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CONSTITUTIONAL ASSEMBLY

MEMORANDUM

TO: Members of the Constitutional Committee Subcommittee
FROM: Executive Director
DATE: 28 March 1996
RE: Panel Memorandum on ***"International Relations, International Law and the Provinces"***

We enclose for your consideration a Memorandum from the Panel on "***International relations, International Law and the Provinces.***"

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PANEL OF CONSTITUTIONAL EXPERTS

MEMORANDUM

TO: CHAIRPERSONS AND EXECUTIVE DIRECTOR OF THE CA

DATE: 27 MARCH 1996

RE: INTERNATIONAL RELATIONS, INTERNATIONAL LAW AND THE PROVINCES

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1. INTRODUCTION

1.1 Over the past year a number of provinces have purported to enter into international agreements. The present constitutional basis for this is not entirely clear. The Panel thinks that the power of provinces to enter into such agreements should be carefully considered and that it may be necessary to deal with the matter in the Constitution. The power to conclude agreements, the relationship between the National and provincial governments and all related issues (such as the demarcation of competencies, means of co-ordination and domestic application) should best be provided for in the Constitution. This will provide the necessary clarity with respect to both international and national spheres.

This memorandum will not address the more typical aspects concerning the conclusion and ratification of treaties by national state organs and the domestic application of treaties and customary International Law. Such matters are already dealt with in the Draft and require further refinement.

The possibility of provincial powers with respect to certain types of international agreements is a novel matter and constitutes the focus point of this memorandum. The matters which might be relevant in determining the capacity of provinces to enter into international relationship will be set out here.

1.2 Two Constitutional Principles which deal with South Africa's international relations in general are relevant:

CPI "The Constitution of South Africa shall provide for the establishment of one sovereign state, a common South African citizenship and a democratic system of government committed to achieving equality between men and women and

people of all races."

CPXXI(3) "Where there is necessity for South Africa to speak with one voice, or to act as a single entity - in particular in relation to other states - powers should be allocated to the national government."

CPI only confirms a rather general point (national sovereignty) which is a quality of all states and which constitutes a basic principle of international law. It does not provide any indication as to what should be contained in the Constitution.

CPXXI(3) has implications for the relationship between the national and provincial governments. It also seems to allocate the "foreign relations power" to the national government.[1] However, it does not decide when

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1 "The foreign relations power is the term that has come to be used to describe the constitutional authority of a government to conduct relations with other States and to address the implications and consequences of those relations. The scope of that authority, the organs of government in which it is vested, and any limitations to which it may be subject, may differ from State to State, and from time to time. In general, how and by which organs of government this authority is exercised is a matter of domestic jurisdiction not of international concern, but, under international law, a State is required to maintain its capacity to conduct foreign relations and is responsible for any default in its international obligations that might result from constitutional deficiencies in the foreign relations power of its government.

The capacity to conduct foreign relations is a characteristic of Statehood under international law, although some States have reduced their relations with other States to a minimum, and sometimes a State delegates the conduct of its foreign relations to other States (e.g. Liechtenstein). Some States have sought to harmonize their foreign relations law as part of programmes for harmonizing their laws generally. State constitutions commonly deal explicitly with the foreign relations powers, but even where the power is not specifically declared, the government's authority to conduct foreign relations will be deemed to be inherent in Statehood and international sovereignty.

The foreign relations power comprises both the power to participate as a State in international relations and to act domestically in ways that have substantial significance for international relations or have other international consequences. It includes the power to establish, maintain or determine the character of diplomatic relations with other States; to make treaties and other international agreements and participate in the creation of customary international law; to join and participate in international organizations; to make and respond to international claims and to resort to means for resolving disputes about them; to declare and wage war or to restore and maintain peace; and, generally, to determine the State's attitudes and policies toward other States; to carry out the State's international obligations and responsibilities and to pursue the State's rights and privileges under international law, and to take domestic measures, by legislation, by executive or administrative action, or by adjudication, necessary or appropriate to implement or regulate the State's foreign relations".
Louis Henkin "Foreign Relations Power" in Encyclopedia of Public International Law Vol 10 185-86.

This power is typically exercised by the executive but usually depends on parliamentary implementation through legislation. The courts may have some

and how it can be determined that South Africa has "to speak with one voice.

Other Constitutional Principles dealing with the relationship between the centre and the provinces may become relevant. Constitutional Principle XX does e.g. not deal with international affairs in a direct manner. It may, however, be relevant when adequate constitutional provisions are to be devised in order to give effect to it. It reads as follows:

> "Each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively. The allocation of powers between different levels of government shall be made on a basis which is conducive to financial viability at each level of government and to effective public administration, and which recognises the need for and promotes national unity and legitimate provincial autonomy and acknowledges cultural diversity."

2. PROVINCIAL POWERS FOR CERTAIN MATTERS RELATING TO INTERNATIONAL AFFAIRS?

2.1 Under the proposed constitutional dispensation, provinces will enjoy "appropriate and adequate legislative and executive powers and functions" in order to function effectively (CPXX). Should these powers include the power to enter into international agreements within the scope of provincial powers? The answer to this question will depend on the interpretation of the Constitutional Principles and on practical consequences resulting from their implementation . Policy considerations will also play a role.

2.2 If provinces are to have some power to enter into international agreements, effective coordination with the central government (and other provinces) will be necessary to ensure that constitutional limits, and national and other provincial interests are respected. In addition, there must be clarity with regard to who bears international responsibility.

2.3 On the other hand there may be a need to ensure that the central government does not use its treaty-making powers and other powers in the field of foreign relations to encroach on provincial competencies.

3. GENERAL PRINCIPLES

The following general principals seem to be relevant with respect to this

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power to review the constitutionality of legislation and executive action.

issue. They deal with constitutional as well international law considerations.[2]

3.1 International law does not in principle distinguish between types of states on the basis of their internal constitutional arrangements. All States are equal (all enjoying sovereign equality) and are all subjects of international law.

3.2 A country's constitution may allow constituent parts (e.g. provinces) to act in the sphere of international relations. The exact nature of such powers is then determined by the national constitution.

3.3 When these powers are provided for in a supreme constitution, all state organs will have to respect them. Such provisions will, in principle, also be justiciable.

3.4 A State cannot escape its international legal responsibilities vis-à-vis other States by invoking its constitution. (Ultimately there is only one South African State which qualifies as a subject of international law.[3])

3.5 The extent to which South African provinces might be able to participate in international matters will depend on the national Constitution. They do not enjoy a separate status under international law now and cannot claim to have been subjects of international law in the past - which would have been a separate basis for a claim to enjoy a treaty-making power.

3.6 Foreign States may only enter into international relations with a province if the national constitution so allows (or perhaps if special approval has been granted). For a foreign state to enter international relations on any other terms would amount to interference in internal affairs. In this area international law defers to municipal law.

3.7 There may be different ways of dealing with provincial treaty-making powers in the Constitution. For instance:

(i) International agreements are treated as the sole prerogative of the national government;

(ii) National government enters enabling agreements with other countries which allow provinces space for entering into international agreements;

(iii) Power to enter into international agreements is linked to legislative competence; or

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2 For further discussion see Walter Rudolf "Federal States' in Encyclopedia of Public International Law Vol 10, pp 165-178 and B de Villiers Foreign Relations and the Provinces HSRC 1995.

3 Some writers support the idea of an "original power" for regions in federations to claim their own status under International Law. De Villiers 13.

(iv) Areas in which provinces could enter into international agreements may be listed in the Constitution.

All these approaches would need mechanism which would facilitate cooperation between the national and provincial governments, such as prior consultation and coordination. (Such mechanisms would enhance cooperative governance.)[4]

3.8 Constituent states conclude different types of "agreements". Not all of them are treaties in terms of International Law. Partnership relations, "twinning" and certain cooperation arrangements are not usually covered by International Law. "These are generally covered in treaty provisions of the respective federal or unitary states, are subject to private law or fall outside the legal sphere entirely."[5] The terms of such "agreements" may even be so general that they involve a statement of intent rather than a legally binding document.

3.9 States often allow for transfrontier cooperation by sub-national units through **enabling treaties**. The national authorities then exercise international control, provide for a binding treaty and for domestic application.[6]

3.10 The provinces should also be protected against the implementation of national treaties which may encroach upon provincial spheres. Adequate consultation and coordination (through special machinery) should again be required - as a constitutional obligation.[7]

3.11 The domestic implementation of provincial treaties will require special measures; involving the duties to consult and coordinate. (Germany e.g. has a Permanent Treaty Commission of the Länder.)

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4 Rudolf 170.

5 Ruldolf p174.

6 See further Ulrich Beyerlin "Transfrontier Cooperation between local or Regional Authorities." Encyclopedia of Public International Law Vol 6, 350 at 354.

7 The German position has been described as follows:

> "Without the consent and co-operation of the member states the federation is not able internally to implement treaties on matters under the legislative competence of the states because it is constitutionally incompetence to do so by itself and, according to the German Federal Constitutional Court)BVerfGE6, 309, 353-354), there is no enforceable right of the federation towards the states with regard to their passing the necessary implementing legislation. The federation cannot order the states to provide for necessary legal norms in the states."

4. SHOULD THE FINAL CONSTITUTION ACCOMMODATE PROVINCES WITH RESPECT TO INTERNATIONAL AGREEMENTS?

4.1 This is first of all a policy decision.

4.2 The Constitutional Principles cited here are relevant.

4.3 Practical needs with respect to economic, technical and transfrontier cooperation, and natural resources or environmentally sensitive areas are to be taken into account. (In Germany, the Länder can even, within their legal competence, become parties to treaties providing for international commissions, such as the International Commission for the Environmental Protection of Lake Constance.[8])

5. HOW COULD PROVINCIAL INTERNATIONAL AGREEMENTS BE ACCOMMODATED

The following models could provide indications of how this area can be dealt with in a constitution.

5.1. **German:**

5.1.1 Article 32 of the German Constitution sets out the role of the national government in international affairs and a framework for the control and coordination of the conclusion of international agreements by the Länder:

Article 32 [Foreign relations]

(1) Relations with other states shall be conducted by the Federation.

(2) Before a treaty which affects the specific circumstances of a German Land is concluded that Land shall be consulted in good time.

(3) In so far as the Länder have power to legislate they may, with the consent of the Federal Government, conclude treaties with other countries.

5.1.2 Article 23 which concerns the European Union is much more detailed.

Article 23 [European Union]

(2) The Bundestag and, through the Bundesrat, the Länder

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8 **Rudolf p170.**

shall be involved in matters concerning the European Union. The Federal Government shall inform the Bundestag and the Bundesrat comprehensively and as quickly as possible.

(3) The Federal Government shall give the Bundestag the opportunity to state its opinion before participating in the legislative process of the European Union. The Federal Government shall take account of the opinion of the Bundestag in the negotiations. Details shall be the subject of a law.

(4) The Bundesrat shall be involved in the decision-making process of the Federation insofar as it would have to be involved in a corresponding internal measure or insofar as the Länder would be internally responsible.

(5) Where in an area in which the Federation has exclusive legislative jurisdiction the interests of the Länder are affected or where in other respects the Federation has the right to legislate, the Federal Government shall take into account the opinion of the Bundesrat. Where essentially the legislative powers of the Länder, the establishment of their authorities or their administrative procedures are affected, the opinion of the Bundesrat shall in this respect prevail in the decision-making process of the Federation; in this connection the responsibility of the Federation for the country as a whole shall be maintained. In matters which may lead to expenditure increases or revenue cuts for the Federation, the approval of the Federal Government shall be necessary.

(6) Where essentially the exclusive legislative jurisdiction of the Länder is affected the exercise of the rights of the Federal Republic of Germany as a member state of the European Union shall be transferred by the Federation to a representative of the Länder designated by the Bundesrat. Those rights shall be exercised with the participation of and in agreement with the Federal Government; in this connection the responsibility of the Federation for the country as a whole shall be maintained.

(7) Details regarding paragraphs (4) to (6) shall be the subject of a law which shall require the consent of the Bundesrat.

5.1.3 The following principles are important in the German practice:

(i) Consultation is important. The federal government must consult Länder and must do so timeously.

(ii) The concept of Bundestreue ("Cooperative governance") plays an important role. "The Basic Law does not define what is meant by 'consultation', and it is therefore left to constitutional interpretation and practice to determine the requirements the Bund has to meet. But the important aspect is that the fundamental principle of *Bundestreue* requires that the *Bund* takes the interest of the *Länder* into account in all matters, including foreign relations." [9]

(iii) Prior consultation in the drafting stage makes subsequent implementation easier. Länder autonomy must be respected. The Basic Law must not be amended indirectly.

(iv) The treaty-making power of the Länder is conditional. They require the consent of the Federal Government and then may only conclude treaties with respect to matters forming part of their exclusive legislative powers, and on concurrent matters only insofar as the federal government has not already done so.[10]

(v) *Bunderstreue* also binds the Länder.

(vi) The formal procedure for the conclusion of a treaty on Land level is regulated by each Land.

(vii) Special cooperation machinery has been created. (The Lindau Agreement between the federal government and the Länder, the Permanent Treaty Commission, Länder Commissions in Bonn and their representation at federal level when treaties are considered.[11])

5.2 USA

5.2.1 In terms of the **American** constitution, the treaty-making power is dealt with as follows:

- The treaty powers are located within the exclusive domain of the federal authorities;
- The states may not conclude treaties without the explicit

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[9] **De Villiers 32.**

[10] **De Villiers 54.**

[11] **De Villiers 58.**

permission of the Federation;

- All treaties concluded by the Federation will be binding as federal law on all levels of government; and

- the Senate as representative of state interests must, with a special majority (two thirds), ratify treaties before they take effect.

The domination of the Federation in treaty matters is further emphasised by:

(i) the "doctrine of preemption" which entails that Federal legislation pre-empts state legislation;

(ii) the "dormant foreign affairs power": although the Constitution does not explicitly mention "foreign affairs" as a federal subject, it is clear from the intent of the framers, as well as from the Supreme Court interpretation of the Constitution, that the Federation has sovereign power over foreign affairs; and

(iii) the foreign commerce clause, which grants congress the power to regulate interstate as well as foreign commerce.[12]

5.2.2 As far as implementation is concerned "all treaties made under authority of the United States (i.e. the federation) shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.[13]

5.2.3 The federal treaty-making power is not to be used to infringe the Constitution or state rights thereunder. (The Supreme Court has ruled on this matter - it is a justiciable issue.)

5.2.4 The states may enter into certain agreements with other subjects of international law, provided Congress agrees. It concerns mostly matters of direct or local concern. "Political" agreements are in principle excluded.

5.2.5 Examples of such agreements are to be found in trade and development programmes, water rights and traffic. Many of these have been entered into with Canadian provinces and Mexican states;

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[12] **De Villiers 81.**

[13] **De Villiers 81.**

a few with countries further afield.

5.2.6 Some states have become quite active in international "politics" and commerce. (Florida has e.g adopted a "Florida International Affairs Act" in 1991.) The need for institutions of cooperation is increasingly realised.

6. CONCLUSION

A distinction should be drawn between "true" international agreements concluded by provinces and "friendship" agreements. The latter probably do not require any specific constitutional arrangement.

6.1 If it is decided to provide for provincial treaty-making powers, it is suggested that this should be provided for in the Constitution.

6.2 Cooperation between provincial and national levels should also be provided for. This may require specially designed structures.

6.3 The National Council of Provinces could be involved in the political and ratification process.

6.4 Formalities relating to the conclusion of such agreements should be provided for on provincial level.

6.5 The Domestic application of international agreements entered into by provinces must be addressed.

6.6 The Constitutional Principles suggest that the primary role of the national government, coupled with respect for provincial interests (via cooperative governance) should be recognized.