INTERNATIONAL AGREEMENTS*

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I. *Introduction*

1. When we are thinking about questions of International Law, we need to get rid of some ideas which are derived from our ordinary legal studies. We are primarily concerned with relations between sovereign states. We are concerned with the creation of legal obligations between such states. The test of such legal obligations is whether they will be recognized, as creating rights and duties, by states and international tribunals. We are not concerned with the question whether the legal obligations, or the resultant rights and duties, will be recognized or enforced by the ordinary courts of justice. There are circumstances in which rights and duties, legal in their character and cognizable and enforceable by the ordinary courts, may result from an international obligation; but such a result is incidental and not an essential element of the obligation.

2. International law has its own law of persons. It is not directly concerned with natural or juristic personality; with the ordinary man, lunatics, idiots, married women or minors; with partnerships, corporations sole or aggregate.

The normal international person is the sovereign state. There are emerging new types of international personality such as the partly sovereign state and the international organization. Any attempt to take into account shades of international personality would unduly complicate the study of international contracts, and it will be convenient to talk about the contractual relations of states whose sovereignty is substantially complete.

In various aspects of international relations, states are represented by their heads, their governments and by other types of state representatives. One finds, embedded in the doctrines of international law, vestigial survivals of an older era, in which the heads of states were regarded as the international persons; and, in protocol, the fossils still control.

3. States, as international persons, are entitled to rights and are subject to duties. These rights and duties, which are recognized by international law, may be directly based upon

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general rules of law. They may result from positive action by a state, giving rise to rights and duties as a legal consequence of the action. For example:

> State A diverts the water in the upper reaches of a river, which flows through another State, B, to such an extent that state B is prevented from making effective use of the river.

This positive action by state A may result in rights and duties. As between A and B there may be rights and duties relating to restoration or partial restoration of the flow of the river, and reparation. Further, legal rights and duties may exist, independently of positive action by a state. It is generally recognized that a state has a right to the quiet enjoyment of its territory, and that a state is, normally, under a legal duty not to attack another state.

4. International rights and duties may be founded on contract. Two or more states, as international persons, may make a contract. The contract is not much different from the sort of contract that Anson wrote about. It contains at least one promise, and usually a network of mutual promises. Each promise involves at least one right and one duty. The doctrine of consideration is lacking. One commonly talks about rights and duties derived from contract, but it should be borne in mind that they owe their ultimate authority to the rule of international law which says that promises freely made by sovereign states give rise to legal rights and duties.

5. The international law of contract is much like the ordinary law of contract. The basic principles are the same and, if you have mastered Anson, you will have little difficulty in taking on treaties in one or two easy lessons.

It will be convenient to begin by looking at the types of international agreements, and the formalities of signature and ratification. Parliamentary action can then be studied.

II. *International Agreements*

1. International agreements are sometimes referred to as treaties (with a small "t"); and it is necessary to understand the difference between treaty (with a small "t") and Treaty (with a big "T"). A treaty (with a small "t") is a generic term, including Treaties and other types of international agreements. It is frequently used as including all types of international agreements. The confusion is twice confounded by the fact that the commonest

instance of the use of the word "treaty" is in the title of a treaty series, in which the convention for capitalization of titles results in a capital "T", *e.g.*, "League of Nations Treaty Series", or, "Canada, Treaty Series, 1945". The only safe rule to follow is to examine the context closely, whenever you come across the words "Treaty" or "treaty". When you use these words, arrange your context so that you cannot be misunderstood.

2. *Types of international agreements*

The principal types of international agreements are as follows:

(a) Treaties,
(b) Conventions,
(c) Protocols,
(d) Agreements,
(e) Declarations,
(f) Final Acts,
(g) Exchanges of Notes.

Even this list is not complete. "Arrangement" is sometimes used for a kind of "Agreement", and "Statute" is sometimes used for a special type of multilateral Treaty or Convention.

In considering these types of international agreements, it should be borne in mind that, from the point of view of international law, they do not represent substantial difference in respect of obligation. When a meeting of the minds has been reached between two or more states, and expressed in writing in a form which is intended to record agreement and with the intention that the agreement is to constitute a legal obligation, there is an international agreement regardless of whether it is expressed in a Treaty or in an exchange of notes or in some intermediate form. A Treaty may be likened unto evening dress with white tie; a convention to a dinner jacket; a protocol to morning coat; agreement, arrangement or declaration to business suits; an exchange of notes to shirt sleeves and overalls; while a statute or charter may be likened unto regimental full dress uniform with decorations.

3. *Classification of international agreements*

In point of form, there are three principal classes:

(a) International agreements between heads of states;
(b) Intergovernmental agreements;
(c) Exchanges of notes.

This classification is important in that it determines the nature of full powers and instruments of ratification. In the case of international agreements concluded between heads of states, the full power must take the form of a document issued in the name of the head of the state. The same rule applies to an instrument of ratification. When an agreement is, in point of form, between states, it is assimilated, for these purposes, to agreements between heads of states. In the case of intergovernmental agreements, both the full power and the instrument of ratification may take the form of documents issued by the Minister for External or Foreign Affairs, though documents issued by the head of a state are sometimes used in such cases. When agreements are concluded by exchange of notes, full powers are usually dispensed with and, ordinarily, there is no provision for ratification. In exceptional instances, in which there is occasion for ratification, the practice is to use further notes confirming the acceptance of the legal obligation.

4. *Full powers*

A full power is written evidence of the authority of the person who signs an international agreement. Ordinarily, plenipotentiaries present full powers, for examination and retention, before signature.

When an international agreement has been negotiated between heads of states, as is ordinarily the case in Treaties and Conventions, the full power must be issued in the name of the head of the state. This is also true when the agreement is, in point of form, between states. In Canada, the full power may be issued by and in the name of the King. It may, in such a case, be passed under the Great Seal of the Realm, or under the Great Seal of Canada, or under any Royal Seal authorized for the purpose under the provisions of the Seals Act. The full power may also be issued by the Governor-General, in the name of and on behalf of the King, and passed under the Great Seal of Canada. The procedure may take the following courses:

(a) If the document is to be passed under the Great Seal of the Realm, it is necessary to invoke the cooperation of the Commonwealth Relations Office; because the Great Seal of the Realm can only be used upon the authority of a warrant under the Sign Manual and Signet, the latter being a royal seal in the keeping of one of His Majesty's Principal Secretaries of State. The warrant sets forth on its face that it is at the request of the Government of Canada. Both the

warrant and the full power are prepared in London by the British governmental authorities, and, in so doing, they consider that they are acting as agents for the Government of Canada and accept no political responsibility. This procedure is no longer in common use, but, theoretically, it is still available.

(b) If the document is to be issued by the King and passed under the Great Seal of Canada or other seal coming within the Provisions of the Seals Act, it is prepared by the Department of External Affairs, together with a submission to His Majesty requesting him to approve the passing of the document under the seal in question. It is transmitted by the Governor-General to the Palace, and returned by the same channel, with the King's approval endorsed on the submission and the Sign Manual on the document. The document is passed under the Great Seal of Canada by the Secretary of State of Canada.

(c) Under the new Letters Patent Constituting the Office of Governor-General of Canada, dated the 7th September and taking effect on the 1st October, 1947, the document may be issued by the Governor-General, in the name of and on behalf of the King, and passed under the Great Seal of Canada. The procedural steps would be greatly simplified, and confined to Ottawa.

When an international agreement has been negotiated, in point of form, between governments, the full power is a much simpler matter. The only formal requirement is a written authority, signed by the Secretary of State for External Affairs. It may, but need not necessarily, include his seal or the seal of the department. An inter-governmental agreement is just as binding as one concluded between heads of states and its validity is not affected by a change of governments.

5. *Ratification*

Many, if not most, international agreements are made subject to ratification. They are signed by plenipotentiaries, possessing full power (informal agreements by exchange of notes usually dispense with such formalities), but the provisions of the agreements stipulate that they are subject to ratification, which means subsequent confirmation by the interested governments. The exchange of instruments of ratification is carried out, in accordance with the stipulation, by a subsequent formal ceremony. This ceremony is frequently witnessed by a protocol of exchange,

which is a formal written record of the fact of exchange. It should be borne in mind that an international agreement, as such, does not require ratification. It is only when, upon reasonable construction, it must be assumed that the parties intended that the agreement was to be subject to confirmation, that ratification becomes necessary.

Ratification is effected by means of documents called instruments of ratification. The procedure corresponds to that followed in the case of full powers, and it is unnecessary to repeat the statement contained in the preceding section, or the special comment with regard to exchanges of notes in section 3.

There are exceptional cases in which international agreements provide, in terms, for the manner in which the signature originally given in the agreement is to be confirmed. In such cases, the instrument of ratification must conform. These cases will cause no difficulty if it is borne in mind that ratification is not a direct legal requirement. It is, essentially, the performance of a condition of the contract, and the obligation of the contract depends upon the performance of the condition.

It is necessary to bear in mind the essential difference between ratification and parliamentary action in relation to treaties. The purpose of ratification is to satisfy the legal requirements of performance of a condition precedent, expressed or implied, in the text of the international agreement. Otherwise, it has no legal significance. Parliamentary action relates to procedures prescribed by the constitution of the country concerned, whether legal or conventional. There are exceptional instances in which the text of a treaty may specifically require some form of parliamentary action by one or more of the parties. Such a provision must be complied with for the purpose of performing a condition. This may, or may not, satisfy the constitutional requirements of the country concerned.

III. *Parliamentary Action*

1. In examining the question of parliamentary action in relation to international agreements, it may be well to begin by considering some elementary principles.

2. *The treaty-making power*

The treaty-making power is a part of the Royal Prerogative. An international agreement is negotiated by representatives acting under the authority of the Crown, signed by them and, subsequently, ratified by the Crown. When it has been thus signed

and ratified, it creates an international obligation, binding upon the State as an international person. Legally, the approval of Parliament is not necessary, at any stage, to create an international obligation.

3. *Parliamentary action*

When the international agreement has been concluded, the question arises whether Parliament should take any part in the matter. Action by Parliament may be necessary or desirable for various reasons:

(a) In his Law and Custom of the Constitution, Anson states, "It would seem to follow from the general principles of our constitution that a treaty which lays a pecuniary burden upon the people or which alters the law of the land, requires parliamentary sanction". Anson also takes the view that a treaty involving cession of the territory of the state requires parliamentary sanction, except, perhaps, in the case of a treaty of peace. Upon examination it would appear that these propositions may be stated too strongly if they are regarded as impairing the validity of the treaty from the point of view of international law. It might be better to regard them as stating the constitutional duty of obtaining parliamentary sanction or approval, rather than as stating legal necessity. It is clear that none of the governments of the Commonwealth would venture to make a treaty involving a pecuniary burden of a substantial character, an alteration of the law of the land, or a cession of territory without some form of parliamentary sanction or approval. The precedents indicate that parliamentary action may be limited to approval of executive action, as distinct from enabling legislation giving legal validity to the executive action.

(b) The object of confirmatory action by Parliament is to enable Parliament to exercise direct and effective control over the executive in the exercise of the treaty-making power. In ordinary matters, the indirect control by the House of Commons over the executive, under our system of cabinet government, is sufficient. In the case of the treaty-making power, it may be desirable that there should be more direct and effective control, because of the specially important character of the executive action involved.

(c) Legislation implementing the provisions of a treaty may be necessary in order to give the executive the legal power

to ensure performance of its obligations. A valid treaty imposes an international obligation upon the state; but it does not become a part of the law of the land. In order to give effect to its provisions, it may, in some cases, be necessary to enact legislation, either giving the force of law to the treaty, or implementing parts of the treaty which require statutory authority.

4. *Courses open after signature but before ratification*

After an international agreement has been signed there are various courses which may be followed before ratification:

(a) The agreement may be ratified without parliamentary action. This course is followed, as a general rule, in Great Britain, but, in Canada, the practice has been to present most international agreements for parliamentary action before ratification.

(b) The agreement may be presented to Parliament for approval by resolution. This course gives to Parliament, or rather to the chambers, an adequate opportunity to exercise some degree of supervision over the exercise of the treaty-making power. It does not affect the legal validity of the agreement, which is based upon ratification, an executive act. This practice has been followed in a large number of cases in Canada, and may be regarded as the general rule in this country.

(c) There has been some controversy as to whether the approval should be given by the House of Commons alone, or by both houses. From the point of view of pure logic, there is much to be said for the view that the House of Commons alone should be asked to approve executive action. From the point of view of practical convenience, there are advantages to be gained by obtaining the approval of the Senate as well as the House of Commons. If a case arose in which the House of Commons approved and the Senate withheld approval, it might be necessary to reconsider the procedure. Meanwhile, as in so many other instances, theoretical have given way to practical considerations, and agreements are presented to both houses.

(d) In Great Britain, the practice has been to table all agreements, thus giving to Parliament the opportunity to consider them at any time, and to limit formal approval to specially important cases. In Canada, all international

agreements, including exchanges of notes, are tabled, regardless of whether further action is to be taken in Parliament.

(e) Apart from procedure by resolution, an agreement may be submitted for parliamentary approval by embodying it in a statute. The statute may simply confirm the agreement and authorize its ratification; it may give the force of law to its provisions; or it may give to the Governor in Council power to give effect to its provisions. This procedure may be combined with a resolution of approval.

5. *Classification of international agreements with regard to the need for legislative action*

When an international agreement has been concluded, it is necessary to determine whether legislation is needed. For this purpose, agreements fall into three classes:

(a) Agreements which do not affect private rights or interests either directly or indirectly, and which do not involve action beyond existing legal powers of the government or contravene existing laws, do not need to be implemented by legislation.

(b) A second class of agreement requires legislation in order to give effect to their provisions. It includes agreements calling for action by the government, where the executive action called for is not covered by existing legal powers or where it would be contrary to existing law: *e.g.*, a convention which the executive could not enforce without fines or imprisonment directed against individuals. This class also includes agreements which require legislation making their terms part of the law of the land, because they are intended to provide for new law governing persons and property and affecting private interests and rights within the state. A good example of this class is the Japanese Immigration Treaty. The class also includes agreements which involve provisions directly or indirectly affecting private rights and interests. The Halibut and Sockeye Salmon Treaties are good examples of this type.

(c) The third class is doubtful. There is some authority for the proposition that Treaties of Peace, and Treaties akin to Treaties of Peace in that their object is to avert imminent war, may affect private rights without legislation. This proposition is doubtful; and, in recent times, treaties of this character have always been implemented by statute.

Although parlimentary action may not be legally essential in the cases coming within the first class, it may be in accordance

with constitutional practice to submit such international agreements for some form of parliamentary approval, or even to have them confirmed by statute. An examination of the debates in the Canadian House of Commons, Resolution of June 21st, 1926 (to be found in the Hansard of 1926, vol. 5, p. 4758), indicates that treaties and conventions involving military or economic sanctions must be submitted to Parliament for approval. This is extended by the practice, as stated by the Prime Minister on April 12th, 1928 (Debates of the House of Commons, 1928, vol. 2, p. 1974). The Prime Minister made it clear that, in addition to the treaties covered by the 1926 resolution, treaties committing the country to obligations involving considerable financial outlays or active undertakings, or political situations of a far-reaching character, would require parliamentary approval. An examination of the precedents in Canada, over the last twenty years, indicates a tendency to submit an even wider list of international agreements that those which were comprehended by the Resolution and the statement of the Prime Minister. The tendency has been to table all international agreements, including even those which are of minor importance. During the war, many agreements were tabled, with short explanatory statements, and formal approval was dispensed with on account of pressure of parliamentary business. This procedure amply safeguarded the rights of Parliament, and it was practical and convenient. It may well be prolonged into the peace-time period.

IV. *Fundamental Principles*

1. There are two aspects of treaty-making, which have been touched in discussing the nature and classification of international agreements and parliamentary action. At the risk of vain repetition they need to be reemphasized.

2. *Intra-commonwealth aspects of the treaty-making power*

It is necessary to understand the somewhat confusing position of the United Kingdom and Canada with regard to the treaty-making power. If one bears in mind that the treaty-making power is a part of the Royal Prerogative, the complex situation is simplified. The King has the legal power. The King is the nominal party, in the case of a heads-of-state agreement. The King's government is the nominal party, when the intergovernmental form is used. Even in the case of an exchange of notes, it is the King's minister (in Canada, the Secretary of State for External Affairs, or, abroad, the King's Canadian Ambassador)

who signs. Legally, the King can make an agreement extending to the whole of his dominions, or extending in its operation to a part. Consequently, when the King enters into an obligation in respect of Canada, he confines, by its terms, its application to the territory in question. When he enters into an agreement applying to the United Kingdom, or to the British Empire other than the Dominions, he indicates it by a territorial restriction in the text of the document.

Originally, the King acted upon the advice of his ministers in London, in making international agreements, regardless of the extent of their territorial operation. In recent years, however, a conventional understanding has grown up, expressed for the most part in resolutions of Imperial Conferences, whereby the King is advised, in respect of agreements, by his ministers in the part of his dominions to which the agreement is intended to apply. No Act of Parliament and no changes in the statutory constitutions were necessary, because no change in the law was involved. The legal power was in the King. The obligation whereby the King is bound to take the advice of ministers and act upon their advice has always been a conventional, and has never been a legal rule. Accordingly, treaties applying to Canada, such as those dealing with Sockeye Salmon, Halibut, or the St. Lawrence, are negotiated by the King's representatives, acting under full powers issued by the King upon the advice of his Canadian ministers, and pursuant to instructions given by the King's Secretary of State for External Affairs. Later it is ratified by the King, upon advice received from the same ministers. The less formal types of agreement follow a course which is essentially similar, but the direct royal intervention is unnecessary under the simpler procedure.

When an agreement applies to more than one part of His Majesty's dominions, it will be negotiated by the King's representative or representatives, acting under full powers from the King, given upon the advice of the various ministers. It is legally possible to have separate full powers or to have a sort of joint full power based upon joint advice, with corresponding procedure as regards ratification. A good illustration is the Treaty of London, 1930, relating to Naval Disarmament. In that case full powers were given to the Canadian representative and to United Kingdom representatives, each of whom signed in respect of the field of his full power. Similarly, separate ratifications were deposited by Mr. Macdonald, Mr. Bennett, Mr. Scullin, General Hertzog, etc. A good illustration of the joint full power technique

is the Rum-running Convention of 1924, which should be studied in conjunction with the proceedings at the Imperial Conference of 1923. This type is obsolete.

3. *International law and municipal law*

There are two kinds of law with which we are concerned: international law and municipal law. By *municipal law* we do not mean the law relating to municipalities. The term "municipal law" is used in all international discussions as meaning the law of a particular country; and, in Canada, it would include the federal statute law, the provincial statute law, the common law and, in the case of Quebec, the Civil Code. Municipal law is concerned with the rights and duties of individuals, associations and corporations; and their relations *inter se* and with the state. International law, on the other hand, is concerned with the rights and duties of states *inter se*. Apart from exceptional and anomalous instances, an individual cannot have a right under international law and cannot be subject to a duty.

International agreements are designed to create contractual obligations under international law. They do not give rise to rights vested in an individual against a foreign state, and they do not impose duties upon individuals as such. They create a position in which one state may have a right which it can assert against another state or against states generally, and in which a state is subject to a duty which can be asserted by another state, party to the agreement. International law is only concerned with the question whether an international obligation is brought into existence by an agreement. The question whether the courts can take congnizance of the obligation is, strictly, a matter of municipal law. It is always important to avoid confusion between the two questions. At the same time, as lawyers, you cannot afford to overlook either side of the problem. Until you understand these principles, you cannot understand international relations and it is even more futile to expect to understand the legal aspects of diplomacy.

4. *Executive agreements*

You may very properly object to the inclusion of executive agreements in a part dealing with fundamental principles. Strictly speaking, it might be suggested that there is no such thing as an executive agreement. Still, as we meet them every day in practice, we should be over-academic if we insisted too persistently upon their non-existence.

Under the constitution of the United States, the treaty-making power is vested in the President, by and with the advice and consent of the Senate, and a treaty must be ratified by a two-thirds vote of that body. Treaties are declared to be the supreme law of the land (Day J. in *B. Altman & Co.* v. *United States*, 224 U.S. 600; cited in Hackworth's Digest, V, p. 394). On the other hand the constitution recognizes that the executive department of the government has the power to conclude agreements, which are not treaties in the sense that the advice and consent of the Senate is required. The legal basis of the power is to be found either in the constitutional authority over foreign intercourse, or in directions given and powers conferred by Congressional legislation. You will find the matter dealt with at length in Hackworth's Digest, V, pp. 390 to 429. It seems to be clear that, from the point of view of international law, treaties and executive agreements are alike in that both constitute equally binding obligations upon the nation. There is, however, no clearly defined line between matters which may be dealt with by treaty and those which may be dealt with by executive agreement. When the matter is doubtful, in this respect, and of major importance, it is possible to place on the international record a formal opinion of the Attorney General of the United States.

The point arose in the negotiation of the Great Lakes-St. Lawrence Waterway Agreement in 1941. Attorney General Jackson gave an opinion, which is cited in Hackworth's Digest, V, p. 410:

> I . . . concur in the conclusion reached by your Legal Adviser that it is legally unobjectionable so far as this country is concerned for the executives of the United States and Canada to enter into an agreement regarding the Great Lakes-St. Lawrence Deep Waterway project conditioned for its effectiveness upon the subsequent enactment of necessary legislation by the Congress and by the Canadian Parliament.
>
> If an Agreement is executed and approved in this manner, its provisions would be binding upon the United States as respects Canada.

From the Canadian point of view there is no difference between an executive agreement and any other kind of international agreement. The formalities regarding full powers and ratification apply without change. The difference is treated as being constitutional rather than international.