One factor mentioned by the court probably has greater weight than its mere mention might suggest: The court found the Senate had ratified Article 44 of the Italian Peace Treaty without raising any question or expressing any point of view about the notification procedure. Suppose the Senate had in giving its consent to the Peace Treaty recorded its "understanding": (a) that war terminates extradition treaties; or, (b) that the list of treaties notified under Article 44 would have to receive Senate concurrence. The approach of the opinion suggests that either Senate action would have changed the picture markedly. It is also of possible significance that court and counsel assumed throughout that as to extradition the international agreement which would justify the power would have to be a Senate-consented type of international agreement:

> That the Executive is without inherent power to seize a fugitive criminal and surrender him to a foreign nation has long been settled. Valentine v. United States, ex rel. Neidecker, 1926, 299 U.S. 5 . . . ; see Factor v. Laubenheimer, 1933, 290 U.S. 276 . . .
>
> While Congress might conceivably have authorized extradition in the absence of a treaty it has not done so. The law is clear . . .

This recalls another area in which the executive agreement had been foreclosed.[17] It is also an area where in practice the House has had no say, except to provide for the implementation of the action agreed between the Executive and the Senate.[18]

But under this decision the courts still have the last say on some rather important questions. Query, the extent to which this judicial rôle could have been foreclosed or cut down by the Senate's use of its power to qualify its consent to treaties by means of reservations, understandings and interpretations.

Taken together, the three contemporary situations suggest that the questions for discussion, should proposals for Constitutional change in the treaty power again come up for serious attention, might well include questions other than those principally discussed in 1953–55.

COVEY T. OLIVER

SOME QUESTIONS OF LEGAL RELATIONS BETWEEN COMMONWEALTH MEMBERS

The emergence of Ghana as the ninth member of the British Commonwealth and the eighty-first Member of the United Nations draws attention anew to a unique and continuing experiment. There is a prospect of four additional members of the Commonwealth in the near future.[1] Already

[17] Editorial, "Executive Agreements and Emanations from the Fifth Amendment," 49 A. J. I. L. 362 (1955).

[18] *Cf.* Arthur Krock, editorial on the proposed Senate "understanding" on the International Atomic Energy Agency Treaty, New York Times, June 18, 1957, p. 32, col. 5. Mr. Krock supports the use by the Senate of "understandings" that treaties be not self-executing as a simple and desirable alternative to Senator Bricker's proposed amendment. But see the discussion, *infra* Part 3.

[1] Malaya, the British West Indies, Nigeria, and the Federation of the Rhodesias and Nyasaland.

including about one fourth of the earth's people (four fifths of the total number in the Commonwealth now being Asians), the associated states proceed in their co-operation and understandings within the wider framework of international law. In their relations *inter se* they are free to maintain special arrangements or to assimilate such rules as apply between them to ordinary rules of international law.

Many of the relationships between Commonwealth members have invited analysis by specialists in international law, as, for example, those involving nationality, judicial assistance in such a matter as extradition, diplomatic protection, and most-favored-nation treatment. In the present comment it is proposed to consider but two aspects of a very large subject: (1) the position of the Commonwealth members with respect to judicial settlement of their disputes *inter se*, and (2) some recent developments concerning jurisdictional immunities of the official representatives which the Commonwealth members exchange with each other. The first of these touches the question of an obligatory international jurisdiction. The second involves practice in the application of long-standing rules of customary international law.

I

When, about a decade after the launching of the League of Nations, the British Dominions faced the question of accepting the Optional Clause in the Statute of the Permanent Court of International Justice, they adopted a common policy with respect to disputes *inter se*. The latter, by the view which prevailed, were not international disputes within the meaning of the Statute, since the relations between the autonomous Dominions (or between any of them and the United Kingdom) were *not international*.[2] An Imperial Conference of 1926 had thought it would then be premature for the Dominions to accept the Optional Clause. By the understanding reached, there was not to be a move in this matter by any Dominion before discussion with the others. Canada initiated such discussion in 1929. The sequel was acceptance of the Optional Clause by all the Dominions. All except the Irish Free State, however, reserved disputes *inter se*. The latter were, by the express wording of acceptances, to be settled in such manner as the parties had agreed upon or might agree upon.[3]

Up to the present time there appears to have been no substantial change in this attitude. Of the eight states which composed the Commonwealth just before the admission of Ghana, six had in their acceptances of the Optional Clause excluded disputes with any other member of the Commonwealth.[4] Ceylon had not accepted the Clause, and Pakistan, while not

[2] See, for example, the remarks of Sir Cecil Hurst at a meeting of jurists in 1929. Minutes of the Committee of Jurists on the Statute of the Permanent Court of International Justice, League of Nations Doc. C. 166.M.66.1929.V, pp. 71–72.

[3] Cmd. 3452.

[4] India's most recent declaration excludes "disputes with the Government of any country which on the date of this Declaration is a member of the Commonwealth of

specifically excluding such disputes, had specified reciprocity, which would presumably preclude Pakistan's being cited by a Commonwealth member which had made a specific reservation of disputes between it and another Commonwealth member.[5]

As early as 1929 an Imperial Conference had recommended that there be a Commonwealth tribunal. More explicit conference proposals of 1930 looked to a plan whereby there would be, not a continuing machinery such as a permanent court, but boards chosen by the disputant states for the adjudication of particular disputes. All of the persons composing such boards were to be from within the Commonwealth. In the absence of "general consent" to obligatory arbitration, reference of any dispute was to be voluntary. The plan was to apply only to "justiciable" disputes.[6] Even within these limitations there has resulted no construction such as the Imperial Conference seems to have contemplated.

As Members of the United Nations, the Commonwealth states are, of course, bound by the pacific settlement provisions of the Charter, in relation to each other as well as in relations with other Members of the United Nations. In the field of air navigation, Commonwealth members appear in their treaties *inter se* to have included compromissory clauses, but even these are primarily in terms of procedures which the parties shall agree upon. In some of these commitments, however, is the rule that if the parties cannot reach agreement as to composition of a tribunal, either of them may submit the dispute for decision by "any tribunal competent to decide it which may hereafter be established within the International Civil Aviation Organization or, if there is no such tribunal, to the Council of the said Organization."[7]

Of the disputes which have developed between Commonwealth members since the establishment of the United Nations, that concerning Indians in the Union of South Africa and the Kashmir dispute are doubtless the most serious. Early in the history of the United Nations the Union of South Africa was agreeable to having the first of these referred to the International Court of Justice for an advisory opinion as to whether the

Nations, all of which disputes shall be settled in such manner as the parties have agreed or shall agree."

There is some variation in the language of the declarations by the respective Commonwealth states. Texts in I. C. J. Yearbook, 1955–1956, pp. 184–189, 194.

[5] On the legal effect of reciprocity in relation to other reservations, see C.H.M. Waldock, "Decline of the Optional Clause," 32 Brit. Yr. Bk. of Int. Law 244, 254–261 (1955–1956).

[6] Imperial Conference, 1930: Summary of Proceedings, pp. 22–24; Robert A. MacKay, "The Problem of a Commonwealth Tribunal," 10 Canadian Bar Review 338, 344 (1932).

[7] Agreement in the form of an exchange of notes between the United Kingdom and Canada concerning the establishment of air communication between Canada and United Kingdom territories in the West Atlantic and Caribbean areas, signed July 17, 1947, Art. 9 (b), 28 U.N. Treaty Series 3. Compromissory clauses in comparable form occur in at least fifteen agreements. In four of these (Pakistan-India, *ibid.* 143, Australia-Pakistan, 35 *ibid.* 23, India-Australia, *ibid.* 83, and New Zealand-Canada, 77 *ibid.* 239) there is provision whereby, as a last resort, disputes may be referred to the International Court of Justice.

question was one of domestic jurisdiction. The move did not succeed, the Soviet Union's spokesman suggesting that to treat the question as a legal matter would tend to "minimize the political importance and weaken the prestige of the United Nations."[8] There have been various suggestions of a possible rôle for the International Court in the Kashmir dispute. One of the most recent, by a well-known British jurist, was to the effect that the fundamental questions involved could be decided by the Court.[9] As has been suggested above, however, there is apparently no existing commitment of India and Pakistan which would legally bind them to refer the dispute to this tribunal.

II

In the matter of representation, and in particular the immunities of official agents, the Commonwealth states have recently provided an illustration of co-operation along agreed lines. In this instance the situation of Eire, which is no longer a member of the Commonwealth, invited special attention.

The development within the British Empire, and later in the Commonwealth, of the practice of sending high commissioners (as also the use of agents-general from Provinces) has been traced by various publicists.[10] The office of High Commissioner apparently dates from 1880, when Canada had such a representative in London. Only after the first World War did the United Kingdom send high commissioners to the respective Dominions (the Governors General having functioned for such purpose of representation as was needed before that time).[11] When Eire ceased to be a member of the Commonwealth, the nations which remained in that association began to send to Dublin official representatives with ranks determined by ordinary diplomatic usage. For some purposes of legislation in Commonwealth states, however, the Republic of Ireland continues to be regarded as if it were not a "foreign" state in the full sense of that term. In the matter of their reception, high commissioners going to the United Kingdom are distinguished from ambassadors sent from other countries; the Commonwealth Relations Office, rather than the Foreign Office, provides a channel of communication.

Inevitably the question has arisen whether, and in what respects, the

[8] General Assembly, 1st Sess. (Pt. II), Official Records, Joint Committee of the First and Sixth Committees, Nov. 21–30, 1946, pp. 1–50, at p. 29.

[9] In a letter to The Times (London) of March 5, 1957, Sir Ivor Jennings wrote in part: "The fundamental question is whether the State of Jammu and Kashmir is lawfully included among the territories of the Union of India by section 1 and the First Schedule of the Constitution of India. If the answer is in the negative, Kashmir is an independent state and the troops should be withdrawn. If it is in the affirmative, Pakistan would no doubt argue that the incorporation is temporary and conditional on the decision of the people after troops have been withdrawn. This question also could be decided by the International Court."

[10] See, especially, Heather J. Harvey, Consultation and Cooperation in the Commonwealth, Ch. VIII (1952); G. P. deT. Glazebrook, A History of Canadian External Relations 150–151 (1950); Canada, Sessional Papers, 1880, No. 105.

[11] Heather J. Harvey, *op. cit.* 181, 184.

high commissioners which Commonwealth members accredit to each other are in fact different from fully titled diplomatic representatives which each of them exchanges with "foreign" states. Some bases for answers are to be found in legislative policy, much resulting from agreement of the Commonwealth members among themselves. In the matter of taxation and customs charges, United Kingdom Finance Acts of 1923 and 1925 placed high commissioners from the Dominions in as favorable a position as ambassadors accredited to Great Britain. Each Dominion had taken a similar step (with respect to high commissioners which it received) by 1948. In that year, following a Conference of Prime Ministers, came the elevation of high commissioners to as favorable a position as that of ambassadors of foreign states in the matter of precedence. It remained to extend to them immunities equal to those which such ambassadors enjoyed. The means was to be legislation, upon the general lines of which there was agreement in principle through an exchange of telegrams in 1949. The fact that in relation to each other the Commonwealth members did not regard themselves as *foreign* states was a stated reason for the means used.

Legislation of the Union of South Africa in 1951,[12] of the United Kingdom, New Zealand and Australia, respectively, in 1952,[13] and of Canada in 1954,[14] implemented the understanding. Discussion of the measures in the respective parliaments elicited various comments on the significance of what was proposed. While the legislation does not appear to have been considered controversial, some of the comments were not completely enthusiastic. Thus, in the British House of Commons there were suggestions that "when we place relations with the Commonwealth on something of a more formal basis and make our relations with them similar to those with *foreign* countries, we appear to detract from the family relationship which we have with the Commonwealth";[15] that the Bill was one of the the "progeny" of the British Nationality Act of 1948;[16] and that (since the ambassador from the Irish Republic was to be a beneficiary of the legislation) it seemed "in order to obtain the privilege of being an ambassador, the ambassador of Ireland is to be treated as a High Commissioner."[17] One speaker observed that this was the first time the expression "Commonwealth" (as distinct from "Commonwealth ter-

[12] Diplomatic Privileges Act, 1951, Statutes of the Union of South Africa, 1951, p. 1204. This Act did not make specific mention of any other countries, but defined "diplomatic agent" to include high commissioner, ambassador, etc.

[13] Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act, 1952, Halsbury's Statutes of England (2nd ed.), Vol. 32, p. 45; An Act to Confer Certain Immunities on the Representatives in New Zealand of Commonwealth Countries and the Republic of Ireland, Statutes of New Zealand, 1952, Vol. II, p. 1207; Diplomatic Immunities Act, 1952, Commonwealth Acts, Australia (1952), Vol. 50, p. 235. The last-mentioned Act did not specifically mention the Republic of Ireland.

[14] Diplomatic Immunities (Commonwealth Countries) Act, Statutes of Canada, 1953–1954, Vol. I, p. 669. This Act does not refer specifically to Ireland.

[15] Parl. Deb., Commons, 1951–1952, Vol. 494, cols. 2447–2448 (italics inserted).

[16] *Ibid.*, col. 2454.

[17] *Ibid.*, col. 2453.

ritories'') had occurred in statutes of the realm, and suggested that ''innovations without necessity are always undesirable.'' [18]

While there was considerable variation from one Commonwealth state to another, the general purpose of this legislation was to accord to high commissioners (and, in the case of New Zealand and the United Kingdom, to the Irish ambassador) diplomatic immunities equal to those enjoyed by ''envoys,'' and to place these immunities on a basis of reciprocity. What was done in effect was to provide through legislation for application of the international law standard. There had been in Great Britain, prior to the legislation of 1952, a report by an interdepartmental committee on diplomatic immunity (which related to law and practice in general, and contained no specific reference to Commonwealth relations).[19] When the Australian legislation was under consideration, one member of Parliament expressed the opinion that ''International law on the matter of diplomatic immunities still goes far beyond what is necessary to enable diplomats and members of their staffs to carry out their duties''; the ''whole matter of international law on this subject,'' he thought, ''should be altered.'' [20] In Canada, the Parliamentary Assistant to the Secretary of State for External Affairs admitted under questioning that no special legislation defined diplomatic immunities. He added that:

> Such powers as are in existence are under the rules of international law and they are in fact applied by the Canadian courts. . . .[21]

Of the five Commonwealth members whose legislation has been noted above, two (Canada and New Zealand) included in the same Act provisions for immunities of persons performing consular functions. These immunities were, in the case of persons accredited from other Commonwealth states, to be as wide as those enjoyed by persons coming from foreign states. In the case of the Republic of Ireland, that country's Consular Conventions Act of 1954, while including a provision concerning reciprocity, made no specific reference to Commonwealth members; the legislation defined a ''consular convention country'' as ''a country between which and the State a consular convention is in force dealing with some or all of the matters for which provision is made by this Act.'' [22]

In the matter of diplomatic representation there developed in 1954, be-

[18] *Ibid.*, Vol. 496, col. 1546.

[19] Cmd. 8460. The Committee was to consider: ''(1) Whether the law or practice of the United Kingdom affords to the Governments, Government Departments and other state organs of foreign States a wider immunity than is desirable or strictly required by the principles of public international law in regard to property (including ships), transactions, any other act capable of creating legal liabilities, or any other matter. (2) Whether the law or practice of the United Kingdom affords to persons possessing diplomatic immunity an immunity in any respect wider than is desirable or is strictly required by the principles of public international law. (3) What, if any, changes in the law of the United Kingdom the Committee recommends should be made having regard to its answers to questions (1) and (2) and to the question of reciprocity.''

[20] Parl. Deb., Australia, Vol. 219, p. 1793.

[21] H. of Com. Deb., Sess. 1953–1954, Vol. V, p. 5421. *Cf.* statement in British House of Lords, Parl. Deb., 1951–1952, Vol. 175, col. 581.

[22] Acts of the Oireachtas, 1954, p. 67.

tween Australia and the Republic of Ireland, a difficulty concerning the form of address in the Letters of Credence for the Australian Ambassador to Ireland.[23] The difficulty resulted in Australia's being represented at Dublin, for the period immediately following this, by a *chargé d'affaires ad interim* rather than an ambassador.

III

Developments which have been noted concerning provision for settlement of disputes of Commonwealth states *inter se* and concerning representation suggest a firm and continuing will to maintain between these states closer ties than they have with "foreign" states. It is possible for a new state carved out of what has been British territory to decline membership in the Commonwealth, as did Burma, or to drop out of membership therein, as did Eire. For those electing to remain in their peculiar association, there is perhaps maintainable a sense of community which makes less necessary (than would otherwise be the case) the full network of formal arrangements which independent states ordinarily utilize between themselves. At the same time, the development of dangerous tensions between certain Commonwealth members raises questions of the possibly greater efficacy of international organization law as compared with a type of optional intra-family procedures. The granting by a Commonwealth member to diplomatic representatives of other Commonwealth states of immunities equal to those granted envoys of "foreign" states marks another step toward the full application of international law in the relations of Commonwealth states *inter se*.

ROBERT R. WILSON.

[23] See statement on "Australian Representation at Dublin," in Current Notes on International Affairs (Department of External Affairs, Australia), Vol. 25, No. 1 (Jan., 1954). It was reported that the Minister for External Affairs (Casey):

". . . had made every possible effort, on behalf of the Australian Government, to secure agreement. The one point of disagreement was the form of address contained in the Letters of Credence. The Government of the Republic of Ireland had insisted that the letters must be addressed to 'The President of Ireland.' Unfortunately, Article 2 of the Irish Constitution states that 'the national territory consists of the whole island of Ireland, its islands and the territorial seas.' Letters of Credence of the chief diplomatic representatives of Australia are signed by the Queen. Mr. Casey said that neither the Australian Government nor he himself would consider asking the Queen to do something in her capacity as Queen of Australia which would embarrass her in her capacity as Queen of the United Kingdom and Northern Ireland. It was impossible for Australia to request her Majesty the Queen to sign Letters of Credence . . . containing a phrase which would appear to throw doubt upon the validity of Her Majesty's title as Queen of the United Kingdom and Northern Ireland."

The Irish Minister for External Affairs (Aiken) was reported as having said, in January, 1954, that his Government had no intention of withdrawing the Irish Ambassador in Australia, as in the latter's case constitutional difficulties had not arisen. The Minister was also reported as referring to a compromise with the United Kingdom whereby the credentials of that country's Ambassador to Ireland were addressed to President O'Kelly personally, and as saying that this compromise (in connection with which he mentioned the partition of Ireland) was "no precedent for two countries which have no quarrel." Keesing's Contemporary Archives, March 13–20, 1954, p. 13466.