8. RAPPORT AMERICAIN

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I. 1. The United States Constitution enumerates the powers conferred on the Federal Government in terms of substantive areas. According to the 10th Amendment to the Constitution, all the powers that are not so enumerated and delegated to the Federal Government remain in the States. In practice, however, the powers of the Congress have been interpreted so broadly that it is fair to say that in the area of economic regulation, at any rate, the Congress has plenary powers comparable to the powers of a parliament in a unitary state.

I. 2. According to Article VI, Section 2 of the United States Constitution, the Constitution and the laws of the United States are superior to the Constitution or laws of any State. Any conflict between federal and state law is resolved through regular judicial process and ultimately by the Supreme Court of the United States. There is no special mechanism for resolving controversies between a State and the federation. Thus, in *New York v. United States,* 326 U.S. 572 (1946) New York State sued the United States contesting a federal tax imposed on state property. Again in *South Carolina v. Katzenbach,* 383 U.S. 301 (1966) the State sued to challenge a federal statute as invading State powers. These suits were filed in the federal district courts and were ultimately determined by the Supreme Court of the United States.

I. 3. Since the foreign relations power is delegated to the federal government, the structure of the United States Department of State is in no way affected by the federalism and it functions like a Ministry of Foreign Affairs of a unitary state. The States have no administrative services for foreign relations. A number of States have units within their executive departments that are concerned with promoting exports from the State and some States maintain trade offices abroad, which, however, have no official standing in the host state and are designed only to help private enterprises interested in exports.

II. 1. According to Article II, Section 2, paragraph 2 of the United States Constitution, the President has the power to make treaties with the consent of the Senate provided that two thirds of the Senators present concur.

II. 2. The States have no power to conclude international treaties and do not conclude any. The Constitution specifically prohibits them from entering into « any Treaty, Alliance, or Confederation ». The Constitution does allow States to enter into an « Agreement or Compact » with a foreign power

providing that the Congress consents but this clause has limited practical importance.

According to Article I, Section. 10, « no state shall enter into any Treaty, Alliance, or Confederation... No State shall, without the consent of Congress... enter into any agreement or compact with another State, or a foreign power... » There is no authoritative determination of the distinction between a « treaty » and an « agreement or compact ». In *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893) involving an interstate (not foreign) compact, the Court held that despite the constitutional language, agreements or compacts require consent of Congress only when they « tend to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States ». Whether by so narrowing the constitutional requirement, or because consent was assumed, state and local authorities have in fact entered into agreements and arrangements with foreign counterparts (such as Canadian provinces or towns) without seeking consent of Congress on such matters as coordination of roads, police cooperation, and border control. According to Council of State Governments, Interstate Compacts, 1783-1977 (a Revised Compilation, Lexington, Kentucky, 1977), (updated), Congress consented or was asked to consent only to 10 compacts with foreign authorities, dealing with an international bridge, a port authority, forest fire prevention, lake basins, tax on fuel in busses, motor vehicle registration, and interpleader (8 with Canadian, one with Mexican and one generally with foreign authorities) ; in two instances the Congress reserved its decision on foreign participation in an interstate compact and in one case it expressly disapproved it. The Council of State Governments list 177 interstate compacts. See generally, L. Henkin, Foreign Affairs and the Constitution at 229-234 (Foundation Press, Mineola, New York, 1972) ; L. Di Marzo, Component Units of Federal States and International Agreements 38-42, 82—84, 100-101 and *passim* (Sijthoff and Noordhoff, Alphen aan den Rijn, 1980) ; Engdahl, « Characterization of Interstate Arrangements : When is a Compact not a Compact ? «, 64 Mich. L. Rev. 63 (1965).

II. 3. The States are in no way associated in negotiations for a treaty but State representatives are sometimes consulted informally.

II. 4. The treaty that is approved by two-thirds of the Senate and ratified by the President becomes part of the domestic legal order and if it is « self-executing » it must be applied by State courts and authorities. Domestically, it has the normative standing of a Congressional act. However, a treaty may be enforced against individuals only if it is properly proclaimed by the President. A self-executing treaty supercedes conflicting State law automatically without awaiting its repeal or other action by the State.

II. 5. A self-executing treaty must be applied by all State as well as federal courts and authorities. The Congress has the necessary power to implement a non-self-executing treaty. The federal government might decide that a treaty should instead be implemented by State legislatures. There probably is no legal means, however, for the federal government to compel State legislatu-

res to act but, as already mentioned, the Congress itself has the power to implement the treaty.

II. 6. As indicated above under II, 2., according to Article I, Section 10, paragraph 3, in theory the Congress could give its consent to a State to enter into an agreement or compact with a foreign power, but this clause has not been applied in practice.

III. 1. According to Article 2, Section 2, paragraph 2, the President appoints ambassadors, ministers and consuls with « the advice and consent » of the Senate. Article III, Section 2, paragraph 1 provides that the federal judicial power extends to all cases affecting foreign ambassadors, ministers and consuls and that in all cases affecting these foreign representatives, the Supreme Court shall have original jurisdiction.

III. 2. The States are not associated in any manner whatsoever with the diplomatic or consular representatives of the United States.

III. 3. No.

III. 4. No.

IV. 1. No.

IV. 2. No.

IV. 3. No.

V. Immunity and act-of-state questions are determined by federal law and federal policy and State courts are required to follow federal law and policy. In the case of *Sullivan v. State of Sao Paulo,* 36 F. Supp. 503 (E.D.N.Y.) (1941), 122 F. 2d 355 (2d Cir. 1941) a component State of the Brazilian federation was granted immunity, but in *Molina v. Comision Reguladora,* 91 N.J.L. 382, 390, 103 Atl. 397, 400 (1918) immunity was denied to Yucatan. The Foreign Sovereign Immunities Act of 1976 (an act of Congress) which regulates the immunity of foreign states from judicial jurisdiction, defines the term « foreign state » as including « a political subdivision of a foreign state ». I am not aware of a case where the question of an « act of state » by a component State was before a court.

VI. The United States alone is internationally responsible for any acts of State authorities except in the case where an injury to an alien results from the non-performance of the State's contractual obligation. In the latter case the State alone is responsible but under the Eleventh Amendment to the Constitution, States cannot be sued in United States courts without their consent, even by a foreign state plaintiff. *Monaco v. Mississippi,* 292 U.S. 313 (1934).

VII. 1. No.

VII. 2. The federal government exercises international law competences of a coastal state in all maritime zones. A State may issue regulations regarding its coastal waters only where the Congress has not preempted the field, e.g. a State may require each vessel entering its port to hire a pilot but it may not regulate the size or design of entering tankers. As for the « benefits », in the Submerged Lands Act (1953), Congress released to the States the rights to

the lands beneath the territorial zone waters out *to the 3-mile* limit or the boundary of the State in the Gulf of Mexico, if more than 3 miles. The Outer Continental Shelflands Act (1953) declares that the United States has jurisdiction and power of disposition of the seabed and subsoil of the continental shelf *outside the 3-mile* limit or the boundaries of the States. State governments are represented in the Regional Councils established by an Act of Congress to determine the optimum sustainable catch in the 200 mile fishing zone.

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