats d'enregistrement. Tous les originaux de ces actes authentiques doivent être remis sans retard au Service des Traités.

Ce Service est chargé de délivrer les copies conformes des actes internationaux conclus au nom de la Belgique et, en général, de tous autres documents authentiques dont les originaux reposent dans ses archives.

## VIII

### *Liste des Traités et Conventions*

19. Le Service des Traités établit et tient à jour la liste des Traités et conventions en vigueur liant la Belgique.

En temps ordinaire, cette liste est publiée à l'Almanach Royal: il est cependant conseillé de consulter la liste originale du Service des Traités car des modifications sont journellement apportées à la liste imprimée de l'Almanach Royal, publiée annuellement et toujours avec un certain retard.

## 7. Bolivia

*(a)* CONSTITUTION OF 23 NOVEMBER 1945 (AS AMENDED). TEXT FURNISHED BY THE BOLIVIAN MINISTRY OF FOREIGN AFFAIRS. TRANSLATION BY THE SECRETARIAT OF THE UNITED NATIONS

*Article 58.* The following are the functions of the legislative power:

. . .

(13) To approve or withhold approval of international treaties and conventions of all kinds.

. . .

*Article 94.* The President shall have the following powers and duties:

. . .

(2) To negotiate and conclude treaties with foreign nations; and to exchange them after prior approval by Congress.

*(b)* MEMORANDUM OF 5 APRIL 1951 FROM THE BOLIVIAN MINISTRY OF FOREIGN AFFAIRS. TRANSLATION BY THE SECRETARIAT OF THE UNITED NATIONS

1. Any international instrument to which Bolivia becomes a party must be approved in the Council of Ministers by the adoption of a resolution, signed by the President and by all the Ministers of State with the concurrence of the Under-Secretary for Foreign Affairs. The President of the Republic then sends a special message to the President of the National Congress, countersigned by the Chancellor of the Republic, setting forth the scope of the treaty and requesting, in accordance with article 58, paragraph 13 of the Political Constitution of the State, that it should be considered and approved by the Legislative Power.

2. The President subsequently causes the treaty to be read in Congress, whereupon it goes to the Joint Committee on Diplomatic Matters, which is composed of fourteen members: nine deputies and five senators. When the matter is urgent, formalities may be discussed and approved immediately after three readings—i.e., as a whole, in detail, and in revised form. Once the Bill submitted to Congress has been approved, the treaty is returned to the Executive Power for action, together with the relevant act duly authenticated with a view to its solemn promulgation.

3. When no request is made to dispense with formalities, and the treaty has gone to the Committee on Diplomatic Matters for report, it comes back to Congress, which then proceeds to debate and approve the treaty Bill. When these requirements have been fulfilled, the Legislative Power returns to the Executive the relevant act duly authenticated for necessary action.

4. When the Committee on Diplomatic Matters fails to reach unanimous agreement, a majority report and a minority report are submitted; in the rare case of total disagreement among the members, individual reports are prepared. When the reports have been read, and the Bill has been tabled by the Committee, it is discussed and approved in accordance with the procedure outlined above.

## 8. Brazil

CONSTITUTION OF 18 SEPTEMBER 1946. TEXT FROM CONSTITUIÇÃO DA REPÚBLICA DOS ESTADOS UNIDOS DO BRASIL (RIO DE JANEIRO, 1950). TRANSLATION BY THE SECRETARIAT OF THE UNITED NATIONS

*Article 66.* It shall be exclusively within the competence of the National Congress:

(1) To give the final decision respecting treaties and conventions concluded with foreign States by the President of the Republic.

. . .

*Article 87.* The President of the Republic shall have exclusive power:

. . .

(6) To maintain relations with foreign States.

(7) To conclude international treaties and conventions *ad referendum* by the National Congress.

## 9. Bulgaria

CONSTITUTION OF 4 DECEMBER 1947. TEXT FURNISHED (IN FRENCH) BY THE BULGARIAN MINISTRY OF FOREIGN AFFAIRS

*Article 35.* Le Présidium du Narodno Sobranié remplit les fonctions suivantes:

1. . . .

2. . . .

3. Il ratifie et dénonce les traités internationaux signés par le Gouvernement.

*Article 43.* Le Gouvernement dirige l'administration de l'Etat, en unifiant et coordonnant le travail des différents Ministères... Il dirige, dans ses lignes générales, la politique extérieure de la République Populaire de Bulgarie...

## 10. Burma

CONSTITUTION OF 24 SEPTEMBER 1947. ENGLISH TEXT PUBLISHED AT RANGOON IN 1947 BY THE SUPERINTENDENT, GOVERNMENT PRINTING AND STATIONERY

### PART IV. POWERS OF THE PARLIAMENT [1]

*Article 92* (1) ... the exclusive legislative authority of the Parliament shall extend to all matters enumerated in List I of the Third Schedule to this Constitution (hereinafter called "the Union Legislative List").

### *Chapter XII. International relations*

*Article 213* (1) Every international agreement to which the Union becomes a party shall be laid before the Parliament.

[1] Article 65. The legislative power of the Union shall be vested in the Union Parliament, which shall consist of the President, a Chamber of Deputies and a Chamber of Nationalities and which is in this Constitution called "the Parliament" or "the Union Parliament".

(2) No international agreement requiring or likely to require legislation in order to give effect thereto shall be ratified except with the approval of the Parliament.

(3) No international agreement involving a charge upon the revenues of the Union shall be ratified unless the terms of the agreement shall have been approved by the Chamber of Deputies.

Explanation. This section shall not apply to inter-governmental agreements or conventions of a technical or administrative character.

*Article 214.* No international agreement as such shall be part of the municipal law of the Union, save as may be determined by the Parliament.

THIRD SCHEDULE

List I. Union Legislative List.

. . .

2—External Affairs.

. . .

(5) The entering into and implementing of treaties and agreements with other countries.

## 11. Byelorussian S.S.R.

CONSTITUTION OF 23 DECEMBER 1936 (AS AMENDED IN 1947). TEXT FROM BYELORUSSIAN OFFICIAL PUBLICATION OF THE BSSR. MINSK, 1950. TRANSLATION BY THE SECRETARIAT OF THE UNITED NATIONS

*Article 16a.* The BSSR. has the right to enter into direct relations with foreign States and to conclude agreements and exchange diplomatic and consular representatives with them.

*Article 43.* The Council of Ministers of the Byelorussian SSR.:

. . .

*(g)* Exercises guidance in the sphere of the relations of the Byelorussian SSR. with foreign States on the basis of the general procedure [1] established by the USSR. governing the relations of Union Republics with foreign States.

## 12. Cambodia [2]

CONSTITUTION OF 2 JUNE 1947. TEXT PUBLISHED BY THE MINISTÈRE DE LA JEUNESSE, DES ARTS ET DES LETTRES (*La documentation française, notes et études documentaires*, 2 JUNE 1947, N° 633)

*Article 45:* Le Roi signe les traités passés avec la France ou autres Etats associés de l'Union Française et les ratifie en vertu d'un vote de l'Assemblée Nationale. Il désigne les personnalités chargées de fonctions ou de missions diplomatiques à l'étranger.

[1] See under title "USSR." in this volume. An identical provision appears in the Constitutions of all the other Union Republics (sixteen in all).

[2] Cambodia is a constitutional monarchy and a member of the French Union.

*Article 46:* Le Roi a la faculté de déléguer en partie ses pouvoirs en ce qui concerne ceux indiqués par les articles 42 et 45 de la présente constitution.

## 13. Canada

MEMORANDUM OF 21 JULY 1952 FROM THE GOVERNMENT OF CANADA

1. Canada has very few statutory provisions relating to the exercise of the treaty-making power. The rules followed, so far as they can be ascertained, are for the most part founded on unwritten custom.

2. The Constitutional Authority to negotiate and conclude treaties is part of the Royal Prerogative, which in practice is exercised in the name of the Crown by the Governor-General in Council on the advice of the Secretary of State for External Affairs, who is responsible (under the Department of External Affairs Act, R.S.C. 1927, c. 65) for the negotiation and conclusion of treaties and other international agreements. [1]

3. There is no law imposing any obligation on the Government of Canada to refer treaties or other international agreements to the Parliament of Canada for approval prior to ratification. International obligations are entered into in many instances without reference to Parliament. The negotiation and conclusion of a treaty or other international agreement is an executive act.

4. Before the Government of Canada assumes an international obligation, two things must be considered. First, there is the question whether the provisions of the treaty or obligation accord with existing Canadian law and secondly whether any action proposed to be taken to implement the treaty is authorized by existing law. Entry into an international obligation or treaty, although binding on Canada internationally, does not give it force of law in Canada. Consequently the power of the Federal Government to implement the treaty frequently, though not always, requires domestic legislation to be passed by the Parliament of Canada or the Provinces, depending upon whether the subject matter is within federal or provincial jurisdiction according to the British North America Act.

5. The only other statutory provision in Canadian law referring to treaty-making powers is to be found in section 132 of the British North America Act, which reads as follows:

"The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any Province thereof, as part of the British Empire, towards Foreign Countries arising under Treaties between the Empire and such Foreign Countries."

This section of Canada's Constitution has in recent years given rise to some difficulty, although, at the time the Canadian Constitution was drafted, it fulfilled our requirements because Canada did not normally negotiate or conclude its own treaties as it does to-day. Various judicial decisions since 1867, however, have developed a constitutional pattern which at present does not permit the Federal Parliament to implement certain types of treaties without concurrent legislative action on the part of the Canadian Provinces.

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[1] International postal agreements are the responsibility of the Postmaster-General under the Post Office Act (S.C. 1951-1st Sess. c. 57).

7. Section 91 of the British North America Act gives the Parliament of Canada exclusive jurisdiction to legislate in certain fields, while section 92 gives the Provinces exclusive jurisdiction to legislate in certain other fields, including property, civil rights and the administration of justice. Should the conclusion of, or accession to, a treaty by the Federal Government require implementation by changing the Provincial Statute Law, the Federal Parliament cannot effect such change without concurrent legislation on the part of the Provinces, if the subject matter lies wholly or partly within the legislative competence of the Provinces. This difficulty is illustrated by a decision of the Judicial Committee of the Privy Council in the case of *Attorney-General of Canada versus Attorney-General for Ontario and others* (re Weekly Rest, Minimum Wages and Hours of Labour Acts, *Law Reports 1937 Appeal Cases*, page 326. A copy of this judgment is appended). The Judicial Committee decided in this case that the Parliament of Canada had no power to enact, for the purpose of carrying out international labour conventions, statutes relating to matters within the exclusive legislative competence of the Provinces.

8. To avoid the difficulty which might arise if provincial legislation, required for the fulfilment of an international obligation, were refused, prior consultations are had, and agreements reached, with the Provinces before Canada enters into international agreements. This makes it difficult for Canada to enter into some international conventions such as the proposed Covenants on Human Rights and Fundamental Freedoms without the inclusion of a federal state clause.

A.-G. CAN. v. A.-G. ONT. *et al.*,

REFERENCE RE WEEKLY REST IN INDUSTRIAL UNDERTAKINGS ACT, MINIMUM WAGES ACT AND LIMITATION OF HOURS OF WORK ACT

*Judicial Committee of the Privy Council. Lords Atkin, Thankerton and Macmillan. Lord Wright. M.R. and Sir Sidney Rowlatt. 28 January 1937*

Constitutional Law II A—Dominion labour laws—Treaty legislation—Property and civil rights

Labour laws regulating wages, working hours and rest days in industriel undertakings, enacted by the Dominion Parliament in accordance with conventions adopted by the International Labour Organisation of the League of Nations under the Treaty of Versailles, are not legislation "necessary or proper for performing obligations arising under treaties between the Empire and foreign countries" within the powers of the Dominion under s. 132 of the B.N.A. Act, nor within its powers under s. 91 "to make laws for the peace, order and good government of Canada"; such legislation (1935 (Can.), cc. 14, 44 and 63), being exclusively within the competence of the Province under its powers as to "property and civil rights," is *ultra vires* the Dominion.

APPEAL from the judgment of the Supreme Court of Canada, [1936] 3 D.L.R. 673, on equal division as to the constitutionality of Dominion labour legislation.

*L. S. St. Laurent*, K.C., *R. S. Robertson*, K.C., *C. P. Plaxton*, K.C., *P. Wright* and *R. St. Laurent*, for A.-G. Can.; *Hon. A. W. Roebuck*, K.C., and *I. A. Humphries*, K.C., for A.-G. Ont.; *Hon. J. B. McNair*, K.C., and *F. Gahan*, for A.-G. N.B.; *J. W. de B. Farris*, K.C., and *W. Barton*, for A.-G. B.C.

The judgment of their Lordships was delivered by

LORD ATKIN:—This is one of a series of cases brought before this Board on appeal from the Supreme Court of Canada ([1936]) 3 D.L.R. 673) on references by the Governor-General in Council to determine the validity of certain statutes of Canada passed in 1934 and 1935. Their Lordships will deal with all the appeals in due course, but they propose to begin with that involving the Weekly Rest in Industrial Undertakings Act, 1935 (Can.), c. 14, the Minimum Wages Act, 1935 (Can.), c. 44, and the Limitation of Hours of Work Act, 1935 (Can.), c. 63, both because of the exceptional importance of the issues involved, and because it affords them an opportunity of stating their opinion upon some matters which also arise in the other cases. At the outset they desire to express their appreciation of the valuable assistance which they have received from counsel, both for the Dominion and for the respective Provinces. No pains have been spared to place before the Board all the material both as to the facts and the law which could assist the Board in their responsible task. The arguments were cogent and not diffuse. The statutes in question in the present case were passed, as their titles recite, in accordance with conventions adopted by the International Labour Organisation of the League of Nations in accordance with the Labour Part of the Treaty of Versailles of June 28, 1919. It was admitted at the bar that each statute affects property and civil rights within each Province; and that it was for the Dominion to establish that nevertheless the statute was validly enacted under the legislative powers given to the Dominion Parliament by the B.N.A. Act, 1867. It was argued for the Dominion that the legislation could be justified either: (1) Under s. 132 of the B.N.A. Act as being legislation "necessary or proper for performing the Obligations of Canada or any Province thereof, as part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries"; or (2) Under the general powers, sometimes called the residuary powers, given by s. 91 to the Dominion Parliament "to make Laws for the Peace, Order and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by" the B.N.A. Act "assigned exclusively to the Legislatures of the Provinces."

The Provinces contended:

As to (1):

*(a)* That the obligations, if any, of Canada under the labour conventions did not arise under a treaty or treaties made between the Empire and foreign countries: and that therefore s. 132 did not apply.

*(b)* That the Canadian Government had no executive authority to make any such treaty as was alleged.

*(c)* That the obligations said to have been incurred and the legislative powers sought to be exercised by the Dominion were not incurred and exercised in accordance with the terms of the Treaty of Versailles.

As to (2) that if the Dominion had to rely only upon the powers given by s. 91, the legislation was invalid, for it related to matters which came within the classes of subjects exclusively assigned to the Legislatures of the Provinces, viz., Property and Civil Rights in the Province.

In order to indicate the opinion of the Board upon these contentions it will be necessary briefly to refer to the Treaty of Versailles, Part XIII, "Labour:" to the procedure prescribed by it for bringing into existence labour conventions; and to the procedure adopted in Canada in respect

thereto. The Treaty of Peace signed at Versailles on June 28, 1919, was made between the Allied and Associated Powers of the one part and Germany of the other part. The British Empire was described as one of the Principal Allied and Associated Powers, and the high contracting party for the British Empire was His Majesty the King, represented generally by certain of his English Ministers and represented for the Dominion of Canada by the Minister of Justice and the Minister of Customs, and for the other Dominions by their respective Ministers. The treaty began with part I of the covenant of the League of Nations by which the high contracting parties agreed to the covenant, the effect of which was that the signatories named in the annex to the covenant were to be the original members of the League of Nations. The Dominion of Canada was one of the signatories and so became an original member of the League. The treaty then proceeds in a succession of parts to deal with the agreed terms of peace, stipulations of course entered into not between members of the League but between the high contracting parties, i.e., for the British Empire His Majesty the King. Part XIII entitled "Labour," after reciting that the object of the League of Nations is the establishment of universal peace, and such a peace can only be established if it is based on social justice and that social justice requires the improvement of conditions of labour throughout the world provides that the high contracting parties agree to the establishment of a permanent organization for the promotion of the desired objects and that the original and future members of the League of Nations shall be the members of this organization. The organization is to consist of a general conference of representatives of the members and an International Labour Office. After providing for meetings of the conference and for its procedure the treaty contains arts. 405 and 407:

"*Article 405*

"(1) When the Conference has decided on the adoption of proposals with regard to an item in the agenda, it will rest with the Conference to determine whether these proposals should take the form: *(a)* of a recommendation to be submitted to the Members for consideration with a view to effect being given to it by national legislation or otherwise, or *(b)* of a draft international convention for ratification by the Members.

"(2) In either case a majority of two-thirds of the votes cast by the Delegates present shall be necessary on the final vote for the adoption of the recommendation or draft convention, as the case may be, by the Conference.

"(3) In framing any recommendation or draft convention of general application the Conference shall have due regard to those countries in which climatic conditions, the imperfect development of industrial organization or other special circumstances make the industrial conditions substantially different and shall suggest the modifications, if any, which it considers may be required to meet the case of such countries.

"(4) A copy of the recommendation or draft convention shall be authenticated by the signature of the President of the Conference and of the Director and shall be deposited with the Secretary-General of the League of Nations. The Secretary-General will communicate a certified copy of the recommendation or draft convention, to each of the Members.

"(5) Each of the Members undertakes that it will, within the period of one year at most from the closing of the session of the Conference, or if it is impossible owing to exceptional circumstances to do so within the period of one year, then at the earliest practicable moment and in no case later than eighteen months from the closing of the session of the Conference bring the recommendation or draft convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action.

"(6) In the case of a recommendation, the Members will inform the Secretary-General of the action taken.

"(7) In the case of a draft convention, the Member will, if it obtains the consent of the authority or authorities within whose competence the matter lies, communicate the formal ratification of the convention to the Secretary-General and will take such action as may be necessary to make effective the provisions of such convention.

"(8) If on a recommendation no legislative or other action is taken to make a recommendation effective, or if the draft convention fails to obtain the consent of the authority or authorities within whose competence the matter lies, no further obligation shall rest upon the Member.

"(9) In the case of a federal State, the power of which to enter into conventions on labour matters is subject to limitations, it shall be in the discretion of that Government to treat a draft convention to which such limitations apply as a recommendation only, and the provisions of this article with respect to recommendations shall apply in such case.

"(10) The above article shall be interpreted in accordance with the following principle:

"In no case shall any Member be asked or required, as a result of the adoption of any recommendation or draft convention by the Conference, to lessen the protection afforded by its existing legislation to the workers concerned."

"*Article 407*

"If any convention coming before the Conference for final consideration fails to secure the support of two-thirds of the votes cast by the Delegates present, it shall nevertheless be within the right of any of the Members of the Permanent Organization to agree to such convention among themselves.

"Any convention so agreed to shall be communicated by the Government concerned to the Secretary-General of the League of Nations, who shall register it."

It will be observed that a draft convention is adopted by a majority of two-thirds of the delegates present; and that at the stage of adoption it has no binding effect on the members; nor do the delegates of members sign it or purport to enter into an obligation on behalf of the members whose delegates they are. "Ratification," therefore, as used in para. 7 of art. 405 is not used in the ordinary sense in which it is used in respect of treaties, the formal adoption by the high contracting party of a previous assent conveyed by the signature of so-called plenipotentiaries. "Consent to" or "accession to" would perhaps better describe the transaction which involves the creation for the first time of any obligation under the convention.

In accordance with the provisions of part XIII, draft conventions were adopted by general conferences of the International Labour Organisation as follows:

October 29—November 29, 1919, Conference.

Draft Convention limiting the Hours of Work in Industrial Undertakings.

October 25—November 19, 1921, Conference.

Draft Convention concerning the Application of the Weekly Rest in Industrial Undertakings.

May 30—June 16, 1928, Conference.

Draft Convention concerning the creation of Minimum Wage Fixing Machinery.

Each of the conventions included stipulations purporting to bind members who ratified it to carry out its provisions, the first two conventions by named dates, *viz.*, July 1, 1921, and January 1, 1924, respectively. These three conventions were in fact ratified by the Dominion of Canada, Hours of Work on March 1, 1935, Weekly Rest, on March 1, 1935, and Minimum Wages on April 12, 1935.

In each case in February and March, 1935, there had been passed resolutions of the Senate and House of Commons of Canada approving them. The ratification was approved by order of the Governor-General in Council, was recorded in an instrument of ratification executed by the Secretary of State for External Affairs for Canada, Mr. Bennett, and was duly communicated to the Secretary-General of the League of Nations. The statutes, which in substance give effect to the draft conventions, were passed by the Parliament of Canada and received the Royal Assent, "Hours of Work" on July 5, 1935, to come into force three months after assent; "Weekly Rest," on April 4, 1935, to come into force three months after assent; "Minimum Wage," on July 28, 1935, to come into force, so far as the convention provisions are concerned, when proclaimed by the Governor in Council, an event which has not yet happened.

In 1925 the Governor-General in Council referred to the Supreme Court questions as to the obligations of Canada under the provisions of part XIII of the Treaty of Versailles and as to whether the Legislatures of the Provinces were the authorities within whose competence the subject-matter of the conventions lay. The answers to the reference, which are to be found in [1925] 3 D.L.R. 1114, were that the Legislatures of the Provinces were the competent authorities to deal with the subject-matter, save in respect of Dominion servants, and the parts of Canada not within the boundaries of any Province: and that the obligation of Canada was to bring the convention before the Lieutenant-Governor of each Province to enable him to bring the appropriate subject-matter before the Legislature of his Province, and to bring the matter before the Dominion Parliament in respect of so much of the convention as was within their competence. This advice appears to have been accepted, and no further steps were taken until those which took place as stated above in 1935.

Their Lordships, having stated the circumstances leading up to the reference in this case, are now in a position to discuss the contentions of the parties which were summarized earlier in this judgment. It will be essential to keep in mind the distinction between (1) the formation, (2) the performance, of the obligations constituted by a treaty, using that word as comprising any agreement between two or more Sovereign states. Within the British Empire there is a well-established rule that

the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the government of the day, decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes. To make themselves as secure as possible they will often in such cases before final ratification seek to obtain from Parliament an expression of approval. But it has never been suggested, and it is not the law, that such an expression of approval operates as law, or that in law it precludes the assenting Parliament or any subsequent Parliament from refusing to give its sanction to any legislative proposals that may subsequently be brought before it. Parliament, no doubt, as the Chief Justice points out, has a constitutional control over the executive; but it cannot be disputed that the creation of the obligations undertaken in treaties and the assent to their form and quality are the function of the executive alone. Once they are created, while they bind the state as against the other contracting parties, Parliament may refuse to perform them and so leave the state in default. In a unitary state whose Legislature possesses unlimited powers, the problem is simple. Parliament will either fulfil or not treaty obligations imposed upon the state by its executive. The nature of the obligations does not affect the complete authority of the Legislature to make them law if it so chooses. But in a state where the Legislature does not possess absolute authority: in a federal state where legislative authority is limited by a constitutional document: or is divided up between different Legislatures in accordance with the classes of subject-matter submitted for legislation, the problem is complex. The obligations imposed by treaty may have to be performed, if at all, by several Legislatures: and the executive have the task of obtaining the legislative assent not of the one Parliament to whom they may be responsible: but possibly of several Parliaments to whom they stand in no direct relation. The question is not how is the obligation formed, that is the function of the executive: but how is the obligation to be performed and that depends upon the authority of the competent Legislature or Legislatures.

Reverting again to the original analysis of the contentions of the parties it will be seen that the provincial contention (1) *(b)* relates only to the formation of the treaty obligation while (1) *(c)* has reference to the alleged limitation of both executive and legislative action by the express terms of the treaty. If, however, the Dominion Parliament was never vested with legislative authority to perform the obligation these questions do not arise. And as their Lordships have come to the conclusion that the reference can be decided upon the question of legislative competence alone, in accordance with their usual practice in constitutional matters they refrain from expressing any opinion upon the questions raised by the contentions (1) *(b)* and *(c)*, which in that event become immaterial. Counsel did not suggest any doubt as to the international status which Canada had now attained, involving her competence to enter into international treaties as an international juristic person. Questions were raised both generally as to how the executive power was to be exercised to bind Canada, whether it must be exercised in the name of the King, and whether the prerogative right of making treaties in respect of Canada

was now vested in the Governor-General in Council, or his Ministers, whether by constitutional usage or otherwise, and specifically in relation to the draft conventions as to the interpretation of the various paragraphs in art. 405 of the Treaty of Versailles and as to the effect of the time limits expressed both in art. 405 and in the conventions themselves. Their Lordships mention these points for the purpose of making it clear that they express no opinion upon them.

The first ground upon which counsel for the Dominion sought to base the validity of the legislation was s. 132. So far as it is sought to apply this section to the conventions when ratified the answer is plain. The obligations are not obligations of Canada as part of the British Empire, but of Canada, by virtue of her new status as an international person, and do not arise under a treaty between the British Empire and foreign countries. This was clearly established by the decision in the *Radio* case (*Re Regulation & Control of Radio Communication, A.-G. Que.* v. *A.-G. Can. et al.*), [1932] 2 D.L.R. 81, 39 C.R.C. 49, and their Lordships do not think that the proposition admits of any doubt. It is unnecessary, therefore, to dwell upon the distinction between legislative powers given to the Dominion to perform obligations imposed upon Canada as part of the Empire by an Imperial executive responsible to and controlled by the Imperial Parliament, and the legislative power of the Dominion to perform obligations created by the Dominion executive responsible to and controlled by the Dominion Parliament. While it is true, as was pointed out in the *Radio* case, that it was not contemplated in 1867 that the Dominion would possess treaty making powers, it is impossible to strain the section so as to cover the uncontemplated event.

A further attempt to apply the section was made by the suggestion that while it does not apply to the conventions, yet it clearly applies to the Treaty of Versailles itself, and the obligations to perform the conventions arise "under" that treaty because of the stipulations in part XIII. It is impossible to accept this view. No obligation to legislate in respect of any of the matters in question arose until the Canadian executive, left with an unfettered discretion of their own volition, acceded to the conventions, a *novus actus* not determined by the treaty. For the purposes of this legislation the obligation arose under the conventions alone. It appears that all the members of the Supreme Court rejected the contention based on s. 132 and their Lordships are in full agreement with them.

If, therefore, s. 132 is out of the way the validity of the legislation can only depend upon ss. 91 and 92. Now it had to be admitted that normally this legislation came within the classes of subjects by s. 92 assigned exclusively to the Legislatures of the Provinces, viz., Property and Civil Rights in the Province. This was in fact expressly decided in respect of these same conventions by the Supreme Court in 1925. How then can the legislation be within the legislative powers given by s. 91 to the Dominion Parliament? It is not within the enumerated classes of subjects in s. 91: and it appears to be expressly excluded from the general powers given by the first words of the section. It appears highly probable that none of the members of the Supreme Court would have departed from their decision in 1925 had it not been for the opinion of the Chief Justice that the judgments of the Judicial Committee in the *Aeronautics* case (*Re Aerial Navigation, A.-G. Can.* v. *A.-G. Ont.*), [1932] 1 D.L.R. 58, 39 C.R.C. 108, and the *Radio* case, *supra*, constrained them to hold that jurisdiction to legislate for the purpose of performing the obligation of a treaty resides

exclusively in the Parliament of Canada. Their Lordships cannot take this view of those decisions.

The *Aeronautics* case, *supra*, concerned legislation to perform obligations imposed by a treaty between the Empire and foreign countries. Section 132 therefore clearly applied: and but for a remark at the end of the judgment, which in view of the stated ground of the decision was clearly *obiter*, the case could not be said to be an authority on the matter now under discussion.

The judgment in the *Radio* case, *supra*, appears to present more difficulty. But when that case is examined it will be found that the true ground of the decision was that the convention in that case dealt with classes of matters which did not fall within the enumerated classes of subjects in s. 92 or even within the enumerated classes in s. 91. Part of the subject-matter of the convention, namely, broadcasting, might come under an enumerated class but if so it was under a heading "Inter-provincial Telegraphs," expressly excluded from s. 92. Their Lordships are satisfied that neither case affords a warrant for holding that legislation to perform a Canadian treaty is exclusively within the Dominion legislative power.

For the purposes of ss. 91 and 92, i.e., the distribution of legislative powers between the Dominion and the Provinces, there is no such thing as treaty legislation as such. The distribution is based on classes of subjects: and as a treaty deals with a particular class of subjects so will the legislative power of performing it be ascertained. No one can doubt that this distribution is one of the most essential conditions, probably the most essential condition, in the inter-provincial compact to which the B.N.A. Act gives effect. If the position of Lower Canada, now Quebec, alone were considered, the existence of her separate jurisprudence as to both property and civil rights might be said to depend upon loyal adherence to her constitutional right to the exclusive competence of her own Legislature in these matters. Nor is it of less importance for the other Provinces, though their law may be based on English jurisprudence, to preserve their own right to legislate for themselves in respect of local conditions which may vary by as great a distance as separates the Atlantic from the Pacific. It would be remarkable that while the Dominion could not initiate legislation however desirable which affected civil rights in the Provinces, yet its Government not responsible to the Provinces nor controlled by provincial Parliaments need only agree with a foreign country to enact such legislation: and its Parliament would be forthwith clothed with authority to affect provincial rights to the full extent of such agreement. Such a result would appear to undermine the constitutional safeguards of provincial constitutional autonomy.

It follows from what has been said that no further legislative competence is obtained by the Dominion from its accession to international status, and the consequent increase in the scope of its executive functions. It is true, as pointed out in the judgment of the Chief Justice, that as the executive is now clothed with the powers of making treaties so the Parliament of Canada, to which the executive is responsible, has imposed upon it responsibilities in connexion with such treaties, for if it were to disapprove of them they would either not be made or the Ministers would meet their constitutional fate. But this is true of all executive functions in their relation to Parliament. There is no existing constitutional ground for stretching the competence of the Dominion Parliament so that it becomes enlarged to keep pace with enlarged functions of the Dominion

executive. If the new functions affect the classes of subjects enumerated in s. 92 legislation to support the new functions is in the competence of the provincial Legislatures only. If they do not, the competence of the Dominion Legislature is declared by s. 91 and existed *ab origine*. In other words the Dominion cannot merely by making promises to foreign countries clothe itself with legislative authority inconsistent with the constitution which gave it birth.

But the validity of the legislation under the general words of s. 91 was sought to be established not in relation to the treaty-making power alone, but also as being concerned with matters of such general importance as to have "attained such dimensions as to affect the body politic," and to have "ceased to be merely local or provincial and to have become matters of national concern." It is interesting to notice how often the words used by Lord Watson in *A.-G. Ont.* v. *A.-G. Can.* (*Local Prohibition Case*), [1896] A.C. 348, have unsuccessfully been used in attempts to support encroachments on the provincial legislative powers given by s. 92. They laid down no principle of constitutional law, and were cautious words intended to safeguard possible eventualities which no one at the time had any interest or desire to define. The law of Canada on this branch of constitutional law has been stated with such force and clarity by the Chief Justice in his judgment in the reference concerning the Natural Products Marketing Act, 1934 (Can.), c. 57, beginning at p. 65 of the record in that case (*Reference Re Natural Products Marketing Act*, [1936] 3 D.L.R. 622, at pp. 633-644, 66 Can. C.C. 180, at pp. 192-3, 205) and dealing with the six Acts there referred to, that their Lordships abstain from stating it afresh. The Chief Justice naturally from his point of view excepted legislation to fulfil treaties. On this their Lordships have expressed their opinion. But subject to this they agree with and adopt what was there said. They consider that the law is finally settled by the current of cases cited by the Chief Justice on the principles declared by him. It is only necessary to call attention to the phrases in the various cases, "abnormal circumstances," "exceptional conditions," "standard of necessity" (*Board of Commerce* case (*A.-G. Can.* v. *A.-G. Alta.*) (1921), 60 D.L.R. 513), "some extraordinary peril to the material life of Canada," "highly exceptional," "epidemic of pestilence" (*Snider's* case *(Toronto Electric Com'rs* v. *Snider)*, [1925] 2 D.L.R. 5), to show how far the present case is from the conditions which may override the normal distinction of powers in ss. 91 and 92. The few pages of the Chief Justice's judgment will, it is to be hoped, form the *locus classicus* of the law on this point, and preclude further disputes.

It must not be thought that the result of this decision is that Canada is incompetent to legislate in performance of treaty obligations. In totality of legislative powers, Dominion and provincial together, she is fully equipped. But the legislative powers remain distributed and if in the exercise of her new functions derived from her new international status she incurs obligations they must, so far as legislation be concerned when they deal with provincial classes of subjects, be dealt with by the totality of powers, in other words by co-operation between the Dominion and the Provinces. While the ship of state now sails on larger ventures and into foreign waters she still retains the water-tight compartments which are an essential part of her original structure. The Supreme Court ([1936] 3 D.L.R. 673) was equally divided and therefore the formal judgment could only state the opinions of the three Judges on either side. Their

Lordships are of opinion that the answer to the three questions should be that the Act in each case is *ultra vires* of the Parliament of Canada, and they will humbly advise His Majesty accordingly.

## 14. Ceylon [1]

MEMORANDUM OF 18 MAY 1951 FROM THE MINISTRY OF EXTERNAL AFFAIRS

1. There is no general legislation in Ceylon, and no provision in the Constitution, governing the negotiation and conclusion of treaties and other international agreements; nor are there any decrees, regulations or judicial decisions having a bearing on this subject.

2. However, article 4 (2) of the Ceylon (Constitution) Order in Council, 1946, provides:

"All Powers, authorities and functions vested in Her Majesty or the Governor-General shall, subject to the provisions of this Order, and of any other law for the time being in force, be exercised as far as may be in accordance with the constitutional conventions applicable to the exercise of similar powers, authorities and functions in the United Kingdom by Her Majesty..."

Article 45 of the same Order provides:

"The executive power of the Island shall continue vested in Her Majesty and may be exercised, on behalf of Her Majesty, by the Governor-General in accordance with the provisions of this Order and of any other law for the time being in force."

3. In practice, international agreements are negotiated and concluded under the authority of the Minister of External Affairs acting with the approval of the Cabinet. The agreements, when concluded, are laid before Parliament for information or, when appropriate, for approval before ratification.

## 15. Chile

*(a)* CONSTITUTION OF 18 SEPTEMBER 1925 (AS AMENDED). TEXT FURNISHED BY THE PERMANENT DELEGATION OF CHILE. TRANSLATION BY THE SECRETARIAT OF THE UNITED NATIONS

*Article 72.* Special functions of the President of the Republic are:

. . .

(16) To maintain political relations with Foreign Powers, receive their agents, admit their consuls, conduct negotiations, make preliminary stipulations, conclude and sign all treaties of peace, alliance, truce, neutrality, commerce, concordats and other conventions. Treaties before their ratification must be presented to the approval of Congress. The discussions and

[1] An External Affairs Agreement was concluded between the United Kingdom and Ceylon in November 1947, as one of the preliminaries to the Ceylon Independence Act 1947, which accorded Ceylon full responsible status within the Commonwealth. This Agreement provided that, in external affairs generally, the governments of Ceylon and the United Kingdom will conform to the principles and practice observed by other members of the Commonwealth.

deliberations on these matters shall be in secret if the President of the Republic so demands.

. . .

*Article 43.* Exclusive functions of Congress are: . . .

(5) To approve or withhold approval of treaties that, before their ratification, the President of the Republic shall present to it. All of the above resolutions shall be subject in Congress to the same procedure as a law.

*(b)* MEMORANDUM OF 29 MAY 1951 FROM THE PERMANENT DELEGATION OF CHILE. TRANSLATION BY THE SECRETARIAT OF THE UNITED NATIONS

1. The President of the Republic exercises the function assigned to him by article 72, paragraph 16 of the Constitution through the Ministry of Foreign Affairs, in accordance with article 1 *(e)* of Organic Decree No. 402, of 11 May 1932, and article 2 *(j)* of Supreme Decree No. 280 *bis*, of 28 February 1946, organizing the Department of the Under-Secretary of Foreign Affairs. The latter provides as follows:

"The Ministry of Foreign Affairs is responsible in general for dealing with all matters connected with the external relations of the country, in accordance with instructions imparted by the President of the Republic, and particularly the following:

. . .

"(j) The study, negotiation, drafting, submission for the approval of Congress, promulgation, registration, execution, and denunciation, of treaties and international agreements; to accede to open conventions or act as a depository for them, in agreement with the competent official bodies."

2. It has been generally understood that a distinction should be drawn between treaties in the strict constitutional sense and international undertakings which, as a group, might be called agreements in a simplified form, requiring no parliamentary approval or ratification. The latter, under the Chilean constitutional system, may refer only to matters within the ordinary competence of the Executive Power and have not the effect, under domestic law, of an Act of Congress. They include administrative agreements, agreements specifying measures of execution, the interpretation of previous conventions and other conventions of a similar type.

3. Commercial conventions in Chile enjoy a special legal position. Article 2 of Act No. 5142 of 10 May 1933, contains the following provisions:

"The President of the Republic is authorized to change the rates of duty established in the Customs Tariff when the interests of the country make it advisable to put into force a commercial convention which has not yet been ratified, and only pending the ratification of such convention.

"These changes in rates of duty shall come into force in each case on the date fixed by the President of the Republic and shall remain in force for a period of 12 months."

4. As regards judicial decisions, it may be said that these are unanimous in recognizing that a treaty concluded and promulgated in the regular manner has the force of law in Chile.

5. In general terms, the practice followed by the Chilean Government in respect of the conclusion of treaties is as follows:

The Government of Chile appoints a plenipotentiary, who, if the convention is to be signed in Chile, is usually the Minister of Foreign Affairs, but negotiations are generally carried out by qualified officials of the Ministry and of the competent technical bodies. When the treaty is to be negotiated in a foreign country, the Chilean plenipotentiary is usually the diplomatic representative accredited to that country, or in special cases, a plenipotentiary *ad hoc*, or the delegate, or delegates, to the international body or conference concerned, advised, when necessary, by experts who also take part in the negotiation or discussion of the agreement. It often happens that the convention is signed by a different plenipotentiary who has had no part in the negotiations, acting on direct instructions from the Ministry. When the treaty has been signed in satisfactory terms the Ministry of Foreign Affairs submits its official text, in Spanish, to the approval of the National Congress by means of a written Message signed by the President of the Republic and the Minister of Foreign Affairs.

6. The approval of the National Congress is communicated to the Ministry of Foreign Affairs by an official letter empowering the President of the Republic to proceed to the ratification of the said treaty. An instrument of ratification is drawn up, and signed, by the President of the Republic and by the Minister of Foreign Affairs. When the other signatory issues a similar instrument of ratification, the ratifications are exchanged in the case of bilateral treaties; in the case of multilateral treaties, Chile's ratification is deposited.

7. Once the ratifications have been exchanged or deposited, the treaty is considered as binding upon the Government of Chile. Nevertheless the Ministry of Foreign Affairs, in conformity with Decree No. 328 of 21 June 1926, issues a decree promulgating the international treaty concerned, and this decree is signed by the President of the Republic and the Minister of Foreign Affairs, an authorized copy being issued for publication in the Official Gazette.

8. All treaties and agreements which have entered into force and have been promulgated are sent for registration with the Secretariat of the United Nations, in conformity with article 102 of the Charter.

9. Accession to an international convention is subject to the same procedure as ratification. If the text of a treaty requires its acceptance, the constitutional procedure for ratification is followed, as there are no provisions relating to the new term "acceptance".

## 16. China

CONSTITUTION OF 1 JANUARY 1947. TRANSLATION PUBLISHED BY THE CHINESE MINISTRY OF INFORMATION, NANKING 1947

*Article 38.* The President shall, in accordance with the provisions of the Constitution, exercise the powers of conclusion of treaties, declaration of war, and making of peace.

. . .

*Article 53.* The Executive Yuan is the highest administrative organ of the State.

. . .

*Article 58.* Prior to the submission to the Legislative Yuan of any ... Bill concerning ... treaties..., the President and the Heads of the various Ministries and Commissions of the Executive Yuan shall present the said Bill to the Executive Yuan Council for discussion and decision.

. . .

*Article 62.* The Legislative Yuan is the highest legislative organ of the State.

*Article 63.* The Legislative Yuan shall have the power to decide upon ... any Bill concerning ... conclusion of peace, treaties ...

## 17. Colombia

*(a)* CONSTITUTION OF 16 FEBRUARY 1945. TEXT FURNISHED BY THE COLOMBIAN MINISTRY OF FOREIGN AFFAIRS. TRANSLATION BY THE SECRETARIAT OF THE UNITED NATIONS

*Article 76.* Congress is vested with the power of making laws. By means of these laws it exercises the following functions:

. . .

(22) To approve, or withhold approval of, treaties and conventions entered into by the Government with foreign Powers.

*Article 78.* Congress and each of its houses are forbidden:

. . .

(4) To require the Government to transmit to them the instructions given to diplomatic agents, or to give information relative to negotiations of a confidential character. . . .

. . .

*Article 120. ...*

(20) It is the duty of the President of the Republic, as the supreme administrative authority, to direct diplomatic and commercial relations with other Powers or sovereigns, to appoint and receive diplomatic agents, and to conclude with foreign Powers treaties and conventions which shall be submitted for the approval of Congress.

*(b)* ACT 7 OF 30 NOVEMBER 1944 RELATING TO THE VALIDITY AND PUBLICATION OF INTERNATIONAL TREATIES IN COLOMBIA. TEXT SUPPLIED BY THE COLOMBIAN MINISTRY OF FOREIGN AFFAIRS. TRANSLATION BY THE SECRETARIAT OF THE UNITED NATIONS

*Article 1.* Treaties, pacts, conventions, agreements or other international acts approved by Congress in accordance with articles 69 and 116 of the Constitution,[1] shall not be considered to have the force of domestic law so

[1] At the time of the passing of the Act the Constitution of 1886, as amended, was in force. The articles specified in the Act appear to relate to matters of procedure.

long as they have not been confirmed as such by the Government by means of an exchange of letters of ratification or the deposit of instruments of ratification or other similar formality, unless it is expressly enacted that the terms of the treaty, convention, agreement, etc., shall have the force of domestic law. ...

The foregoing shall not prevent the Executive Organ from ordering the application of the provisions of a particular treaty, convention, etc., as executive provisions prior to the completion of the formalities for its approval should it deem such action necessary. This provision shall apply only to such treaties, conventions, pacts or agreements as obtain legislative approval after the entry into force of this Act.

*Article 2.* As soon as the international obligations assumed by Colombia under a treaty, agreement, convention, etc. have become binding, the Executive Organ shall promulgate a decree in which the text of the treaty or convention referred to shall be included, as well as the text of any reservations formulated by the Government at the time of the deposit of its ratification.

*Article 3.* In addition to being subject to the provisions of this Act and subject to publication in the Official Journal, each decree promulgating treaties and conventions shall be published in a separate series and numbered consecutively according to the date on which the international obligation assumed by Colombia became binding.

*Article 4.* When a treaty, convention, agreement, etc., ceases to be in force for Colombia because of its non-validity, lapse or for any other reason, the Executive Organ shall issue a decree stating this fact and the date on which the treaty ceased to be valid for Colombia. These decrees shall be published as supplements to the series referred to in article 3, and reference shall be made in the text of such decrees to their serial number in the said series.

## 18. Costa Rica

CONSTITUTION OF 8 NOVEMBER 1949. TEXT SUPPLIED IN ENGLISH BY THE MINISTRY OF FOREIGN AFFAIRS

*Article 7.* No authority may conclude pacts, treaties or conventions which are in conflict with the sovereignty and independence of the Republic. Any person so doing shall be tried for treason.

Any treaty or convention negotiated by the Executive Power which concerns the territorial integrity or political organization of the country shall require the approval of the Legislative Assembly by a vote of not less than three-quarters of its total membership and the approval by a two-thirds majority of a Constituent Assembly convened for that purpose.

*Article 121.* In addition to other powers conferred upon it by the present Constitution, it shall rest exclusively with the Legislative Assembly:

. . .

(4) To approve or withheld approval of international agreements, treaties and concordats;

. . .

(6) To authorize the Executive Power to declare a state of national emergency and to negotiate peace;

*Article 140.* The President and the Minister of State are jointly responsible for the following:

. . .

(10) The conclusion of agreements, treaties and concordats, their promulgation and application after their approval and ratification by the Legislative Assembly, or, where necessary, by a Constituent Assembly, as provided in this Constitution;

. . .

(12) The direction of the international relations of the Republic.

## 19. Cuba

CONSTITUTIONAL LAW OF 4 APRIL 1952. TEXT FROM GACETA OFICIAL 4 APRIL 1952. TRANSLATION BY THE SECRETARIAT OF THE UNITED NATIONS. [1]

*Article 120.* The President of the Republic shall:

. . .

*(d)* Direct diplomatic negotiations and conclude treaties with other nations, after consultation with the Council of Ministers and the Consultative Council when he deems it necessary.

*Article 133.* In the exercise of its functions as legislative authority, the Council of Ministers shall have the following powers:

. . .

*(e)* To approve treaties negotiated by the President of the Republic with other nations.

. . .

*(p)* To declare war and to approve peace treaties negotiated by the President of the Republic.

*Article 138.* The Consultative Council shall be heard:

*(a)* In connexion with treaties of commerce negotiated by the President of the Republic with other nations.

. . .

*(f)* In connexion with the declaration of war and peace treaties.

## 20. Czechoslovakia

CONSTITUTION OF 9 JUNE 1948. ENGLISH TRANSLATION PUBLISHED BY THE CZECHOSLOVAK MINISTRY OF INFORMATION AND PUBLIC CULTURE

*Article 74.* The President of the Republic:

(1) Shall represent the State externally. He shall negotiate and ratify international treaties. Political treaties, and economic treaties of a general

[1] *Article 254.* The third Sunday of November 1953 has been decided on as the date of the general elections.

*Article 256.* The Council of Ministers will draw up a project of reform to the constitutional text of 1940, which will be submitted to a referendum at the convoked general elections. If this project of reform is rejected, the Constitution of 1940 will again come into force on the date when the President of the Republic takes office as Chief Executive.

character, as well as such treaties as require legislation in order to be carried into effect, shall require approval by the National Assembly prior to ratification. Treaties involving alteration of the State boundaries shall be enacted by the National Assembly in the form of a Constitutional Law (section 166 (1)). The negotiation of international treaties and agreements which do not require approval by the National Assembly, and which are not subject to ratification, may be delegated by the President to the Government, and, with the consent of the Government, to individual members thereof. The conditions in which economic treaties of a general nature may be executed even prior to approval by the National Assembly, shall be prescribed by law;

## 21. Denmark

*(a)* CONSTITUTION OF 5 JUNE 1915 (AS AMENDED). OFFICIAL DANISH TRANSLATION

*Article 18.* Without the consent of the Rigsdag [1], the King shall not declare war or make peace, make or dissolve alliances or conclude or terminate commercial treaties, cede any part of the country, or undertake any engagement that may alter existing constitutional conditions.

*(b)* ACT RESPECTING THE HOME GOVERNMENT OF THE FARÖE ISLANDS (ACT NO. 137 OF 23 MARCH 1948). TRANSLATION FROM *Yearbook on Human Rights for 1948* (UNITED NATIONS, 1950), P. 55

*Article 5.* The competence of the Faröe authorities shall be subject to the limitations resulting from the rights and obligations for the time being in force under treaties and other international agreements.

The authorities of the Kingdom shall decide questions concerning the foreign relations of the Kingdom.

. . .

*Article 7.* Bills originating with the Danish Government authorities that contain provisions exclusively applicable to the Faröe Islands shall be communicated to the Faröe Home Government for consideration before they are introduced in the Rigsdag. Danish laws concerning local conditions in the Faröe Islands shall also be communicated to the Faröe Home Government for consideration before they are given effect in the Islands. The same procedure shall apply with respect to treaties and other international agreements needing ratification by the Rigsdag and concerning the special interests of the Islands.

*Article 8.* Where the Faroe Home Government so requests, a specialist in Faröe affairs may be appointed after consultation with the National *Landsstyre* to assist the Ministry of Foreign Affairs in matters concerning the special economic interests of the Faröe Islands. Similarly an assistant dealing particularly with the interests of the Faröe Islands shall be appointed to assist Danish representatives in countries in which the Islands have special economic interests. The Faröe Home Government may represent the special interests of the Islands in negotiations with foreign countries on trade and fishery agreements. In matters of special interest to the

[1] Article 29. The Rigsdag consists of the Folketing and the Landsting.

Islands the Minister of Foreign Affairs may authorize representatives of the Faröe Home Government to conduct negotiations directly with the assistance of the Danish Foreign Office.

## 22. Dominican Republic

CONSTITUTION OF 10 JANUARY 1947. TEXT FROM *Constitución de la República Dominicana* (EDICIÓN OFICIAL, 1943). TRANSLATION BY THE SECRETARIAT OF THE UNITED NATIONS

*Article 33.* Congress shall have power:

(15) To approve or withhold approval of international treaties and conventions concluded by the Executive Power.

*Article 49.* . . .
The President of the Republic shall have power:
. . .

(7) To ..., direct diplomatic negotiations and conclude treaties with foreign nations, and shall submit all treaties to the approval of Congress failing which they shall have no validity and shall not be binding on the Republic.

## 23. Ecuador

CONSTITUTION OF 31 DECEMBER 1946. TEXT SUPPLIED BY THE MINISTRY OF FOREIGN AFFAIRS. TRANSLATION BY THE SECRETARIAT OF THE UNITED NATIONS

*Article 53.* The following powers are vested in Congress:
. . .

(15) To approve or withhold approval of public treaties and other conventions, which may not be ratified without the approval of Congress.
. . .

*Article 92.* The powers and duties of the President of the Republic shall be as follows:
. . .

(7) To direct the international relations and diplomatic negotiations of the Republic; to enter into treaties and ratify them, having first secured the approval of Congress, and to exchange ratifications.
. . .

*Article 71.* Treaties and conventions shall be considered by both Houses of Congress in joint session in a single debate ... and any decree issued in that connexion shall not be subject to the general rules concerning the period for promulgating laws. In consequence, the Executive Power may delay ratification if it deems this advisable, reporting its decision to Congress, in public or secret session, at its discretion.

## 24. Egypt

*(a)* Egyptian Constitution of 30 April 1923. Text furnished by the Permanent Delegation of Egypt

*Article 36.* Le Roi est le commandant suprême des forces de terre et de mer. Il nomme et licencie les officiers. Il déclare la guerre, fait la paix et conclut des traités dont il donne connaissance au Parlement aussitôt que l'intérêt et la sûreté de l'Etat le permettent, en y joignant les communications convenables. Toutefois, une guerre offensive ne peut être déclarée sans l'assentiment du Parlement. Les traités de paix, d'alliance, de commerce, de navigation, ainsi que tous ceux qui entraînent soit une modification du territoire de l'Etat, soit une diminution de ses droits de souveraineté, soit une dépense à la charge du trésor public, ou qui porteraient atteinte aux droits publics ou privés des citoyens égyptiens, n'auront effet qu'après avoir reçu l'assentiment du Parlement. Dans aucun cas, les articles secrets d'un traité ne peuvent être destructifs des articles patents.

*(b)* Rules of Procedure of the Chamber of Deputies. Text furnished by the Permanent Delegation of Egypt

*Article 87.* Lorsque la Chambre est saisie d'un projet de loi portant approbation d'un traité conclu entre le Gouvernement et une Puissance étrangère, auquel il n'est pas admis d'apporter des modifications, elle peut ou accepter le traité, le rejeter, ou en ajourner l'examen. Dans le cas de rejet elle signale au Gouvernement les dispositions du traité qui ont motivé son intention de ratifier le traité.

*(c)* Memorandum of 30 April 1951 from the Permanent Delegation of Egypt

Le Roi, Chef Suprême de l'Etat, est le seul, en principe, qui a la prérogative de conclure les Traités avec les Puissances étrangères, ou de modifier les Traités existant entre l'Égypte et ces Puissances.

A cet effet la Constitution égyptienne prévoit dans son article 46 que « le Roi est le Commandant Suprême des forces de terres et de Mer... et conclut les Traités ».

2. Or, comme le Roi exerce le pouvoir par l'entremise de ses Ministres (article 48 de la Constitution) c'est donc le Gouvernement qui assume, en fait, la conclusion des Traités. Il est l'autorité qualifiée pour entreprendre des négociations ou entrer dans des pourparlers avec un Etat étranger, au nom du peuple égyptien, et de prendre, en somme, les diverses dispositions pour aboutir à la conclusion d'un Traité avec un Etat étranger ou à la modification des Traités en vigueur.

3. Les deux Chambres du Parlement n'interviennent point dans les pourparlers ou dans les négociations qui précèdent ou accompagnent la conclusion des Traités.

Le Gouvernement n'est tenu de donner connaissance au Parlement des résultats auxquels aboutissent les négociations que si l'intérêt et la sûreté de l'Etat le permettent.

Toutefois dans son article 46 la Constitution égyptienne a énuméré diverses catégories de Traités qui ne peuvent être conclus qu'avec l'assen-

timent des deux Chambres du Parlement. Cette disposition est tirée de la Constitution Monarchique Belge et de l'ancienne Constitution Républicaine Française de 1875.

4. Il est indiscutable que le pouvoir exécutif en exerçant la politique extérieure ne peut le faire que dans les limites de la Constitution et conformément à sa lettre et à son esprit. Considérant par ailleurs que les relations extérieures de l'Etat ne sont qu'une partie de sa politique générale et que le Ministère est responsable de cette politique générale de l'Etat devant le Parlement il devient par le fait même responsable de cette politique devant les Chambres.

5. A remarquer que sa responsabilité lorsqu'il s'agit de sa politique extérieure diffère par la nature des choses de la responsabilité du chef de ses actes intérieurs. Il en est résulté en Egypte, comme ailleurs, une différence correspondante dans les procédés du contrôle parlementaire. Alors que les actes intérieurs du Gouvernement sont assujettis à tout moment aux différents procédés du contrôle parlementaire, la pratique constitutionnelle égyptienne a conféré par contre, au Gouvernement, en ce qui concerne sa politique extérieure, la liberté de choisir le moment où il doit saisir le Parlement des résultats de ses actes. D'autre part, le Parlement ne doit pas restreindre les droits et prérogatives des pouvoirs exécutifs à cet égard. Il ne peut pas refuser par avance de conclure un Traité avec un Etat déterminé ou exiger que les Traités à conclure ne contiennent certaines clauses. De même il ne peut pas désigner au Gouvernement les Etats avec lesquels des Traités doivent être conclus, ni les clauses qui doivent être insérées dans ces Traités. Tout acte de ce genre porterait atteinte aux principes de la séparation des pouvoirs consacrés par la Constitution égyptienne, et constituerait partant une violation de la Constitution.

6. Il n'est pas admis non plus aux Chambres du Parlement d'apporter des modifications aux Traités soumis à leur assentiment. Elles peuvent seulement ou accepter les Traités, les rejeter ou en ajourner l'examen. Dans le cas du rejet elles pourront signaler au Gouvernement les dispositions du Traité qui ont motivé pareille attitude.

Cette règle se trouve expressément consacrée par le règlement intérieur de la Chambre des Députés.

7. Il est de pratique en Egypte que les Traités devant être soumis au Parlement pour son assentiment conformément à l'article 46 de la Constitution, lui soient présentés sous forme d'un projet de loi.

8. En principe, tous les traités doivent être promulgués par le pouvoir exécutif. Cette formalité se fait par Décret Royal publié au Journal Officiel et auquel le texte du Traité promulgué est annexé.

9. A ajouter enfin que la Constitution égyptienne tout en présupposant la possibilité de l'existence des articles secrets dans un Traité quelconque conclu par le Gouvernement, stipule cependant que ces articles ne peuvent être destructifs des articles patents.

En fait le Gouvernement Egyptien n'a jamais eu recours à cette faculté qui lui est théoriquement reconnue en vertu du texte précité de la Constitution.

## 25. El Salvador

CONSTITUTION OF 8 SEPTEMBER 1950. *Constitución Política de la República de El Salvador (Publicaciones del Ministerio de Relaciones Exteriores, San Salvador, 1950)*. TRANSLATION BY THE SECRETARIAT OF THE UNITED NATIONS

*Article 46.* The Legislative Assembly shall have power:

. . .

(29) To ratify or withhold ratification of all treaties or pacts negotiated by the Executive with other Nations. In no case may treaties or conventions that in any way restrict or affect any constitutional provision be ratified.

For the ratification of any treaty or pact which submits to arbitration any question relating to the boundaries of the Republic the approval of at least three-quarters of the Deputies shall be required.

. . .

*Article 78.* The Executive shall have power:

. . .

(12) To conclude treaties and any international conventions, submitting them to the ratification of the Legislative Assembly, and to see that they are implemented.

## 26. Ethiopia

CONSTITUTION OF 16 JULY 1931. OFFICIAL ETHIOPIAN TRANSLATION

*Article 14.* The Emperor has legally the right to negotiate and sign all treaties.

## 27. Finland

MEMORANDUM OF 13 MARCH 1951 FROM THE GOVERNMENT OF FINLAND. ORIGINAL TEXT IN ENGLISH

1. The principal legislative regulations relating to treaties and other international agreements are included in the Form of Government Act and the Diet Act of Finland and read as follows:

(a) *Form of Government Act of 17 July 1919*

*Article 33.* The President shall determine the relations of Finland to foreign Powers; yet the treaties concluded with foreign Powers must be approved by the Diet in so far as they contain stipulations falling within the domain of legislation or otherwise requiring, according to the Constitution, the consent of the Diet. Decisions of peace and war shall be taken by the President with the consent of the Diet. All communications to foreign Powers or to the diplomatic representatives of Finland abroad must be made through the Minister to whose competency the management of foreign affairs belongs.

(b) *Diet Act of 13 January 1918*

*Article 48.* The Committee for Foreign Affairs shall be charged with preparing questions relating to the treaties, or the provisions contained in treaties, which, according to the Form of Government, should be approved by the Diet; it shall also prepare other questions relating to foreign affairs, the decision of which requires the consent of the Diet, as well as all questions of foreign policy which may be referred to it.

The Committee should receive, as often as circumstances require, a statement by the Government concerning the relations of the country with foreign Powers; the Committee can, if it judges it necessary, express its opinion on this statement.

The Committee shall also examine the report aimed at in article 29, [1] in as far as it regards relations with foreign Powers, and make such proposals as the matter may require.

The members of the Committee should observe the discretion that the Government may impose upon them in the case in point.

. . .

*Article 69.* Proposals tending towards the adoption of such provisions, contained in a treaty concluded between Finland and a foreign Power, as are within the legislative sphere shall be considered, whether the provisions be included in a peace treaty or other treaty, according to article 66 [2] and, if fundamental law is concerned, according to paragraph 1 of article 67. [3] However, in these cases, a bill should not be left pending.

A proposal for the adoption by the Diet of a provision, contained in a treaty, by which the State is bound to maintain during a certain time legal provisions in force, as well as a proposal aiming at the adoption of a treaty, or of a provision contained in a treaty, which without touching the legislative domain, by the terms of the Constitution requires the consent of the Diet, shall be considered without regard for the order stipulated in article 66 [3] and the matter shall be decided by the majority of votes. A proposal for a change in the frontiers of the State which constitutes a reduction of territory must nevertheless be carried by at least two-thirds of the votes cast to be considered approved by the Diet.

2. On the basis of these constitutional provisions there has arisen the following practice. The questions to be negotiated are first prepared by Finnish authorities, usually by the Ministry for Foreign Affairs. The initiative in concluding treaties and agreements may be taken by the President of the Republic, the Diet, or the Ministry for Foreign Affairs, and, in matters regarding the International Labour Organisation, also by the Ministry for Social Affairs.

3. The usual procedure is that the treaties and other international agreements are submitted to the approval of the Government, for which reason the signing takes place only after a preliminary approval has been obtained. After a treaty has been concluded it must be ratified by the President. When the instruments of ratification have been duly signed by the parties concerned, they are interchanged or deposited as agreed in the treaty.

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[1] Referring to article 66 of the Diet Act, which requires a prior report of the Government before action is taken by the Diet.

[2] Which requires a majority of the votes cast.

[3] Which requires two-thirds of the votes cast.

4. The terms of a treaty or an agreement are internally carried into force by a law ruling that they are to be observed. In this law the terms are not enumerated, and there is only one article referring to the treaty or the agreement. If the treaty or agreement does not include terms falling within the domain of legislation, the enforcement is carried out by a statute or other administrative measures.

5. The power to decide whether negotiations are to be entered into rests with the President of the Republic, and the negotiators are appointed and authorized by him. The treaties and other international agreements are concluded by the President alone, with exceptions mentioned in the above article 69 of the Diet Act. On account of these exceptions the Diet also plays an important role in the adoption of treaties. As public expenses require the approval of the Diet, such approval is, in practice, necessary for the adoption of treaties involving permanent expenses for the Government.

## 28. France

*(a)* Constitution of 27 October 1946. Text furnished by the French Government

*Article 26.* Les traités diplomatiques régulièrement ratifiés et publiés ont force de loi dans le cas même où ils seraient contraires à des lois françaises, sans qu'il soit besoin pour en assurer l'application d'autres dispositions législatives que celles qui auraient été nécessaires pour assurer leur ratification.

*Article 27.* Les traités relatifs à l'organisation internationale, les traités de paix, de commerce, les traités qui engagent les finances de l'Etat, ceux qui sont relatifs à l'état des personnes et au droit de propriété des Français à l'étranger, ceux qui modifient les lois internes françaises, ainsi que ceux qui comportent cession, échange, adjonction de territoire ne sont définitifs qu'après avoir été ratifiés en vertu d'une loi.

Nulle cession, nul échange, nulle adjonction de territoire n'est valable sans le consentement des populations intéressées.

*Article 28.* Les traités diplomatiques régulièrement ratifiés et publiés ayant une autorité supérieure à celle des lois internes, leurs dispositions ne peuvent être abrogées, modifiées ou suspendues qu'à la suite d'une dénonciation régulière, notifiée par voie diplomatique. Lorsqu'il s'agit d'un des traités visés à l'article 27, la dénonciation doit être autorisée par l'Assemblée nationale, exception faite pour les traités de commerce.

. . .

*Article 31.* Le Président de la République est tenu informé des négociations internationales. Il signe et ratifie les traités.

Le Président de la République accrédite les ambassadeurs et les envoyés extraordinaires auprès des puissances étrangères; les ambassadeurs et les envoyés extraordinaires sont accrédités auprès de lui.

*(b)* Memorandum of 10 January 1953 from the French Government

Le droit et la pratique français concernant la conclusion et l'application des traités internationaux peuvent être dans leurs grandes lignes résumés comme suit:

## I. — *La négociation et la conclusion des traités*

La négociation et la conclusion des traités sont de la compétence exclusive du pouvoir exécutif.

C'est ce principe qu'énonce l'article 31 de la Constitution du 27 octobre 1946: « Le Président de la République est tenu informé des négociations internationales. Il signe et ratifie les traités. »

En pratique il y a quelques différences entre la procédure suivie pour les traités bilatéraux négociés par les représentants des deux Etats concernés et la procédure suivie pour les traités plurilatéraux (principalement les traités généraux) négociés par une conférence internationale ou un organe d'une institution internationale.

(a) *Traités bilatéraux*

Le Ministre des Affaires étrangères ou des agents diplomatiques placés sous son autorité négocient avec les représentants de l'autre partie. Quand les deux parties sont tombées d'accord sur un texte définitif, parfois elles marquent leur accord en paraphant le texte, la signature devant intervenir plus tard. Le plus souvent à la fin des négociations on procède simplement à la signature qui exprime non seulement un accord sur le texte définitif mais encore l'intention des parties de s'engager. (En ce qui concerne la signature voir ci-dessous n° II.)

(b) *Traités plurilatéraux*

Dans le cas où les traités sont négociés par une conférence diplomatique, les pouvoirs des délégués à la conférence sont généralement délivrés par le ministre des Affaires étrangères et non par le Président de la République, si ces pouvoirs ne les habilitent qu'à négocier. Les délégués ainsi accrédités prennent part aux discussions et aux votes, notamment au vote final sur l'ensemble du traité, marquant la conclusion du traité qui est ensuite ouvert à la signature des gouvernements. Si les pouvoirs sont donnés aux délégués à la fois pour négocier ou pour signer, ils doivent émaner du Président de la République.

Dans le cas où les traités sont négociés par un organe d'une Institution internationale, la situation est la même sauf qu'il arrive que les délégués soient munis de pouvoirs permanents.

Des problèmes particuliers se sont posés à cet égard en ce qui concerne la représentation de la France auprès des institutions spécialisées des Nations Unies. En l'absence d'un texte général précisant l'autorité qui représente le Gouvernement auprès des administrations internationales, la pratique varie d'une institution à l'autre.

Dans certains cas le Ministère technique intéressé représente le Gouvernement auprès de l'institution spécialisée. Dans d'autres cas au contraire et notamment pour toutes les institutions dernièrement créées, c'est le Ministère des Affaires Etrangères qui représente et engage le Gouvernement vis-à-vis de ces organismes. Il en est notamment ainsi de l'Organisation mondiale de la Santé, de l'Organisation de l'Agriculture et de l'Alimentation, de l'Organisation de la Météorologie.

Le Ministère technique n'agit qu'en vertu d'une délégation de pouvoirs formels, plus ou moins large, du Ministère des Affaires étrangères. Celui-ci se réserve toujours la désignation des délégués, la signature des instructions et la conclusion de tous actes engageant le Gouvernement français. C'est

également à lui qu'est destiné le rapport établi à l'issue de l'Assemblée générale de l'Organisation considérée; et c'est de même lui qui reçoit en original ou en copie la correspondance échangée entre celle-ci et le Gouvernement.

La négociation est l'affaire du gouvernement, c'est-à-dire des ministres; néanmoins le Président de la République doit être informé conformément à l'art. 31 de la Constitution qui dispose: « Le Président de la République est tenu informé des négociations internationales. »

Il est fréquent que d'autres ministres que le Ministre des Affaires étrangères soient spécialement intéressés par un traité dont l'objet rentre dans le domaine de leur compétence particulière (commerce, finance, instruction publique, etc.). En pareil cas il arrive que le Ministre spécialement intéressé joue le rôle principal dans la préparation et la négociation du traité, mais le Ministre des Affaires étrangères conserve la responsabilité principale pour ce qui concerne les éléments formels de la procédure (délivrance des pouvoirs, établissement des clauses finales, dépôt des instruments de ratification, etc.).

Un rappel exprès de ces principes a été fait par le Ministère des Affaires étrangères dans une note du 14 mars 1950, à la suite de certains errements constatés depuis 1945.

### II. — *La signature et la ratification*

Aux termes de l'article 31 de la Constitution « Le Président de la République... signe et ratifie les traités ».

(a) *Signature.* La signature est donnée par un agent auquel des pouvoirs ont été délivrés par le Président de la République.

Certains traités ne prévoient pas qu'une ratification devra suivre la signature. Dans ce cas la signature, si elle est donnée sans condition (une signature *ad referendum* est une signature sous condition), engage définitivement l'Etat.

(b) *Ratification.* Le Président de la République signe les instruments de ratification qui, dans le cas d'une convention bilatérale, sont remis à l'autre partie, et qui dans le cas d'une convention plurilatérale sont déposés auprès soit de l'Institution internationale dont un organe a été l'auteur du traité, soit d'un gouvernement chargé du Secrétariat du Traité.

Il faut se souvenir que l'article 38 de la Constitution, qui consacre un des principes fondamentaux du régime parlementaire, dispose: « Chacun des actes du Président de la République doit être contresigné par le Président du Conseil des ministres et par un ministre. » En conséquence les actes précités sont contresignés par le Président du Conseil et le Ministre des Affaires étrangères. Ces actes ainsi contresignés engagent la responsabilité non seulement des deux ministres susmentionnés mais celle du gouvernement tout entier pour autant qu'ils relèvent de la politique générale du Cabinet.[1] Aussi bien les traités de quelque importance qui tendent à fixer la politique internationale de la France sont aux divers stades de la procédure soumis au Conseil des ministres qui en discute.

L'exigence du contreseing ministériel est parfois de nature à poser des problèmes délicats de validité constitutionnelle lorsque le contreseing

[1] L'article 48 de la Constitution dispose:
« Les Ministres sont collectivement responsables devant l'Assemblée de la politique générale du Cabinet et individuellement de leurs actes personnels. »

émane de ministres démissionnaires. C'est une situation qui peut se produire aux divers stades successifs de l'élaboration du traité.

(1) C'est ainsi que le traité franco-chinois du 4 avril 1885 (préliminaires de paix) a été signé par le Général Billot sur la base de pleins pouvoirs donnés par le Président Grévy avec le contreseing du Président du Conseil Jules Ferry, démissionnaire depuis le 30 mars.

(2) Par contre la signature par le Président Auriol du traité franco-cambodgien, prévue pour le début d'octobre 1949, a été ajournée au 8 novembre 1949, à la suite de la démission du Cabinet Queille le 6 octobre, la formation d'un nouveau Gouvernement (Ministère Bidault, constitué le 28 octobre 1949) ayant été jugée indispensable pour dissiper toute incertitude quant à la validité du contreseing ministériel.

(3) En sens inverse on rappellera que la ratification des accords sur les dettes de guerre (accord Mellon-Bérenger du 29 avril 1926 et accord Gaillaux-Churchill du 13 juillet 1926) a été autorisée par la loi du 28 juillet 1929, cette loi étant intervenue entre la démission du Cabinet Poincaré (26 juillet) et la formation du Cabinet Briand (29 juillet), et le contreseing ayant émané en l'espèce de ministres démissionnaires.

### III. — *Le rôle du pouvoir législatif en matière de traités*

L'article 27 de la Constitution dispose:

« 27. — Les traités relatifs à l'organisation internationale, les traités de paix, de commerce, les traités qui engagent les finances de l'Etat, ceux qui sont relatifs à l'état des personnes et au droit de propriété des Français à l'étranger, ceux qui modifient les lois internes françaises, ainsi que ceux qui comportent cession, échange, adjonction de territoire, ne sont définitifs qu'après avoir été ratifiés en vertu d'une loi.

« Nulle cession, nul échange, nulle adjonction de territoire n'est valable sans le consentement des populations intéressées. »

*(a)* L'intervention du pouvoir législatif quand elle est requise ne l'est qu'à un des derniers stades de la procédure. Le parlement au moyen d'une loi autorise l'Exécutif à donner une ratification en vertu de laquelle la France sera engagée par le traité. [1]

Depuis longtemps consacré en doctrine, ce point de vue a été à son tour admis par la jurisprudence, tant judiciaire qu'administrative, celle-ci analysant l'intervention de l'organe législatif comme tendant uniquement à « autoriser » le Président de la République à ratifier les traités (Cour d'appel de Paris, 28 janvier 1926, Renault et Société des Usines Renault c. Société Rousski-Renault, Recueil Sirey, 1927, 2.I avec la note du pro-

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[1] Voir par exemple la Loi n° 49-984 du 23 juillet 1949 autorisant le Président de la République à ratifier le statut du Conseil de l'Europe signé à Londres le 5 mai 1949 et fixant les modalités de désignation des représentants de la France à l'Assemblée consultative prévue par ce statut.

« L'Assemblée nationale et le Conseil de la République ont délibéré,

« L'Assemblée nationale a adopté,

« Le Président de la République promulgue la loi dont la teneur suit:

« Article 1er. — Le Président de la République *est autorisé à ratifier* la convention dite « Statut du Conseil de l'Europe » conclue à Londres le 5 mai 1949, entre le Gouvernement français et les Gouvernements de Belgique, de Danemark, de Grande-Bretagne, des Pays-Bas, d'Irlande, d'Italie, de Luxembourg, de Norvège et de Suède.

« Un exemplaire dudit statut sera annexé à la présente loi... »

fesseur Niboyet; Conseil d'Etat, 7 décembre 1934, Motais de Narbonne, Recueil des arrêts du Conseil d'Etat, p. 1156).

L'intervention du Parlement est également requise quand il s'agit de dénoncer les traités dont la ratification devait être autorisée par le Parlement (voir N° V).

*(b)* L'intervention du Parlement pour autoriser l'Exécutif à ratifier un traité n'est requise que pour certaines catégories de traités dont l'article 26 donne une énumération limitative à savoir:

*(a)* Les traités relatifs à l'organisation internationale.
*(b)* Les traités de paix.
*(c)* Les traités de commerce.
*(d)* Les traités qui engagent les finances de l'Etat.
*(e)* Les traités relatifs à l'état des personnes.
*(f)* Les traités relatifs au droit de propriété des Français à l'étranger.
*(g)* Les traités qui modifient les lois internes françaises.
*(h)* Les traités qui comportent cession, échange, adjonction de territoire. Pour ces derniers traités la Constitution exige en outre le consentement des populations intéressées.

La plupart des éléments de cette énumération sont repris de l'article 8 de la loi constitutionnelle du 16 juillet 1875 qui formait un des éléments de la Constitution qui régissait la France sous la Troisième République.

Application de ces dispositions a été faite dans les circonstances suivantes:

(1°) Traités relatifs à l'organisation internationale: convention du 22 juillet 1946 créant l'Organisation mondiale de la Santé (ratification autorisée par la loi du 13 mai 1948), convention du 6 février 1947 créant la Commission du Pacifique Sud (loi du 29 mai 1948), convention de Coopération économique européenne signée à Paris le 16 avril 1948 (loi du 10 juillet 1948), convention internationale des télécommunications signée à Atlantic City le 2 octobre 1947 (loi du 24 avril 1949), statut de Londres du 5 mai 1949 portant création du Conseil de l'Europe (loi du 23 juillet 1949), convention de Paris du 5 juillet 1947 relative à l'Union postale universelle (loi du 2 août 1949), traité de l'Atlantique Nord signé à Washington le 4 avril 1949 (loi du 2 août 1949), conventions de Genève du 12 août 1949 pour la protection des victimes de la guerre (loi du 16 février 1951), convention du 6 mars 1948 créant l'Organisation maritime consultative intergouvernementale (loi du 11 avril 1951), traité du 18 avril 1951 instituant la Communauté européenne du charbon et de l'acier (loi du 10 avril 1952), protocole de Genève du 19 septembre 1949 relatif à la circulation routière (loi du 12 juillet 1952), convention de Londres du 19 juin 1951 sur le statut des forces des Etats parties au Pacte Atlantique (loi du 16 juillet 1952), convention de Washington du 8 février 1949 sur les pêcheries de l'Atlantique du Nord-Ouest (loi du 20 novembre 1952).

(2°) Traités de Paix: traité de paix du 10 février 1947 avec l'Italie (loi du 26 juin 1947), traité de paix du 8 septembre 1951 avec le Japon (loi du 11 avril 1952).

(3°) Traités engageant les finances de l'Etat: convention financière franco-libanaise du 24 janvier 1948 (loi du 22 septembre 1948), convention franco-tchécoslovaque du 1er décembre 1947 relative au paiement des pensions aux victimes de la guerre (loi du 21 mars 1949), convention financière franco-syrienne signée à Damas le 7 février 1949 (loi du 2 août 1949), convention relative aux doubles impositions signée avec les Etats-Unis le 18 octobre 1946 (loi du 2 août 1949), avenant relatif aux doubles

impositions signé avec la Suède le 8 avril 1949 (loi du 23 décembre 1950), convention franco-britannique du 23 janvier 1950 sur l'octroi de pensions aux victimes civiles de la guerre (loi du 3 janvier 1951), convention franco-canadienne du 16 mars 1951 relative aux doubles impositions (loi du 22 décembre 1952).

(4°) Traités relatifs à l'état des personnes: convention d'établissement signée à Paris le 3 mars 1950 entre la France et la Sarre (loi du 3 décembre 1950).

(5°) Traités relatifs au droit de propriété des Français à l'étranger: accords conclus le 16 juillet 1947 avec le Danemark et le 28 octobre 1947 avec les Etats-Unis relativement à la restauration de certains droits de propriété industrielle atteints par la 2ème guerre mondiale (loi du 28 février 1948), accords analogues conclus avec le Canada à Ottawa le 5 mai 1948 et avec l'Italie à Rome le 29 mai 1948 (loi du 1er janvier 1949), convention franco-sarroise du 15 décembre 1948 concernant la propriété industrielle (loi du 15 mars 1950), convention de Bruxelles du 26 juin 1948 portant revision de la convention d'Union de Berne pour la protection des œuvres littéraires et artistiques (loi du 21 décembre 1950), accords conclus le 2 juin 1950 avec la Tchécoslovaquie et le 12 juin 1950 avec la Hongrie sur l'indemnisation des intérêts français atteints par les mesures de nationalisation prises dans ces deux Etats (loi du 24 mai 1951), accord franco-cubain du 17 janvier 1951 sur la propriété industrielle (loi du 27 juin 1952), accord conclu le 14 avril 1951 avec la Yougoslavie sur l'indemnisation des intérêts français atteints par les mesures de nationalisation prises dans cet Etat (loi du 21 juillet 1952).

(6°) Traités modifiant le territoire national: traité signé le 2 février 1951 avec l'Inde concernant la cession du territoire de la Ville libre de Chandernagor (loi du 17 avril 1952).

Deux additions ont été faites. L'une concerne les traités relatifs à l'organisation internationale, l'autre concerne les traités qui modifient les lois internes françaises. La première addition s'explique par l'importance que le législateur constituant a attaché à l'organisation internationale.

La pratique française interprète l'expression « traités concernant l'organisation internationale » comme s'appliquant aux seuls traités créant une organisation internationale permanente investie de pouvoirs de décision ou imposant des renonciations ou des limitations de souveraineté à la France.

La seconde est la conséquence du fait que la Constitution de 1946 donne la primauté aux traités sur les lois ordinaires. Si l'intervention du Parlement n'était pas requise, le pouvoir exécutif pourrait de sa seule autorité abroger ou amender les lois existantes au moyen de traités.

L'innovation n'est d'ailleurs qu'apparente, la jurisprudence interne ayant spontanément consacré cette solution avant 1940.

Par ailleurs on doit tenir compte de l'intervention du Conseil économique pour les traités d'ordre économique (cas du traité d'union douanière franco-italien du 26 mars 1949 et du traité du 18 avril 1951 instituant la communauté européenne du charbon et de l'acier, respectivement approuvés par lui le 21 novembre 1950 et le 29 novembre 1951). On notera enfin que la ratification des traités échappe à la procédure du débat restreint instituée lors de l'adoption des modifications au règlement de l'Assemblée Nationale le 27 mars 1952.

S'il s'agit de traités portant sur les objets énumérés à l'article 26, l'Exécutif ne pourrait éluder l'obligation de demander au Parlement l'autorisation de ratifier en concluant des traités comportant simplement

une signature et ne prévoyant pas une ratification. En pareil cas l'Exécutif devrait demander l'autorisation du Parlement avant de donner une signature définitive.

Il arrive que le Gouvernement, sans attendre que le stade de la conclusion du traité ait été atteint, saisit le parlement pour lui expliquer sa position et lui faire part de ses intentions en ce qui concerne le traité projeté, de façon à s'assurer de l'approbation du parlement quand celui-ci ultérieurement sera appelé à autoriser la ratification du traité.

### IV. *La valeur des traités dans le droit interne*

La primauté du traité par rapport à la loi. Cette primauté est établie par les articles 26 et 27 de la Constitution.

L'article 26 de la Constitution est ainsi conçu:

« 26. — Les traités diplomatiques régulièrement ratifiés et publiés ont force de loi dans le cas même où ils seraient contraires à des lois françaises, sans qu'il soit besoin pour en assurer l'application d'autres dispositions législatives que celles qui auraient été nécessaires pour assurer leur ratification. »

Cet article pose en premier lieu deux principes, celui de l'indépendance du traité par rapport à la loi et celui de la supériorité du traité par rapport à la loi.

*(a)* Les traités ont force de loi, c'est-à-dire qu'il n'est pas besoin, pour qu'ils soient applicables, qu'une loi intervienne reproduisant leurs dispositions. Le traité comme tel est obligatoire et s'impose aux autorités publiques ainsi qu'aux particuliers.

*(b)* En cas de contradiction entre un traité et une loi la préférence est donnée au traité. Le traité prime la loi sans qu'il y ait à distinguer s'il est antérieur ou postérieur à la loi avec laquelle il est en contradiction. En effet la préférence donnée au traité sur la loi est la règle. Elle résulte de la primauté que la Constitution confère au traité sur la loi en vertu de l'article précité et de l'article 27 qui déclare: « Les traités diplomatiques régulièrement ratifiés et publiés ayant *une autorité supérieure à celle des lois internes...* »

La tendance actuelle de la jurisprudence est de refuser toute valeur aux traités modifiant la législation interne lorsque leur ratification n'a pas été autorisée par une loi. Il en a été ainsi jugé: 1° pour les traités d'extradition (Cour d'appel de Rouen 31 octobre 1950, Van Erck « Gazette du Palais », 1er mai 1951, et Cour d'appel de Paris, 28 novembre 1950, Van Bellinghen, Recueil Dalloz, 1951, J. 440, avec la note du professeur Carbonnier — *contra* Cour d'appel de Montpellier, 18 janvier 1951, Daem, « Gazette du Palais », 1er mai 1951); 2° pour les traités d'établissement (Tribunal civil de Bonneville, 1er mars 1950, Benzoni et autres c. Davidovici et autres, Recueil Sirey, 1951, 2.79 et Tribunal paritaire d'arrondissement de Pithiviers, 19 avril 1951, époux Naslin c. époux Rimbault, Recueil Dalloz, 1951, J. 337).

Sauf cette réserve, et par application de l'article 27 de la Constitution, la jurisprudence, tant judiciaire qu'administrative, fait prévaloir dans tous les cas les traités internationaux — y compris ceux en vigueur avant 1946 — sur les lois internes contraires. Voir comme applications notables:

(1°) Dans la jurisprudence judiciaire: Cour d'appel d'Aix, 10 novembre 1947, Chouchol c. dame Vita, Recueil Sirey, 1948.2.81, avec la note du professeur Niboyet; Cour d'appel de Paris, 30 janvier 1948, Lambert c.

Jourdan, « Gazette du Palais », 30 mars 1948, et 22 mai 1950, Rollin c. Saint-Léger-Rasson, *ibid.* 8 août 1950; Cour d'appel de Lyons, 16 février 1952, Sanchez *ibid.* 26 février 1952; Tribunal civil de la Seine, 22 juillet 1948, Mandel c. Vatan, *ibid.* 15 octobre 1948, et 5 mai 1949, Fraenkel et Cie Suisse la Vita, *ibid.* 10 juin 1949; Tribunal correctionnel de la Seine, 9 mai 1952, Mayol, *ibid.* 11 juillet 1952; Tribunal correctionnel de Montluçon, 17 juillet 1952, Ministère public c. Cot, *ibid.* 4 novembre 1952; Tribunal correctionnel de Saint-Nazaire, 6 novembre 1952, Ortiz, *ibid.* 6 janvier 1953.

(2°) Dans la jurisprudence administrative: Conseil d'Etat 23 décembre 1949, Société C. O. I. N. F. I., Recueil Sirey, 1950, J.3.54 et 24 octobre 1952, Geimer, arrêt inédit, qui admet implicitement qu'un traité même ratifié par décret l'emporte sur une loi interne contraire. On notera également avec intérêt que, depuis l'arrêt dame Kirkwood du 30 mai 1952 (*Revue du droit public*, 1952, pp. 781-795, avec la note du professeur Waline et les conclusions du Commissaire du Gouvernement Letourneur), le Conseil d'Etat admet qu'à l'appui d'un recours pour excès de pouvoir le requérant peut se prévaloir de la violation d'un traité international au même titre que de la violation de la loi, le traité international ayant force de loi en vertu de l'article 26 de la Constitution.

La règle établie par le traité ne peut donc être abolie ou amendée qu'en dénonçant le traité.

Les conditions qui doivent être remplies pour que les traités soient applicables. Ces conditions sont au nombre de deux:

*(a)* En premier lieu s'il s'agit d'un traité pour lequel, en vertu de l'article 27 de la Constitution, une loi doit intervenir pour autoriser la ratification, il faut que cette loi ait été adoptée.

*(b)* En second lieu il faut que le texte du traité ait été publié. Ceci est une application particulière du principe que toute règle de droit quelle que soit sa source (traité, loi, règlement, etc.) n'est obligatoire que si elle a été portée à la connaissance de ceux qu'elle doit régir. La publication est opérée au moyen d'une insertion au Journal officiel.

Les services du Ministère des Affaires étrangères étudient actuellement les moyens d'assurer la publication de tous les engagements internationaux conclus à quelque titre que ce soit par le Gouvernement français.

### V. *La dénonciation des traités*

L'article 28 de la Constitution dispose:

« 28. — Les traités diplomatiques régulièrement ratifiés et publiés ayant une autorité supérieure à celle des lois internes, leurs dispositions ne peuvent être abrogées, modifiées ou suspendues qu'à la suite d'une dénonciation régulière, notifiée par voie diplomatique. Lorsqu'il s'agit d'un des traités visés à l'article 27, la dénonciation doit être autorisée par l'Assemblée nationale, exception faite pour les traités de commerce ».

*(a)* Les traités « ayant une autorité supérieure à celle des lois internes » il en découle qu'une loi ne peut pas abroger, modifier ou suspendre un traité.

Les autorités qui sont intervenues pour créer l'obligation conventionnelle ont seules compétence pour abroger, modifier ou suspendre cette obligation.

S'il s'agit d'un traité auquel la France est devenue partie sans que le pourvoir législatif ait dû intervenir, le pouvoir exécutif pourra abroger le traité sans l'intervention du pouvoir législatif. Dans le cas contraire la dénonciation devra être autorisée par l'Assemblée nationale.

Application de cette règle a été faite par la loi du 4 janvier 1950 autorisant le Président de la République à dénoncer la Convention internationale du 31 mai 1929 pour la sauvegarde de la vie humaine en mer et à ratifier la convention du 10 juin 1948 se substituant à la précédente.

Toutefois une exception est faite pour les traités de commerce. Ceux-ci ne peuvent être ratifiés qu'en vertu d'une loi (article 27) mais ils peuvent être dénoncés par l'Exécutif sans le concours du Législatif.

*(b)* Les traités ne peuvent être abrogés « qu'à la suite d'une dénonciation régulière notifiée par voie diplomatique ».

Cette stipulation de la Constitution vise à assurer le respect du droit international. En effet la régularité de la dénonciation dont il s'agit est la régularité du point de vue du droit international.

Si, par exemple, le traité contient une clause fixant les conditions de la dénonciation, la dénonciation devra être opérée conformément à cette clause.

## 29. Germany (Demoeratic Republic Germauy)

CONSTITUTION OF 7 OCTOBER 1949. TEXT FROM *Die Verfassung der Deutschen Demokratischen Republik*, PUBLISHED IN 1949 BY "AMT FÜR INFORMATION DER REGIERUNG DER DEUTSCHEN DEMOKRATISCHEN REPUBLIK". TRANSLATION BY THE SECRETARIAT OF THE UNITED NATIONS

*Article 63.* The functions of the People's Chamber include:

... and the approval of the treaties.

. . .

*Article 88.* ... Treaties referring to matters of legislation shall be promulgated like laws.

*Article 105.* The President of the Republic shall represent the Republic in matters of international law.

On behalf of the Republic he shall conclude treaties with foreign countries and sign them.

. . .

*Article 112.* The Republic has the exclusive right to legislate on the following matters:

... foreign relations.

. . .

*Article 117.* The maintenance of foreign relations is within the exclusive province of the Republic.

In certain cases, on matters within the purview of *Land* legislation, the *Laender* may conclude treaties with foreign states; such treaties are subject to the approval of the People's Chamber.

Treaties with foreign states concerning changes of boundaries of the Republic shall be concluded by the Republic, after the consent of the *Land* affected thereby has been obtained. Boundary changes may only be affected by a law of the Republic, unless a mere rectification of boundaries in uninhabited areas is involved.

## 30. Germany [1] (Federal Republic of Germany)

*Section I. German Provisions governing the conclusion of international agreements of the Federal Republic and its* Laender

*(a) Federal legislation of 23 May 1949 (Basic Law)*

*Article 25:* Les règles générales du droit international public font partie intégrante du droit fédéral. Elles ont la prépondérance sur les lois et créent directement des droits et des obligations pour les habitants du territoire fédéral.

*Article 32:* (1) Les relations avec les Etats étrangers incombent à la Fédération.

(2) Un *Land* doit être entendu en temps voulu avant la conclusion d'un traité relatif à sa situation spéciale.

(3) Les *Länder* peuvent passer des traités avec des Etats étrangers avec l'assentiment du Gouvernement Fédéral dans la mesure de leur compétence législative.

*Article 59:* (1) Le Président de la Fédération représente la Fédération dans les relations internationales. Il conclut au nom de la fédération les traités avec les Etats étrangers. Il accrédite et reçoit les représentants diplomatiques.

(2) Les traités réglant les relations politiques de la Fédération ou ayant trait à des matières relevant de la législation fédérale requièrent sous forme de loi fédérale l'agrément ou la participation des organismes législatifs fédéraux compétents. Les prescriptions sur l'administration fédérale s'appliquent *mutatis mutandis* aux accords administratifs. »

*Article 65:* Le Chancelier Fédéral fixe les lignes directrices de la politique et en assume la responsabilité. Dans ces limites, chaque Ministre fédéral dirige son ministère de façon autonome et sous sa propre responsabilité. Le Gouvernement Fédéral statue sur les divergences d'opinions entre les Ministres fédéraux. Le Chancelier Fédéral dirige les affaires gouvernementales selon un règlement intérieur pris par le Gouvernement Fédéral et approuvé par le Président de la Fédération.

*(b) Legislation of the* Laender

(1) *Bade:*

*Article 99 of the Constitution of 22 May 1947*

En ce qui concerne les affaires qui sont de la compétence législative du *Land,* le Gouvernement du *Land* ne peut conclure des traités avec d'autres *Länder* allemands ou avec des Etats étrangers. Les traités doivent être soumis à l'approbation du Landtag.

(2) *Bavaria:*

*Article 47 of the Constitution of 2 December 1946*

Le Ministre-Président assume la Présidence du Gouvernement du *Land* et en dirige les affaires.

[1] The relevant texts are reproduced in the official French version as transmitted to the Secretariat by the Allied High Commissioner for Germany under cover of a letter dated 9 June 1951.

Il fixe les lignes directrices de la politique et en assume la responsabilité devant le Landtag.

Il représente la Bavière dans les relations avec l'extérieur.

Il exerce le droit de grâce dans des cas individuels. L'exécution de la peine capitale est sujette à confirmation par le Gouvernement du *Land*.

Il soumet au Landtag les projets du Gouvernement du *Land*. »

*Article 72 of the Constitution:*

Les lois sont adoptées par le Landtag ou par le peuple (plébiscite).

Les traités sont conclus par le Ministre-Président avec l'approbation préalable du Landtag.

(3) *Bremen:*

*Article 118 of the Constitution of 21 October 1947:*

Le Sénat dirige l'administration selon les lois et les directives données par les citoyens. Il représente la Ville hanséatique libre de Brême dans les relations avec l'extérieur. Le Président du Sénat ou son adjoint sont habilités à faire des déclarations engageant en droit la ville hanséatique libre de Brême.

(4) *Hambourg:* néant.

(5) *Hesse:*

*Article 103 of the Constitution of 11 December 1946:*

Le Ministre-Président représente le *Land* de Hesse. Il peut confier la charge de le représenter au Ministre compétent ou à des instances subordonnées.

Les traités qui sont conclus par le *Land* sont soumis à l'approbation du Landtag.

(6) *Basse-Saxe:*

*Article 26 of the Constitution of 13 April 1951:*

(1) Le Ministre-Président représente le *Land* dans les relations avec l'extérieur.

(2) Les traités se rapportant à des matières faisant l'objet de textes législatifs doivent être approuvés par le Landtag.

(7) *Rhénanie du Nord-Westphalia:*

*Article 57 of the Constitution of 11 June 1950:*

« Le Gouvernement du *Land* représente le *Land* Rhénanie du Nord-Westphalia dans les relations avec l'extérieur. Il peut déléguer cette charge au Ministre-Président, à un autre membre du Gouvernement du *Land* ou à une instance subordonnée. »

*Article 66 of the Constitution of 11 June 1950:*

Les lois sont votées par le Landtag. Les traités du *Land* doivent être soumis à l'approbation du Landtag.

(8) *Rhénanie-Palatinat:*

*Article 101 of the Constitution of 18 May 1947:*

Le Ministre-Président représente le *Land* de Rhénanie-Palatinat. Les traités qui sont conclus par le *Land* doivent être approuvés par le Landtag.

(9) *Schlesvig-Holstein:*

*Article 25 of the Constitution of 13 December 1949:*

(1) Le Ministre-Président représente le *Land* dans la mesure où les lois n'en disposent pas autrement. Il peut déléguer cette charge.

(2) Les traités avec le Gouvernement Fédéral ou avec d'autres *Länder* doivent être approuvés par le Gouvernement du *Land.* Dans la mesure où ces traités se rapportent à des matières faisant l'objet de textes législatifs ou nécessitent la promulgation d'une loi pour leur exécution, ils doivent également être approuvés par le Landtag.

(10) *Wurtemberg-Bade:*

*Article 74 of the Constitution of 20 May 1947:*

Le Staatspräsident représente le *Land* dans les relations avec l'étranger. La conclusion d'un traité doit être approuvée par le Gouvernement et autorisée par le Landtag.

(11) *Wurtemberg-Hohenzollern:*

*Article 47 of the Constitution of 20 May 1947:*

Le Staatspräsident représente le *Land* dans les relations avec l'étranger. La conclusion d'un traité doit être approuvée par le Gouvernement et autorisée par le Landtag.

## *Section II. Directives and Decisions issued by the Allied High Commission for Germany*

(a) *Directive No. 3 (revised)*

SUR LES NÉGOCIATIONS D'ACCORDS INTERNATIONAUX PAR LE GOUVERNEMENT FÉDÉRAL OU LES GOUVERNEMENTS DES *Länder*

La Directive No. 3, bien qu'elle a été publiée au No. 24 du Journal Officiel du 24 juin 1950, est abrogée et remplacée par les dispositions suivantes qui régiront les négociations, par le Gouvernement Fédéral ou les Gouvernements du *Land,* des accords internationaux (autres que les accords de commerce et de paiement):

1. Le Gouvernement Fédéral fournira à la Haute Commission Alliée tous les renseignements appropriés relatifs à ses négociations internationales.

2. La Haute Commission Alliée aura un droit d'intervention dans les négociations affectant les pouvoirs réservés.

3. Les textes, dans la langue ou les langues de l'original, de tous les instruments constitutifs d'un accord conclu seront soumis, après signature, à la Haute Commission Alliée et pourront faire l'objet de sa désapprobation pendant une période de 21 jours. Aucun accord n'entrera en vigueur avant l'expiration de cette période ou de toute période plus courte que la Haute Commission Alliée pourra autoriser.

4. Si, après une décision de non-désapprobation de la Haute Commission Alliée soit expresse, soit tacite faute d'intervention dans le délai de 21 jours prescrit au paragraphe (3) ci-dessus, les autorités compétentes de la République Fédérale d'Allemagne décident de ratifier l'accord proposé sous certaines conditions ou réserves, il conviendra de saisir la Haute Commission

Alliée de ladite approbation conditionnelle ou approbation sous certaines réserves, et l'entrée en vigueur n'interviendra qu'après une nouvelle décision de la Haute Commission Alliée de non-désapprobation, ou à l'expiration d'un nouveau délai de 21 jours à courir du lendemain du jour où ladite approbation conditionnelle ou approbation sous certaines réserves sera parvenue au Secrétariat Général Allié.

5. Une copie certifiée conforme de chaque accord international ainsi que des copies certifiées conformes de tous les instruments de ratification seront déposées auprès de la Haute Commission Alliée.

6. Le Gouvernement Fédéral fournira en outre à la Haute Commission Alliée tous les renseignements et informations relatifs à l'application des accords internationaux que la Haute Commission Alliée pourra demander.

7. Dans le cas de la négociation d'un accord international par un *Land*, la procédure fixée ci-dessus s'appliquera dans la mesure où elle est appropriée, mais toutes les communications entre le Gouvernement du *Land* intéressé et la Haute Commission Alliée se feront par l'entremise du Commissaire du *Land*. En soumettant à la Haute Commission Alliée les accords qui auront pu être conclus, le Gouvernement du *Land* devra administrer la preuve de l'assentiment du Gouvernement Fédéral auxdits accords.

8. La présente Directive entrera en vigueur le 7 mars 1951.

*(Journal Officiel de la Haute Commission Alliée en Allemagne No. 49, 6 mars 1951)*

(b) *Directive No. 6*

TRAITÉS CONCLUS PAR L'ANCIEN REICH ALLEMAND

1. La Haute Commission Alliée transmettra à la République Fédérale toute communication qu'elle aura reçue d'une Puissance intéressée à la suite de l'invitation adressée par les trois Gouvernements alliés et dont l'objet sera la mise en vigueur, entre la République Fédérale et cette Puissance intéressée, d'un ou plusieurs traités de l'ancien Reich allemand. Le Gouvernement Fédéral pourra alors communiquer directement avec la Puissance intéressée en ce qui concerne le ou les traités en question.

2. Si le Gouvernement Fédéral désire qu'un ou plusieurs traités de l'ancien Reich allemand soient mis en vigueur entre la République Fédérale et une ou plusieurs parties à ces traités, il notifiera cette intention à la Haute Commission Alliée. Sur la base de cette notification, la Haute Commission Alliée autorisera le Gouvernement Fédéral à communiquer directement avec la ou les Puissance intéressées en ce qui concerne le ou les traités en question.

3. Lorsque le Gouvernement Fédéral aura officiellement fait savoir à la Haute Commission Alliée que la République Fédérale et la Puissance intéressée désirent d'un commun accord voir mettre en application tout ou partie d'un traité de l'ancien Reich et sont éventuellement d'accord sur la date d'entrée en vigueur de ce traité, la Haute Commission Alliée, sauf désapprobation de sa part, déclarera, dans une communication au Gouvernement Fédéral, que le traité est applicable à la République Fédérale et a force obligatoire à son égard. Cette communication sera considérée comme autorisant le Gouvernement Fédéral et a force obligatoire à son égard. Cette communication sera considérée comme autorisant le Gouver-

nement Fédéral à publier dans le Journal Officiel de la République Fédérale le traité en question ou tous autres avis qui pourraient être appropriés.

4. Lorsqu'une convention multilatérale sera basée sur la réciprocité, elle n'aura effet obligatoire qu'entre la République Fédérale et ceux des autres signataires qui auraient donné leur accord.

5. Si la République Fédérale a des objections à une demande présentée par la Puissance intéressée en vue de la mise en vigueur d'un traité, la Haute Commission Alliée ne prendra aucune décision sur les mesures à adopter, s'il y a lieu, avant l'expiration d'un délai de six mois à dater de la réception de la demande initiale de la Puissance intéressée.

Fait à Bonn, Petersberg, le 19 mars 1951. *(Journal Officiel de la Haute Commission Alliée en Allemagne No. 52, 2 avril 1951.)*

(c) *Decision No. 11*

COMPÉTENCE DU GOUVERNEMENT FÉDÉRAL DANS LE DOMAINE DES AFFAIRES ÉTRANGÈRES

Dans l'exercice des pouvoirs réservés par le paragraphe 2 *(c)* du Statut d'Occupation modifié par le Premier Instrument de Révision, le Conseil de la Haute Commission Alliée décide ce qui suit:

*Article 1:* Le Gouvernement Fédéral est autorisé à établir un Ministère des Affaires Etrangères, et aura la responsabilité exclusive du choix du personnel des missions diplomatiques, consulaires et commerciales.

*Article 2:* Le Gouvernement Fédéral peut entretenir des relations avec les pays étrangers sous réserve des dispositions de la présente Décision.

*Article 3:* (1) L'établissement de relations diplomatiques et consulaires ou de missions commerciales est subordonné à l'approbation préalable de la Haute Commission Alliée.

(2) Le Gouvernement Fédéral peut, cependant, sans autorisation préalable, établir des missions diplomatiques, dans les pays autres que la France, le Royaume-Uni et les Etats-Unis d'Amérique où, antérieurement à l'entrée en vigueur de la présente Décision, il a été autorisé à établir des missions consulaires.

(3) Aucune autorisation préalable ne sera requise pour l'établissement de consulats ou de missions commerciales dans les pays avec lesquels le Gouvernement Fédéral entretient des relations diplomatiques ou consulaires.

*Article 4:* Le Gouvernement Fédéral est autorisé par la présente Décision à nommer des agents officiels dans les capitales de la France, du Royaume-Uni et des Etats-Unis d'Amérique.

*Article 5:* L'accréditement et le statut des missions étrangères sur le territoire de la République Fédérale seront régis par les dispositions suivantes:

(i) Normalement, les missions diplomatiques et les consulats établis sur le territoire de la République Fédérale seront, respectivement, accrédités auprès de la République Fédérale, ou reconnus par elle. Dans des circonstances exceptionnelles, ils pourront être, respectivement, accrédités auprès de la Haute Commission Alliée, ou reconnus par elle. Il n'y aura en aucun cas double accréditement des missions auprès de la Haute Commission Alliée et de la République Fédérale ou délivrance d'exéquaturs

à des consuls, à la fois par la Haute Commission Alliée et par le Gouvernement Fédéral.

(ii) L'accréditement des missions étrangères auprès de la République Fédérale sera notifié à la Haute Commission Alliée; ces missions auront ensuite accès auprès d'elle pour toutes les questions entrant dans les domaines réservés aux Autorités d'Occupation.

*Article 6:* Le Gouvernement Fédéral et les Gouvernements du Land devront informer la Haute Commission Alliée de toutes leurs Négociations internationales. La Haute Commission Alliée peut intervenir dans les négociations relatives à des questions qui entrent dans les domaines réservés aux Autorités d'Occupation.

*Article 7:* Le Gouvernement Fédéral devra fournir à la Haute Commission Alliée toute information appropriée concernant toute démarche entreprise en application des dispositions de la présente Décision.

*Article 8:* La présente Décision entrera en vigueur le 7 mars 1951. Fait à Bonn, Petersberg, le 6 mars 1951. *(Journal Officiel de la Haute Commission Alliée en Allemagne, No. 49, 6 Mars 1951.)*

## 31. Greece [1]

CONSTITUTION OF 14 JUNE 1911. TEXT FROM *Greek Government Gazette* OF SAME DATE. TRANSLATION BY THE SECRETARIAT OF THE UNITED NATIONS

*Article 32.* The King is the highest authority of the State. He commands the land and sea forces, declares war, concludes treaties of peace, alliance, and commerce, and communicates them to the House of Representatives, with all the relevant documents as soon as the interest and the security of the State permit. Nevertheless, treaties of commerce and any other treaties granting concessions which, according to other provisions of the present Constitution, require statutory authority, or which lay a burden upon Greek citizens as such, are not valid without the consent of the House of Representatives.

*Article 33.* No cession or exchange of territory can take place without a law. The secret articles of a treaty shall not render the published articles of no effect.

## 32. Guatemala

*(a)* CONSTITUTION OF 11 MARCH 1945. TEXT SUPPLIED BY THE PERMANENT DELEGATION OF GUATEMALA. TRANSLATION BY THE SECRETARIAT OF THE UNITED NATIONS

*Article 119.* In addition, Congress shall have the following functions...

. . .

(9) To approve, or to withhold approval of, prior to their ratification, the treaties and conventions concluded by the Executive. For the purposes of approval, a two-thirds majority of the total number of members of

[1] A new Constitution was, in fact, adopted in 1927, which continued in force until 10 October 1935, when the 1911 Constitution was revived on the restoration of the monarchy.

Congress is required. Any treaty, convention, pact, or agreement which affects the Republic's integrity, sovereignty, or independence, or which is inconsistent with the Constitution, shall not be approved, though this does not apply to any such instruments, as aforesaid, which relate to the total or partial restoration of the Central American Federation. A two-thirds majority of the total number of members of Congress is required for the purpose of submitting to arbitration any questions relating to the national frontiers. The Decree shall set forth the reasons for referring the matter to arbitration and shall describe the case in question. All agreements relating to the passage of foreign troops through national territory or the use of military bases in time of war, shall require the approval of a two-thirds majority of the total number of members of Congress.

*(b)* LAW PROMULGATED BY THE EXECUTIVE POWER, DECREE NO. 93. (SECTION VIII. MINISTRY OF FOREIGN AFFAIRS)

*Article 21.* The Ministry shall have the following powers:

. . .

(5) To conclude and denounce international treaties, pacts and conventions and to stipulate reciprocal treatment in cases where this is not prescribed.

## 33. Haiti

CONSTITUTION OF 14 NOVEMBER 1950. TEXT FROM *Le Moniteur*, 25 NOVEMBER 1950, 105TH YEAR, NO. 137

*Article 45* — Les attributions de l'Assemblée Nationale sont:

. . .

(3°) d'approuver ou de rejeter les Traités de Paix et autres Traités et Conventions internationales;

*Article 79* — Le Président de la République nomme et révoque les Secrétaires d'Etat... Il est chargé de veiller à l'exécution des traités de la République.

. . .

Il fait tous traités ou toutes conventions internationales, sauf la sanction de l'Assemblée Nationale à la ratification à laquelle il soumet également tous accords exécutifs.

## 34. Honduras

CONSTITUTION OF 8 MARCH 1936. TEXT FROM *Decretos de la Asamblea. Nacional Constituyente 1936* (Talleres Tipograficos Nacionales, 1936). TRANSLATION BY THE SECRETARIAT OF THE UNITED NATIONS

*Article 101.* The powers of the Congress are the following:

. . .

(25) To approve or withhold approval of treaties concluded with other Nations.

*Article 121.* The President of the Republic exercises the general administration of the country.

His powers are:

. . .

(18) To conclude treaties ... submitting them to Congress for ratification.

## 35. Hungary

CONSTITUTION OF 20 AUGUST 1949. ENGLISH TEXT PUBLISHED BY THE HUNGARIAN GOVERNMENT, BUDAPEST, 1949

*Article 19.* (1) At its first sitting Parliament elects from among its own members the Presidential Council of the People's Republic, consisting of a President, two Vice-Presidents, a Secretary and seventeen members. ...

*Article 20.* (1) The competence of the Presidential Council of the People's Republic extends to:

. . .

*(e)* Concluding international treaties on behalf of the Hungarian People's Republic; ...

*(f)* Appointing diplomatic representatives and receiving the letters of credence of foreign diplomatic representatives;

*(g)* Ratifying international treaties.

*Article 21.* (1) The term of office of the Presidential Council of the People's Republic expires when Parliament elects a new Presidential Council of the People's Republic.

. . .

(4) In order to make valid decisions at least nine members of the Presidential Council of the People's Republic must be present in addition to the President and Secretary.

## 36. Iceland

CONSTITUTION OF 17 JUNE 1944. ENGLISH TRANSLATION PUBLISHED BY THE INFORMATION OFFICE OF THE ICELANDIC MINISTRY OF FOREIGN AFFAIRS (1948)

*Article 21.* The President concludes treaties with other states. Except with the consent of the Althing, [1] he may not make such agreements if they entail renouncement of, or servitude on, territory or territorial waters or if they entail constitutional changes.

## 37. India

*(a)* HISTORICAL NOTE PREPARED BY THE SECRETARIAT OF THE UNITED NATIONS

1. India became one of the original members of the League of Nations in 1920, and from that time forward possessed the status of an International Person.

[1] Parliament (Upper House and Lower Houses).

2. A Foreign and Political Department of the Government of India was organized under a Foreign Secretary who dealt with Indian relations with foreign States, and who was responsible to the Governor-General. Treaties could be concluded on behalf of India either by a representative of the Government of India or by a representative of the Government of the United Kingdom acting on behalf of India. If the treaty was made in the heads-of-States form, the representative received a Full Power signed by the King; the instrument of ratification was signed by His Majesty acting on the advice of the Government of India.

3. By the Indian Independence Act, 1947 (of the United Kingdom Parliament) provision was made for the setting up of two separate "Dominions"—India and Pakistan. As a result, provision was made by the Indian Independence (International Arrangements) Order, 1947, for the apportionment between these two countries of international rights and obligations to which India was entitled before 15 August 1947. Under this Order, membership of all international organizations devolved solely upon India. As regards rights and obligations under existing international agreements having an exclusive territorial application to an area comprised within the new State of India, the Order provided that these should devolve exclusively upon India; a similar provision was made as regards international agreements having an exclusive territorial application to an area comprised within Pakistan.

4. India, as from 26 January 1950, declared herself to be a Republic owing no allegiance to the King, and not forming part of his dominions, but acknowledging him as Head of the Commonwealth of Nations of which India continues to be a member. India, therefore, no longer concludes treaties in the King's name.

*(b)* MEMORANDUM OF 19 APRIL 1951 FROM THE GOVERNMENT OF INDIA

1. Under article 73 of the Constitution of India "The exclusive power of the Union shall extend to the matters in respect of which Parliament has power to make laws", and under article 53 the executive power of the Union "is vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution". Under article 246 (1) "Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the 'Union List')". List I, clause 14, contains the item: "entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries".

2. Parliament has not made any laws so far on the subject, and, until it does so, the President's power to enter into treaties (which is after all an executive act) remains unfettered by any "internal constitutional restrictions".

3. In practice, the President does not negotiate and conclude a treaty or agreement himself. Plenipotentiaries are appointed for this purpose, and they act under full powers issued by the President. It is, however, the President who ratifies a treaty.

4. Apart from treaties made between heads of states, agreements of a technical or administrative character are also made by the Government

of India with other governments. Such agreements are made in the name of the signatory governments, and are signed by the representatives of these governments. Full powers are granted and ratification is effected on behalf of the Government.

## 38. Indonesia

*(a)* HISTORICAL NOTE PREPARED BY THE SECRETARIAT OF THE UNITED NATIONS

1. A Round Table Conference met at The Hague from August to November 1949. There were represented at this conference the Government of the Netherlands, the Government of the Republic of Indonesia, and the (Indonesian) Federal Consultative Assembly. The purpose of this conference was to reach an agreement on the future political status of Indonesia. At that time the Republic of Indonesia consisted of a number of states bound together in a federation, and the Conference took note of a Constitution for the Republic of the United States of Indonesia. This Constitution was, however, superseded, in August 1950 (when the federal structure of the State was replaced by a unitary one), by the promulgation of the Provisional Constitution of the Republic of Indonesia, the relevant portions of which appear below. An agreement was reached at the conference regulating the conduct of foreign relations by the two States which constitute the Netherlands—Indonesian Union. This was entitled "Agreement between the Union Partners concerning foreign relations" and at the present time [1] is still in force.

2. By article 5 of the Agreement on Transitional Measures (*Security Council Official Records, Fourth Year, Special Supplement No. 6*, p. 102) the Kingdom of the Netherlands and the Republic of the United States of Indonesia agreed that "the rights and obligations of the Kingdom arising out of treaties and other international agreements concluded by the Kingdom shall be considered as rights and obligations of the Republic of the United States of Indonesia only where and inasmuch as such treaties and agreements are applicable to the jurisdiction of the Republic of the United States of Indonesia, and with the exception of rights and duties arising out of treaties and agreements to which the Republic of the United States of Indonesia cannot become a party on the ground of the provisions of such treaties and agreements".

3. On 19 May 1950, the Government of the United States of Indonesia —also acting on behalf of the member states of East Indonesia and East Sumatra—and the Government of the member state of the Republic of Indonesia reached an agreement jointly to establish a unitary state to be called the "Republic of Indonesia". This unitary state includes the old Republic of Indonesia and all the other member states of the "Republic of the United States of Indonesia". On 15 August 1950, the President of the Republic of the United States of Indonesia proclaimed a Charter declaring, "as an internal change, the establishment of the Unitary State of the Republic of Indonesia comprising the whole Indonesian country and nation of Indonesia".

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[1] 1 April 1952.

*(b)* PROVISIONAL CONSTITUTION OF 13 AUGUST 1950. TEXT SUPPLIED BY THE INDONESIAN MISSION

*Article 120.* (1) The President concludes and ratifies all treaties and other agreements with foreign powers.

Unless the law provides otherwise a treaty or other agreement is not ratified until approved by law.

(2) Accession to and termination of treaties and other agreements is effected by the President by virtue of the law only.

*Article 121.* The Republic of Indonesia shall join international organizations on the basis of the treaties and agreements referred to in article 120.

*Article 123.* The President accredits representatives of the Republic of Indonesia to other Powers, and approves of the accrediting of representatives of other Powers to the Republic of Indonesia.

*(c)* AGREEMENT BETWEEN THE UNION PARTNERS CONCERNING FOREIGN RELATIONS, NOVEMBER 1949, *Official Records of the Security Council, Fourth Year, Special Supplement No. 6*, p. 101

*Article 1.* The Netherlands-Indonesian Union shall co-operate in the field of foreign relations.

Where both partners feel that it is in their interest and so decide, the Conference of Ministers may provide for joint or common representation in international intercourse. [1]

. . .

*Article 3.* Neither Partner shall conclude a treaty, nor shall it perform any other juridical act in international intercourse, involving the interests of the other Partner, except after consultation with the other.

## 39. Iran

*(a)* CONSTITUTION OF 30 DECEMBER 1906. TEXT FURNISHED (IN FRENCH) BY THE IRANIAN GOVERNMENT

*Article 24:* L'échange de traités ou de conventions et l'oetroi de concession (monopole) commerciale, industrielle ou agricole etc. aussi bien aux nationaux qu'aux étrangers, doivent être soumis à la ratification du Madjlesse, sauf pour les traités, qui dans l'intérêt de l'Etat et de la Nation, doivent être tenus secrets.

*(b)* CONSTITUTIONAL LAW OF 8 OCTOBER 1907. TEXT FURNISHED (IN FRENCH) BY THE IRANIAN GOVERNMENT

*Article 52:* Les traités qui d'après les principes de l'art. 24 de la Loi Constitutionnelle du 14 Zighadeh 1324 doivent être tenus secrets seront présentés par (de la part du) le Roi aux chambres accompagnés des motifs explicatifs, aussitôt que l'intérêt et la sécurité du pays le permettront et que les causes de les tenir secrets seront dissipées.

[1] See, for example, article 21 of the Financial and Economic Agreement concluded at the Round Table Conference (*Official Records of the Security Council, Fourth Year, Supplement No.* 6, p. 116).

*Article 53:* Les clauses secrètes d'aucun traité ne peuvent résilier les clauses ouvertes du même traité.

*(c)* MEMORANDUM OF 2 JULY 1951 FROM THE IRANIAN GOVERNMENT

Le Gouvernement iranien ou le Gouvernement qui désirerait conclure un traité avec l'Iran, fera connaître ses vœux d'entamer des pourparlers, en ce sens, par une note adressée à l'autre partie.

Au cas où les deux parties seraient d'accord d'entamer des négociations, celles-ci débuteront en un lieu convenu et agréé par les deux parties.

Ces négociations une fois terminées, et en cas d'accord de vue, le texte ainsi rédigé sera paraphé par les représentants des deux parties chargées des négociations.

Le Ministre des Affaires Etrangères soumettra le texte paraphé, en vue de son approbation, au Conseil des Ministres.

Une fois l'approbation du Conseil des Ministres obtenue, le Ministère des Affaires Etrangères priera Sa Majesté Impériale de vouloir bien daigner d'accorder un Ferman autorisant la signature du traité ou de la convention par le Ministre des Affaires Etrangères ou par son remplaçant ou par un représentant dûment autorisé.

Le Firman Impérial une fois accordé les représentants plénipotentiaires des deux parties contractantes se réuniront à une date préalablement convenue pour la signature du traité et après l'échange des signatures de pleins pouvoirs accordés par les chefs de leur Etat respectif et la rédaction du procès-verbal, procéderont à la signature du traité ou de la convention.

Après la signature, un exemplaire du traité sera remis à l'autre partie contractante et le deuxième exemplaire sera conservé par l'Iran.

Le Gouvernement Iranien présentera le texte du traité joint à un projet au parlement en vue de sa ratification et les chambres ratifieront le texte intégralement ou le rejetteront en totalité.

Après la ratification des deux chambres et l'apposition du Sceau Impérial l'échange des instruments de ratification se fera en un lieu mentionné dans le texte même de l'accord.

## 40. Iraq

MEMORANDUM OF 11 JUNE 1951 FROM THE GOVERNMENT OF IRAQ

1. The only legal text relating to the conclusion of treaties is found in paragraph 4 of article 26 of the Iraqi Constitution which reads as follows:

"The King concludes treaties but may not ratify them without the consent of Parliament."

2. The procedure which is usually followed by the Iraqi Government conforms strictly with the accepted customs of international law. The King, as the Head of the executive authority, issues full powers or credentials to some individual or individuals to conduct negotiations and sign the treaty in his name. When this has been done the Government prepares a legislative bill embodying the treaty, and presents it to parliament for consideration and approval. When both Houses of Parliament have given their consent, authorizing the King to ratify the treaty, he thereupon issues the instrument of ratification, which is deposited or exchanged in accordance with the provisions of the treaty.

3. Conventions and agreements, or other international contracts which do not fall within the scope of treaties, may be entered into by the Government with the authorization of the King as Head of the executive authority, without the prior approval of Parliament. If, however, those international contracts involve any financial obligations, then it becomes mandatory to present them to Parliament for consent, and they are subject to the same conditions as treaties.

## 41. Ireland

CONSTITUTION OF 1 JULY 1937. TEXT PUBLISHED BY THE GOVERNMENT SALES OFFICE, DUBLIN 1945

*Article 29. ...*

4. (1) The executive power of the State in, or in connexion with, its external relations shall, in accordance with article 28 of this Constitution, [1] be exercised by, or on the authority of, the Government.

(2) For the purpose of the exercise of any executive function of the State in, or in connexion with, its external relations, the Government may to such extent and subject to such conditions, if any, as may be determined by law, avail itself of, or adopt, any organ, instrument, or method of procedure used or adopted for the like purpose by the members of any group or league of nations with which the State is or becomes associated for the purpose of international co-operation in matters of common concern.

5. (1) Every international agreement to which the State becomes a party shall be laid before Dáil Éireann. [2]

(2) The State shall not be bound by any international agreement involving a charge upon public funds unless the terms of the agreement shall have been approved by Dáil Éireann.

(3) This section shall not apply to agreements or conventions of a technical or administrative character.

6. No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas. [3]

## 42. Israel

MEMORANDUM OF 11 MARCH 1951 FROM THE GOVERNMENT OF ISRAEL

1. The situation in Israel is at present characterized by the absence of clear and specific provisions of a legislative character. The Legislative Assembly, the Knesseth, was originally elected in 1949 as a Constituent Assembly, but after lengthy discussion it decided, in the middle of 1950, not to proceed with the adoption of a full constitution and instead to concentrate on the writing of a number of fundamental laws which, in the course of time, would become the formal constitution of the country. Until such laws are adopted the constitutional framework is provided

[1] Article 28 specifies the powers and duties of the various organs of Government.

[2] House of Representatives.

[3] National Parliament (Dáil Eireann and Seanad Eireann).

by the following two enactments, namely: the Law and Administration Ordinance, No. 1, of the year 5708-1948 as subsequently amended, and the Transition Law, 5709-1949, as subsequently amended. Translations into English of these laws are attached to this Note. [1] The main purpose of these two sets of enactments is to provide the legal framework, from the point of view of the domestic law, for the transfer of authority and governmental powers from the former Mandatory Government to the Provisional Government of Israel which was in office from May 1948 until February 1949; and thence from the Provisional Government of Israel to the regular Government of Israel, which was first constituted in February 1949 after the general elections to the first Knesseth. Except for dealing with this transfer of authority, these enactments scarcely touched upon the substantive law, which broadly speaking remains today as it was on 14 May 1948, that is to say, the last day of the Mandatory regime.

2. This indeed is specifically stipulated in section 11 of the Law and Administration Ordinance, which provides:

"The Law which existed in Palestine on the 5th day of Iyar, 5708 (14 May 1948) shall remain in force, in so far as there is nothing therein repugnant to this Ordinance or to the other laws which may be enacted by, or on behalf of, the Provisional Council of State, and subject to such modifications as may result from the establishment of the State and its authorities."

Having regard for this stipulation it follows that, no further enactment on the subject having been passed since the establishment of the State of Israel, the law and practice regarding the negotiation and conclusion of treaties and other international agreements is still today fundamentally what it was in the days of the Mandate with, however, such consequential modifications of those rules and practices, if any, which, while appropriate to a regime of dependence, are incompatible with the sovereignty of an independent State. These modifications are mainly in the nature of constitutional practices inseparable from the institution of an elected legislature to which the Government is responsible, which has taken the place of the Crown Colony type of government, without any legislative assembly, by which the country was governed in the period of the Mandate.

3. The Government of Israel is obviously not in a position to speak with authority on the practice of the Mandatory Government, and the remarks which follow are therefore based on its interpretation of the Mandatory Law: even less is it possible for the Government of Israel to describe the customary practice or usages of the Mandatory Government in this respect. The relevance of this aspect is due to the fact that in so far as the Mandatory Government's practice was based on law that law is still for the most part in force. Under article 12 of the Mandate the Mandatory, that is to say, His Britannic Majesty (in accordance with the fourth recital in the Preamble to the Mandate), was entrusted with the control of the foreign relations of Palestine, and this provision, together with articles 10, 18, 19 and 20 of the Mandate, conferred some degree of treaty-making power upon the Mandatory acting for Palestine; and in the sole case envisaged in the second paragraph of article 18, a very

[1] Not reproduced.

limited treaty-making power was conferred upon the Administration of Palestine itself acting on the advice of the Mandatory. The basic constitutional law during the period of the Mandate was contained in the Palestine Order-in-Council of 1922 as amended. The person appointed by the British Sovereign to administer the Government of Palestine was known as the High Commissioner. The Palestine Order-in-Council of 1922 did not specifically refer to the conclusion of international treaties. It was not strictly necessary for it to do so because, as has been seen, under the Mandate the treaty-making power was conferred principally upon the Mandatory and not upon the High Commissioner, and the Palestine Order-in-Council was concerned with the domestic provisions regulating the Government of Palestine. The jurisdiction of the British Sovereign in Palestine was governed by the Foreign Jurisdiction Act, 1890, the purpose of which was described in its Preamble in the following terms:

"Whereas by treaty, capitulation, grant, usage, sufferance, and other lawful means, Her Majesty the Queen has jurisdiction within divers foreign countries, and it is expedient to consolidate the Acts relating to the exercise of Her Majesty's jurisdiction out of Her dominions:"

The extent of this jurisdiction in those foreign countries which come within the scope of the Act is defined by section 1 which provides:

"It is and shall be lawful for Her Majesty the Queen to hold, exercise, and enjoy any jurisdiction which Her Majesty now has or may at any time hereafter have within a foreign country in the same and as ample a manner as if Her Majesty had acquired that jurisdiction by the cession or conquest of territory."

It will be observed that this Act, too, is not specific on the question of the conclusion of international treaties, but it is assumed that this was implicit, as being part of the Royal Prerogative.

4. The further stipulation which is believed to be relevant to the Mandatory practice is section 46 of the Palestine Order-in-Council of 1922 which described the law to be applied by the civil courts of Palestine. Broadly speaking this provided that, subject to any written local law relevant to the subject, the jurisdiction of the civil courts shall be exercised in conformity with the substance of the common law and the doctrines of equity in force in England so far as the circumstances of Palestine and its inhabitants and the limits of His Majesty's jurisdiction permit, and subject to such qualifications as local circumstances render necessary.

5. The consequence of the foregoing is that the treaty-making power in the time of the Mandate was exercisable in accordance with the treaty-making power of the British Sovereign in territories which the British Sovereign acquired by treaty, capitulation, grant, usage, sufferance and other lawful means, or alternatively—if it was possible for the matter to come before the civil courts—in accordance with the English common law. In point of fact, this means that the treaty-making power was, so far as concerns the domestic law, to all intents vested exclusively in the British Sovereign or in the High Commissioner of Palestine subject, from the point of view of international law, only to the limitations imposed by the Mandate. This aspect has been described more fully in this Ministry's Note of 24 January 1950 published in A/CN.4/19, particularly at pp. 30-36.

6. This situation was retained in force during the regime of the Provisional Government of Israel, by operation of section 11 of the Law and Administration Ordinance above quoted. These substantive rules were supplemented by section 14 of this Ordinance which provided for the devolution of powers from the various British authorities which formerly exercised them to the Provisional Government, and this included the general treaty-making power, whether vested in the King or the High Commissioner. This devolution of powers to the Provisional Government was subject to a reservation in case the State Provisional Council provided otherwise in an Ordinance, but in regard to the matters which are here being discussed no such Ordinance has been passed. The powers thus vested in the Provisional Government were, by section 12 of the Transition Law, 5709-1949, later vested in the Government of Israel, and this is the position currently in force.

7. The authority which in this way is vested exclusively in the Government of Israel extends not only to negotiating and signing international treaties, whether or not they are subject to ratification. It also includes ratifying international treaties requiring ratification as well as acceding to existing multilateral conventions where the act of accession suffices to make the convention definitively binding upon the acceding State. Moreover, in strict law the Government's power is exercisable without the interposition of parliamentary consent. However, a measure of general parliamentary control exists by virtue of section 11 of the Transition Law, 5709-1949, which enables the Kensseth to express its lack of confidence in the Government. On one or two occasions, notably in connection with the signing of the Armistice Agreements with various of the Arab States, the Government's exercise of its treaty-making powers has been brought up for parliamentary discussion in this way.

8. As far as concerns the manner in which the Government uses its powers, reference should be made to section 2 *(d)* of the Law and Administration Ordinance, 5708-1948, as read together with section 12 of the Transition Law, 5709-1949. Decisions concerning the use of the treaty-making power are taken by the Cabinet as a whole, and the execution of these decisions is the responsibility of the Minister for Foreign Affairs. If the document to give effect to the Government's decisions requires the signature of the President, such document has to bear the attesting signature of the Minister for Foreign Affairs.

9. The President's functions in connection with the exercise of the treaty-making power are governed by section 6 of the Transition Law, 5709-1949, under which "the President of the State shall sign treaties with foreign States which have been ratified by the Knesseth". This means that when in fact the Knesseth has expressed its approval to the ratification of the treaty, the act of ratification will be signed by the President. In other cases the act of ratification may be signed by the President, or by the Foreign Minister. Section 7 of the said Law provides for the attesting signature of the Head of the Government or such other Minister as the Government may determine to all official documents signed by the President. By a decision of the Government dated 17 April 1949, published in the State Records, Public Notices, No. 13 of 3 May 1949 at p. 248, the Government formally decided that documents relating to treaties ratified by the Knesseth and requiring to be signed by the President shall bear the attesting signature of the Minister for Foreign Affairs. It is to

be observed that this provision is one relating to the powers of the President. It does not import any modification in the general law about treaty-making or about the authority of the Knesseth to ratify treaties. This aspect is not regulated by any law passed by the Israel Legislature and therefore remains as described above.

10. In accordance with what is understood to be British constitutional usage, and in line with decisions of the courts of the Mandatory period, the provisions of international treaties do not become executory from the point of view of domestic law by the mere fact that the acts necessary to make the instrument binding from the point of view of international law have been duly performed. If the international convention is intended to introduce changes into the domestic legislation, or requires such changes for its effective implementation, these changes can only be effected by means of a domestic law passed in the normal way. Judicial decisions such as *Jamal Eff. Husseini* v. *Government of Palestine* (1 *Palestine Law Reports*, 50) and *Jerusalem-Jaffa District Governor and another* v. *Suleiman Murra and others*, *ibid.*, p. 71, have been more fully described on pp. 41-42 of document A/CN.4/19, to which reference should here be made. Having regard for this, it has been the practice of the Government of Israel not to exercise its powers of ratification until it is certain that parliamentary authority for the domestic law will be forthcoming. This constitutional practice was established in connection with the passage of the Crime of Genocide (Prevention and Punishment) Law, 5710-1950.

In his speech introducing the first reading of the Bill, on 26 December 1949, the Minister of Justice made it clear that the Government intended to deposit its instrument of ratification after the Knesseth had adopted the necessary law. See *Divrei Haknesseth* (Official record of the proceedings in the Knesseth), vol. 3, p. 315. The absence of clarity as to the provisions of the law concerning the exercise of treaty-making power by the Government occasioned some surprise in the public's mind, and as a matter of fact on 28 December 1949 the Knesseth adopted a resolution of which the following is a translation:

"The Knesseth decides that the Convention on the Prevention and Punishment of the Crime of Genocide which was signed by the representative of Israel on 17 August 1949 shall be ratified. The instrument of ratification shall be deposited with the Secretary-General of the United Nations in accordance with the provisions of the said Convention."

But such a resolution did not have the effect of changing the law about the exercise of treaty-making powers. The constitutional precedent of suspending the ratification until the domestic law has been brought into conformity with the terms of the treaty has been followed in other cases.

11. The position can therefore be summarized in the following way:

*(a)* The legal power to negotiate, sign and ratify international treaties on behalf of Israel is vested exclusively in the Government of Israel and is in the charge of the Minister for Foreign Affairs;

*(b)* Where the Knesseth has given its approval to the ratification of the treaty, the act of ratification is signed by the President of the State;

*(c)* Where the President of the State performs acts connected with the treaty-making power, the documents have to bear the attesting signature of the Minister for Foreign Affairs acting on behalf and under the authority of the Government;

*(d)* General parliamentary control over the actions of the Government in the sphere of treaty-making power is exercised by means of the procedure of proposing motions of non-confidence;

*(e)* If the international treaty necessitates changes in the domestic law, the Government will not normally ratify the treaty until it is appraised of the attitude of the Knesseth.

## 43. Italy

CONSTITUTION OF 1 JANUARY 1948. TEXT SUPPLIED BY THE ITALIAN OBSERVER TO THE UNITED NATIONS. TRANSLATION BY THE SECRETARIAT OF THE UNITED NATIONS

*Article 80.* The Chambers shall authorize by legislative enactment the ratification of international treaties which are of a political nature, or which provide for arbitration or judicial settlement, or which entail territorial changes or financial burdens or modifications of the laws.

## 44. Japan

*(a)* NOTE BY THE CHIEF OF DIPLOMATIC SECTION OF GENERAL HEADQUARTERS, SUPREME COMMANDER FOR THE ALLIED POWERS

Post-surrender directives of the Supreme Commander prevent, until such time as Japan regains its status as a sovereign nation, the conclusion by Japan of international agreements which have, in general, been concluded by the Supreme Commander on behalf of Japan. As a result rules and regulations have not yet been formulated for the implementation of the provisions of the Constitution appropriate to the negotiation and conclusion of treaties.

*(b)* CONSTITUTION OF 3 MAY 1947. TEXT SUPPLIED BY THE CHIEF OF DIPLOMATIC SECTION OF GENERAL HEADQUARTERS, SUPREME COMMANDER FOR THE ALLIED POWERS

*Article 7.* The Emperor, with the advice and approval of the Cabinet, shall perform the following acts in matters of State on behalf of the people:

Promulgation of amendments of the Constitution, laws, cabinet orders and treaties.

Attestation ... of full powers and credentials of Ambassadors and Ministers.

Attestation of instruments of ratification and other diplomatic documents as provided by law; receiving foreign Ambassadors and Ministers.

. . .

*Article 61.* The second paragraph of the preceding article [1] applies also to the Diet approval [2] required for the conclusion of treaties.

*Article 72.* The Prime Minister, representing the Cabinet, submits bills, reports on general national affairs and foreign relations to the Diet...

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[1] Being article 60, which prescribes the procedure to be followed when there is a disagreement between the two Houses of the Diet.

[2] See article 73, quoted below.

*Article 73.* The Cabinet ... shall perform the following functions:

Administer the law faithfully; conduct affairs of State.

Manage foreign affairs.

Conclude treaties.

However, it shall obtain prior or, depending on the circumstances, subsequent approval of the Diet.

## 45. Jordan

CONSTITUTION OF 1 MARCH 1947. TEXT PUBLISHED IN THE *Official Gazette* OF JORDAN. TRANSLATION BY THE SECRETARIAT OF THE UNITED NATIONS

*Article 26.* ...

*(b)* The King declares war, and concludes treaties with the agreement of the Council of Ministers.

## 46. Korea

CONSTITUTION OF 12 JULY 1948. ENGLISH TEXT FROM *Korea—1945 to 1948*, PUBLISHED BY DEPARTMENT OF STATE, UNITED STATES OF AMERICA, OCTOBER 1948, NO. 3305 FAR EASTERN SERIES 28

*Article 42.* The National Assembly shall have the right to consent to treaties concerning international organizations, peace treaties, treaties pertaining to mutual aid, commercial treaties, treaties financially incumbent on the State or people, treaties related to legislative affairs, and declare war against a foreign State.

. . .

*Article 59.* The President shall conclude and ratify treaties, declare war, make peace, and receive and accredit diplomatic representatives of foreign countries.

. . .

*Article 68.* The State Council shall act as a collegiate body. It shall be composed of the President, the Prime Minister and other ministers and shall decide on important national policies which come within the scope of the powers of the President.

. . .

*Article 72.* The following matters shall be referred to the State Council for decision:

. . .

(2) Proposed treaties, declaration of war, conclusion of peace, and other important foreign policy.

## 47. Laos [1]

CONSTITUTION OF 11 MAY 1947. TEXT PUBLISHED BY THE MINISTÈRE DE LA JEUNESSE, DES ARTS ET DES LETTRES (*La documentation française, notes et études documentaires*, 17 SEPTEMBER 1947, No. 725)

*Article 13:* ... Le Roi signe les traités passés avec la France et les autres Etats associés de l'Union Française et les ratifie en vertu des délibérations de l'Assemblée Nationale.

*Article 28:* L'Assemblée Nationale... —délibère sur l'accord à donner pour la ratification des traités.

## 48. Lebanon

CONSTITUTION OF 23 MAY 1926, AS AMENDED. TEXT FROM *Revue Egyptienne de Droit International*, vol. 3 (1947) p. 203

*Article 52:* (Loi constitut. 2017 Oct. 1927, Art. 26) Le Président de la République négocie et ratifie les traités. Il en donne connaissance à la Chambre aussitôt que l'intérêt et la sûreté de l'Etat le permettent.

Les traités qui engagent les finances de l'Etat, les traités de commerce et en général les traités qui ne peuvent être dénoncés à l'expiration de chaque année, ne sont définitifs qu'après avoir été votés par la Chambre.

## 49. Liberia

*(a)* CONSTITUTION OF 26 JULY 1847, AS AMENDED. TEXT SUPPLIED BY THE LIBERIAN GOVERNMENT IN ENGLISH

*Article 3.*

*Section 1.* The Supreme Executive Power shall be vested in a President who shall be elected by the people and shall hold his office for a term of eight years... He shall have the power to make treaties, provided the Senate concur therein, by a vote of two-thirds of the Senators present.

*(b)* AN ACT RELATING TO TREATIES [2]

*Section 1.* That in all cases of treaties to be made, of which this Government shall be a party, the President may appoint Commissioners, who may be clothed with the necessary power, and held bound to depart in no wise from their instructions. And all treaties whereof the Republic is one of the contracting parties shall, from the date of their publication become laws: and offenders against their provisions shall be punished according to law.

*(c)* MEMORANDUM OF 31 MAY 1951 FROM THE LIBERIAN GOVERNMENT

According to the procedure followed in Liberia international treaties concluded by the Government become effective only when the treaties

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[1] Laos is a constitutional monarchy and a member of the French Union.

[2] *Revised Statutes of the Republic of Liberia* (1919), vol. I, p. 148. No date is cited for this Act in the volume.

have been submitted, considered, and ratified by the Liberian Senate by two-thirds vote of the Senators in regular or call session of the Legislature. The treaty is thereafter forwarded by the Senate to the President of the Republic of Liberia, who under the Constitution of the Republic, is invested with the power to give it executive ratification, and who, in turn, after ratifying it forwards the treaty to the Secretary of State of Liberia for publication. The duties of the Secretary of State are set forth in the following provisions:

*(d)* ACT OF THE LEGISLATURE, 11 DECEMBER 1911

The Secretary of State shall immediately after their passage, ratification and conclusion see to the publication of all such Acts, Statutes resolutions and other matters the subject of legislation; all proclamations by the President; all papers referring to concessions, loans, agreements or contracts, upon which there have been direct or indirect legislation; and all such statistical matters as shall come within his jurisdiction.

## 50. Libya

CONSTITUTION OF 7 OCTOBER 1951. TEXT FROM *Official Records of the General Assembly, Sixth Session, Supplement No. 17* (A/1949).

*Article 36.* The Federal Government shall exercise legislative and executive powers in connexion with the matters shown in the following list: ...

(5) The conclusion and implementation of treaties and agreements with other States.

. . .

*Article 69.* The King shall declare war and conclude peace and enter into treaties which he ratifies after the approval of Parliament.

## Liechtenstein

*(a)* CONSTITUTION OF 5 OCTOBER 1921. TEXT SUPPLIED BY THE SWISS OBSERVER TO THE UNITED NATIONS. TRANSLATION BY THE SECRETARIAT OF THE UNITED NATIONS

*Article 8.* The Prince shall, without prejudice to the necessary participation of the responsible Government, represent the State in all its relations with foreign States.

Treaties which provide for the cession of State territory or the alienation of State property, dispose of the sovereign rights or royalties of the State or accept burdens for the Principality or its citizens or an obligation affecting the rights of the citizens of the Principality, are not valid unless approved by the Diet.

. . .

*Article 62.* The functions of the Diet shall extend primarily to the following matters:

. . .

*(b)* Participation in the conclusion of treaties (Article 8).

*(b)* INTRODUCTORY ACT TO CUSTOMS TREATY WITH SWITZERLAND, [1] 29 MARCH 1923. SAME SOURCE AND TRANSLATION

*Article 105.* The Government is in particular empowered:

(a) To conclude special agreements with the authorities of the Confederation on matters related to the customs treaty [2] and to take the necessary steps to secure the recognition by a foreign government of the applicability of the Swiss Customs and Commercial Treaties.

*(b)* To conclude treaties or agreements with the governments of other States on matters arising in all branches of law, by agreement with the Finance Commission, or in more important matters, by agreement with the Diet.

*(c)* INTRODUCTORY AND TRANSITIONAL PROVISIONS, 20 JANUARY 1926. SAME SOURCE AND TRANSLATION

*Article 157.* ...

*Section 4.* The Government is empowered to conclude further treaties and agreements with other States.

This provision shall not prejudice the status of treaties now in force or about to be concluded, or the government's right to order such measures of retaliation against aliens as it may consider appropriate.

*(d)* CONSTITUTION ACT OF 2 SEPTEMBER 1939. SAME SOURCE AND TRANSLATION

*Article 1.* In view of the gravity of the international situation, the Diet empowers the Government of the Principality to adopt and execute all such measures as it deems appropriate for the purpose of bringing the economy of Liechtenstein into good order and ensuring satisfaction of the vital needs of the people of Liechtenstein. In particular the Government is empowered to declare applicable to Liechtenstein such Swiss enactments and orders as embody measures of war economy.

## 52. Luxembourg

*(a)* CONSTITUTION OF 15 MAY 1919, AS AMENDED. TEXT FURNISHED BY GOVERNMENT OF LUXEMBOURG

*Article 37:* Le Grand-Duc commande la force armée. Il fait les traités. Aucun traité n'aura d'effet avant d'avoir reçu l'assentiment de la Chambre. Les traités secrets sont abolis. Nulle cession, nul échange, nulle adjonction de territoire ne peut avoir lieu qu'en vertu d'une loi.

*(b)* MEMORANDUM OF 20 FEBRUARY 1952 FROM THE GOVERNMENT OF LUXEMBOURG

*I. Législation*

1. *Dispositions fondamentales.* Le texte fondamental relatif à la matière des traités internationaux est l'article 37 de la Constitution, ainsi conçu depuis la revision constitutionnelle de 1919:

[1] Promulgated 13 May 1924, *Liechtensteinisches Gesetzblatt*, 1924/11.

« Le Grand-Duc... fait les traités. Aucun traité n'aura d'effet avant d'avoir reçu l'assentiment de la Chambre. Les traités secrets sont abolis... »

Le texte antérieur à la revision s'inspirait de la Constitution belge et il était libellé comme suit:

« Le Grand-Duc... fait les traités. Il en donne connaissance à la Chambre, aussitôt que l'intérêt et la sûreté de l'Etat le permettent, en y joignant les communications convenables. Les traités de commerce et ceux qui pourraient grever l'Etat ou lier individuellement les Luxembourgeois, et en général tous ceux portant sur une matière qui ne peut être réglée que par une loi, n'ont d'effet qu'après avoir reçu l'assentiment de la Chambre... Dans aucun cas, les articles secrets d'un traité ne peuvent être destructifs des articles patents. »

Les travaux préparatoires de la revision constitutionnelle de 1919 figurent au compte rendu de la Chambre des Députés, session 1918/19: Proposition de la Commission spéciale (vol. 5, p. 65/66); avis du Conseil d'Etat (*ibid.*, p. 70/71); discussion et vote (vol. 2, p. 995/996, 1025/1026, 1031, 1066).

2. *Compétence gouvernementale.* Selon une tradition constante, les arrêtés grand-ducaux, pris en exécution de l'article 76 de la Constitution et portant répartition des services publics, attribuent au Département du Ministre des Affaires Etrangères les « relations internationales et traités internationaux ».

3. *Renvoi au droit commun.* Pour le reste, les actes juridiques passés en matière de traités internationaux sont soumis au droit commun sous les différents aspects de la compétence, de la forme et de la procédure. Ceci est vrai notamment pour les pleins pouvoirs, pour la procédure relative aux lois approbatives de traités, pour les arrêtés pris en exécution des traités, ainsi que pour les instruments de ratification ou d'adhésion. Les principales règles juridiques entrant en ligne de compte sont les suivantes:

*(a)* Les règles qui gouvernent l'exercice du pouvoir exécutif, les actes du Souverain et la responsabilité ministérielle, l'organisation du Gouvernement, l'activité de l'administration publique et l'exercice du pouvoir réglementaire.

*(b)* Les règles qui gouvernent l'exercice du pouvoir législatif par le Parlement avec la participation du Souverain, la procédure législative et l'intervention du Gouvernement et du Conseil d'Etat au cours de cette procédure.

4. *Sources.* Les règles auxquelles il vient d'être fait allusion sont contenues dans trois ensembles de textes:

*(a)* La Constitution du Grand-Duché de Luxembourg du 17 octobre 1868, modifiée par les lois constitutionnelles des 15 mai 1919, 28 avril et 6, 15 et 21 mai 1948.

*(b)* L'arrêté royal-grand-ducal du 9 juillet 1857, portant une nouvelle organisation du Gouvernement, en connexion avec les dispositions du règlement du 2 juin 1842 pour l'exercice des fonctions du Conseil de Gouvernement et de l'arrêté royal-grand-ducal du 23 juillet 1848 sur l'organisation du Gouvernement pour autant que celles-ci sont restées en vigueur. Il faut y ajouter les arrêtés grand-ducaux portant répartition des services publics, qui sont renouvelés lors de l'entrée en fonction de chaque nouveau Gouvernement.

*(c)* La loi du 15 janvier 1866 portant organisation du Conseil d'Etat.

5. *Incidences du droit international.* Les règles juridiques internes, énoncées ci-dessus, déterminent exclusivement la compétence des organes étatiques appelés à intervenir pour l'élaboration, la conclusion et la mise en vigueur des traités, ainsi que la forme et la procédure à suivre, pour autant qu'il s'agit d'actes de portée interne. Pour le reste, la matière des traités est régie par le droit international. La présence simultanée de normes appartenant à deux systèmes juridiques distincts, interne et international, donne lieu aux observations suivantes:

*(a)* Pour autant que les règles internationales ne sont pas contraires au droit interne, les organes appelés à négocier et à conclure les engagements jouissent d'une discrétion entière pour déterminer, conformément au droit international, la procédure des négociations et la forme à donner aux instruments conventionnels ainsi qu'à tous autres actes internationaux pertinents. La pratique diplomatique luxembourgeoise est par conséquent libre de s'adapter à la pratique suivie dans la vie internationale, aux évolutions de cette pratique, ainsi qu'aux circonstances de chaque cas particulier.

*(b)* Par contre, des problèmes délicats se posent pour autant que les règles internationales ne coïncident pas avec le droit interne. Deux principes importants du droit international doivent être mentionnés dans cet ordre d'idées:

Premièrement, les pouvoirs reconnus dans les relations internationales au Chef d'Etat et au Ministre des Affaires Etrangères, pour représenter et pour engager l'Etat, sont bien plus étendus que ceux que le droit luxembourgeois reconnaît au Grand-Duc et au Gouvernement. Deuxièmement, les Etats éttangers et les organisations internationales attachent toujours foi à l'acte fait par le Chef d'Etat et le Ministre des Affaires Etrangères, sans contrôler si cet acte est régulier au regard du droit interne de l'Etat en cause.

## *II. La conclusion des traités*

6. *Principe fondamental.* D'après l'article 37 de la Constitution, le Grand-Duc fait les traités. Cette disposition signifie que tous les actes relatifs à l'élaboration et à la conclusion des engagements internationaux appartiennent à la prérogative du Souverain. Cette compétence comprend la négociation, la signature ainsi que l'adhésion définitive, sous forme de ratification ou autrement. Certains des actes sont faits par le Grand-Duc en personne, d'autres sont faits pour le Grand-Duc par le Gouvernement, par l'administration gouvernementale ou par des plénipotentiaires. La compétence du Souverain est exercée, en pratique, de la façon décrite ci-après.

7. *Action personnelle du Grand-Duc.* D'après les usages, un certain nombre d'actes sont faits par le Grand-Duc en personne, à savoir:

*(a)* La délivrance de pleins pouvoirs pour signer des engagements internationaux.

*(b)* La ratification (qui intervient sur signature préalable) et l'adhésion (qui intervient sans signature préalable).

*(c)* Les arrêtés qui peuvent intervenir soit pour la publication, soit pour la mise en vigueur d'un engagement (dans le cas d'une habilitation législative, ci-dessous sub 17) ainsi que les règlements nécessaires pour l'exécution d'engagements dûment mis en vigueur.

En vertu du droit commun, les actes ci-dessus sont délibérés par le Gouvernement en conseil. Ils sont contresignés exclusivement par le Ministre des Affaires Etrangères pour autant qu'il s'agit d'actes internationaux (pleins pouvoirs, ratifications et adhésions). Par contre, les lois approbatives ainsi que les arrêtés de caractère interne, sont contresignés par le Ministre des Affaires Etrangères et tout autre Ministre intéressé à la matière de l'engagement. Les lois et les arrêtés de portée réglementaire sont soumis en outre à l'avis préalable du Conseil d'Etat.

8. *Exercice des autres prérogatives grand-ducales.* Les autres fonctions relatives aux engagements internationaux, à savoir la négociation, la signature et les fonctions d'ordre administratif, sont exercées pour le Grand-Duc par le Gouvernement, l'administration publique et les plénipotentiaires ad hoc désignés dans les pleins pouvoirs, suivant les cas. La compétence pour l'exercice des fonctions dévolues au Gouvernement et à l'administration est déterminée par les règles générales relatives à l'organisation du Gouvernement et des services publics, dont il résulte ce qui suit.

En principe, les fonctions internationales et internes relatives aux engagements internationaux sont exercées par le Ministre des Affaires Etrangères avec l'aide des services placés sous ses ordres à savoir l'administration centrale du Département des Affaires Etrangères et du Commerce Extérieur ainsi que le service diplomatique.

9. *Service des traités internationaux.* Il existe, au sein du Département des Affaires Etrangères, un service des traités internationaux dont les fonctions sont déterminées comme suit:

*(a)* Ce service prépare les pleins pouvoirs ainsi que les mandats de négocier.

*(b)* Il émet son avis sur le texte des traités en négociation. Cet avis se restreint à la forme et au style diplomatique, aux clauses de style, ainsi qu'aux questions juridiques relatives au régime de la conclusion et de la mise en vigueur des engagements.

*(c)* Il établit les instruments de signature.

*(d)* Il prépare les actes nécessaires pour la ratification des traités (ou tout acte équipollent), pour leur enregistrement, ainsi que pour leur dénonciation.

*(e)* Il prépare l'approbation parlementaire, la mise en vigueur interne et la publication des engagements. Il émet en outre son avis sur les actes légaux et réglementaires nécessaires pour leur exécution.

*(f)* Il reçoit les actes relatifs aux traités, émanés d'Etats étrangers ou de secrétariats internationaux, ainsi que toutes notifications y relatives, et dresse, le cas échéant, les procès-verbaux afférents.

*(g)* Il détient les archives des originaux, des copies certifiées conformes et de toutes autres pièces originales.

*(h)* Il exerce les fonctions de secrétariat en ce qui concerne les traités dont le Gouvernement luxembourgeois est dépositaire.

*(i)* Il tient un répertoire des traités internationaux, ainsi que de tous renseignements qui les concernent, pour autant que possible à partir du début des négociations.

Les fonctions ci-dessus sont exercées en liaison avec les services gouvernementaux intéressés à la matière de chaque engagement.

10. *Voie diplomatique et exceptions.* L'un des principes fondamentaux de l'organisation publique est l'exclusivité de la voie diplomatique, c'est-à-dire de l'intervention du Ministre des Affaires Etrangères et de ses services,

pour la conduite des relations avec les Etats étrangers et les organisations internationales, ainsi que pour la négociation et la conclusion des traités internationaux (voy. ci-dessus sub 2). Des relations officielles et des négociations ne peuvent avoir lieu en dehors de la voie diplomatique, à moins qu'elles soient exceptionnellement prévues par une disposition légale ou conventionnelle expresse.

En conséquence de ce qui précède, les autres membres du Gouvernement, leurs Départements et les administrations qui dépendent de ceux-ci interviennent dans la mesure suivante, chaque fois que la matière d'un engagement relève de leur compétence:

*(a)* A la demande du Ministre des Affaires Etrangères, pour participer aux négociations ou pour donner leur avis sur les textes en cours d'élaboration.

*(b)* Pour concourir aux procédures de caractère interne relatives à l'approbation et la mise en vigueur des engagements.

*(c)* Exceptionnellement, pour conduire des négociations indépendantes, chaque fois qu'une disposition conventionnelle ou légale prévoit dans des termes exprès l'élaboration d'arrangements internationaux au moyen de contacts directs entre certaines autorités internes de deux ou de plusieurs pays, à l'exclusion de l'intermédiaire de la voie diplomatique. Régulièrement, les contacts entre autorités internes n'ont lieu que pour l'élaboration des engagements; par contre, on rentre toujours dans la voie diplomatique pour la phase finale de la conclusion.

11. *Pleins pouvoirs.* Les pleins pouvoirs pour la signature des engagements sont signés de la main du Grand-Duc et contresignés par le Ministre des Affaires Etrangères (voy. Annexe, formule I). Ils ne peuvent être délivrés, sauf exception, que sous réserve de ratification, en raison notamment des pouvoirs de contrôle du Parlement. En conséquence, les plénipotentiaires luxembourgeois signent les traités en apposant la mention « sous réserve de ratification » ou « ad referendum », à moins que cette réserve apparaisse d'une manière non équivoque dans le texte même.

Le simple mandat de négocier (qui ne comporte pas le pouvoir de signer) est délivré dans une forme quelconque, par le Ministre des Affaires Etrangères. En général, il est rédigé comme lettre patente. Le mandat de négocier doit être considéré comme comprenant le pouvoir de parapher; en effet, le paraphe sert à documenter simplement l'accord personnel des négociateurs sans engager la décision du Gouvernement.

12. *Ratification.* La ratification ou l'adhésion constitue l'acte décisif dans la procédure de la conclusion des traités. En effet, c'est la ratification ou l'adhésion, ou tout acte équipollent, qui met le traité en vigueur, tant dans l'ordre international que dans l'ordre interne. C'est pour cette raison qu'il est réservé au Grand-Duc personnellement en tant qu'il constitue, par excellence, l'exercice de la prérogative de l'art. 37 de la Constitution (voy. Annexe, formules VI et VII).

Un procès-verbal est dressé à l'occasion de l'échange ou du dépôt des ratifications. Cet acte revêt une haute importance, étant donné qu'il a la double fonction de constater le fait de l'échange ou du dépôt et d'en fixer la date, déterminant de cette façon l'entrée en vigueur de l'engagement.

### *III. L'Approbation parlementaire*

13. *Principe fondamental.* Tout engagement international doit être soumis à la Chambre des Députés pour approbation avant qu'il puisse produire

ses effets. Cette approbation devra intervenir par conséquent avant que ne soit fait l'acte destiné à le mettre définitivement en vigueur, à savoir la ratification ou une signature donnée sans réserve.

14. *Nature et effets de la loi approbative.* L'approbation parlementaire est donnée sous forme de loi (voy. Annexe, formule II). Tout en documentant l'assentiment de la Chambre, la loi approbative a encore un autre effet: elle ouvre la voie pour l'intégration de l'engagement dans l'ordre juridique interne. La loi approbative ne produit pas par elle-même la mise en vigueur du traité; elle n'en constitue qu'une condition préalable et ce n'est qu'en vertu de la ratification, ou de l'adhésion, ou de tout acte équipollent, que le traité revêt force exécutoire sur le territoire national.

D'autre part, la loi approbative n'a pas non plus pour effet de transformer le traité en loi interne. Celui-ci garde son caractère à la fois contractuel et international, c'est-à-dire que son exécution reste soumise à toutes les conditions découlant de sa nature synallagmatique et de ses propres termes ainsi qu'aux règles générales du droit international. En d'autres mots, le traité constitue une source de droit originale et irréductible aux autres sources reconnues dans notre ordre juridique.

S'il est vrai que la loi approbative s'identifie avec la loi ordinaire quant à la forme et quant à la procédure, il ne faut néanmoins pas perdre de vue le fait qu'elle constitue l'exercice d'un pouvoir essentiellement distinct du pouvoir législatif institué par l'art. 46 de la Constitution. En effet, la prérogative établie par l'art. 37 de la loi fondamentale en faveur du Parlement se définit comme une compétence de simple contrôle et de simple approbation, différente de la législation.

15. *Procédure.* Les lois approbatives d'engagements internationaux parcourent la procédure législative normale. L'avant-projet de loi, ensemble avec un exposé des motifs et toute autre documentation pertinente, est élaboré par l'administration publique et soumis, par le Gouvernement, à l'avis du Conseil d'Etat. Ensuite, le projet de loi, avec l'ensemble des travaux préparatoires à l'inclusion de l'avis du Conseil d'Etat, est déposé par le Gouvernement à la Chambre des Députés, en exécution d'un arrêté de dépôt pris par le Grand-Duc. Le vote du Parlement étant acquis et la procédure législative étant accomplie, la loi approbative est promulguée par le Grand-Duc et publiée au Mémorial.

16. *Etendue du pouvoir de contrôle.* Le pouvoir de contrôle du Parlement luxembourgeois sur les engagements internationaux est général. Tous engagements sont soumis à son approbation, quelle que soit la technique de leur conclusion (instrument unique ou échange de notes), quelle que soit leur qualification comme traités, accords, arrangements ou autrement, quelle que soit leur matière et quels que soient leurs effets. La Constitution luxembourgeoise n'a pas adopté la distinction établie par d'autres constitutions entre certaines conventions soumises à approbation parlementaire et d'autres catégories (différentes d'ailleurs de pays en pays) qui échappent à ce contrôle.

17. *Dispositions habilitantes.* Toutefois, il est de pratique que le Parlement vote des dispositions ayant pour effet d'habiliter le Gouvernement à mettre en vigueur, sans recourir à l'approbation parlementaire, des accords internationaux conclus dans des matières déterminées (voy. Annexe, formule III). Des dispositions de ce genre sont faites dans deux cas notamment:

*(a)* Certaines lois contiennent des dispositions habilitant le Gouvernement à mettre en vigueur des accords ayant trait à la matière qui forme l'objet de ces mêmes lois.

*(b)* Certaines lois approbatives d'engagements internationaux habilitent le Gouvernement à mettre en vigueur des accords ultérieurs, conclus pour l'exécution, la modification ou l'extension des engagements en question.

Sauf disposition contraire, les accords passés en vertu d'une disposition habilitante de cette sorte sont négociés et conclus de la même manière que les autres engagements, mais ils ne sont pas soumis à l'approbation parlementaire et leur promulgation est faite par voie d'arrêté grand-ducal (voy. Annexe, formule IV).

### *IV. L'Intégration, la Publication et l'Exécution des engagements internationaux*

18. *Principe fondamental.* L'intégration des traités internationaux dans le droit interne a lieu par l'effet même de la ratification ou de l'adhésion. Mais comme la ratification est un acte international, l'entrée en vigueur du traité dans l'ordre interne requiert, en plus de l'approbation parlementaire, tout un ensemble de mesures additionnelles, à savoir des mesures de publicité, auxquelles peuvent s'ajouter, dans certaines circonstances, des mesures légales ou réglementaires.

19. *Publication des traités.* Un traité reste inopposable tant qu'il n'a pas été publié. Cette nécessité résulte, à la fois, de la prohibition des traités secrets prononcés par l'article 37 de la Constitution, ainsi que d'une extension par analogie de l'art. 112 de la Constitution qui requiert la publication des lois et règlements. La règle de l'art. 37 se dirige non seulement contre une pratique bien connue dans l'histoire diplomatique, mais considérée en connexion avec l'ensemble du droit public luxembourgeois, elle revêt actuellement une double portée pratique.

*(a)* Le Gouvernement ne saurait soustraire un engagement international à la connaissance du Parlement. Un engagement reste sans effet tant qu'il n'a pas reçu l'approbation parlementaire ou, suivant les cas, tant qu'il n'a pas été mis en vigueur en vertu d'une habilitation législative. Pour autant, la prohibition des traités secrets se couvre avec l'obligation positive de soumettre tout engagement à l'assentiment de la Chambre des Députés.

*(b)* D'autre part, un engagement international ne peut devenir obligatoire sans avoir été porté à la connaissance du public. Il semble être évident que cette publication doit se faire dans la forme déterminée pour la publication des lois et règlements. Elle est opérée par insertion au Mémorial; à la différence d'autres pays, le Luxembourg ne possède pas de recueil spécial des traités internationaux.

20. *Procédés de publication.* Généralement, le texte de l'engagement est publié comme annexe de la loi approbative. Ce système présente l'inconvénient d'amener la publication de textes qui ne sont pas encore devenus obligatoires et qui peuvent ne jamais entrer en vigueur. En effet, la ratification ou l'adhésion sont toujours subséquentes à l'approbation parlementaire; d'autre part, l'entrée en vigueur des engagements est liée, suivant les cas, à la ratification de l'autre Partie contractante ou à l'adhésion de plusieurs autres Etats. On essaye de pallier à cet incon-

vénient en annonçant, par voie d'avis au Mémorial, la ratification ou l'adhésion, ainsi que l'entrée en vigueur de l'engagement sur le plan international.

21. *Procédés de publication: l'arrêté g.-d. de publication.* Dans certains cas on a utilisé un procédé plus satisfaisant: La promulgation et la publication de l'engagement n'est pas faite à la suite de la loi approbative, mais en vertu d'un arrêté grand-ducal, pris en exécution de celle-ci, et consécutif à la ratification ou à l'adhésion, ainsi qu'à l'entrée en vigueur internationale (voy. Annexe, formule V).

Ce système a l'avantage de documenter d'une façon authentique, dans le préambule de l'arrêté de publication, à la fois le caractère obligatoire de l'engagement et la date exacte de son entrée en vigueur.

Au demeurant, la pratique est flottante sur ce point, le meilleur régime étant choisi de cas en cas suivant les circonstances.

22. *Mise en œuvre des traités.* Le traité devient exécutoire par l'effet même de son entrée en vigueur internationale (par ratification ou autrement), dûment publiée sur le territoire. Il faut toutefois, pour que cet effet se produise, que les clauses du traité soient assez explicites et précises, en d'autres mots qu'elles revêtent un degré suffisant de positivité, pour être susceptibles d'une application immédiate. On désigne cette sorte de traités par le terme anglais de self-executing. En général, les traités sont conçus de telle façon qu'ils soient susceptibles d'une application immédiate, sans autre mise en œuvre.

Toutefois tous les traités n'ont pas atteint ce degré de développement. L'application de certains traités demande des mesures d'exécution à prendre par la voie législative ou réglementaire, suivant les cas.

*(a)* Des mesures législatives sont nécessaires chaque fois que les mesures d'exécution appartiennent au domaine d'une réserve de la loi. C'est le cas notamment pour la fixation de mesures pénales. Les dispositions nécessaires à cet effet sont réunies en général dans un même texte avec l'approbation parlementaire. Cet aménagement est pratique, mais il convient de faire remarquer qu'une loi de ce genre est de nature hybride en tant qu'elle unit l'approbation parlementaire à des mesures de législation interne (voy. sub 14 ci-dessus).

*(b)* Dans les autres cas, les mesures sont à prendre par règlement d'administration publique. Il est vrai que l'art. 36 de la Constitution ne se réfère qu'à l'exécution des lois. Or, nous avons dit que le traité international est une source de droit sui generis. Toutefois, il semble évident que ce texte doive être étendu par analogie à l'exécution des traités internationaux.

## ANNEXE

### Formules de quelques actes relatifs aux traités internationaux, extraites du formulaire du ministère des affaires étrangères

#### I. *Pleins pouvoirs (formule fondamentale)*

Nous CHARLOTTE etc.

Sur le rapport de notre Ministre des affaires étrangères et après délibération du gouvernement en conseil;

Avons trouvé bon et entendu de conférer à M. N.N. des pleins pouvoirs à l'effet de signer [suit la désignation de l'engagement et, pour autant que faisable, de l'autre Partie ou des autres Parties contractantes];

Nous réservant d'approuver et de ratifier ce que notre plénipotentiaire aura signé en vertu des présents pleins pouvoirs.

En foi de quoi nous avons signé les présentes et y avons fait apposer notre sceau grand-ducal.

Donné à

*(Signature)*

*(Contreseing du Ministre des affaires étrangères).*

II. *Loi approbative*

La pratique utilise à cet effet plusieurs formules dont la plus usuelle est la suivante:

Est approuvé le traité...

Cette formule est utilisée, peu importe que l'approbation porte sur un acte signé sous réserve de ratification, ou sur un acte préétabli auquel il s'agit d'adhérer ultérieurement. Pour plus de clarté on rédige parfois, dans ce dernier cas, la formule de la loi en ces termes:

Est approuvé, en vue de l'adhésion du Grand-Duché de Luxembourg, le traité...

III. *Disposition habilitante pour la mise en vigueur de traités sans recours à l'approbation parlementaire*

La meilleure, parmi les formules utilisées, est la suivante:

Des règlements d'administration publique auront pour objet la mise en vigueur des accords à conclure pour...

IV. *Arrêté grand-ducal d'intégration*

Cet arrêté, qui remplace la loi approbative, intervient toujours en vertu d'une habilitation législative expresse.

Nous Charlotte etc.

Vu (suit une référence à la disposition habilitante):

Attendu (suit, le cas échéant, une référence à l'adhésion, si celle-ci a précédé l'arrêté);

Notre Conseil d'Etat entendu (ou: vu l'article 27 de la loi du 16 janvier 1866 sur l'organisation du Conseil d'Etat et considérant qu'il y a urgence);

Sur le rapport de notre Ministre des affaires étrangères (et de notre ministre...) et après délibération du gouvernement en conseil;

Avons arrêté et arrêtons:

Article 1er. L'accord (suit la désignation de l'accord) sera publié au memorial afin d'être exécuté et observé par tous ceux que la chose concerne.

Article 2. Notre Ministre des Affaires étrangères (et notre Ministre...) est (sont) chargé(s) de l'exécution du présent arrêté (chacun en ce qui le concerne).

Luxembourg, le

*(Signature)*

*(Contreseing du Ministre des affaires étrangères)*

*(Contreseing de l'autre ou des autres Ministres intéressés)*

### V. *Arrêté grand-ducal de publication*

Cet arrêté se distingue nettement de l'arrêté précédent. Il suppose l'approbation parlementaire ainsi que l'entrée en vigueur du traité, par l'effet de la ratification. Il se borne à ordonner la publication.

Nous Charlotte etc.

Vu (suit une référence à la loi approbative et, par le truchement de son titre, au titre du traité);

Attendu (suit une référence à la ratification ou à l'adhésion);

Attendu (suit une détermination de la date de l'entrée en vigueur);

Sur le rapport de notre Ministre des affaires étrangères (et de notre Ministre...) et après délibération du Gouvernement en Conseil;

Avons arrêté et arrêtons:

Article 1er. Le traité (suit la désignation du traité) sera publié au mémorial afin d'être exécuté et observé par tous ceux que la chose concerne.

Article 2. Notre Ministre des affaires étrangères (et notre Ministre...) est (sont) chargé(s) de l'exécution du présent arrêté (chacun en ce qui le concerne).

Luxembourg, le

*(Signature)*

*(Contreseing du Ministre des affaires étrangères)*

*(Contreseing du ou des Ministres qui ont contresigné la loi approbative)*

### VI. *Ratification*

GRAND-DUCHÉ DE LUXEMBOURG

RATIFICATION[1]

de (suit la désignation de l'engagement)

Nous Charlotte etc.

Ayant vu et examiné (suit le titre de l'engagement), dont le texte est reproduit ci-après:

[1] Un instrument rédigé comme ratification est fait chaque fois qu'il s'agit de confirmer une signature préalable donnée sous réserve. La désignation de l'instrument est adaptée à la terminologie de l'engagement (p. ex. comme acceptation ou autrement) chaque fois que ceci apparaît utile.

(suit le texte)[1]

Avons approuvé et approuvons le dit engagement (insérer la désignation pertinente), déclarons qu'il est accepté, ratifié et confirmé et promettons qu'il sera exécuté et observé dans le Grand-Duché de Luxembourg selon sa forme et teneur.

(Suivent, le cas échéant, les réserves et les qualifications de la ratification.)

En foi de quoi nous avons signé les présentes et y avons fait apposer notre sceau grand-ducal.

Donné à

*(Signature)*

*(Contreseing du Ministre des affaires étrangères)*

## VII. *Adhésion*

### Grand-Duché de Luxembourg

#### adhésion[2]

à (suit la désignation de l'acte)

Nous Charlotte etc.

Désirant adhérer à (suit le titre de l'acte)[3] dont le texte est reproduit ci-après:

(suit le texte)[4]

Déclarons adhérer au dit acte (insérer la désignation pertinente) et promettons qu'il sera exécuté et observé dans le Grand-Duché de Luxembourg selon sa forme et teneur.

(Suivent, le cas échéant, les réserves et les qualifications de l'adhésion.)

En foi de quoi nous avons signé les présentes et y avons fait apposer notre sceau grand-ducal.

Donné à

*(Signature)*

*(Contreseing du Ministre des Affaires étrangères)*

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[1] L'instrument reproduit in extenso l'engagement ainsi que tous autres actes accessoires, pour autant que ceux-ci sont destinés à produire des obligations internationales.

[2] Un instrument rédigé comme adhésion est fait chaque fois qu'il s'agit de rendre obligatoire un acte international sans signature préalable. La désignation de l'instrument est adaptée à la terminologie de l'acte (p. ex. comme accession ou autrement) chaque fois que ceci apparaît utile.

[3] Une désignation précise de la clause d'adhésion peut être insérée ici, chaque fois que ceci apparaît utile.

[4] L'instrument reproduit in extenso l'engagement ainsi que tous autres actes accessoires, pour autant que ceux-ci sont destinés à produire des obligations internationales.

## 53. Mexico

CONSTITUTION OF 5 FEBRUARY 1917. TEXT FROM *Constitución Política de los Estados Unidos Mexicanos* (IMPRENTA DE LA CAMERA DE DEPUTADOS, MEXICO, 1950). TRANSLATION BY THE SECRETARIAT OF THE UNITED NATIONS

*Article 76.* The exclusive powers of the Senate are:

(1) To approve the treaties and diplomatic conventions concluded by the President of the Republic with the foreign Powers.

*Article 89.* The powers and obligations of the President are the following:

. . .

(10) To direct diplomatic negotiations and to conclude treaties with foreign powers, submitting them to the ratification of the Federal Congress;...

## 54. Monaco

MEMORANDUM OF 9 MARCH 1951 FROM THE MINISTRY OF STATE OF MONACO

*(a)* Constitution of 5 January 1911 as amended:

*Article 15* de l'Ordonnance Constitutionnelle du 5 Janvier 1911:

Le Gouvernement de la Principauté est exercé, sous la haute autorité du Prince, par un Ministre d'Etat, assisté d'un Conseil.

*Article 21* de l'Ordonnance Constitutionnelle du 5 Janvier 1911:

Le Pouvoir législatif est exercé par le Prince et par un Conseil National.

*Article 8* de l'Ordonnance Constitutionnelle du 18 Novembre 1917:

Les dispositions suivantes sont ajoutées à l'article 21 de la Constitution et formeront les 2ème et 3ème paragraphes:

Le Prince rend les Ordonnances nécessaires pour l'exécution des lois et pour l'application des traités ou accords internationaux.

En cas de divergence d'interprétation sur le point de savoir si, aux termes des dispositions constitutionnelles, il y a lieu de recourir à une loi ou à une ordonnance, le Prince décide par Ordonnance Souveraine, après avis conforme du Conseil d'Etat.

*(b) Article 2* de l'Ordonnance Souveraine du 20 Novembre 1932:

Le Service des Relations Extérieures est rattaché au Ministère d'Etat.

Notre Ministre d'Etat est spécialement chargé du Service des Relations Extérieures de Notre Principauté.

*(c)* Practice:

Le Service des Relations Extérieures, placé sous l'autorité du Souverain, est dirigé par le Ministre d'Etat. Il est chargé des négociations diplomatiques concernant les traités et autres accords internationaux.

Les traités et autres accords internationaux sont conclus par le Ministre d'Etat ou par tout autre Plénipotentiaire muni de pouvoirs conférés par S.A.S. le Prince; ils sont ratifiés par le Souverain et rendus exécutoires sur le territoire de la Principauté par Ordonnance Souveraine.

## 55. Mongolian People's Republic

CONSTITUTION OF 30 JUNE 1940. TEXT FROM *Sovetskoe Gosudarstvo i Pravo*, 1947, NO. 8. TRANSLATION BY THE SECRETARIAT OF THE UNITED NATIONS

*Chapter II. The Organization of the State*

*Article 10.* The jurisdiction of the Mongolian People's Republic, as represented by its highest organs of authority and organs of government, extends to:

*(a)* Representation of the Mongolian People's Republic in international relations: the conclusion and ratification of treaties with other States.

*Chapter IV. The Little Khural*[1] *and the Presidium of the Little Khural*[2]

*Article 23.* The Presidium of the Little Khural:

. . .

*(j)* Ratifies treaties and agreements with other States.

## 56. Nepal

The Maharajah of Nepal promulgated a Constitution which took effect on 1 April 1948. This Constitution, however, contains no reference to any rules on the subject of the exercise of the treaty-making power, and no official information is available concerning any customs or usages in the matter.

## 57. Netherlands

EXCERPT FROM LETTER OF 17 JUNE 1952 ADDRESSED TO THE LEGAL DEPARTMENT OF THE SECRETARIAT BY THE PERMANENT DELEGATION OF THE NETHERLANDS. TRANSLATION BY THE SECRETARIAT OF THE UNITED NATIONS

*Amended Articles of the Constitution of 8 May 1952*[3]

*Article 58.* The Crown shall have the supreme direction of foreign relations. It shall promote the development of the international legal order.

*Article 60.* Agreements with other Powers and with international organizations shall be concluded by, or with the authorization of, the Crown and, in any case where an agreement so requires, shall be ratified by the Crown.

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[1] The Legislative Assembly elected by the Great People's Khural, which is the Assembly of Electors.

[2] Members: 1 President, 1 Vice-President, 1 secretary, 4 members.

[3] Under the Netherlands Constitution, these articles, in order to be valid amendments, require to be approved by a two-thirds vote by the States-General twice, once before, and once after, a dissolution. The first approval has been given but at the time of going to press (1 December 1952) the new States-General had not yet given the second approval. Even after such approval, the articles require the signature of the Queen.

The agreements shall be submitted to the States-General as soon as possible; they shall not be ratified, and shall not come into effect, until they have received the approval of the States-General.

The courts shall not have power to inquire into the constitutionality of agreements.

*Article 60a.* The above approval shall be deemed to have been given unless, within thirty days after the submission of the agreement, the wish is expressed by or in the name of one of the Chambers of the States-General or by at least one-fifth of the constitutional membership of one of the Chambers, that the agreement should be subject to a decision by the States-General, or if both Chambers of the States-General declare, before the expiry of this time-limit, that no decision is requested. The time-limit mentioned in the foregoing paragraph shall be suspended when the States-General are not in session. In all cases where an agreement is subject to a decision by the States-General, approval may only be given by legislation.

*Article 60b.* Except in the circumstances described in article 60c, this approval shall not be required:

*(a)* In the case of an agreement for which provision is made by legislation;

*(b)* If the agreement refers exclusively to the implementation of an approved agreement, in so far as the States-General, in giving their approval, did not otherwise stipulate;

*(c)* If the agreement does not involve the Realm in any important financial commitments and is concluded for not more than one year;

*(d)* If, in exceptional cases of an urgent nature, the interests of the Realm require that the agreement should come into effect without delay.

An agreement within the terms of *(d)* shall not be concluded except with the proviso that it shall be terminated if the approval of the States-General is withheld. The States-General shall be notified immediately of the conclusion of the agreement. The agreement shall also be submitted to the States-General for approval if, within thirty days after this notification, a request to that effect is made by, or in the name of, one Chamber of the States-General or by at least one-fifth of the constitutional membership of one Chamber.

The provisions contained in the foregoing paragraph shall not be applicable if it would manifestly conflict with the interests of the Realm to observe them. In any such case the agreement shall be submitted to the States-General as soon as possible and, if they withhold their approval, it shall be terminated as quickly as is consistent with the terms of the agreement.

*Article 60c.* If the development of the international legal order so requires, it shall be permissible for an agreement to depart from the provisions of the Constitution. In any such case the agreement shall not be deemed to be approved unless the States-General decide to approve it by two-thirds of the votes cast in each Chamber.

*Article 60d.* The provisions of the four preceding articles shall apply, *mutatis mutandis*, to accessions to agreements.

Articles 60, 60a and 60b shall apply, *mutatis mutandis*, to the denunciation of agreements, the second paragraph of article 60 to be construed as requiring that the States-General shall be notified of the intention to denounce.

*Article 60e.* If any legislative provision in force in the Realm is or becomes incompatible with any agreement published in conformity with article 60f before or after the enactment of the provision, then the provision in question ceases to be applicable.

*Article 60f.* Agreements shall only be binding on citizens if they have been published. The rules to be observed in the publication shall be prescribed by legislation.

*Article 60g.* Legislative, administrative and jurisdictional powers may be delegated to international organizations by, or in virtue of, an agreement.

Article 60e shall apply, *mutatis mutandis*, to decisions by international organizations.

## 58. New Zealand

MEMORANDUM OF 29 APRIL 1952 FROM THE GOVERNMENT OF NEW ZEALAND

In New Zealand, the Crown, acting on the advice of the New Zealand Government, is the constitutional organ responsible for the conduct of foreign affairs. Accordingly, when full powers and instruments of ratification are required for the negotiation or conclusion of treaties in the Heads of State form, the necessary instruments are signed by Her Majesty the Queen.

Nowadays New Zealand, in conformity with international practice, usually enters into international agreements in the inter-governmental form. In such cases the Queen's signature is not obtained and full powers, instruments of ratification, etc., are signed on behalf of the Government by the Minister of External Affairs. This he can do under the authority of the External Affairs Act, 1943. By that Act, the Minister of External Affairs, appointed by the Governor-General, is charged "generally with the administration of the external and foreign affairs of New Zealand, including relations with other countries, communications between the Government of New Zealand and other governments, the representation of New Zealand in other countries, and the representation of other countries in New Zealand."

## 59. Niearagua

CONSTITUTION OF 6 NOVEMBER 1950. TEXT FROM *La Gaceta, Diario Oficial*, VOL. 54, NO. 235. TRANSLATION BY THE SECRETARIAT OF THE UNITED NATIONS

*Article 148.* It is within the competence of Congress, each Chamber sitting separately

. . .

(7) To approve or withhold approval of treaties concluded with foreign nations. The treaties referred to in article 6 require, for their approval, two-thirds of the votes cast.[1]

[1] *Article 6.* The territory and sovereignty of the Republic are indivisible and inalienable. However, treaties may be concluded that tend toward union with one or more of the Republics of Central America; or that have for their purpose the construction, sanitation, operation, and defence of an inter-oceanic canal across the national territory. Pacts may also be concluded that aim at granting temporary use of national territory to an American Power, for Continental defence exclusively.

*Article 191.* It is within the competence of the President of the Republic in so far as concerns his relations with the Legislative Power:

. . .

(6) By the medium of the Ministers, to lay before the Legislative Power *projets* of laws, and treaties and contracts which require the approval of the legislature.

*Article 195.* It is within the competence of the President of the Republic as Supreme Administrative Authority:

. . .

(7) To conclude treaties of peace informing Congress thereof at its next session.

(8) To conclude treaties ... and to ratify them with the previous approval of the Legislative Power.

## 60. Norway

*(a)* CONSTITUTION OF 17 MAY 1814, AS AMENDED. TEXT (IN ENGLISH) FURNISHED BY THE NORWEGIAN GOVERNMENT

*Article 26.* The King shall have the right to assemble troops, to commence war in defence of the Kingdom and to conclude peace, to conclude and abrogate alliances, to send and to receive diplomatic envoys. Treaties bearing on matters of special importance, and, in any case, such treaties as, according to the Constitution, necessitate a new law or a decision on the part of the Storting in order to be carried into effect shall not be binding until the Storting has given its consent thereunto.

*(b)* MEMORANDUM OF 4 APRIL 1951 FROM THE NORWEGIAN GOVERNMENT (ORIGINAL IN ENGLISH)

1. In spite of the expression "of special importance", the rule is to obtain the consent of the Storting regarding all treaties of any importance.

2. The consent of the Storting is always necessary if the treaty, according to the Constitution, requires a new law or a decision of the Storting. A new law is necessary when the treaty requires a change in existing legislation, and also when the State assumes responsibilities contrary to present laws, or obligations encroaching upon the rights of the citizens in such a way that, according to the Constitution, they must be authorized by a formal law.

3. Action, other than legislation, by the Storting, is especially required when the treaty affects the Storting's authority in financial matters.

4. The Storting must give its consent before a treaty is ratified. If the treaty requires legislation, the correct procedure is for the Storting both to give its consent to the treaty and to enact the law, before ratification takes place. However, in some cases the Storting gives a general consent in advance for the conclusion of treaties in a special field.

5. If the foregoing formal requirements are not fulfilled, the treaty is not binding. The regulation therefore limits not only the King's right but also his capacity to create binding obligations.

6. Treaties that are in conflict with absolute prohibitions of the Constitution cannot be entered into, even with the consent of the Storting. The abrogation of a treaty does not require consent by the Storting. The countersigning of international ratification documents is done by the Foreign Minister.

## 61. Pakistan

MEMORANDUM OF 28 DECEMBER 1951 FROM THE GOVERNMENT OF PAKISTAN (ORIGINAL IN ENGLISH)

1. There are no laws, regulations, decrees or judicial decisions regarding the negotiation and conclusion of treaties in Pakistan. The matter is governed by custom and usage. Since the creation of Pakistan as a separate Dominion of the Commonwealth, i.e., 15 August 1947, its treaty-making power has been exercised by the Government of Pakistan. When a treaty is to be negotiated as between Governments, the Government of Pakistan authorizes its representatives to exercise its treaty-making powers. These representatives receive Full Powers signed by the Governor-General which authorize them to negotiate, conclude and sign the treaty or other bilateral and multilateral agreements on behalf of Pakistan. When the treaty is to be negotiated and concluded as between Heads of States, the powers of the Head of State are exercised by the Governor General.

2. For agreements of a non-political character of minor importance, certain functionaries are recognized as competent to exercise the treaty-making power of Pakistan to the extent it is delegated to them. Such functionaries are, by virtue of their offices and duties, competent to enter into certain agreements without the requirement of ratification. Thus, for instance, the Director-General of Posts and Telegraphs of Pakistan can enter into bilateral agreements concerning postal and telecommunication matters for which no subsequent ratification is necessary.

3. Ratification of a treaty or other international agreement takes the form of a document—an instrument of ratification. If the treaty or agreement is in Governmental form, the instrument of ratification is signed by the Foreign Minister. If the treaty or agreement is in the Head of State form, the instrument of ratification is signed by the Governor-General. Accession to multilateral international agreements, conventions, protocols, etc., is done by the Government of Pakistan through an instrument of accession, notified by the Foreign Minister or by the Envoy of Pakistan accredited to the country to which the accession is to be notified, or by the Permanent Representative of Pakistan in the United Nations or any of its allied organizations.

## 62. Panama

CONSTITUTION OF 1 MARCH 1946. TEXT FROM CONSTITUCIÓN DE LA REPÚBLICA DE PANAMA (EDICIÓN OFICIAL, PANAMA 1946). TRANSLATION BY THE SECRETARIAT OF THE UNITED NATIONS

*Article 118.* The legislative functions of the National Assembly shall be ... and, in particular, the following:

. . .

(5) To approve or withhold approval of public treaties concluded by the Executive.

*Article 144.* The President of the Republic shall exercise the following functions in co-operation with the competent Minister, the Cabinet Council, or the Permanent Legislative Commission, as the case may be, :

. . .

(8) The direction of foreign relations; accrediting and receiving diplomatic agents and consuls as well as the conclusion of public treaties and conventions, which shall be submitted to the consideration of the National Assembly;

## 63. Paraguay

CONSTITUTION OF 10 JULY 1940. TEXT FROM CONSTITUCIONES POLÍTICAS DE AMERICA (HAVANA 1942). TRANSLATION BY THE SECRETARIAT OF THE UNITED NATIONS

*Article 51.* The President of the Republic has the following powers:

. . .

(11) He negotiates and signs treaties of peace, of commerce, of navigation, of alliance, of boundaries and of neutrality, concordats and other international agreements, being obliged to submit them to the Council of State and to the Chamber of Representatives for their approval.

*Article 63.* The powers of the Council of State shall be:

. . .

(2) To judge upon matters of international policy submitted for its consideration by the Executive Power.

*Article 76.* It is within the competence of the Chamber of Representatives:

. . .

(8) To consider international treaties, and to authorize the Executive Power to make war or conclude peace.

## 64. Peru

MEMORANDUM OF 28 FEBRUARY 1951 FROM THE GOVERNMENT OF PERU. TRANSLATION BY THE SECRETARIAT OF THE UNITED NATIONS

*Constitution of 9 April 1933*

*Article 123.* The functions of Congress are:

. . .

(21) To approve or withhold approval of the treaties, concordats, and other conventions concluded with foreign governments.

The above approval mentioned in the text is granted by means of what are known as "legislative decisions" which have the same legal force as an Act. Recently, it has become the practice for such agreements

as do not, in any of their articles, modify, alter, or derogate from any existing law to be approved by means of decisions of the Executive Power *(resolución suprema)*, since it is within the competence of the Executive Power to enact provisions which, from the juridical point of view, are second only to the laws enacted by the Legislative Power.

## 65. Philippines

MEMORANDUM OF 25 JANUARY 1951 FROM THE GOVERNMENT OF THE PHILIPPINES (ORIGINAL IN ENGLISH)

*Constitution of 8 February 1935 as amended*

*Article 4.* ...

(7) The President shall have the power, with the concurrence of two-thirds of all the members of the Senate, to make treaties and with the consent of the Committee on Appointments he shall appoint ambassadors, other public ministers and consuls. He shall receive ambassadors and other public ministers duly accredited to the Government of the Philippines.

Under Commonwealth Act No. 732, a Department of Foreign Affairs was created. In pursuance of the same Act an Executive Order No. 18 was promulgated on 16 September 1946. This Order provides that the Secretary of Foreign Affairs shall be responsible to the President for promulgating and carrying into effect the foreign policy of the Republic of the Philippines; for the conduct of the foreign relations; for the negotiation of treaties, conventions and other agreements of similar force.

## 66. Poland

CONSTITUTION OF 20 FEBRUARY 1947. TRANSLATION PUBLISHED IN 1948 BY THE POLISH RESEARCH AND INFORMATION SERVICE, NEW YORK CITY

*Article 4.* (1) The Diet may pass legislation authorizing the Government to issue decree-laws in all matters except: ... the ratification of international treaties.

. . .

*Article 48.* The President of the Republic shall represent the State abroad, receive diplomatic representatives of foreign countries and dispatch diplomatic representatives of Poland to foreign countries.

*Article 49.* The President of the Republic shall have the right to conclude treaties with other countries and must inform the Diet thereof. Trade and tariff agreements, agreements implying permanent financial obligations for the State, or agreements implying obligations for the citizens, treaties regarding boundary changes, as well as alliances, require the consent of the Diet.

## 67. Portugal

*(a)* CONSTITUTION OF 11 APRIL 1933 (AS AMENDED). TEXT FROM CONSTITUIÇÃO POLITICA DA REPÚBLICA PORTUGESA (Edição Oficial, Lisboa 1948) TRANSLATION BY THE SECRETARIAT OF THE UNITED NATIONS

*Article 81.* The President of the Republic shall:

. . .

(7) Represent the nation and direct the foreign policy of the State; conclude international conventions and negotiate treaties of peace, alliance, arbitration, and commerce and submit them through the government to the National Assembly for approval.

*Article 82.* The acts of the President of the Republic must be countersigned by the President of the Council and by the appropriate minister or ministers; otherwise they shall be null and void...

*(b)* MEMORANDUM OF 12 APRIL 1951 FROM THE PORTUGUESE GOVERNMENT

1. Although article 81 of the Constitution attributes the direction of international activity to the President of the Republic this power is in practice exercised by the Minister of Foreign Affairs, through the Department of State in Portugal, and through the Portuguese diplomatic missions and Consulates abroad (article 1 of the Decree-Law No. 29,970 of 13 October 1939).

2. The Commission for Economic Co-ordination, which was created by Decree-Law No. 38,008 of 23 October 1950, is subordinated to the Ministry of Economy, and its functions include the implementation of the decisions taken by the Council of Ministers for External Trade in so far as these affect the Ministry of Economy. The Commission is required to follow closely the directives laid down by the Council in regard to commercial policy, and is called upon to supply the necessary data for the negotiation of commercial agreements. When the agreements have entered into force the Commission has the function of observing the manner in which they are being executed.

3. After ratification by the National Assembly every treaty or other international agreement must be published in the Government Gazette as required by article 81 (9) of the Constitution quoted above.

## 68. Romania

CONSTITUTION OF 13 APRIL 1948. ORIGINAL TEXT OF THE CONSTITUTION, IN ROMANIAN, PUBLISHED BY THE STATE INDUSTRIAL ENTERPRISE, CENTRAL PRINTING OFFICE, BUCHAREST, 1949. TRANSLATION BY THE SECRETARIAT OF THE UNITED NATIONS

*Article 44.* The Presidium of the Grand National Assembly of the People's Republic of Romania shall:

. . .

(6) Represent the People's Republic of Romania in international relations.

. . .

(8) Receive letters of credence and recall of diplomatic representatives of foreign States accredited to the Republic.

. . .

(13) On a motion by the Government ratify or denounce international treaties.

## 69. Saudi Arabia

*(a)* CONSTITUTION OF 29 AUGUST 1926. TEXT PUBLISHED IN THE REVUE EGYPTIENNE DE DROIT INTERNATIONAL (1947), VOL. 3, PP. 146-156. TRANSLATION BY THE SECRETARIAT OF THE UNITED NATIONS

*Article 18.* The direction of foreign affairs is entrusted by His Majesty to the person who is the most competent and best qualified to perform the duties involved.

*(b)* DECREE CONSTITUTING A COUNCIL OF MINISTERS, 29 DECEMBER 1931. SAME SOURCE AND TRANSLATION

*Article 16.* The following departments of government are subject to the authority of the President of the Council:

. . .

(2) Foreign Affairs.

## 70. Spain

ACT OF 17 JULY 1942 CONCERNING THE SPANISH CORTES AS AMENDED BY AN ACT OF 9 MARCH 1946. DICCIONARIO DE LEGISLACION (EDITORIAL ARAZANDI—1951) p. 919. TRANSLATION BY THE SECRETARIAT OF THE UNITED NATIONS

*Article 14.* The Cortes in full session or in committee, according to the circumstances, shall be heard as to the ratification of treaties which affect matters falling within the competence of the Cortes, as specified in the preceding articles[1] of this Act.

## 71. Sweden

*(a)* INSTRUMENT OF GOVERNMENT OF 6 JUNE 1809 AS AMENDED. TEXT FURNISHED IN ENGLISH BY THE SWEDISH GOVERNMENT

*Article 12.* The King shall have power to enter into agreements with foreign Powers after the Council of State has been heard upon the subject. When such agreements deal with matters which are required under this instrument of government to be decided by the Riksdag, either alone or with the King, or when, though not dealing with such matters, they

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[1] The preceding articles specify the matters on which the Cortes shall be consulted.

are of major importance, they shall be laid before the Riksdag for approval; and such agreements shall contain a reservation making their validity dependent upon the Riksdag's sanction.

*(b)* MEMORANDUM OF 28 MAY 1951 FROM THE SWEDISH GOVERNMENT. TRANSLATION BY THE SECRETARIAT OF THE UNITED NATIONS

Should there be an occasion when the interests of the State require that agreements, which are of great importance but do not deal with matters required to be decided by the Riksdag, should be concluded without the confirmation of the Riksdag, this may be done, but in such circumstances the committee on foreign affairs or the advisory committee shall be given an opportunity to express its opinion before the agreement is concluded.

1. The treaties which must be submitted to the Riksdag for approval fall into two classes:

First, treaties dealing with matters which under the Instrument of Government must be decided by the Riksdag, either alone or jointly with the King.

2. This former class includes any agreement the execution of which requires funds, e.g., a vote by the Riksdag or a measure of taxation. An example is a social welfare convention involving the provision of poor relief for the nationals of a certain country. This requires a special appropriation for the authority concerned, a matter which only the Riksdag can decide. Similarly, this category would also include an agreement for the avoidance of double taxation, as the Riksdag alone can levy taxes. Another example is an agreement regarding exemption from customs duties or alteration of customs rates.

3. To this category also belong treaties, execution of which calls for a statute, which under the Instrument of Government can be passed only by joint decision of the King and the Riksdag. Examples are the bills of exchange and cheques conventions, which gave rise to the present statutes on bills of exchange and cheques; citizenship agreements; and a number of treaties relating to private international law, particularly those dealing with the family. This category includes the extradition treaties, the legal basis of which is the criminal law enacted by joint decision and the law concerning the extradition of criminals.

4. The restriction of the King's power to conclude treaties of this kind admits of no exception, and is aimed at preventing encroachment on the fiscal and legislative powers of the Riksdag.

5. The second group of treaties which must be submitted to the Riksdag consists of those which, though not touching on questions falling wholly or partly for decision by the Riksdag, are of major importance. This group may include agreements the execution of which requires legislation falling within the King's constitutional power to make administrative law, for example, police regulations and industrial legislation; and other treaties of major importance which do not call for special legislation but may nevertheless impose obligations upon the State, e.g., most political treaties, and agreements concerning conciliation, judicial decisions and arbitral awards.

6. Whereas a treaty concerning even the least significant legislative or fiscal matter must in all circumstances be laid before the Riksdag for approval, exceptions exist to the rule that the Riksdag must approve treaties of major importance. The Instrument of Government does not specify which treaties are "of major importance". It is accordingly left to the King to decide, after consultation with the Council of State, which is responsible under the Constitution, which agreements are of major importance and must, therefore, be submitted to the Riksdag's examination. It is further provided, in the second paragraph of article 12 of the Instrument of Government, that such an agreement may be concluded without confirmation by the Riksdag in a case where the interests of the State so require, for instance, if the Riksdag is not in session or fails to decide the matter in time. In such a case, however, the Advisory Committee *(Utrikesnamnd)* or the Committee on Foreign Affairs *(Utrikesutskott)* must be given an opportunity to express its opinion before the agreement is concluded. Whether in a given case the State's interests are involved is decided by the King, after consultation with the Council of State. The Advisory Committee is a consultative body in matters of foreign policy and is composed of the members of the Committee on Foreign Affairs. Neither the Advisory Committee nor the Committee on Foreign Affairs may, in the present case, decide to approve a projected agreement on behalf of the Riksdag; it may merely advise for or against.

7. In an attempt to solve the problem in international law of the extent to which the King's constitutionally limited authority to enter into treaties with foreign Powers affects the validity of a treaty as against the other contracting party, a provision was inserted in article 12 of the Instrument of Government laying down that a treaty which has to be submitted to the Riksdag must contain a reservation making its validity depend upon the Riksdag's approval. In treaties concluded by Sweden, this reservation is generally placed in the ratification clause.

8. In practice the Riksdag's approval has taken several forms. In addition to the one provided for in the Constitution, according to which a draft agreement is laid before the Riksdag for approval after signature, there is an approval in advance, authorizing the King to enter into agreements of a more or less specified content. Such authority is usually given subject to reciprocity. In many cases it is written into an existing domestic statute, e.g., the 1918 Poor Relief Act and the provisions of the 1937 Old Age Pensions Act concerning national income and property tax. Naturally the King, in concluding the agreement, may not exceed the authority conferred by the statute; but the existence of the authority does not prevent him from laying the agreement before the Riksdag for its approval.

## 72. Switzerland

*(a)* FEDERAL CONSTITUTION[1] OF 12 SEPTEMBER 1848 AS AMENDED AND REVISED.

*Article 8:* La Confédération a seule le droit de déclarer la guerre et de conclure la paix, ainsi que de faire, avec les Etats étrangers, des alliances et des traités, notamment des traités de péage (douanes) et de commerce.

[1] Text furnished by the Swiss Government.

*Article 9:* Exceptionnellement, les cantons conservent le droit de conclure, avec les Etats étrangers, des traités, sur des objets concernant l'économie publique, les rapports de voisinage et de police; néanmoins, ces traités ne doivent rien contenir de contraire à la Confédération ou aux droits d'autres cantons.

*Article 10:* Les rapports officiels entre les cantons et les gouvernements étrangers ou leurs représentants ont lieu par l'intermédiaire du Conseil fédéral.

Toutefois, les cantons peuvent correspondre directement avec les autorités inférieures et les employés d'un Etat étranger, lorqu'il s'agit des objets mentionnés à l'article précédent.

*Article 11:* Il ne peut être conclu de capitulations militaires.

*Article 84:* Le Conseil national et le Conseil des Etats délibèrent sur tous les objets que la présente constitution place dans le ressort de la Confédération et qui ne sont pas attribués à une autre autorité fédérale.

*Article 85:* Les affaires de la compétence des deux conseils sont notamment les suivantes:

. . .

5. Les alliances et les traités avec les Etats étrangers, ainsi que l'approbation des traités des cantons entre eux ou avec les Etats étrangers; toutefois, les traités des cantons ne sont portés à l'Assemblée fédérale que lorsque le Conseil fédéral ou un autre canton élève des réclamations.

6. Les mesures pour la sûreté extérieure, ainsi que pour le maintien de l'indépendance et de la neutralité de la Suisse; les déclarations de guerre et la conclusion de la paix.

*Article 89:* ...

Les traités internationaux conclus pour une durée indéterminée ou pour plus de quinze ans sont soumis également à l'adoption ou au rejet du peuple lorsque la demande en est faite par 30.000 citoyens actifs ou par huit cantons.

*Article 102:* Les attributions et les obligations du Conseil fédéral, dans les limites de la présente constitution, sont notamment les suivantes.

. . .

7. Il examine les traités des cantons entre eux ou avec l'étranger, et il les approuve, s'il y a lieu (art. 85, chiffre 5).

8. Il veille aux intérêts de la Confédération au dehors, notamment à l'observation de ses rapports internationaux, et il est, en général, chargé des relations extérieures.

### *(b)* Federal Order[1] concerning economic defence against foreign countries. 14 October 1933

*Article 1:* En vue de combattre le chômage, de sauvegarder la production nationale, là où ses intérêts vitaux sont menacés, d'augmenter les stocks destinés à assurer l'approvisionnement du pays en marchandises indispensables et de développer l'exportation, comme dans l'intérêt de la balance des paiements de la Suisse, le Conseil fédéral est autorisé à prendre les mesures nécessaires.

[1] Text furnished by the Swiss Government.

*Article 2:* Le Conseil fédéral peut limiter, à titre exceptionnel et temporaire, l'importation de marchandises qu'il lui appartient de désigner ou faire dépendre cette importation d'un permis à délivrer aux conditions qu'il fixe.

Il peut subordonner la délivrance des permis à l'acquittement d'une taxe proportionnée au prix et à la valeur de la marchandise.

*Article 3:* Afin de sauvegarder les intérêts suisses à l'égard des Etats qui entravent le transfert des paiements, le Conseil fédéral peut conclure des accords à court terme. Lorsqu'il n'y parvient pas, il est autorisé à défendre les intérêts suisses en prenant toutes les mesures unilatérales de nature économique et financière qui lui paraîtront indiquées, particulièrement en réglementant les paiements.

*Article 4:* Avant de prendre de telles mesures, le Conseil fédéral consulte une commission, dans laquelle les principaux groupes économiques seront représentés.

*Article 5:* Les mesures prises en vertu du présent arrêté sont portées deux fois l'an, en règle générale, dans les sessions de printemps et d'automne, à la connaissance de l'Assemblée fédérale, qui décide, au vu d'un rapport des commissions des douanes, si elles doivent rester en vigueur ou être complétées ou modifiées.

*Article 6:* Le Conseil fédéral peut prévoir, pour les contraventions aux prescriptions édictées en vertu du présent arrêté, une amende de dix mille francs au plus ou un emprisonnement d'un an au plus. Les deux peines peuvent être cumulées.

La première partie du code pénal fédéral du 4 février 1853[1] est applicable. Celui qui agit par négligence est également punissable.

La poursuite et le jugement sont du ressort des autorités cantonales, à moins que le Conseil fédéral ne saisisse de l'affaire la cour pénale fédérale.

Le Conseil fédéral peut décider que les dispositions pénales et la procédure pénale régissant les infractions aux prescriptions douanières s'appliqueront par analogie aux restrictions d'importation.

*Article 7:* Le présent arrêté remplace celui du 23 décembre 1931. Il aura effet jusqu'au 31 décembre 1935.[2]

*Article 8:* Le présent arrêté est déclaré urgent et entre immédiatement en vigueur.

Le Conseil fédéral est chargé de son exécution. Il édicte les prescriptions nécessaires.

*(c)* MEMORANDUM FROM THE SWISS GOVERNMENT DATED 11 MAY 1951

Les dispositions fondamentales se trouvent dans la Constitution fédérale aux articles 8 à 11, 85 chiffres 5 et 6, 89 al. 4, 95 et 102 chiffres 7 à 9. Elles attribuent des compétences: —

*(a)* au Gouvernement fédéral, appelé Conseil fédéral (articles 10, 85 chiffre 5, et 102 chiffres 7 à 8) ;

[1] La partie générale du code pénal suisse du 21 décembre 1937 est maintenant applicable en vertu de l'article 333 dudit code.

[2] L'arrêté a été prorogé successivement jusqu'aux 31 décembre 1937, 1939, 1942, 1945, 1948, puis enfin jusqu'au 31 décembre 1951, avec faculté pour l'Assemblée fédérale de la proroger de trois ans au plus si la situation internationale l'exige.

*(b)* au Parlement fédéral, appelé Assemblée fédérale, qui est composé de deux Conseils, le Conseil national dont les membres sont élus par les cantons au *prorata* de leur population et le Conseil des Etats dans lequel chaque canton est représenté par deux députés et chaque demi-canton par un député;

*(c)* aux citoyens actifs, qui peuvent demander par voie d'initiative populaire réunissant au moins 30.000 signatures qu'un traité conclu pour une durée indéterminée ou pour plus de 15 ans soit soumis à une votation populaire (article 89 al. 4);

*(d)* aux Etats fédérés (19 cantons et 6 demi-cantons) qui peuvent conclure eux-mêmes certains traités dans le cadre de la Constitution fédérale (articles 8 à 11, 85 chiffre 5, et 102 chiffre 7) et de leur propre constitution cantonale et qui peuvent demander par voie d'initiative présentée par 8 cantons au moins qu'un traité conclu pour une durée indéterminée ou pour plus de 15 ans soit soumis à une votation populaire (article 89 al. 4).

En ce qui concerne les traités et autres accords internationaux conclus par la Confédération, les compétences respectives du Conseil fédéral et de l'Assemblée fédérale résultent des dispositions de la Constitution fédérale et de l'interprétation qui en a été donnée dans la pratique.

Le Conseil fédéral négocie, signe et ratifie les traités et procède aux adhésions et dénonciations. Toutefois lorsque le traité comporte des obligations nouvelles à la charge de la Confédération, le Conseil fédéral ne peut prendre un engagement définitif qu'après y avoir été autorisé par l'Assemblée fédérale. Cette autorisation peut lui être donnée d'avance pour certaines catégories de traités (par exemple pour les traités visés à l'article 3 de l'arrêté fédéral du 14 octobre 1933 concernant les mesures de défense économique contre l'étranger) ou encore dans les périodes de crise internationale. Il est en outre admis dans la pratique que le Conseil fédéral peut, sans requérir l'approbation de l'Assemblée fédérale, conclure des accords provisoires urgents ainsi que des traités dans les domaines où il a, en droit interne, la compétence d'édicter des ordonnances (par exemple en matière de police).

Lorsque l'Assemblée fédérale a donné son approbation à un traité, le Conseil fédéral reste libre, si les circonstances ont changé, de ne pas ratifier sa signature ou de ne pas faire acte d'adhésion. S'il s'agit d'un traité conclu pour une durée indéterminée ou pour plus de 15 ans, 30.000 citoyens actifs ou 8 cantons peuvent dans le délai de 90 jours demander que l'approbation de l'Assemblée fédérale soit soumise à une votation populaire (article 89 al. 4). Lorsqu'une votation populaire n'est pas demandée, l'approbation du traité devient définitive à l'expiration du délai de 90 jours. Dans le cas contraire, il faut attendre le résultat de la votation pour savoir si l'approbation est confirmée ou annulée. Elle est confirmée lorsque la majorité des votants s'est prononcée en faveur du traité.

Lors de l'adhésion de la Suisse à la Société des Nations, l'Assemblée fédérale a jugé qu'il convenait de recourir à la procédure prévue pour les revisions partielles de la Constitution fédérale, c'est-à-dire à une votation populaire dans laquelle la modification proposée n'est acceptée que si elle est approuvée à la fois par la majorité des votants et par la majorité des cantons.

Le présent mémoire est accompagné du texte de la Constitution fédérale et de l'arrêté fédéral du 14 octobre 1933 concernant les mesures de défense économique contre l'étranger. Aucune décision judiciaire n'est à signaler.

## 73. Syria

CONSTITUTION OF 5 SEPTEMBER 1950. TEXT[1] FROM "INFORMATIONS CONSTITUTIONNELLES ET PARLEMENTAIRES", *Union Interparlementaire*, 1 APRIL 1951, 3RD SERIES, NO. 6

*Article 51.* Les traités concernant la sûreté de l'Etat ou les finances publiques, les traités de commerce et tous les traités conclus pour plus d'une année ne sont définitivement acquis qu'après leur ratification par la Chambre des Députés.

*Article 77.* 1° Le Gouvernement doit tenir le Président de la République informé des négociations internationales;

2° Le Président de la République signe les traités et les ratifie après adoption par la Chambre des députés;

3° Il accrédite les chefs des missions diplomatiques auprès des Gouvernements étrangers et reçoit les chefs des missions diplomatiques accrédités auprès de lui.

## 74. Thailand

MEMORANDUM OF 9 NOVEMBER 1951 FROM THE MINISTRY OF FOREIGN AFFAIRS OF THAILAND

1. In Thailand the Law of Treaties is regulated by section 154 of the Constitution of 1949, which reads as follows:

"Section 154. It shall be the Royal Power of the King to conclude peace treaties and other treaties with foreign States.

"Any treaty which provides for a change in the Thai territories, or which requires the promulgation of an Act to enforce its provisions, must be approved by the National Assembly."

2. The term "Treaty" in the above provision is used in the wide sense and includes any kind of international compact. Any treaty, convention, agreement, arrangement, etc., which may be concluded is, therefore, governed by this provision.

3. However, in exercising the Royal Power thus vested in the King, His Majesty's Government have not failed to take into account the fact that, in modern times, there are an increasing number of international compacts concluded amongst nations on various matters, and have tried to conform to international practices in this connexion, in so far as such practices are not in direct conflict with the above provision of the Constitution. As the conclusion of treaties is exclusively within the power of the King, it follows that, to be valid, a treaty must always be made in the name of the King. This is, in actual fact, complied with in the case of a treaty between the Heads of States, as appears from the preamble which invariably begins with "His Majesty the King of Thailand, and His Majesty the King of .... (or the President of ..., as the case may be), being desirous of strengthening .... etc."

4. On the other hand, there are other agreements, more especially in modern times, which are concluded merely by governments without

[1] Described as "traduction officieuse".

mentioning the Heads of States. To comply with the relevant provision of the Constitution, therefore, it is the duty of the Government, in the document putting such an agreement in force, to insert a formula stating in unequivocal terms that the Government has received the necessary sanction from the King.

5. As regards the procedure for the denunciation of a treaty, in the absence of any provision on this point in the Constitution, each case must be considered in accordance with the terms of the treaty in question.

6. The question of publication of treaties is not governed by any legislation in Thailand, but in practice, as a general rule, a Royal Proclamation is published in the Government Gazette, but this does not constitute a pre-requisite which would affect the validity of a treaty.

## 75. Turkey

*(a)* CONSTITUTION OF 10 JANUARY 1945. TRANSLATION PUBLISHED IN THE SERIES "TURKEY TODAY" NO. 11, ISSUED BY THE TURKISH INFORMATION OFFICE, NEW YORK

*Article 26.* The Grand National Assembly directly exercises such functions as enacting, modifying, interpreting and abrogating laws; concluding conventions and treaties of peace with foreign states...

*(b)* MEMORANDUM OF 6 JUNE 1951 FROM THE TURKISH GOVERNMENT. (ORIGINAL IN ENGLISH)

1. According to the above article, the Grand National Assembly directly exercises such functions as, *inter alia*, concluding conventions, treaties, and peace with foreign States. However, in practice, international instruments are not negotiated, concluded and signed by the Grand National Assembly itself, nor by delegates appointed to that effect by the Grand National Assembly. The negotiation, conclusion and signature of international instruments is carried out by representatives of the Government. These representatives are appointed by, and their credentials are issued upon a decree of, the Council of Ministers. The international instruments signed or adhered to by these representatives are submitted by the Government to the Grand National Assembly, and become effective, in regard to Turkey, upon ratification by the Grand National Assembly.

2. In addition to the general rule embodied in the Turkish Constitution and referred to above, Law No. 4582, dated 5 June 1944 (see *(c)* below) empowers the Government to conclude *modi vivendi* and trade agreements, of a provisional character, to modify the customs duties of articles referred to in the provisional trade agreements, and in *modi vivendi*, and to take measures affecting articles originating from States which are unwilling to come to an agreement.

3. The provisions of Law No. 4582 were to come into effect for a period of two years, as of 13 June 1944. This period was extended three times, in 1946, 1948 and 1950 by Laws No. 4931, 5217, 5589, respectively. The provisions of Law No. 4582 are thus in force until 13 June 1952.

4. According to article 1 of the above-mentioned law, the Government has competence to negotiate and conclude *modi vivendi*, and trade and pay-

ment agreements of a provisional character, and to effect changes, with the proviso of reciprocity, in the lists annexed to trade treaties, conventions and *modi vivendi*, or to abrogate completely the said lists and to annex new lists to trade treaties, conventions and *modi vivendi*.

5. Article 2 empowers the Council of Ministers to effect changes of a provisional character in the customs duties of articles referred to in the trade agreements and *modi vivendi* concluded in conformity with article 1 of the above-mentioned law. Article 3 provides that the agreements concluded by the Government, and the measures taken by it, are to be submitted, for ratification, to the Grand National Assembly within a period not exceeding three months. Article 4 deals with measures to be taken by the Government in regard to articles originating from countries which have not, or are unwilling to, come to an agreement with the Government of the Turkish Republic.

*(c)* ACT NO. 4582 OF 5 JUNE 1944 AUTHORIZING THE PROVISIONAL CONCLUSION OF TRADE AGREEMENTS AND *modus vivendi* ARRANGEMENTS WITH FOREIGN STATES, AND THE AMENDMENT OF CUSTOMS DUES PROVIDED THEREBY, AND DISCRIMINATION AGAINST THE EXPERTS OF STATES NOT ACCEDING TO SUCH AGREEMENTS. PUBLISHED AND PROMULGATED IN *Official Gazette* NO. 5729 OF 13 JUNE 1944. TEXT SUPPLIED BY THE TURKISH GOVERNMENT. TRANSLATION BY THE SECRETARIAT OF THE UNITED NATIONS

*Article 1.* The Government shall have power to negotiate, and conclude provisionally, trade and payment agreements and *modi vivendi*, and, as necessary, and subject to reciprocity, to amend or rescind any agreed list annexed to a trade treaty or contract or *modus vivendi*, and in like manner to add new lists to a trade treaty or contract or *modus vivendi*.

*Article 2.* The Council of Ministers shall have power, at its discretion, and on a joint proposal of the competent ministry and the Ministry of Customs and Excise, to alter provisionally any customs due, imposed by an article of a trade treaty or contract or *modus vivendi* as referred to in article 1 thereof, or to rescind any such due, or to subject to duty any article previously exempt therefrom.

*Article 3.* The Government shall within three months lay before the Grand National Assembly for its approval any measure adopted or agreement concluded by it in accordance with article 1 or 2 hereof.

*Article 4.* The Government shall have power, generally or specifically, to prohibit, restrict, or limit, or to apply discriminatory treatment to, the manufactures, produce or shipping of any foreign State which has not concluded a trade agreement with the Turkish Government, or to start negotiations for any agreement with any such State or with any State which has not acceded to a trade agreement or *modus vivendi*, or has unilaterally suffered an existing contract to become void before the expiry of its term.

An order made by the Government in the exercise of this power shall become effective after the expiry of a duly determined and notified period.

*Article 5.* This Act shall remain in force for two years from the date of its publication.

*Article 6.* The provisions of this Act shall be enforced by the Council of Ministers.

## 76. Ukrainian S.S.R.

CONSTITUTION OF 30 JANUARY 1937. OFFICIAL UKRAINIAN TEXT. PUBLICATION OF THE SUPREME COUNCIL OF THE UKRAINIAN S.S.R., 1951. TRANSLATION BY THE SECRETARIAT OF THE UNITED NATIONS

*Article 15* . . .

*(b)* The Ukrainian S.S.R. has the right to enter into direct relations with foreign States and to conclude agreements and exchange diplomatic and consular representatives with them.

. . .

*Article 43.* The Council of Ministers of the Ukrainian S.S.R.:

. . .

*(h)* Exercises guidance in the sphere of the relations of the Ukrainian S.S.R. with foreign States, on the basis of the general procedure[1] established by the U.S.S.R. governing the relations of Union Republics with foreign States.

## 77. Union of South Africa

1. *Treaty-making power:*

*(a)* SECTION 4 (1) OF THE STATUS OF THE UNION ACT, 1934 (ACT NO. 69 OF 1934)

The Executive Government of the Union in regard to any aspect of its domestic or external affairs is vested in the King, acting on the advice of His Ministers of State for the Union, and may be administered by His Majesty in person or by a Governor-General as his representative.

*(b)* MEMORANDUM OF 12 JANUARY 1953 FROM THE GOVERNMENT OF THE UNION OF SOUTH AFRICA

In very few cases, however, does Her Majesty exercise this right to conclude treaties on behalf of the Union, and then only where it is the practice that treaties of a certain type be concluded between Heads of State.

In fact, the practice has arisen that the treaty-making power in the Union of South Africa is almost exclusively exercised by the Governor-General in Council (i.e., the Government, consisting in practice of the Governor-General acting on the advice of his Ministers and also known as the Executive Council).

Furthermore, while the Government is responsible to Parliament for its actions, and through Parliament to the Electorate, it can be stated that *normally* no limitation is placed on the Government's treaty-making power by either Parliament or the Electorate, for the following reasons:

*(a)* Only in exceptional circumstances does legal provision exist for the actual approval by Parliament of international agreements. This special legislation is set out below in the list of Acts relating to the negotiation and conclusion of international agreements.

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[1] See under title "U.S.S.R.".

*(b)* All international agreements are, in accordance with established practice, eventually laid upon the Tables of both Houses of Parliament and Parliament can then express its approval or disapproval of any such agreement. Any such approval or disapproval, however, has no effect on the validity of an international agreement entered into by the Government.

2. *Negotiation:*

The agencies concerned in the negotiations leading up to the signature of, or accession to, an international agreement are the following:

(i) The Department or Departments within whose sphere the subject matter of the agreement falls, in consultation if necessary, with the appropriate Minister;

(ii) The Department of External Affairs;

(iii) The External Trade Relations Committee in the case of Commercial or related agreements. This committee consists of representatives of the Departments of External Affairs, Finance, Commerce and Industries, Mines, Agriculture and Customs and Excise.

Draft agreements are drawn up or considered by the Department or Departments within whose sphere of administration they fall. Any proposals emanating from such Departments are examined by the Department of External Affairs. In the case of commercial or related agreements, the views of the External Trade Relations Committee are obtained from a policy point of view.

Once agreement has been obtained as to the reading of the draft agreement, negotiations are initiated or carried on with the State or Organization concerned through the Department of External Affairs, and any counter-proposals follow the same steps outlined above, until agreement is obtained between all parties concerned.

3. *Signature:*

The Department which will administer the agreement, or, if several Departments are concerned, the Department most directly affected then approaches the Executive Council (see paragraph 1 above) through the prescribed channels for authority to sign the agreement and to issue a Full Power to the representative designated to sign the agreement on behalf of the Government.

Full Powers are drawn up, bound and sealed by the Department of External Affairs, on receipt of the Executive Council Authority from the Department which has obtained that authority.

It is customary for Full Powers to be signed by the Honourable the Prime Minister and Minister of External Affairs though, on occasion, another Minister may sign the Full Power.

Where practice requires that the treaty should be between Heads of State, the Full Power is issued by Her Majesty the Queen on the advice of Her Ministers in the Union.

4. *Steps taken after Signature in certain cases:*

Where ratification is not necessary, e.g., in the case of an agreement concluded by means of an Exchange of Notes, or in certain other cases, steps may be taken which normally only take place after ratification. Thus the agreement may be published for information in the *Government Gazette*

(the Official Government Newspaper) or it may be Proclaimed in the *Government Gazette* if this should be required by law. These and other steps are set out in the paragraphs following on that dealing with ratification.

5. *Accession:*

Where the Union is not an original party to an agreement, the same preliminary steps are taken with regard to procedure and the obtaining of Executive Council authority as in the case of signature. In this case, however, no Full Power is issued, but an Instrument of Accession is drawn up by the Department of External Affairs, printed and bound, and then signed by the Honourable the Prime Minister and Minister of External Affairs, whereafter it is despatched for deposit with the appropriate authorities.

6. *Ratification:*

Where an agreement requires ratification by the Union, this ratification is effected by the deposit of an Instrument of ratification signed by the Honourable the Prime Minister and Minister of External Affairs, or, where the treaty is between Heads of State, by Her Majesty the Queen. Parliament itself has in the past ratified international agreements but it may be said that this is done only where the agreement is of great interest to the Union of South Africa. No legislation requires such ratification by Parliament except that, in 1948, the Treaties of Peace Act, 1948, was passed (see below) which requires that Peace Treaties be ratified with the prior concurrence of Parliament.

Before the Instrument of Ratification is drawn up and signed, however, it is again necessary to approach the Executive Council for authority to ratify. This authority is again obtained by the Department administering the agreement, or the Department most directly affected, as in the case where authority is obtained for signature.

7. *Tabling and proclamation:*

International agreements entered into by the Union may be divided generally into four categories:

*(a)* Those agreements, which by law require to be approved by resolution of both Houses of Parliament within a certain time after they are concluded, and in the absence of which approval, the agreements lapse, or those which merely require Tabling with no provision as to approval.

The following examples of sections of the relevant Acts of Parliament, taken from the extracts quoted in paragraph 10, indicate what types of agreements are affected:

(i) See paragraph 10 *(b)* below: section 3 of chapter I of the Post Office Administration and Shipping Combinations Discouragement Act, 1911 (Act No. 10 of 1911).

(ii) See paragraph 10 *(k)* below: sections 69, 72, 73 and 74 of Act No. 35 of 1944 (the Customs Act, 1944) as amended.

*(b)* Those agreements which, by law, require to be proclaimed by the Governor-General in the *Government Gazette*, and thereafter to be Tabled in both Houses of Parliament with the minimum delay.

The following sections from the relevant Acts are examples of the legislation governing these types of agreements.

(i) See paragraph 10*(g)* below: section 2 of the Aviation Act, 1923 (Act 16 of 1923);

(ii) See paragraph 10*(f)* below: section 36 *bis* of the Death Duties Act, 1922 (No. 29 of 1922), as inserted by section 12 of the Finance Act, 1939 (Act 33 of 1939) as amended;

(iii) See paragraph 10*(j)* below: section 94 of Act No. 31 of 1941 (the Income Tax Act, 1941) as amended.

*(c)* Those agreements which are merely required to be published in the *Government Gazette.*

The following are examples of the sections of the relevant Acts relating to this group:

(i) See paragraph 10*(d)* below: section 85 of Act 36 of 1919 (the Public Health Act, 1919);

(ii) See paragraph 10*(e)* below: section 14(1) of the Prisons and Reformatories Act Amendment Act, 1920 (Act 46 of 1920) as amended by section 88 of the Children's Act, 1937 (Act 31 of 1937);

(iii) See paragraph 10*(h)* below: section 50 of the Children's Act, 1937 (Act 31 of 1937);

(iv) See paragraph 10*(o)* below: section 33 of Act No. 25 of 1949 (the Work Colonies Act, 1949).

*(d)* Those agreements for which no express provision is made in legislation to the effect that they should be brought to the notice of Parliament, or that they be published in the *Government Gazette.*

Where provision exists for an agreement to be brought to the notice of Parliament for its express approval, this step is carried out before any of the other steps mentioned below, which are applicable to all four categories of agreements, are taken. The following procedure is adopted:

The agreement is Tabled in both Houses of Parliament (viz., the House of Assembly and the Senate). A Minister gives notice of a motion in either House, to the effect that the agreement is approved. At the proper time, the motion is considered by the relevant House and, should it be approved, it becomes a resolution of the House. The resolution is then sent by Message to the Other House. Should the resolution be concurred in by the Other House, the Government is duly informed.

The motion for the approval of an agreement may be introduced into either House, but it is more usual for introduction to take place in the Lower House, i.e., the House of Assembly.

Where it is required by law that an agreement must be proclaimed, the Governor-General is approached with a request to sign the necessary Proclamation, which is then published in both official languages (English and Afrikaans) in the *Government Gazette.* In such a case, the relevant Statute generally also provides that, as soon as possible after Proclamation, copies thereof should be Tabled in both Houses of Parliament with the minimum delay. Such Tabling is for the information of Parliament only, but nothing prevents either House from expressing an opinion on the agreement by way of a resolution.

In accordance with the principle that Parliament should be informed, as far as public policy demands it, of all the acts of the Government, all International Agreements are Tabled in both Houses of Parliament in the

form of the Union's *Treaty Series* publications. This step occurs, however, only after the agreement has been published in the *Government Gazette* for the information of the general public. The remarks made in paragraph 1*(b)* above, also apply to the Tabling of Agreements. This practice of Tabling all agreements is not based on any express legal enactment, but has been invariably followed for a considerable period of time.

8. *Publication:*

All international agreements are, as far as it is deemed expedient in the light of public policy, published for general information in the *Government Gazette*, unless such publication has already occurred by way of Proclamation. There is also no specific enactment or regulation which requires such publication except in those cases cited in paragraph 7 above, but the practice has been followed for a considerable period.

After publication has taken place in the *Government Gazette*, steps are taken to publish the agreement again in the Union's *Treaty Series* publications. It is these publications which are Tabled in Parliament, if no specific provision is made in any legislation that Tabling should occur within a certain period of time after the conclusion of the agreement. (See paragraph 7 above.) The *Treaty Series* publications are also available for sale to the public.

9. *Translation:*

Section 137 of The South Africa Act, 1909, as amended, provides that all records, journals and proceedings of Parliament shall be kept in both official languages (i.e., English and Afrikaans) and all Bills, Acts and Notices of general public importance or interest issued by the Government of the Union shall be in both languages.

In accordance with these provisions, all international agreements must be translated if the original was drawn up in only one of the official languages, or in a foreign language, before Tabling in Parliament or publication in the *Government Gazette* or *Treaty Series*. This translation is done by the official Government Translation Bureau.

10. *Legislation affecting Treaties:*

The following are the Acts of Parliament which have a bearing on the negotiation and conclusion of treaties or international agreements and their coming into operation, together with extracts of the relevant sections:

*(Note:* Several other Acts have been passed from time to time which have a bearing on international agreements, but these either ratify specific agreements or provide for their effective application.)

*(a)* Extradition Acts of 1870, 1873, 1895 and 1906 of the United Kingdom which are part of the law of the Union, and section 28 of the Administration of Justice Act, 1912 (Act No. 27 of 1912), and section 4 of the Fugitive Criminals (Further Provision) Act, 1926 (Act 13 of 1926).

The sections having a bearing on the *negotiation and conclusion* of international agreements, are the following:

Sections 2 and 17 of the Extradition Act, 1870 (33 and 34 Victoria, chapter 52).

2. Where an arrangement has been made with any foreign State with respect to the surrender to such State of any fugitive criminals, Her Majesty may, by Order in Council, direct that this Act shall apply in the case of such foreign State.

17. This Act, when applied by Order in Council, shall, unless it is otherwise provided, extend to every British possession in the same manner as if throughout this Act the British Possession were substituted for the United Kingdom or England, as the case may require... These two sections should be read with section 7 of the Royal Executive Functions and Seals Act, 1934 (No. 70 of 1934) which is as follows:

7. In the absence of any Act of Parliament of the Union providing otherwise, the powers of the King to be exercised by His Majesty in Council or by Order in Council under Acts of the Parliament of the United Kingdom passed prior to the commencement of the Statute of Westminster, 1931, and extending to the Union as part of the law of the Union shall, in respect of the Union, after the commencement of this Act, be exercised respectively by the Governor-General in Council or by him by Proclamation in the *Gazette* unless the Governor-General in Council decide that the exigencies of the case require that the procedure prescribed by such Acts be followed:

Provided that the King in Council shall in the latter case act or purport to act in respect of the Union only at the request of the Prime Minister of the Union duly conveyed and it be expressly declared in the instrument containing the King's pleasure that the Union has requested and consented to the King in Council so acting in respect of the Union.

By section 4 of the Fugitive Criminals (Further Provision) Act, 1926 (Act 13 of 1926), the Government of the Union may adhere in respect of the territory of South West Africa to any extradition treaty between His Majesty and a foreign State, and thereupon the provisions of such treaty and of the Extradition Acts 1870-1906 become applicable as between the territory and that State.

*(b)* The Post Office Administration and Shipping Combinations Discouragement Act, 1911 (Act No. 10 of 1911), chapter I, section 3, subsections 4, 5 and 6 read as follows:

(4) The Postmaster-General may, with the concurrence of the Minister, establish, maintain, and abolish mail services, post offices, and savings bank offices, as he may deem fit, make and alter postal and telegraph arrangements, and enter into conventions and agreements with other postal and telegraph administrations, and may further from time to time make regulations, not inconsistent with this Act, for the conduct of any business entrusted to him, or as to the manner of exercising the powers and duties assigned to him by this Act, and all such conventions, agreements, and regulations when approved by the Governor-General shall be published in the *Gazette* and shall thereupon have the same force and effect as if they were in this Act contained.

(5) A copy of every such convention or agreement or of any alteration thereof shall, within thirty days after the same is executed, be laid before both Houses of Parliament, if Parliament be then in session, or if it be not in session, within thirty days after the commencement of its next ensuing session.

(6) Any regulation, convention, or agreement made under a law repealed by this Act, shall, notwithstanding the repeal, remain in force until rescinded under the power of this Act.

*(c)* Patents, Designs, Trade Marks and Copyright Act, 1916 (Act No. 9 of 1916)—sections 191, 191 *bis*, 191 *ter* and 193, as amended by sections 23, 24 and 25 of the Patents, Designs and Trade Marks Amendment Act, 1947 (Act No. 19 of 1947).

The amended sections mentioned above, relate to the conditions whereunder a person who has applied for protection for any invention, design or trade mark in a "Convention Country", is entitled to a patent or to registration of his design or trade mark in the Union; they also relate to the power of the Governor-General to make rules with regard to the above. Section 193 of Act 9 of 1916 as amended by section 25 of Act 19 of 1947, reads as follows:

"Convention Country" shall mean a country in the case of which there is for the time being in force a declaration made by the Governor-General by proclamation, with a view to the fulfilment of a treaty, convention, arrangement or engagement, declaring that that country is a Convention Country, and for this purpose every colony, protectorate, territory subject to the authority or under the suzerainty of another country, or territory in respect of which a mandate or trusteeship is being exercised, shall be deemed to be a country in the case of which a declaration may be made:

Provided that a declaration may be made as aforesaid for the purpose either of all or of some (but not all) of the provisions of this Act, and a country in the case of which a declaration made for the purpose of some (but not all) of the provisions of this Act is in force shall be deemed to be a Convention Country for the purposes of these provisions only.

*(d)* Section 85 of Act 36 of 1919 (the Public Health Act, 1919) provides as follows:

85. The Governor-General may enter into agreements with the Imperial Government, or with the Government of any British Dominion or of any foreign country, providing for the reciprocal notification of outbreaks of any formidable epidemic or other disease or any other matter affecting the public health relations of the Union with other countries. The terms or a summary of every such agreement shall be notified in the *Gazette*.

*(e)* Section 14 (1) of the Prisons and Reformatories Act Amendment Act, 1920 (Act 46 of 1920) as amended by section 88 of the Children's Act, 1937 (Act 31 of 1937) reads as follows:

14 (1). The Governor-General may enter into an agreement with the officer administering the government of any territory in Africa south of the equator (being a portion of the British Dominions or a territory under the protection of the Crown) on terms and conditions set out in the agreement, for the reception in the Union and detention in any prison or gaol therein of any person sentenced by a competent court of such territory according to law in force therein to imprisonment with or without hard labour.

The fact that any such agreement has been entered into with the officer administering any such territory and a summary of the terms of the agreement shall be notified by the Minister in the *Gazette*.

*(f)* Section 36 *bis* of the Death Duties Act, 1922 (Act No. 29 of 1922) as inserted by section 12 of the Finance Act, 1939 (Act 33 of 1939) and as amended by section 16 of the Finance Act, 1945 (Act 46 of 1945) reads as follows:

36 *bis* (1) The Governor-General may enter into an agreement with the government of any other country or territory, whereby arrangements are made with such government with a view to the prevention, mitigation or discontinuance of the levying, under the laws of the Union and of such other country or territory, of death duties in respect of the same property, or to the rendering of, reciprocal assistance in the administration of, and in the collection of death duties under, the laws relating to death duties in force in the Union and in such other country or territory.

(2) As soon as may be after the conclusion of any such agreement the arrangements thereby made shall be notified by proclamation by the Governor-General, in the *Gazette*, whereupon until such proclamation is revoked by the Governor-General, the arrangements notified therein shall, so far as they relate to immunity, exemption or relief in respect of Union death duties, have effect as if enacted in this Act, but only if and for so long as such arrangements, so far as they relate to immunity, exemption or relief in respect of death duties levied or leviable in such other country or territory have the effect of law in such country or territory.

(3) As soon as may be after the publication in the *Gazette*, of any such proclamation copies thereof shall be laid upon the Tables of both Houses of Parliament.

(4) The Governor-General may at any time revoke any such proclamation by proclamation in the *Gazette*, and the arrangements notified in such earlier proclamation shall cease to have effect upon a date fixed in such latter proclamation, but the revocation of any proclamation shall not affect the validity of anything previously done thereunder.

(5) As soon as may be after the publication in the *Gazette* of any proclamation, revoking any such proclamation, copies thereof shall be laid upon the Tables of both Houses of Parliament.

*(g)* Section 2 of the Aviation Act, 1923 (Act 16 of 1923) reads as follows:

2. The Governor-General may

*(a)* Issue such proclamations as appear to him necessary for carrying out the convention, and for giving effect thereto or to any of the provisions thereof;

*(b)* Do all things necessary to ratify or cause to be ratified on behalf of the Union of South Africa, *any amendments of or additions to* the Convention which may from time to time be made and, by proclamation in the *Gazette*, declare that the amendments or additions so ratified shall be observed and have the force and effect of law in the Union: provided that copies of any amendments or additions so ratified or proclaimed shall be laid on the Tables of both Houses of Parliament within fourteen days after their publication in the *Gazette* if Parliament is then in session or, if Parliament is not then in session, within fourteen days after the commencement of its next ensuing session;

*(c)* By proclamation in the *Gazette*, declare that any of the provisions of the convention shall, with such modifications or adaptations and such consequential and supplementary provisions as may be necessary or expedient, apply also to air navigation within the limits of the Union.

The Convention referred to was, originally, the Convention for the Regulation of Aerial Navigation of 13th October, 1919, but this was repealed and, by section 1 of the Aviation Amendment Act, 1947 (Act 42 of 1947), the Convention on International Civil Aviation of 7th December, 1944, was substituted in its place.

*(h)* Subsections (1) and (2) of section 50 of the Children's Act, 1937 (Act 31 of 1937) read as follows:

50 (1) The Governor-General may enter into an agreement with the head of the government of any British territory in Africa south of the equator for the reception into and retention in any reformatory in the Union of any person under the age of twenty-one whose detention has been ordered by a competent court of the said territory according to the law in force therein. When such an agreement has been entered into, the Minister shall publish in the *Gazette* a notice of that fact and a summary of the terms of the agreement.

(2) Every agreement entered into under section fourteen of the Prisons and Reformatories Act Amendment Act, 1920, which is in force at the commencement of this Act shall continue in force as if it had been entered into under subsection (1) of this section.

*(i)* Section 106 of the Workmen's Compensation Act, 1941 (Act 30 of 1941) reads as follows:

106. For the purpose of giving effect to any convention with a foreign State or with the government of any member of the British Commonwealth of Nations or of any part of His Majesty's Dominions providing for reciprocity in matters relating to compensation to workmen for accidents causing disablement or death, the Governor-General may make rules by Proclamation in the *Gazette* including rules

*(a)* For determining in any case where a workman is entitled to compensation both under this Act and under the law of any such country with which the convention is made, under the law of which party to the convention such workman or his dependants shall be entitled to recover compensation:

. . .

*(j)* Subsections (1) to (5) of section 94 of Act No. 31 of 1941 (the Income Tax Act, 1941), as amended by section 12*(a)* of the Income Tax Act, 1945 (Act 39 of 1945) read as follows:

94. (1) The Governor-General may enter into an agreement with the Government of any other country or territory, whereby arrangements are made with such Government with a view to the prevention, mitigation or discontinuance of the levying, under the laws of the Union and of such other country or territory, of income tax in respect of the same income, or to the rendering of reciprocal assistance in the administration of, and in the collection of taxes under, the income tax laws of the Union and of such other country or territory.

(2) As soon as may be after the conclusion of any such agreement the arrangements thereby made shall be notified by proclamation by the Governor-General in the *Gazette*, whereupon until such proclamation is revoked by the Governor-General, the arrangements notified therein shall, so far as they relate to immunity, exemption or relief in respect of Union income tax, have effect as if enacted in this Act, but only if and

for so long as such arrangements, so far as they relate to immunity, exemption or relief in respect of income tax levied or leviable in such other country or territory have the effect of law in such country or territory.

(3) As soon as may be after the publication in the *Gazette* of any such proclamation, copies thereof shall be laid upon the Tables of both Houses of Parliament.

(4) The Governor-General may at any time revoke any such proclamation by proclamation in the *Gazette*, and the arrangements notified in such earlier proclamation shall cease to have effect upon a date fixed in such latter proclamation, but the revocation of any proclamation shall not affect the validity of anything previously done thereunder.

(5) As soon as may be after the publication in the *Gazette*, of any proclamation revoking any such proclamation, copies thereof shall be laid upon the Tables of both Houses of Parliament.

*(k)* The following sections of Act No. 35 of 1944 (the Customs Act, 1944) as amended by Section 4 of Act 33 of 1950 (the Customs Amendment Act, 1950) and the other Acts indicated, are relevant to the negotiation and conclusion of international agreements:

69. *Intermediate Rates in Respect of Foreign States.* The Governor-General may conclude an agreement with the government of any territory whereby, in consideration of equivalent privileges in respect of goods imported into that territory from the Union, rates of duty not lower than the intermediate rates of duty set forth in the tariff are extended to specific goods produced or manufactured in and imported from that territory.

72. *Agreements with other Parts of the King's Dominions:*

The Governor-General may conclude an agreement with the government of any Commonwealth country or of any territory which is under the King's protection or in respect whereof a mandate has been issued to the King by the League of Nations, whereby, in consideration of equivalent privileges in respect of goods imported into that territory from the Union, rates of duty not lower than the minimum rates of duty set forth in the tariff are extended to specific goods produced or manufactured in and imported from that territory.

73. (This section was substituted by section 1 of the Customs Amendment Act, No. 38 of 1947 as amended by section 1 of Act 27 of 1948 (the Customs Amendment Act, 1948).)

*Agreements with Governments of Territories in Africa.*

(1) The Governor-General may enter into an agreement with the government of any territory in Africa whereby

*(a)* Goods produced or manufactured in the Union shall be admitted into that territory free of duty or at special rates of duty, and goods produced or manufactured in that territory shall be admitted into the Union free of duty or at special rates of duty;

*(b)* In respect of goods manufactured in the territory of either party to the agreement and removed from the one territory to the other territory, there shall be paid by the government of the territory from which the goods are being removed to the government of the other territory a mutually agreed percentage of the export value of such goods;

*(c)* One party to the agreement shall

(i) Pay over to the other party the customs duties paid in respect of goods which having been imported into its territory are removed to the territory of the other party; and

(ii) Collect on behalf of the other party and pay over to such other party the difference between the duties paid in respect of goods imported into its territory and removed to the territory of the other party, and the duties which would have been payable if such goods had been imported direct into the territory of the other party: Provided that where the difference in the tariff rates applicable in the respective territories in respect of the importation of any goods does not exceed a mutually agreed percentage the parties may agree to dispense with such collection and payment in respect of those goods;

*(d)* One party to the agreement shall collect on behalf of the other party and pay over to such other party the excise duties or surtax imposed in respect of goods which having been produced or manufactured in or imported into its territory are removed to the territory of the other party;

*(e)* In the event of an excise duty or surtax being imposed on any goods produced or manufactured in or imported into the Union a corresponding duty or surtax may be levied on like goods which, having been produced or manufactured in or imported into the territory of the other party to the agreement, are imported into the Union from that territory;

*(f)* One party to the agreement shall collect on behalf of the other party any export duty imposed in respect of goods which having been produced or manufactured in the territory of either party are removed to the territory of the other party and thence exported to a third country, if such duty would otherwise be payable on the direct exportation of such goods to such third country.

*(g)* One party to the agreement shall from time to time pay to the other party either a mutually agreed amount or a mutually agreed percentage of the total revenue derived from customs and excise duties in the territory of that party, instead of the payments referred to in paragraphs *(b)*, *(c)* and *(d)*;

*(h)* A council shall be established for the purpose of investigating, reporting and making recommendations on the working of the agreement and the progress made towards the attainment of the objects and purposes of the agreement. The Governor-General may by proclamation in the *Gazette* declare any or all of the provisions of the Commissions Act, 1947 (Act No. 8 of 1947), to be applicable in the Union with reference to any council so established.

(2) *(a)* Payments made by the government of any territory to the Government of the Union in terms of any agreement entered into under subsection (1) shall accrue to the Consolidated Revenue Fund.

*(b)* Payments to the government of any territory by the Government of the Union in terms of any such agreement shall be deemed to be refunds of duty and shall be paid as drawbacks out of revenue accruing to the Consolidated Revenue Fund.

74. *Agreements Lapse if not Approved by Parliament:* An agreement concluded under section *sixty-nine*, *seventy-two* or *seventy-three* during any session

of Parliament upon a date not less than twenty-eight days before the end of that session shall lapse at the end of that session unless it has been approved of during that session by resolution of both Houses of Parliament. An agreement concluded under the said sections at any other time shall lapse at the end of the next ensuing session of Parliament unless it has, during that session, been approved of by resolution of both Houses of Parliament, but the lapsing of any such agreement shall not detract from its validity before it lapsed.

(1) Section 93 of Act No. 47 of 1946 (The Silicosis Act, 1946) reads as follows:

93. (1) The Governor-General may by an agreement with the Government of any territory in Southern Africa regulate the manner in which any benefit which was awarded to any Native who is domiciled in the territory in question, shall be paid to the Native concerned or to any other person on his behalf, and the manner of disposing of any part of such a benefit which has not been expended because the beneficiary died.

(2) When the Governor-General has entered into such an agreement as aforesaid, which contains any provisions mentioned in subsection (1) which are in conflict with the provisions of subsection (1) of section *seventy-three* in relation to a Native who is domiciled in the territory with whose Government the agreement was concluded, the said provisions of the agreement shall prevail.

(3) Any agreement entered into, before the commencement of this Act, by the Governor-General with the Government of any territory in Southern Africa, which contains any such provisions as is mentioned in subsection (1) shall, for the purposes of this section, be deemed to have been concluded after the commencement of this Act.

*(m)* The Treaties of Peace Act, 1948 (Act No. 20 of 1948) reads as follows:

*Act No. 20 of 1948*

ACT

To provide for carrying into effect Treaties of Peace between the Government of the Union of South Africa and certain other powers.

*(English Text signed by the Governor-General)*
*(Assented to 25th March, 1948)*

Be it enacted by the King's Most Excellent Majesty, the Senate and the House of Assembly of the Union of South Africa, as follows:

1. In this Act the expression "the Treaties" means the Treaties of Peace with Bulgaria, Finland, Hungary, Italy and Romania (copies of which were laid before Parliament on the thirtieth day of May, 1947) which were signed on behalf of the Government of the Union in Paris on the tenth day of February, 1947, and to the ratification of which the concurrence of Parliament has been obtained, and such other treaties as may be included in this definition in accordance with the provisions of section three.

2. (1) The Governor-General may, subject to the provisions of subsection (3), and after any one of the Treaties has been ratified by the Government of the Union, by proclamation make such regulations as

appear to him to be necessary or expedient for carrying out such treaty, and for giving effect to the provisions thereof.

(2) Without prejudice to the generality of the powers conferred by subsection (1), such regulations

*(a)* Shall be of force and effect, notwithstanding anything to the contrary in any other law contained;

*(b)* May, for the purpose set out in subsection (1), be made retrospective in effect;

*(c)* May for the said purposes, establish any necessary offices, and authorize any necessary appointments;

*(d)* May provide for the imposition of penalties specified therein for any contravention of or failure to comply with any provision of the regulations.

(3) *(a)* Any proclamation issued in terms of subsection (1) shall be laid on the Tables of both Houses of Parliament within fourteen days after publication if Parliament is then in ordinary session, or if it is not then in ordinary session, within fourteen days after the commencement of its next ensuing ordinary session.

*(b)* If both Houses of Parliament have by resolutions passed in the same session (being a session during which any proclamation referred to in paragraph *(a)* had been duly laid on the Tables) approved of any such proclamation, or of any provision in any such proclamation, such proclamation shall thereafter be of force and effect to the extent to which it has been so approved, but without prejudice to anything that has been done in terms of such proclamation, up to the date of the passing of such resolutions which shall be deemed to have been validly done, whether such proclamation is approved or disapproved.

3. (1) Whenever a treaty of peace is concluded between the Government of the Union and any power not mentioned in section one, between whom and the Union a state of war exists at the date of commencement of this Act, or has at any time since the sixth day of September, 1939, existed, the Governor-General may, after such treaty has been ratified with the prior concurrence of Parliament, provide by proclamation that, save as provided in subsection (2), such treaty shall for the purposes of this Act thereafter be deemed to be included in the definition of the expression "the Treaties" in section one contained.

(2) The provisions of subsection (3) of section two shall apply *mutatis mutandis* in regard to any proclamation promulgated in terms of subsection (1).

4. This Act shall be called the Treaties of Peace Act, 1948.

*(n)* A special Act was also passed to give effect to the Geneva General Agreement on Tariffs and Trade. This Act (No. 29 of 1948) is known as the Geneva General Agreement on Tariffs and Trade Act, 1948, and the undermentioned sections provide as follows:

3. The agreement shall, in relation to the territories the governments of which are referred to in section *two*, be applied either provisionally or definitively as the Governor-General may determine by proclamation in the *Gazette*, with effect from a date specified in such proclamation.

4. The Governor-General may by proclamation in the *Gazette* withhold

or withdraw, as the case may be, any concessions, including concessions in customs tariff rates, which the Government of the Union has in terms of the agreement undertaken to grant or granted to any party to the agreement if such party does not accept the agreement or, as the case may be, withdraws from the agreement after having accepted or acceded to it.

5. (1) The agreement shall, in relation to any territory the government of which has, in terms of the agreement, acceded thereto, be applied with effect from a date to be fixed by the Governor-General by proclamation in the *Gazette*.

(2) The Governor-General may, by any proclamation referred to in subsection (1) or by a later proclamation grant, in consideration of equivalent privileges in respect of goods imported from the Union into the territory of any acceding Government, concessions in customs tariff rates in respect of specified goods produced or manufactured in the territory of that government on their importation into the Union.

6. The Governor-General may by proclamation in the *Gazette* and subject to the terms of the agreement and with effect from a date specified in the proclamation withdraw, in whole or in part, any concession, including a concession in customs tariff rates, granted to any party to the agreement or, in consideration of equivalent privileges in respect of goods imported from the Union into the territory of any party to the agreement, grant further concessions in customs tariff rates in respect of specified goods produced or manufactured in the territory of that party on their importation into the Union.

. . .

8. Any proclamation under section *three*, other than a proclamation relating to the provisional application of the agreement, and any proclamation under sections *four*, *five*, *six* or *seven*, issued during any session of Parliament upon a date not less than twenty-eight days before the end of that session shall lapse at the end of that session unless it has been approved of during that session by resolution of both Houses of Parliament and any proclamation issued at any other time shall lapse at the end of the next ensuing session of Parliament unless it has, during that session, been approved of by resolution in both Houses of Parliament, but the lapsing of any such proclamation shall not detract from its validity before it lapsed.

Act 27 of 1950 (the Geneva General Agreement on Tariffs and Trade Amendment Act, 1950) amended Act 29 of 1948, by granting the Governor-General power to apply customs tariff rates, applied in relation to territories whose governments are parties to the above Agreement, to certain territories between whose government and the Government of the Union of South Africa there is in existence an agreement concluded in terms of section *sixty-nine* of the Customs Act, 1944 (see *supra*) or in terms of which most-favoured-nation treatment is accorded, as well as to certain areas of Germany.

*(o)* Subsections (1) and (2) of section 33 of Act No. 25 of 1949 (the Work Colonies Act, 1949) provide as follows:

33. (1) The Government of the Union, represented by the Minister, may enter into an agreement with the Government of any British territory in Africa for the admission to and the detention in any work colony, retreat or certified retreat in the Union, of any person over the age of

nineteen years whose detention in any work colony, inebriate reformatory or similar institution for a period of not less than one year has been ordered by a competent court of the said territory according to the law in force therein. Whenever such an agreement has been entered into, the Minister shall cause to be published in the *Gazette* a notice of that fact and a summary of the terms of the agreement.

(2) The Minister may order the admission to and detention in a work colony, a retreat or a certified retreat of any person over the age of nineteen years whose detention in any work colony, inebriate reformatory or similar institution for a period of not less than one year has been ordered by a competent court of a territory with the Government of which the Government of the Union has entered into an agreement mentioned in subsection (1).

## 78. Union of Soviet Socialist Republics

CONSTITUTION OF 5 DECEMBER 1936 AS AMENDED. TRANSLATION PUBLISHED BY FOREIGN LANGUAGES PUBLISHING HOUSE, MOSCOW 1947

*Article 14.* The jurisdiction of the Union of Soviet Socialist Republics, as represented by its higher organs of State power and organs of State administration, embraces:

*(a)* Representation of the U.S.S.R. in international relations, conclusion, ratification and denunciation of treaties of the U.S.S.R. with other States, establishment of general procedure governing the relations of Union Republics with foreign States.

. . .

*Article 18. (a)* Each Union Republic has the right to enter into direct relations with foreign States and to conclude agreements and exchange diplomatic and consular representatives with them.

. . .

*Article 30.* The highest organ of State power in the U.S.S.R. is the Supreme Soviet of the U.S.S.R.

*Article 31.* The Supreme Soviet of the U.S.S.R. exercises all rights vested in the Union of Soviet Socialist Republics in accordance with article 14 of the Constitution, in so far as they do not, by virtue of the Constitution, come within the jurisdiction of organs of the U.S.S.R. that are accountable to the Supreme Soviet of the U.S.S.R., that is, the Presidium of the Supreme Soviet of the U.S.S.R., the Council of Ministers of the U.S.S.R., and the Ministries of the U.S.S.R.

*Article 49.* The Presidium of the Supreme Soviet of the U.S.S.R.:

. . .

*(o)* Ratifies and denounces international treaties of the U.S.S.R.

. . .

*Article 68.* The Council of Ministers of the U.S.S.R.:

. . .

*(d)* Exercises general guidance in the sphere of relations with foreign States.

## 79. United Kingdom of Great Britain and Northern Ireland

STATEMENT PREPARED BY THE SECRETARIAT OF THE UNITED NATIONS [1]

1. In the United Kingdom there is no single document which can be referred to as "the Constitution", and the rules concerning the conclusion and ratification of treaties are the result of custom and usage. As a matter of law, the treaty-making power rests with the Crown. This power, however, may, according to British constitutional practice, only be exercised by Her Majesty on the advice of Her Ministers. So it was that, in 1815, when the Holy Alliance, between the Crowned Heads of Russia, Austria-Hungary, and Prussia was formed, and these rulers invited the King of Great Britain to become a party, the Prince Regent replied declining the invitation on the ground that such action would infringe the Constitutional principle stated above.

2. Where a treaty is to be made in the form of an agreement between Heads of States the Full Powers and the instrument of ratification are signed by the Queen. In the case of inter-governmental agreements the Full Power and the instrument of ratification are usually signed by the Secretary of State for Foreign Affairs, or, it may be, in exceptional cases, by the Prime Minister. Whatever the form of the treaty, and whether the Queen's signature is or is not required for such formal documents, her role today in the matter of treaty-making is a formal one, the actual decisions concerning the negotiation and contents of treaties being taken by her Ministers. As a general rule the Foreign Secretary takes these decisions, after consultation, where appropriate, with any government departments that may be interested. In some cases, according to the nature and importance of the treaty, he may consult the Cabinet. [2]

3. Each successive Secretary of State for Foreign Affairs and each Permanent Under-Secretary of State for Foreign Affairs [3] receives, on taking up his duties, a "General Full Power" which authorizes him to treat "with any other Powers or States". Where an ambassador or other diplomatic agent, or a person appointed *ad hoc*, is to be authorized to negotiate and conclude a particular treaty he receives a "Special Full Power" the authority being limited to that particular treaty. These documents are prepared by the Treaty Formalities Section of the Foreign Office.

4. The doctrine of ministerial responsibility is illustrated by the procedure followed in relation to these instruments. A Full Power requiring the Queen's signature is submitted to Her Majesty together with another document called the Warrant for affixing "the Great Seal". The Queen signs both these documents and returns them to the Foreign Secretary. The latter (or in his absence any other Secretary of State) countersigns the Warrant but not the Full Power. (The Great Seal of the Realm authen-

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[1] This memorandum was prepared by the Secretariat on the basis of published information. It was then submitted to the British Foreign Office, who, subject to certain amendments, approved it.

[2] The Cabinet is the Council of Ministers holding offices of the highest importance. This body has supreme direction of policy and takes decisions binding on all departments of Government.

[3] The Secretary of State is the Minister; the Permanent Under-Secretary is the civil service official who is in charge of the Foreign Office.

ticates the Full Power as an official document, and the Foreign Secretary, by countersigning the Warrant, assumes ministerial responsibility for the decision to enter upon negotiations.) The Warrant is transmitted, after counter signature by the Foreign Secretary, to another Minister of the Crown—the Lord Chancellor, who has custody of the Great Seal, and who, being so authorized by the Warrant, causes the Great Seal to be affixed to the Full Power. The same procedure is followed in the case of instruments of ratification.

5. The procedure described above is confined to treaties concluded in the form of agreements between Heads of States. It does not apply to inter-governmental agreements, which do not require any intervention by Her Majesty or any use of the Great Seal. In the case of such agreements Full Powers are issued by the Foreign Secretary under his own signature and seal of office. Accessions to treaties are not signed by or in the name of Her Majesty, nor are they passed under the Great Seal. Accession is effected either by a formal instrument signed on behalf of the Government of the United Kingdom or by a written notification through the diplomatic channel.

6. As regards inter-departmental agreements (i.e., agreements concluded directly between the Government Departments of different States) these agreements are, generally speaking, arrangements which concern matters of private law rather than matters of an international legal character (e.g., arrangements for, or in connexion with, the purchase of goods, or for the sale on a commercial basis of materials or supplies) and are not such as would be normally registrable under Article 102 of the Charter of the United Nations. An example of such an agreement is the Agreement of 29 August 1949 between the United Kingdom Minister of Food and the Norwegian Director of Fisheries regarding the landings of fresh white fish in the United Kingdom from Norwegian fishing vessels. This Agreement was signed, on the one part, by an Assistant Secretary to the Ministry of Food on behalf of the Minister of Food and, on the other part, by the Norwegian Director of Fisheries.

7. Agreements of this kind are normally negotiated directly between representatives of the United Kingdom Government Department concerned and the corresponding representatives of the other Government Department. Although the Foreign Office is generally kept informed of negotiations concerning such agreements, formal Full Powers for their signature are not issued by the Secretary of State. There have been occasions when another Government Department has requested that one of H.M. Ambassadors should sign a particular agreement on behalf of the Minister of the Department concerned and authority for this course has been conveyed by official dispatch addressed to the Ambassador.

8. In its relations with other members of the British Commonwealth of Nations the Government of the United Kingdom follows the principles agreed upon at the Imperial Conference of 1930 which are as follows:

(1) Any of Her Majesty's Governments conducting negotiations should inform the other Governments of Her Majesty in case they should be interested, and give them an opportunity of expressing their views, if they think that their interests may be affected.

(2) Any of Her Majesty's Governments should, if it desires to express any views, do so with reasonable promptitude.

(3) None of Her Majesty's Governments can take any steps which might involve the other Governments of Her Majesty in any active obligations without their definite assent.

It may be remarked, in this connexion, that the expression "Her Majesty's Government" should now be replaced by "Government of a Commonwealth country" since India, though still a member of the Commonwealth, has become a Republic.

9. In order that the third principle summarized above may in all cases be clearly understood by foreign Powers, as well as by members of the Commonwealth, it is now the practice in connection with Agreements between Heads of States that the Full Power, the instrument of ratification, and the face of the treaty itself, specifically indicate the part of the Commonwealth in respect of which the treaty obligations are assumed.[1]

10. The United Kingdom possesses a number of overseas territories governed by various kinds of constitution. These territories "are dependent on the United Kingdom in that it is responsible for the conduct of their international relations: they comprise colonies which are British possessions, and protectorates, protected States, and Trust Territories which are not".[2] It has also been said [3] that "the overseas territories of the United Kingdom do not enjoy independent status in international law and therefore cannot enter into diplomatic relations with foreign States or participate as of right in treaties to which foreign States are parties". On the other hand most of the overseas territories of the United Kingdom are self-governing in a number of administrative and technical fields. Some of them, although they are internationally dependent on the United Kingdom, and may, therefore, from the international point of view, be described as its "overseas territories", are, from the point of view of British constitutional law, "foreign" territories. This is true of British protectorates and British protected States. Other territories are British "possessions" in British constitutional law. Some of these are "colonies": others (e.g., the Isle of Man, the Channel Islands) are, for historical reasons, not "colonies", but are "possessions".

11. Thus, although, from the international point of view, the United Kingdom is responsible for its overseas territories, and can conclude

[1] Agreements made by members of the Commonwealth with each other are made in the inter-governmental form. They come into force on signature and are registered with the United Nations.

[2] Fawcett, "Treaty Relations of British Overseas Territories" *British Yearbook of International Law*, vol. XXVI (1949), p. 88. The expression "British possession" is a technical one defined in section 18 (2) of the Interpretation Act, 1889, which reads as follows:

"The expression 'British possession' shall mean any part of Her Majesty's dominions exclusive of the United Kingdom, and where parts of such dominions are under both a central and a local legislature, all parts under the central legislature shall, for the purposes of this definition, be deemed to be one British possession."

The expression "colony" is defined in section 18 (3) of that Act which reads:

"The expression 'colony' shall mean any part of Her Majesty's dominions [exclusive of the British Islands and of British India *and of British Burma*] and where parts of such dominions are under both a central and a local legislature, all parts under the central legislature shall, for the purposes of this definition, be deemed to be one colony."

[3] *Ibid.*, p. 105.

treaties which apply to those territories, the constitutional relationship of the territories to the United Kingdom varies widely according to the status of the territory concerned. Because of the intricate legal issues which may arise in connexion with the application to any such territory of a treaty concluded by the United Kingdom the latter has, for many years, made a practice of ensuring the insertion in its treaties of an article (the so-called "colonial" article) providing, either that the treaty applies to territories "for whose international relations the United Kingdom is responsible", if special notice to that effect is given (thus implying that, in the absence of any such notice, it extends to the metropolitan territory only) or, in the reverse form, under which the territories are included unless a declaration is made, or notice given, that the treaty shall not apply to specified territories in the absence of a special acceptance on their behalf.

12. The form in which the "colonial article" is expressed has varied from time to time, but its function is "to bridge the gap between the dependent status of the overseas territories in international law and their independence of the Government of the United Kingdom in certain administrative and technical fields under constitutional law and practice".[1]

The use of the colonial article has been the subject of controversy in the United Nations,[2] and has been inserted in some conventions and omitted from others. In the course of the debates on the matter the Government of the United Kingdom has made statements defining its position.

13. In the course of the discussion on the transfer to the United Nations of the functions and powers previously exercised by the League of Nations under the International Convention relating to Economic Statistics, the representative of Haiti drew attention to the fact that article II of the Convention contained a "colonial article". The record states "Mr. Fitzmaurice (United Kingdom) said that the insertion of that clause was justified because colonies and Trust Territories had their autonomous political organs. The mother country or Administering Authority could not, therefore, assume any obligations regarding those Territories without having consulted the local administrations and without the latter having taken the necessary legislative measures to allow the implemention of the Convention.

"He made it clear that after such Conventions had been signed, his Government did its best to ensure that most of the colonies and territories under its administration joined in carrying out the obligations laid down in the conventions".[3]

14. In the course of the discussion of the draft Convention on Genocide, held in Paris on 15 November 1948, the representative of the United Kingdom proposed the insertion of the following form of "colonial article":

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[1] Fawcett, *ibid.*, p. 106. The historical development of the article is described, *ibid.*, pp. 93-105. See also McNair, *The Law of Treaties* (1938), pp. 76-79.

[2] See Liang, "Colonial and Federal Clauses in United Nations Multilateral Instruments", *American Journal of International law*, vol. 45 (1950), p. 108.

[3] *Official Records of the Third Session of the General Assembly, part I, Sixth Committee*, pp. 263-264.

"Any High Contracting Party may, at any time, by notification addressed to the Secretary-General of the United Nations, extend the application of the present Convention to all or any of the territories for the conduct of whose foreign relations that High Contracting Party is responsible."

In supporting this amendment (which was adopted and became article 12 of the Convention) the representative of the United Kingdom said:

"The draft convention under discussion covered new ground and dealt with a completely new offence. In most countries, therefore, new legislative measures would be required in order to put its provisions into practice. Among the territories administered by the United Kingdom some were completely self-governing in their internal affairs and it would be constitutionally impossible for the United Kingdom to accept the convention on their behalf without first consulting them. His delegation had, therefore, proposed the insertion of a new article to take that situation into account and he hoped that the Committee would accept his proposal. If such an article were not inserted there would be a considerable, if not an indefinite, delay before his country and those territories for which it was internationally responsible could adhere to the convention".[1]

The representative of the United Kingdom repeated on other occasions these statements concerning the constitutional relationship between itself and the territories for which it is internationally responsible.[2]

15. It may be mentioned, however, that in the International Sanitary Regulations, which were approved by the World Health Assembly in May 1951, there is no Colonial Application Clause, but members of the Organization are allowed, in respect of overseas territories for whose international relations they are responsible, eighteen months (instead of nine months in respect of the metropolitan territory) in which to notify rejection of, or reservation to, the Regulations.[3] This provision was inserted because other members of the Organization appreciated the United Kingdom's necessity for consulting the local administrations of colonial territories before assuming obligations which would have to be carried out by those administrations.

16. The system of parliamentary control over the conclusion of treaties which exists in many countries does not prevail in the United Kingdom. The consent of Parliament is not normally required for the negotiation or ratification of treaties; as already explained above these are functions which are exercised on behalf of the Queen through Her Ministers. On certain occasions, however, the Government deems it desirable to obtain formal parliamentary approval before a treaty is ratified. This procedure was followed in the case of all the treaties of peace following the First World War. Furthermore it has been the practice in the United Kingdom, since 1924, for the Government to lay on the table of both Houses of Parliament, for a period of twenty-one sitting days, and as soon as possible after signature, every treaty which is subject to ratification. The reason for this is that Parliament should be afforded the opportunity of debating the provisions of the treaty before ratification should it so desire. The customary formalities for ratification may then proceed and, in due course, when the treaty has entered into force, the text is presented to Parliament

[1] *Ibid.*, p. 471.

[2] See *General Assembly, Second Session, Official Records, Plenary Meetings*, vol. I, pp. 341-345. See also United Nations document A/C.3/SR.294, p. 5.

[3] Article 106(2) of the Regulations.

for the second time and is published in the *British Treaty Series of Parliamentary Papers*. The practice does not apply to treaties which are not subject to ratification. Such treaties (which generally enter into force on the date of signature) are presented to Parliament and published in the *British Treaty Series* as soon as they have been concluded.

17. There is a further qualification upon the rule that the executive is not subject to parliamentary control in the exercise of the treaty-making power. It is that "there is a practice now amounting probably to a binding constitutional convention whereby treaties involving a cession of British territory are submitted for the approval of Parliament and the approval takes the form of a statute".[1]

18. Finally, it is to be observed that under the law of the United Kingdom treaties are not self-executing; they are not *ipso facto* part of the law of the land. If, therefore, the stipulations of a treaty require something to be done which may come into question in a court of law, or require for its enforcement the assistance of a court of law, the question will at once arise whether there is any inconsistency between the treaty and the existing law of the land, or whether the Executive is sufficiently equipped with powers under existing law to implement the treaty. In such cases legislative action by Parliament is required. This is so:

*(a)* Where the treaty requires for its execution and application by the United Kingdom a change in existing law;

*(b)* Treaties requiring for their execution by the United Kingdom that the Crown receive some new powers not already possessed by it;

*(c)* Treaties creating a direct or contingent financial obligation upon the United Kingdom;

*(d)* Treaties specifically providing that Parliament be consulted.

The Executive may also in practice consult Parliament either before signature, or after signature and before ratification, though not bound constitutionally to do so.[2]

## 80. United States of Ameriea

*(a)* CONSTITUTION OF 4 MARCH 1789. UNITED STATES CODE, 1946, VOL. I, P. XL.

*Article 2.*—Section 2. He[3] shall have power, by and with the advice and consent of the Senate to make treaties, provided two-thirds of the Senators present concur...

*(b)* STATEMENT PREPARED BY THE SECRETARIAT OF THE UNITED NATIONS[4]

1. Whether a particular international agreement is a treaty within the meaning of the above provision is a question of domestic constitutional

[1] McNair, *The Law of Treaties* (1938), p. 24.

[2] Concrete examples of the instances of consultation described above are given in McNair, *op. cit.*, pp. 13-31.

[3] The President of the United States.

[4] This memorandum was prepared by the Secretariat of the United Nations on the basis of information supplied on a previous occasion by the United States Government. It was then submitted to the Department of State who, subject to certain amendments, approved it.

law, and the designation given to such an agreement by the parties thereto does not determine this question. The word "treaty" in the international sense includes more classes of instruments which are international agreements than the class submitted for the advice and consent of the Senate. Other international arrangements, such, for example, as those approved by the majority of both Houses, may properly be termed treaties, for the purposes of international usage, notwithstanding the fact that they are not submitted for the advice and consent of the Senate alone for two-thirds concurrence. The Congress of the United States has itself, on occasion, so employed the term "treaty". Thus, in legislation authorizing postal arrangements with foreign countries it provided:

"For the purpose of making better postal arrangements with foreign countries, or to counteract their adverse measures affecting our postal intercourse with them, the Postmaster General, by and with the advice and consent of the President, may negotiate and conclude postal *treaties* or *conventions* [italics added], and may reduce or increase the rates of postage or other charges on mail matter conveyed between the United States and foreign countries: *Provided*, That the decisions of the Postmaster General construing or interpreting the provisions of any *treaty* or *convention* [italics added] which has been, or may be, negotiated and concluded shall, if approved by the President, be final and conclusive upon all officers of the United States" (5 U.S.C. section 372).

2. The treaties of the United States, in general, follow much the same pattern so far as form is concerned. Other international agreements of the United States are not drawn up in any particular form. In practice certain types of agreements are usually prepared in certain special forms, but a variation in form is not considered to affect the binding character of the obligations assumed. Consular conventions which deal with the rights and privileges of consular officers are usually concluded as between heads of States rather than as between Governments, e.g., the Consular Convention between the United States and the United Kingdom signed on 6 June 1951. The agreement between the United States and the United Nations concerning the Headquarters of the latter is an example of a comparatively new type of agreement, i.e., between a State and an international organization of which the United States itself is a member.

3. Informal authorization from the Department of State is regarded as sufficient authority for the head of a delegation to an international conference or an ambassador to sign an international agreement for which no Full Power is considered necessary, e.g., the authority of the United States representatives to sign the agreement for the trial of war criminals of the European Axis was contained in a telegram to London on 30 June 1945, signed by the Acting Secretary of State. It is the invariable practice, in the case of an international agreement of the United States deemed to be a treaty in the constitutional sense, to issue a Full Power authorizing the United States Plenipotentiary to sign. Full Powers are sometimes issued to authorize the exchange of instruments of ratification but, under United States practice, it is recognized that they are not necessarily required in that connexion. Thus, the Department of State informed the American Ambassador to France in an instruction dated 10 December 1944 as follows:

"Ordinarily the Department considers that it is not necessary to furnish a Full Power for the purpose of effecting an exchange of ratification.

Possession of the instrument of ratification is regarded as sufficient evidence of authority in this respect. This is understood to be the general international practice. However, in order to avoid any possible embarrassment and delay, in the event that the French authorities should express a desire to have you present or exhibit an appropriate Full Power, such a Full Power is furnished you herewith."

4. Since the Secretary of State is charged by law, and by the President, with duties incident to the conduct and direction of the international relations of the United States, it has been United States practice to have the Secretary of State or, in his absence, the Acting Secretary of State, sign for the United States of America international agreements concluded in Washington, unless a Full Power has been issued by the President authorizing another person to sign. Authority to negotiate an agreement is not *per se* authority to sign the agreement which is negotiated. Thus the agreement on petroleum with the United Kingdom was signed for the United States on August 8, 1944, by Mr. Edward E. Stettinius, Acting Secretary of State, rather than by the Secretary of the Interior, Acting Chairman of the Cabinet Committee appointed by the President to negotiate the agreement. Agreements which are negotiated in other countries are normally signed on behalf of the United States of America by the American Ambassador, the American Minister or, in the absence of the Ambassador or Minister, the Chargé d'Affaires. When a multilateral agreement is formulated at an international conference at which the United States is represented by a plenipotentiary delegation, the Chairman, and frequently other members of the delegation, sign on behalf of the United States.

5. With respect to the negotiation and signature of an agreement modifying the Bizonal Fusion Agreement of December 2, 1946, the view was expressed that:

"We do not perceive that any particular credentials are required for Mr. Saltzman to conduct negotiations in Washington with the British for a modification of the Bizonal Fusion Agreement of December 2, 1946. For the signature of an international agreement by an Assistant Secretary a Full Power would be required...

... If the Ambassador signs for the United Kingdom, the Secretary or the Acting Secretary should sign for the United States, according to good protocol." [Memorandum of the Assistant for Treaty Affairs (Barron), October 10, 1947].

. Changes in conditions which would affect the terms of the convention either in its scope or its application, and which occur, subsequent to signature but prior to approval by the Senate, are brought to the attention of the Senate for appropriate action.

6. Articles 1(2), 2(3) *(b)*, and 2(4) *(a)* of a consular convention[1] between the United States of America and the United Kingdom, signed February 16, 1949, provide for the inclusion of Newfoundland and Newfoundland citizens in the scope of the convention. Before 1949, the convention was submitted to the Senate, Newfoundland had been incor-

[1] On June 6, 1951, there was signed a consular convention between the United States and the United Kingdom to be substituted for the 1949 Convention, and the latter was withdrawn from the United States Senate.

porated in the Dominion of Canada so that, notwithstanding those articles, the convention could have no application in Newfoundland. In reply to a note from the British Ambassador, the Secretary of State replied as follows:

"Your note states, with reference to those articles, that by virtue of the British North America Act, 1949, His Majesty's Government in the United Kingdom has ceased to be responsible, effective April 1, 1949, for the international relations of Newfoundland, which became incorporated in the Dominion of Canada as from midnight of March 31, 1949. Accordingly, you propose that notwithstanding the aforementioned articles the convention shall be deemed not to apply to Newfoundland and Newfoundland citizens.

"I have the honor to inform Your Excellency that the Government of the United States agrees to the foregoing proposal, and regards Your Excellency's note and this reply as constituting the understanding reached with regard to this matter, and as modifying the said convention accordingly." [The Secretary of State (Acheson) to the British Ambassador (Franks), October 12, 1949].

7. The notes exchanged regarding the non-application of the convention to Newfoundland constituted a modification of the convention. In another communication, the Department of State had pointed out that:

"It will be necessary for these notes to be transmitted to the Senate of the United States along with the Convention in order that both the Convention and the notes may receive the advice and consent of the Senate to ratification. The United States instrument of ratification will, accordingly, apply to the notes as well as to the Convention, and we would expect, in return, that the British instrument of ratification would do likewise." [Assistant to the Legal Adviser (Lay) to F. H. A. Gates, British Embassy, August 1, 1949].

8. It is possible, of course, for a particular agreement to specify without qualification that it enters into force on the date of signature, but in United States practice it is never considered appropriate to provide in a bilateral agreement for entry into force on signature when the agreement is considered to be a treaty which is to be sent to the Senate. In the event that an agreement specifies without qualification that it is to enter into force on signature, each government must decide for itself whether it can constitutionally or legally bind itself as a party to the agreement by signature only, or whether further national action must be taken. If further national action is necessary, then the government should make a reservation to that effect at the time of signature. In the case of certain agreements, such as the sugar protocols, the signature on behalf of the United States has been affixed with a reservation "Subject to ratification" or "Subject to approval". In any case, where the reservation refers specifically to ratification, it is the invariable practice to send the agreement to the Senate as a treaty in the constitutional sense. If the reservation is "Subject to approval" or "Subject to acceptance", the agreement may still be sent to the Senate for advice and consent to ratification, depending on the character of the agreement; for example, an agreement which amended or modified a treaty to which the United States is a party would be sent to the Senate with a view to ratification in the same way as the original treaty itself. On the other hand, a reservation "Subject to approval" or

"Subject to acceptance" avoids the necessity for the negotiators to decide what national procedure shall be followed; this is sometimes a matter that requires careful consideration after the close of a conference at which an agreement has been formulated.

9. As to the national action which must be taken in the event of such reservations, it may be pointed out that, so far as the United States is concerned, this depends primarily on the character of the agreement, involving such factors as these: (1) whether it affects substantively the provisions of an existing treaty; (2) whether the substantive provisions of the agreement are already consistent with or within the framework of existing national law; (3) whether, if the agreement's provisions do not already have an adequate basis in national law, it would be sufficient and practicable to obtain legislative action to lay such a basis in national law, and then to take the necessary international action in accordance with such law; or (4) whether the terms of the agreements would, in and of themselves, establish fundamental law of a kind which, in the light of established constitutional concepts, makes it necessary to follow the customary treaty procedures. It probably would be unwise to attempt to lay down an inflexible rule-of-thumb applicable in all circumstances.

10. In recommending action enabling the Government of the United States of America to approve the trusteeship agreement for the Territory of the Pacific Islands, President Truman stated as follows in his message to the Congress:

"I have given special consideration to whether the attached trusteeship agreement should be submitted to the Congress for action by a joint resolution or by the treaty process. I am satisfied that either method is constitutionally permissible, and that the agreement resulting will be of the same effect internationally, and under the supremacy clause of the Constitution, whether advised and consented to by the Senate or whether approval is authorized by a joint resolution. The interest of both Houses of Congress in the execution of this agreement is such, however, that I think it would be appropriate for the Congress, in this instance, to take action by a joint resolution in authorizing this Government to bring the agreement into effect." [Message of the President to the Congress, July 3, 1947; House Document No. 378, 80th Congress, 1st Session.]

Authority to approve the agreement was granted to the President by the Joint Resolution of the Congress of July 18, 1947, and the agreement was approved by him that day.

11. With regard to the processes of making international agreements other than treaties, the Department of State has commented as follows:

... "throughout the history of this country, both treaties and international agreements other than treaties have been made in conducting its foreign relations. The existence and validity of international agreements other than treaties is recognized in long-standing statutes of the United States; for example, the statutory provision[1] ... regarding publication in the United States Statutes at Large of 'treaties' and 'international agreements other than treaties' to which the United States is a party (Act approved January 12, 1895, as amended June 20, 1936 and June 16, 1938; 26 Stat. 615; 49 Stat. 1551; 52 Stat. 760)."

[1] See below p. 14.

"Treaties continue to be made in accordance with the treaty-making provision in the Constitution. International agreements other than treaties continue to be made, in appropriate cases, in accordance with the constitutional and legal authority of the President in conducting the foreign relations of the United States.

"The subject of so-called Executive agreements is a complex one. A clear understanding of the subject, however, requires first of all the pointing out that the term "Executive agreement" is itself a misnomer as applied to all "international agreements other than treaties".

"Actually, such agreements may be considered broadly in three classes: (1) agreements or understandings entered into with foreign governments, pursuant to or in accordance with, specific direction or authorization by the Congress; (2) agreements or understandings made with foreign governments but not given effect except with the approval of the Congress, by specific sanction or implementation; and (3) agreements or understandings made with foreign governments by the Executive solely under and in accordance with the Executive's constitutional power.

"The latter, number (3), is comparatively rare; examples are armistice arrangements, made under the Executive's power as Commander-in-Chief.[1] The other two categories, where the agreements or understandings are made pursuant to or within the framework of existing law, or are implemented by legislative action, constitute the vast majority of international agreements other than treaties. In a true sense, they could well be designated Legislative-Executive agreements instead of Executive Agreements.

"Typical examples of class (1) are the reciprocal trade agreements made under and in conformity with the Trade Agreements Act or that Act as amended, the lend-lease agreements which were made under and in conformity to Acts of Congress, the series of agreements made by the exchange of diplomatic notes for reciprocal tax exemptions on shipping profits in conformity to provisions in the Internal Revenue Code, and others. Examples of class (2) are various arrangements whereby the United States has participated in the work of certain international organizations, after legislative implementation and appropriation, such as the work of the International Labour Organisation.

"As already indicated, the subject is a complex one. Generalized statements which would imply that there is any concerted attempt to nullify or circumvent the treaty-making provision in the Constitution are made without a clear appreciation of the normal processes of conducting foreign relations. There is nothing new in the processes of making international agreements other than treaties. It has been the practice of this Government, during the greater part of this nation's existence, in intercourse with foreign governments, to enter into agreements other than treaties to deal with many problems or questions on an executive or administrative level, where this could be done consistently with, and within the framework of, existing law."

12. The joint resolution of the Congress of the United States of America approved July 1, 1947 (Public Law 146, 80th Congress) authorizing the President of the United States

[1] Such agreements, however, i.e., those made without Statutory authorization have been held to be part of the "law of the land" within Article VI of the Constitution. *United States* v. *Belmont* (1937) 301 U.S. 324; *United States* v. *Pink* (1942) 315 U.S. 203.

of America, the Constitution of the International Refugee Organization, stated that such authorization was given "upon condition and with a reservation". It was deemed necessary to include in the United States acceptance of the International Refugee Organization constitution the text of the condition and reservation as set forth in that joint resolution of the Congress.

13. It is the position of the Government of the United States that if the Congress of the United States of America (or the legislative body of another country) has seen fit to include a condition and reservation in the enabling law by which the Executive is empowered to accept membership in an international organization established pursuant to international agreement, the Executive must take cognizance of that condition and reservation in his execution of the instrument of acceptance. Inclusion of the condition and reservation in the instrument of acceptance will constitute official notice to the other governments concerned with respect to the legislative restriction upon United States action. The ultimate decision with respect to the question of the completeness of an acceptance of the constitution of such an international organization will be made by other governments parties to that constitution rather than by officials of the organization concerned. Failure of other governments concerned to question the adequacy of the instrument is usually taken as tacit consent.

14. The term "understanding", when used in a Senate resolution approving a treaty "subject to an understanding" or when used in the United States ratification of a treaty "subject to an understanding", is used most appropriately to apply to a statement of purpose, an interpretation, a definition, or a paraphrase which is in effect a mere clarification of a particular provision or of the treaty; that is to say, it is not intended to modify or amend in any way the treaty provisions, or to reserve the position of the United States in such a way as to preclude the full operation of any of the treaty provisions in respect of the United States, but has the object of clarifying the understanding as to the actual intention of the negotiators in formulating the provisions to which the "understanding" relates.

15. The term "reservation", when used in a Senate resolution approving a treaty "subject to a reservation" or when used in the United States ratification of a treaty "subject to a reservation", is used most appropriately to designate a statement which has the effect of writing into the treaty a new provision or of modifying the application of a treaty provision with respect to the United States or of indicating the non-application of certain provisions with respect to the United States. A familiar example of a reservation in the case of a bilateral treaty is that which was set forth in the Senate resolution of approval and also in the President's ratification of the treaty of friendship, commerce and navigation of December 8, 1923 with Germany (Treaty Series 725; 44 Stat. 2132). That treaty, as signed, contained certain broad provisions relating to the rights of the nationals of either country with respect to the entry into and travel and residence in the other country. The Senate gave its advice and consent to ratification subject to the following reservation affecting the application of the treaty: "Nothing herein contained shall be construed to affect existing statutes of either country in relation to the immigration of aliens or the right of either country to enact such statutes". After

obtaining the consent of the foreign government to that reservation, the treaty was ratified by the President, the ratification embodying the text of the reservation.

16. Sometimes the Senate resolution and the ratification will set forth both understandings and reservations, introduced by wording such as "subject to the following understandings and reservations". On the other hand, it may be difficult to determine with certainty whether a statement to be included in the Senate resolution and the ratification is an "understanding" in the nature of a mere clarification, or has in fact the character of a "reservation" involving a possible modification or amendment in the terms of the treaty. In such case, it is customary to designate the statement a "reservation", although it may be designated as "the following understanding and reservation".

17. After conclusion of a treaty, the original signed text, or in the case of a multilateral convention a duly certified or otherwise authenticated copy is submitted by the Secretary of State to the President and by him transmitted to the Senate. In his message to the Senate of January 10, 1947, President Truman wrote as follows:

"With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith the Convention between the United States of America and France, signed at Paris on October 18, 1946, for the avoidance of double taxation and the prevention of evasion in the case of taxes on estates and inheritances, and for the purpose of modifying and supplementing certain provisions of the convention between the two Governments relating to income taxation signed at Paris on July 25, 1939.

"I also transmit for the information of the Senate the report by the Secretary of State with respect to the convention."

18. After consideration of a treaty, the Senate may return it to the President with a resolution of advice and consent to ratification, with or without a reservation, or with a resolution that the Senate has considered and rejected the treaty. If the treaty has been returned without action having been taken by the Senate or returned with Senate action which the President believes should be reconsidered, the President may resubmit it at a later date for further consideration.

19. The Committee on Foreign Relations asked and received the unanimous consent of the Senate on September 26, 1940, to return three conventions, without the advice and consent of the Senate to ratification, "in view of the political changes effected through military operations in Europe since these conventions were signed". (Congressional Record, vol. 86, part 11, page 12670.) Two of the conventions, a double taxation convention, and protocol thereto, with France, signed July 25, 1939 (Executive A, 76th Congress, 3d Session), and a claims convention with Norway, signed March 28, 1940 (Senate Executive H, 76th Congress, 3d Session), were resubmitted to the Senate after the liberation of France and Norway, and the Senate gave its advice and consent to their ratification. The third, a consular convention with Lithuania, signed May 10, 1940 (Senate Executive I, 76th Congress, 3d Session), has not been resubmitted.

20. A treaty may remain pending in the Senate, carried on the Treaty Calendar from Session to Session. The Committee on Foreign Relations

may suggest measures to be taken to facilitate Senate approval of a particular treaty.

21. A treaty which remains pending in the Senate for a long period of time may become obsolete by virtue of changed conditions, or another treaty may be drawn up to replace it. The Executive Branch of the Government may conclude that there is little chance that the treaty will receive the approval of the Senate, and decide that it should be withdrawn and filed in the National Archives as an "unperfected treaty".

22. In his message to the Senate dated April 8, 1947, President Truman stated that:

"Because of changed conditions affecting their provisions since they were submitted to the Senate, a number of the treaties now pending in the Senate have become obsolete. The situation with respect to several other pending treaties would be clarified if they were withdrawn for further study and consideration in the light of developments since they were formulated and, if found advisable, resubmitted with a fresh appraisal of their provisions.

"I, therefore, desire to withdraw from the Senate the following treaties with a view to placing the Treaty Calendar on a current basis:"

The nineteen treaties, conventions, and protocols named by the President were returned to him in accordance with a resolution of the Senate passed on April 17, 1947. A similar procedure was followed in 1949, when, by a message dated August 10, 1949, the President informed the Senate of his desire to withdraw certain other treaties, which were returned to him pursuant to the Senate resolution of October 13, 1949.

23. An international agreement which has the effect of amending a treaty or convention ratified with the advice and consent of the United States Senate is submitted to the Senate for its concurrence. In transmitting to the Congress a draft of a joint resolution providing for acceptance by the United States of America of the revised constitution of the International Labour Organisation as adopted at Montreal on October 9, 1946, the statement was made in a document accompanying the letter from the Secretary of State that:

"The Final Articles Revision Convention, which is printed in the same document, is to be discussed in a separate memorandum. It is intended that this convention will be submitted to the Senate for its advice and consent inasmuch as its intended effect is to change the language of conventions which have been ratified with the advice and consent of the Senate or are pending before that body." [Appendix C to letter from the Secretary of State (Marshall) to the Speaker of the House of Representatives (Martin), May 8, 1947; House Report 1057, 80th Congress, 1st Session.]

24. After a treaty or other international agreement has entered into force with respect to the United States, it is mandatory that its text be published, in accordance with the Act of Congress approved September 23, 1950, and be registered with the Secretariat of the United Nations. The United States also registers texts of aviation agreements with the International Civil Aviation Organization, in accordance with articles 81 and 83 of the 1944 Convention on International Civil Aviation, and registers texts of treaties and other agreements with the Organization of American

States (formerly the Pan American Union), in accordance with resolution XXIX of the Eighth International Conference of American States.

25. Treaties and other international agreements of the United States which entered into force up to the end of the year 1949 were published in the United States Statutes at Large pursuant to the Act of Congress approved June 16, 1938 (Act of January 12, 1895 as amended) which provided in part as follows:

"That the Secretary of State shall cause to be compiled, edited, indexed, and published, the United States Statutes at Large, which shall contain all the laws and concurrent resolutions enacted during each regular session of Congress; all treaties to which the United States is a party that have been proclaimed since the date of the adjournment of the regular session of Congress next preceding, all international agreements other than treaties to which the United States is a party that have been signed, proclaimed, or with reference to any other final formality which has been executed, since that date... (52 Stat. 760; 1 U.S.C. Sec. 30, 44 U.S.C. Sec. 196).

26. By the Act of Congress of September 23, 1950 the law with respect to publication of treaties and other international agreements of the United States was amended so that, as to those instruments which entered into force beginning with 1950, they are to be published separately from the Statutes at Large, but with essentially the same evidentiary quality, in a compilation entitled "United States Treaties and Other International Agreements". The new law provides in part as follows:

"S. 112a. The Secretary of State shall cause to be compiled, edited, indexed and published, beginning as of January 1, 1950, a compilation entitled 'United States Treaties and other International Agreements' which shall contain all treaties to which the United States is a party that have been signed, proclaimed, or with reference to which any other formality has been executed, during each calendar year. The said United States Treaties and other International Agreements shall be legal evidence of the treaties, international agreements other than treaties, and proclamations by the President of such treaties and agreements, therein contained, in all the courts of the United States, the several States, and the Territories and insular possessions of the United States" (1 U.S.C. sec. 112a).

## 81. Uruguay

CONSTITUTION OF 25 JANUARY 1952. TEXT FURNISHED BY THE PERMANENT DELEGATION OF URUGUAY. TRANSLATION BY THE SECRETARIAT OF THE UNITED NATIONS

*Article 6.* In any international treaties which the Republic may conclude there shall be proposed a clause to the effect that all differences which may arise between the contracting parties shall be settled by arbitration or other peaceful means.

*Article 85.* The General Assembly is competent:

. . .

(7) To declare war and to approve or withhold approval, by an absolute majority of the full membership in each Chamber, of such treaties of

peace, alliance, commerce, and such conventions or contracts of any nature as the Executive Power may make with foreign Powers;

*Article 168.* The National Council of Government, acting jointly with the appropriate Minister or Ministers, has the following duties:

. . .

(20) To conclude and sign treaties, the approval of the Legislative Power being necessary for their ratification.

## 82. Vatican City

FUNDAMENTAL LAW OF 7 JUNE 1929. ACTA APOSTOLICAE SEDIS, SUPPLEMENTO PER LE LEGGI E DISPOSIZIONI DELLO STATO DELLA CITTÀ DEL VATICANO, PONTIFICATO DI SCEA SANTITÀ PIO XI—ANNO VIII. TRANSLATION BY THE SECRETARIAT OF THE UNITED NATIONS

*Article 3.* Reserved to the Sovereign Pontiff is the representation of the State of the Vatican, by the intermediary of the Secretary of State, in so far as concerns the conclusion of treaties and diplomatic relations with foreign States.

## 83. Venezuela

*(a)* CONSTITUTION OF 20 JULY 1936, AS AMENDED IN 1945. TEXT FURNISHED BY THE VENEZUELAN MINISTRY OF FOREIGN AFFAIRS. TRANSLATION BY THE SECRETARIAT OF THE UNITED NATIONS

*Article 78:* The Chamber of Deputies and the Senate, acting as co-legislators, have the following functions:

. . .

(5) To approve or withhold approval of international or diplomatic treaties and pacts, which, without the required approval shall be invalid and shall not be ratified.

Treaties shall not be published officially until they have been ratified and the ratifications exchanged.

. . .

*Article 104:* The President of the United States of Venezuela has the following functions:

. . .

(8) To promulgate the Constitution and the laws and to exercise the other functions conferred on him by Articles 89, 90 and 91 of this Constitution... The time at which a law approving a Treaty or International Convention should be promulgated is at the discretion of the Federal Executive subject to international usage and the interests of the Republic.

. . .

(2) To direct diplomatic negotiations through the Minister of Foreign Affairs and to negotiate, through Plenipotentiaries designated by him and with the approval of the Council of Ministers, any treaty with other nations, submitting such treaties to the Legislative Chambers for approval or disapproval at the proper time.

In international treaties, the following clause shall be inserted:

"Any disputes between the High Contracting Parties relating to the interpretation or execution of this treaty shall be settled by the peaceful means recognized in international law."

*(b)* ORGANIC STATUTE OF THE MINISTRIES. SAME SOURCE AND TRANSLATION

*Article 19:* The Ministry of Foreign Affairs shall be responsible for all matters connected with:

. . .

(3) The negotiation, signature, and ratification of international treaties, conventions, pacts and agreements, accession and reservations to international treaties, conventions, pacts and agreements, the prolongation, execution and denunciation of international treaties, conventions, pacts and agreements.

## 84. Viet Nam[1]

ORDINANCE No. 1 OF 1 JULY 1949. TEXT PUBLISHED BY THE MINISTÈRE DE LA JEUNESSE, DES ARTS ET DES LETTRES *(La documentation française, notes et études documentaires,* 11 Mai, 1950, No. 1, 325)

*Article 2:* Le Chef d'Etat signe et ratifie les traités. Il nomme et accrédite les chefs de missions et envoyés diplomatiques de Vietnam à l'étranger et dans l'Union française. Les chefs de mission et envoyés diplomatiques des Etats étrangers et de l'Union française sont accrédités auprès de lui.

## 85. Yemen

NOTE BY THE SECRETARIAT OF THE UNITED NATIONS

There is no written constitution of Yemen, which is governed by the Imam Yahya ibn Mohammed Hamid al-Dine. No official information is available as to any rules or usages which may relate to the exercise by him, as Head of the State, of the treaty-making power.

## 86. Yugoslavia

*(a)* CONSTITUTION OF 31 JANUARY 1946. ENGLISH TRANSLATION FURNISHED BY THE YUGOSLAV GOVERNMENT

*Article 74.* The Presidium of the Federal People's Republic of Yugoslavia performs the following functions:

. . .

(9) Ratifies international treaties.

. . .

*Article 80.* The Government of the People's Federal Republic of Yugoslavia ... sees to the carrying out of international treaties and obligations, directs the maintenance of relations with foreign States ...

[1] Viet Nam is a member of the French Union. The above ordinance was promulgated by His Majesty the Emperor Bao-Dai as Chief of State.

*(b)* LAW OF 2 MARCH 1951 ON THE PRESIDIUM OF THE PEOPLE'S ASSEMBLY OF THE FEDERAL PEOPLE'S REPUBLIC OF YUGOSLAVIA. ENGLISH TRANSLATION SUPPLIED BY THE YUGOSLAV GOVERNMENT

*Article 6.* The Presidium of the People's Assembly of the Federal People's Republic of Yugoslavia exercises the following rights:

(1) It represents the State sovereignty of the Federal People's Republic of Yugoslavia in international relations; it appoints and recalls, on the proposal of the Government of the Federal People's Republic of Yugoslavia, Ambassadors, Envoys Extraordinary and Ministers Plenipotentiary to foreign countries; receives the credentials and letters of recall of the diplomatic representatives of foreign States accredited to it; ratifies and renounces international treaties and more important conventions and agreements, as far as it is not done by the People's Assembly itself; authorizes the Government of the Federal People's Republic of Yugoslavia to contract loans abroad...

*(c)* MEMORANDUM (UNDATED 1951) FROM THE GOVERNMENT OF YUGOSLAVIA. (ORIGINAL IN ENGLISH)

1. According to the established practice of Yugoslavia in the matter of the negotiation and conclusion of international treaties, the provision contained in article 80 quoted above is being interpreted in the sense that the Government of the People's Federal Republic of Yugoslavia is competent to negotiate and conclude treaties. The representative who is to conduct negotiations and conclude or sign an international treaty—in so far as it is not a matter of a loan—is granted full powers by the Minister of Foreign Affairs of the Republic, seeing that the matter of treaties is reserved exclusively to the federal organs.

2. According to the practice of the Republic, the renunciation of a treaty is proposed by the Government to the Presidium which then takes a decision on the matter. The act of renunciation is carried out by the Minister of Foreign Affairs.

3. International instruments can acquire or lose the force of internal law as follows:

(a) By the publication of the law of the People's Assembly on the ratification or renunciation of a treaty, if the treaty has a particular political importance (in practice the People's Assembly has ratified only the Charter of the United Nations, treaties of alliance, friendship and mutual assistance, and the peace treaties).

*(b)* By the publication of the decree of the Presidium concerning ratification or renunciation of international treaties and of important conventions and agreements.

*(c)* By the publication of the decision of the Government of the Republic on the approval or renunciation of those conventions or agreements which neither involve changes in, or constitute an exception to, federal laws or provisions. Into this category falls action concerning agreements and conventions of a less important character, i.e., agreements of an adminis-

trative character, or agreements implementing international instruments already in force.

4. There are no special regulations exclusively concerning the negotiation and conclusion of international agreements, but draft rules concerning the practice on the subject of how international instruments acquire or lose the force of internal law are under consideration.

# A SELECT BIBLIOGRAPHY ON THE LAW OF TREATIES

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Chapitre IV. Conditions et validité des traités, p. 434.
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