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7. THE FEDERATED STATE AND ITS TREATY-MAKING POWER

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LIST OF ABBREVIATIONS (A SELECTION)

A.C.	= Appeal Cases (Judicial Committee of the Privy Council)
AFDI	= Annuaire français de droit international
AJIL	= American Journal of International Law
BGE	= Entscheidungen des Schweizerischen Bundesgerichts
B.N.A. Act	= British North America Act (1867) as amended, since April 17, 1982 = Constitution Act, 1867
BVerfGE	= Entscheidungen des Bundesverfassungsgerichts (B.R.D.)
C.L.R.	= Commonwealth Law Reports (Australia)
D.L.R.	= Dominion Law Reports
Fed. L. Rev.	= Federal Law Review (Australia)
ftn	= footnote
ILM	= International Legal Materials
JfOR	= Jahrbuch für Ostrecht
JöR n.F.	= Jahrbuch des öffentlichen Rechts, neue Folge
Mon.b.	= Moniteur belge
NJW	= Neue juristische Wochenschrift
ÖJZ	= Österreichische Juristen-Zeitung
Rec. Cours	= Recueil des Cours (Hague Academy)
R.B.D.I.	= Revue belge de droit international
S.C.R.	= Supreme Court Reports (Canada)
SEMP	= Sovetsjikh Ezhegodnikh Mezhdunarodnogo Prava
Stat	= U.S. Statutes at large
U.S.	= U.S. Supreme Court Reports
Univ. Tor. L.J.	= University of Toronto Law Journal
ZaöRV	= Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
ZSR n. F.	= Zeitschrift für Schweizerisches Recht, neue Folge

INTRODUCTION

From all the states in the world, which in one way or the other present federal characteristics, although by far not all of them deserve the name *« federal state »*, the organisers of this colloquium have chosen eleven. This choice as study subject, which is a selective rather than a restrictive one, cannot be called unlucky. Without being exhaustive, it enables the presentation of a fairly complete picture of the subject matter on hand.

Contrary to the legal standing of the federation or federal state as a fully recognised actor on the international scene, including a concomittant treaty-making power, the international status of the federated state — be its designation province, state, region, land, republic, canton or community — especially as regards a concrete, a putative or a non-existent ius tractatuum, remains far from undisputed. This notwithstanding an increased interest in the matter on the part of legal scholars (1), coupled with new and interesting developments in the area of federalism and external relations (2).

The principal reason for this lies no doubt in the fact that there exists no archetype of a federated state as such. Differences in the division of power structures in the field of foreign affairs are in a number of cases so fundamental that hardly any common chracteristics are discernable. Even there where the component units reach out to the international scene, a number of common elements or comparable factors might be present, but an attempt to distinguish and consequently develop some type of uniform pattern remains a very difficult task.

It is therefore not in my intentions to bring conflicting views or disparities in federal state structures on a common denominator, nor do I want to present some type of a draft convention on the law of treaties of federated states (in as far as a compatibility of their respective power structures would lend itself to such an endeavour). I will simply attempt to answer the question whether, and if so, where and what kind of *« ius tractatuum »* a federated state can possess.

(1) Reference can be made here to D. Blumenwitz, Der Schutz innerstaatlicher Rechtsgemeinschaften beim Abschluss völkerrechtlicher Vertäge, München, 1972 ; I. Bernier, International Legal Aspects of Federalism, London, 1973 ; R.F. Swanson, State-Provincial Interaction : a Study of Relations between U.S. States and Canadian Provinces, Washington D.C., 1974 (prepared for the U.S. State Department) ; H.J. Uibopuu, Die Völkerrechtssubjektivität der Unionsrepubliken der UdSSR, Wien, 1975 ; L. Di Marzo, Component Units of Federal States and International Agreements, Alphen a/d Rijn, 1980.

(2) See e.g. P. Pernthaler, Die Zuständigkeit der Länder zum Verkehr mit ausländischen Staaten und anderen Völkerrechtssubjekten und deren Vertretungsbehörden in Österreich, in Köchler, Transnationale Zusammenarbeit in der Alpenregion, Innsbruck, 1973, p. 31-32 ; Y. Lejeune, Les communautés et les régions belges dans les relations internationales, 16 R.B.D.I., 1981, p. 53-80 ; Cl. Morividucci, The International Activities of the Italian Regions, 2 Ital. Yb. of Int. L., 1976, p. 201-223 ; Ibid., Le attività di rilievo internazionale delle Regioni e l'interpretazione governativa del D.P.R. 616, Le Regioni 1980, p. 983-1014 ; M. Mitić, The Problems of Concluding and Executing International Treaties and their Regulation by Laws, Yugoslaw Law, 1979, nr. 2, p. 27-42.

In the search for results, one should not engage in a discussion of and a elaboration on the peculiarities of a state per state approach. On the contrary, only a comprehensive scrutinizing, based upon the main components of a possible, a potential or a real treaty-making competence, can provide valid answers. Faithful to such an approach, the subject matter has been divided in three main parts of which the first one dealing with the external aspects is definitely the most important one. It indeed includes an inquiry into the sources, the nature and essence, and the scope of the constituent state's treaty-making power. It will be here that most of the relevant answers will be provided for.

The second, respectively the third part deals, more in the way of a supplement, with largely virginal areas ; namely internal treaty-making frame works in federated states and possible treaty conflicts between the member-state and the federation. This last one within an international legal perspective.

PART I. THE EXTERNAL ASPECTS OF A IUS TRACTATUUM

Chapter 1

the Sources of the Federated State's Treaty-Making Power (if existent) in International and in Constitutional Law

SECTION A. IN INTERNATIONAL LAW

An inherent characteristic of a state in international law is that it possesses the right to enter into treaties, conventions, agreements, arrangements. Article 6 of the Vienna Convention on the Law of Treaties could not be anymore clearer.

On the other hand, the competence to conclude « *treaties* » cannot be said to be a common characteristic of federated states, whereby the term « *treaty* », in relation to the ius tractatuum of a federated state, is used here in the sense of article 2(a) of the Law of Treaties Convention, so as a common designation for all international law agreements. If further specifications or restrictions of this definition are necessary in relation to certain situations or cases, they will be dealt with accordingly. Indeed, as already mentioned in the introduction, there does not exist anything like **the** federated state as such.

Consequently, international law cannot provide us with a ready answer (3), but it does not contain any prohibition of such power on the part of the

(3) Di Marzo (fnt. 1), p. 4-21. In the search for an international legal explanation, the author undertook a rather curious, highly theoretical and actually superfluous investigation into the concepts of sovereignty and international legal personality, instead of a direct venturing on an empirical basis. Discarding them as « *indeterminate* » explanation (p 21), the author lastly has to admit the failure of his efforts. See also A. Verdross-B. Simma, Universelles Völkerrecht, Berlin, 1976, p. 349. The authors refer to a distinct international legal basis for such powers, but fail to explain why they see it that way.

component unit either (4). If there is one requirement, however, to be referred to in international law as regards a member-state's treaty-making capacity, it is that of a sufficient degree of autonomy. The component unit must be able to honour its international obligations if it engages in treaty relations (5). In iontradistinction to other subdivisions of states, federated states in general comply with such prerequisite.

International law further simply refers to the relevant provisions in the constitutions of the different federations, the so-called **renvoi** (6). It cognises a treaty-making competence on the part of the constituent state if the federal constution (or other pertinent municipal legislaion) stipulate so. This was equally the scope and purpose of article 5 § 2 of th ILC's 1966 draft articles on the law of teaties (7). In the end, however, art. 5 (2) was omitted from the convention. The two main objections causing this deletion were firstly, the rather unfounded fear that states would start interpreting foreign constitutions for themselves, which would pose the danger of an illicit intervention in domestic affairs. An energetic protest and elucidation by the federal government would in such case be the most apt means for a correct interpretation. Secondly, a constitutive recognition of such treaty-making capacity embedded in international law was asked for (8), without it article 5 (2) could not be adopted. This second objection calls for a brief critique. It is laudable that the advocates of such an additional prerequisite put such great faith in the normative force of international law. The only effective « *constitutive* » recognition would actually have been the inclusion of a list of federated states possessing « treaty-making powers » in the convention itself. But how could an agreement ever be found on its nature and scope ? Leaving a so-called « *constitutive recognition* » to the individual states, would mean another renvoi, but of a worse kind. It would make the treaty-making power dependent not on the own federal constitutions, but on an act of a foreign state. Therefore, the only possible international recognition of a treaty-making capacity cannot but have declaratory character and will already be included in the recognition of the federation itself (9).

(4) See e.o. Uibopuu (ftn. 1), p. 11-12; 14-15. Article 3 of the Law of Treaties Convention explicitly leaves the question open.

(5) See e.g. R. Bernhardt, Der Abschluss völkerrechtlicher Verträge im Bundesstaat. Eine Untersuchung zum deutschen und ausländischen Bundesstaatsrecht, Köln, 1957, p. 21; M. Skumski, Beziehungen von Ländern eines Bundesstaates zu Auslandstaaten unter besonderer Berücksichtigung gemeinsamer Verwaltung, Diss. Würzburg, 1971, p. 31.

(6) See e.g. Blumenwitz (ftn. 1), p. 79-80; Di Marzo (fnt. 1), p. 21; see also Bernhardt (fnt. 5), p. 19, Brownlie, Principles of Public International Law, Oxford, 1979, p. 79.

(7) « States members of a federal union may possess a capacity to conclude treaties if such capacity is admitted by the federal constitution and within the limits there laid down. » On its history see R. Rosenne, The Law of Treaties, Leyden, 1970, p. 126-129.

(8) See e.g. J.S. Stanford, United Nations Law of Treaties Conference : First Session, 19 Univ. Tor. LJ, 1969, p. 60-61: Ibid., The Vienna Convention on the Law of Treaties, 20 Univ. Tor. L.J., 1970, p. 29-31, 44-47; Uibopuu (ftn. 1), p. 17-20; critical Blumenwitz (ftn. 1), p. 155-158.

(9) See e.g. in that sense Blumenwitz (fnt. 1), p. 158-160; contra Bernhardt (fnt 5), p. 21; P. Sonn, Die auswärtige Gewalt des Gliedstaates im Bundesstaat, Diss. Kiel, 1960, p. 18; Bernier (ftn. 1), p. 78-81.

Can now also an international agreement between a federation and a foreign state bestow a treaty-making power on a constituent state of the said federation ? Blumenwitz (10) considers such a process as a second source for a member-state's ius tractatuum, apart from the constitutional provisions. Moreover, so the author, an instrument of international law and not of municipal law is used in such cases. A closer look at such an agreement or treaty learns that — even if one accepts that the federated state in question is devoid of treaty-making power according to the federal constitution — the grant of such competence can only take place according to an act of municipal law, normally through a delegation. The so-called « *conferral clause* » in such an international agreement is nothing else but a mere information to the third state that a component unit has been authorized to enter into an agreement. Consequently, the clause is in the first place destined to one of the own member-states and not to the treaty partner. The question can be asked why the avenue of the direct consent is not used instead of relying on the internal effect of a so-called consent to a foreign addressee ?

SECTION B. IN CONSTITUTIONAL LAW

Seen the fact that the only relevant basis for a treaty-making capacity of the federated state has to be found in municipal constitutional law, an examination of the pertinent provisions in the respective federations is indispensable.

Taking into account, however, that this study is conceived as a transversal examination, this constitutional scrutiny will be confined to only one question : « Do the federal constitutions at issue yes or no provide for a treaty-making power on the part of their constituent states ? » Hereby constitutional law has to be viewed in its broader sense, including all the important rules, whate er their source may be, which allocate or devide governmental power within a federation (11).

1. ARGENTINA

The constitution of the Republic of Argentina stipulates in article 107 that the provinces, with the knowledge of the federal Congress, may enter into partial treaties for certain purposes. Article 108 explicitly forbids nevertheless any such partial treaty of a political character. The constitutional text does, however, not make mention of the treaty partner as such. A closer look at the 22 provincial constitutions should provide an answer to this apparent silence in the federal constitution. There it is clearly stated that partial treaties can only be entered into with the other provinces, the nation, or other

(10) Blumenwitz (ftn. 1), p. 154, especially referring to the Canadian practice of the « *accords-cadre* ». See also infra (127).

(11) See e.g. K.C. Wheare, Modern Constitutions, Oxford, 1966, p. 1-4.

sub-divisions within the state (12). As curiosum the province of Chaco constitution (art. 115, sec. 7) makes mention of « *international organisations* », however, no concrete indication of any practical application in casu could be found.

Since the « Pronunciamento Militar » of 24 March 1976, until recently, the Military Council exercised all treaty-making powers (13). It should not be concealed that a normally functioning federalism was under such circumstances virtually excluded (14).

That has not prevented some western scholars from interpreting the first parts of articles 107 and 108 of the constitution as a possibility for the provinces to also reach out to the international scene (15). But also in Argentina such a thesis has not been waived altogether. Predicating such an opinion on article 104 of the constitution (the general presumption of powers in the hands of the provinces) in connection with articles 107 and 108, F.R. Teson points out that the provinces have retained their right to enter into « *non political* » compacts with foreign states (16). Moreover, there indeed exists a limited and rather recent provincial treaty practice, which deserves a closer examination.

2. THE COMMONWEALTH OF AUSTRALIA

The Commonwealth of Australia Act (1900) does not contain anything on a division of powers in external affairs or more specifically in the field of treaty-making capacities (17). The executive power of the federation is vested in the Queen and this royal prerogative, including the treaty-making power, has been delegated to the Governor-General (18). Does this now mean that the royal prerogative on foreign affairs has exclusively been delegated to the federal executive, inter alia completely precluding the states

(12) This also conforms to the nearly unanimous opinion of the Argentina constitutional doctrine, see e.g. J.R.A. Vanossi, Régimen constitucional de los tratados, Buenos Aires, 1969, p. 56-59; C.E. Romero, Derecho Constitucional, II, Buenos Aires, 1976, p. 296-298; P. Frias, Introducción al Derecho Publico Provincial, Buenos Aires, 1980, p. 116. Further on the inter-provincial « *treaty-making* », e.g. J.M. Galdós, El federalismo regionalista argentino. Algunas nociones jurídicas, 28 Jus (Rev. Jur. de la Provincia de Buenos Aires) 1979, p. 34-43.

(13) See also Romero (Ibid) p. 363 et seq., esp. p. 369-370 : el estatuto para el proceso de reorganización nacional, art. 2.

(14) See e.g. P. Malanczuk, Föderalismus unter den Bedingungen eines Militärregimes : Argentinien, 13 VRÜ, 1980, p. 35-54.

(15) J.Y.Morin, La conclusion d'accords internationaux par les provinces canadiennes à la lumière du droit comparé, 2 Can. Yb. of Intern. L., 1965, p. 160-161, the author even mentions an initiative in that sense by the province of Buenos Aires (with the USA); Blumenwitz (fnt. 1) p. 126.

(16) F.R. Teson, Fédéralisme et relations internationales dans la République argentine, rapport national, colloque : les Etats fédéraux dans les relations internationales, Bruxelles, 1982, p 9; see also H. Quiroga Lavie, Derecho Constitucional, Buenos Aires, 1978, p. 654.

(17) Article 51 (XXIX) confers the legislative power in external affairs on the Commonwealth Parliament.

(18) Articles 61 and 2 of the Commonwealth of Australia Act.

from entering into any agreement with foreign governments ? Once again the constitutional texts are silent, but several scholars refrain from advocating an outright prohibition for the states to do so. On the other hand they do not want to express themselves in favour of such power either (19). The strongest argument in support of a certain ius tractatuum on the part of the individual Australian states is the fact that they possessed a limited treaty-making power in the pre-federation era, and as the State of Queensland Official Treaties Commission strongly underlined:

> « there is nothing in the constitution which ousts the state executive authority and nothing which reverses what that authority was capable of in external relations in 1900... » (20).

Neither the federal government, nor the courts have up to now faced any direct conflict related to an international agreement entered into by a state. Nevertheless, according to statements, respectively obiter dicta on the states' international standing, such a development can hardly be expected to be approved of (21). This has not impeded the above mentioned treaties commission to explicitly defend the legality of international state agreements (22), and a similar stand has recently been taken by the Sollicitor-General for the State of Western Australia (23).

Conflicting views in the constitutional interpretation are not really conducive to a clearing of the problem. Whether this can be brought about by the praxis — if existent — will have to be examined in the further course of this study.

3. THE FEDERAL REPUBLIC OF AUSTRIA

The constitutional picture in Austria does at first glance not leave any room for divergent interpretations. Article 10(1) cl. 2 of the Federal Con-

(19) See D.P. O'Connell, The Evolution of Australia's International Personality, in *ibid.*, International Law in Australia, Sydney, 1965, p. 11, 15-16; G. Doeker, The Treaty-Making Power in the Commonwealth of Australia, The Hague, 1966, p. 212-213; C. Enright, Constitutional Law, Sydney, 1977, p. 48; R.D. Lumb and K.W. Ryan, The Constitution of the Commonwealth of Australia Annotated, Sydney, 1977, p. 151; M.H.M. Kidwai, External Affairs Powers and the Constitutions of the British Dominions, 9 Univ. of Queensl. L.J., 1977, p. 183-184; contra : R.C. Ghosh, Treaties and Federal Constitutions, their Mutual Impact, Calcutta, 1961, p. 55; P.H. Lane, The Australian Federal System, Sydney, 1979, p. 239-240; H. Burmester, The Australian States and Participation in the Foreign Policy Process, 9 Fed. L. Rev., 1979, p. 261, 265-266, 276-278.

(20) State of Queensland Treaties Commission, First Report, 1.12. 1976, A. 79-1976, p. 26-27.

(21) See e.g. a mémoire of the Australian delegation to the U.N. Secretary-General on treaty-making power, UN Legislative Series, ST/LEG/SER B 3, December 1952, p. 6; see also case law, The Commonwealth v. the State of New South Wales (1923) 32 C.L.R. 200 at p. 210, 218; R. v. Burgess ex parte Henry (1936) 55 C.L.R. 608 at p. 645, 685-686; Bonser v. La Macchia (1969) 122 C.L.R. 177 at p. 185, 222; The State of New South Wales v. the Commonwealth (1975) 135 C.L.R. 337 p. 364.

(22) The Queensland Treaties Commission (fnt. 20), p. 28.

(23) Burmester (ftn. 19), p. 264 referring to the proceedings in the N.S. Wales v. Commonwealth (1975) case, 135 C.L.R. 337.

stitutional Law puts the full ius tractatuum in the hands of the federation (24). The question on hand, however, is more complex than this constitutional clause might appear to put forth. Indeed, a few Austian scholars recently engaged in a search for a more complete answer. They argued that article 10(1) cl. 2 only deals with federal foreign affairs and so does not give an answer as to the absence of any treaty-making power by the Länder. According to the same authors the federal treaty implementing clause of article 16 of the Constitutional Law does so, but solely indirectly. However,the insertion in 1974 of a new article 10 (3) in the Federal Constitional Law on cooperation in treaty-matters between Bund and Länder denied unequivocally the member-states such competence (25).

That, nevertheless, still leaves a number of questions unanswered as to the legal regime of the steadily increasing transborder activities of the Austrian Länder. So did the Länder in their demands program of 1976 plead for the inclusion in the Federal Constitutional Law of a provision on the power to conclude international agreements within their sphere of competence (26). In the Land of Voralberg even a referendum took place in June 1980 on a catalogue of proposals for a revision of the distribution of powers between the federation and the constituent states, inter alia containing an item on an autonomous Land treaty-making power. The Land government subsequently got the mandate to negotiate with the federal authorities on basis of these proposals (27).

Even when such proposals have not as yet been translated into constitutional amendments, none the less the reality of transnational Länder relations calls for further investigation.

4. BELGIUM

The treaty-making power in Belgium is vested in the King (article 68 sec. 1 of the Constitution). However, since the reforms of the Belgian state in 1970-71 and in 1980, the Constitution contains a provision on the international cultural cooperation and the international cooperation in personalised matters by the Flemish Council, respectively the French Community Council (article 59bis § 2 cl. 3 § 2bis). The Special Law of 8 August 1980 on Institutional Reforms in its article 16 restricts this international cooperation to a mere power of assent to cultural and personalised treaties. Indeed this

(24) See e.g. I. Seidl-Hohenveldern, Relation of International Law to Internal Law in Austria, 49 AJIL, 1955, p. 470-471; E. Weiser, Compétence des Etats membres de la République d'Autriche en matière de conclusion et de mise en œuvre des accords internationaux, in J. Brossard et al., Les pouvoirs extérieurs du Québec, Montréal, 1967, p. 156-157.

(25) L. Fröler, P. Oberndorfer, F. Zehetner, Rechtsprobleme grenzüberschreitender Raumplanung, Linz, 1977, p. 64-67.

(26) P. Pernthaler, Das Forderungsprogramm der österreichischen Bundesländer, Wien, 1980, p. 24-25. See also H.R. Klecatsky, Plaidoyer für eine verfassungsrechtliche Harmonisierung der Regionalstrukturen im Alpenraum, in Festschrift für Fröhler, Berlin, 1980, p. 149-150.

(27) H. Schäffer, Aktuelle Probleme des Föderalismus in Osterreich, 36 OJZ, 1981, p. 1-2.

competence, which at first sight might have seemed to be broad, possibly including a treaty-making capacity, is only bestowed on the legislative bodies of both communities. The federalisation process in Belgium is indeed characterised by a rather unusual « *binary devolution of powers* » between on the one hand the nation and on the other hand the component units' legislative and executive branches separately. Consequently, a like power has for example not been granted the respective community executives. They, together with the executive of the Walloon and the Flemish region — in this last case the organs of both the community and region have merged (28) — only possess a right to be associated with the negotiations of international agreements in matters coming within their sphere of competence. The King, however, remains the sole interlocutor at the international level (article 81 of the Special Law on Institutional Reforms). Any ius tractatuum in the hands of communities or regions seems so to have been discarded (29). Nevertheless, the legal concept of the assent or approval of treaties requires further answers, as does the question of other possible transnational contacts.

5. CANADA

In times where the British Crown was the sole holder of the royal prerogative in treaty-making matters, the Dominion Parliament of Canada was the only organ empowered to implement them, at the exclusion of the provincial legislatures (article 132 of the B.N.A. Act). The accession to international status by Canada, especially in the post Statute of Westminster era changed this situation. A landmark ruling by the Judicial Committee of the Privy Council in the so-called « *Labour Conventions Case* » in 1937 drew a clear dividing line as regards the legislative performance of treaty obligations between federation and provinces (30). However, with respect to a similar division of powers in the treaty-concluding process, the Privy Council remained silent (31). In the same case before the Supreme Court of Canada the year before, Chief Justice Duff had — be it in an obiter dictum — denied the provinces any ius tractatuum (32). Up to now the Canadian Supreme Court, now the country's highest judicial body, has not yet reversed this Privy Council ruling, nor have its dicta on Canada's ius tractatuum ever dealt with

(28) They, however, still retain their separate legal personality. See Special Law on Institutional Reforms, August 8, 1980, art. 1 §1. For the text of this special law see Mon. b. 15.8.1980.

(29) See e.g. Y. Lejeune, Communauté française de Belgique et relations culturelles internationales : aspects juridiques, dossiers du CACEF 81, 1980, p. 19—20, 35-36, who does not exlude such an evolution in the future (p. 36); F.L.M. Van de Craen, Belgien nach der zweiten Staatsreform; ein Bundesstaat in der Bewährung, 41 ZaöRV, 1981, p. 546-547.

(30) A.G. for Canada v. A.G. for Ontario (1937) A.C. 326.

(31) Ibid. at p. 348-349. See e.g. F.R. Scott, The Consequences of the Privy Council Decisions, 15 Can Bar Rev., 1937, p. 486-487.

(32) In the Reference be Weekly Rest in Industrial Undertaking Act, The Minimum Wages Act and the Limitation of Hours of Work Act (1936) S.C.R. 461 at p. 496.

the constitutionality of provincial treaty-making powers (33). Proponents of an exclusive federal treaty-making competence rely on Duff's obiter and the Court's upholding of a link between sovereignty and treaty-making in reference to the Dominion (34). Others, rightly so I deem, reject this argument (35), but some use it also in favour of a distinct provincial treaty-making capacity (36).

The main issue in the constitutional debate, nevertheless, centers around the delegation of the royal prerogative to enter into international agreements. The Seals Act of 1939 (37) but especially the Letters Patent of 1947 (38) conferred the royal prerogative on the Governor-General. No mention was made of the heads of the provincial executives, the Lieutenant-Governors. There is of course no question of them being deprived of the royal prerogative since the provinces are autonomous and independent within their sphere of competence (39), this not only in legislative but also in executive matters (40). But does this also include an autonomy in the international field where the relevant jurisprudence was clearly related to local matters ? (41). Once again the case law does not give a satisfactory answer, so that in the end the federal royal prerogative argument as regards the ius tractatuum vested in the Governor-General should prevail (42). This overall federal treaty-making power now is in the practice not exercised in an exclusive way and still leaves enough room for provincial initiatives. The federal authorities, in the search for a « *modus vivendi* », indeed had and still have to resort to a number of — be it rather debatable — constitutional techniques which will receive further attention in due course.

(33) See e.g. Francis v. The Queen (1956) S.C.R. 618 at p. 625; Re Offshore Mineral Rights of British Columbia (1967) S.C.R. 792 at p. 815-817; McDonald et al v. Vapour Canada ltd. et al. (1976) 66 D.L.R. (3d) 1 at p. 27-29.

(34) Ghosh (ftn. 19), p. 46-47; P. Martin (viewpoint of the federal government as external affairs minister), fédéralisme et relations internationales, Ottawa, 1968, p. 27; in reference, A. Jacomy-Millette, Treaty-Law in Canada, Ottawa, 1975, p. 54-55.

(35) See e.g. E. McWhinney, Canadian Federalism and the Foreign Affairs and Treaty Power, 7 Can. Yb. of Intern. L., 1969, p. 6-7.

(36) See L. Giroux, La capacité internationale des provinces en droit constitutionnel canadien, 9 Cah. de droit, 1967-68, p. 255; referring to Quebec's viewpoint, Jacomy-Millette (fnt. 34), p. 87-88.

(37) Statutes of Canada (1939) c. 22.

(38) Revised Statutes of Canada 1970, Appendix II n° 35.

(39) This fundamental principle of federalism has already been early upheld, see e.g. Hodge v. the Queen (1883-84) 9 A.C. 117; Maritime Bank of Canada v. Receiver-General of New Brunswick (1892) A.C. 437; In re Initiative and Referendum Act (1919) A.C. 935.

(40) See e.g. Bonanza Creek Gold Mining Co v. the King (1916) 1 A.C. 437.

(41) See critical G.L. Morris, Treaty-Making Power : a Canadian Dilemma, 45 Can. Bar Rev., 1967, p. 483-484. For an affirmative answer see e.g. Giroux (ftn. 36), p. 252-262; J.Y. Morin (ftn. 15) p. 180; Jacomy-Millette (reference to Quebec's Viewpoint) (ftn. 36), p. 86-87.

(42) Di Marzo (ftn. 1), p. 43-46; Martin (ftn. 34), p. 14-16; Gotlieb (ftn. 34), p. 28-29; for the older literature see e.g. Ghosh (ftn. 19), p. 45, 48-49; G.J. Szablowski, Creation and Implementation of Treaties in Canada, 34 Can. Bar Rev., 1956, p. 31-32.

Contrary to the other provinces (43), Quebec still insists on a constitutional interpretation in favour of a division of treaty-making powers (44). But also the international activities of the other component units raise questions as to their compatibility with an exclusive federal treaty-making competence. So did for example not only Quebec enact its own legislation on international intergovernmental agreements (45), but also Alberta passed a similar bill, be it then in a more rudimentary version (46). Unfortunately, the revived debate on patriation and on the revision of the constitution in the past years has paid virtually no attention to this thorny problem (47).

6. THE FEDERAL REPUBLIC OF GERMANY

As distinct from the conflicting views in Australia and especially in Canada in favour or against a constitutional stratum for the constituent states' treaty-making competence, the Basic Law of the Federal Republic of Germany could not be more plain. This at least as far as the principle is concerned. Indeed, article 32 sec. 3 of the Basic Law explicitly grants the Länder, in so far as they have power to legislate and with the consent of the federal government, the power or conclude treaties with foreign states. The application of this principle is however not without controversies as will appear later on in this study.

7. ITALY

The Italian regions do not possess any constitutionally entrenched ius tractatuum as such. The treaty-making power is solely vested in the President of the Republic (article 87 cl. 7 of the Constitution). Nevertheless a long standing development of transnational activities by the regions, for which no coherent monitoring policy on the part of the national government had existed (48), compelled finally the national authorities to include a relevant regulatory provision in the Decree of the President of the Republic nr. 616 of 24 July 1977 (article 4, sections 1 and 2) (49). Whereas international legal

(43) See e.g. Jacomy-Millette (ftn. 34), p. 74. Ontario can be considered as representative here.

(44) Its « *document de travail sur les relations avec l'étranger* », conférence constitutionnelle, 5.2.1969, esp. p. 14-21 is actually still valid; see too P. Painchaud, le rôle international du Québec, 8 Et. Internat. 1977, p. 378-379, who states that Quebec cannot be compared with a normal federated state, « ... il s'agit d'un véritable acteur international ».

(45) Intergovernmental Affairs Department Act, S.Q., 1974 c. 15, esp. arts. 15-22.

(46) The Department of Federal and Intergovernmental Affairs Act, S.A. 1972 c. 33, esp. arts. 1, 4, 5.

(47) See e.o. Towards a new Canada (Can. Bar Association) 1978, p. 125-126, favouring an exclusive federal treaty-making power but unclear on the constitutionality of the present practice. The Task Force on Canadian Unity (1979), p. 85, proposing a provincial ius tractatuum, but without further specifications.

(48) See e.g. on the circular letter policy of the Italian government, A. Cassese, Foreign Affairs and the Italian Constitution, in Ibid., Parliamentary Control over Foreign Policy. Alphen a/d Rijn, 1980, p. 97-99.

(49) This in execution of art. 3 of the Law nr. 382 of 22 July 1975 on norms regarding the regional legal order and the organisation of the public administration, see e.g. Cl. Morividucci (ftn. 1), Le Regioni, 1980, p. 983-985.

relations were explicitly excluded (section 1), « *promotional activities* » abroad within the regional sphere of competence were allowed. This none the less within a framework of guidelines. These guidelines were first issued in a circular of 1 April 1978 by the presidency of the Council of Ministers (50). Later on they were taken over in an extended and more comprehensive way by a decree of the President of the Council of Ministers (11 March 1980) (51). None of these texts, however, can be relied upon to upheld any regional ius tractatuum. On the contrary, sec. f in article 1 of the last mentioned decree explicitly forbids any internationally binding agreement-making activities with foreign states. Moreover, it still is a generally accepted principle in Italian constitutional law that one of the basic « *legality limits* » of the regional sphere of competence is the so-called « *limite degli obblighi internazionali* ». This as a result of the exclusive foreign affairs powers of the state (52). However, these rather clear constitutional and legal provisions should not incite one to write off the Italian example right away. As a matter of fact, in the view of continuing transnational activities by the Italian regions, the doctrine, or at least part of it, seems to be inclined to switch to a more differentiated approach.

8. THE SWISS CONFEDERATION

The Swiss Federal Constitution explicitly provides for a cantonal treaty-making power with foreign states. Article 9 stipulates that exceptionally the cantons retain this right as regards certain matters within their jurisdiction (53). The constitution also contains provisions as to its nature and scope, but all that will receive due attention further on in this study.

9. THE UNION OF SOCIALIST SOVIET REPUBLICS

The new Soviet Union Constitution of 7 October 1977 (as its predecessor of 1936, amended in 1944, in article 18a (54)) stipulates in its article 80 that a union republic has the right to enter into relations with foreign states and to conclude treaties with them.

10. THE UNITED STATES OF AMERICA

According to the U.S. Constitution, the states do not possess any ius tractatuum in the strict sense of the word. Article 1 § 10, clause 1 explicitly forbids

(50) Circolare ai Commissari del Governo sull' attività di rilievo internazionale delle Regioni, for the text see Cl. Morividucci (ftn. 1), Le Regioni, 1980, p. 1009-1011.

(51) Disposizioni di indirizzo e coordinamento per le attività promozionali all'estero delle Regioni nelle materie di competenza (Gazetta Ufficiale N. 106, 1980).

(52) See e.g. L. Paladin, Diritto regionale, Padova, 1979, p. 66, 68-69; see also the argumentation contra any regional international activity, Cassese (ftn. 48), p. 99-100.

(53) See also art. 49(2) in the draft for a total revision of the Swiss constitution, and also Bericht. Expertenkommission für die Totalrevision der Bundesverfassung, Bern, 1977, p. 113.

(54) Article 18a used the term agreements, not treaties. However, this cannot be considered as a formal limitation, see e.g. Uibopuu(ftn. 1), p. 192; T. Schweisfurth, Der internationale Vertrag in der modernen sowjetischen Völkerrechtstheorie, Köln, 1968, p. 75.

any state to enter into any treaty, alliance or confederation. Besides, the treaty-making power is clearly vested in the President (article 2 § 2, clause 2 of the constitution). Nevertheless, article 1, § 10 in its third clause permits the states, with the consent of Congress, to conclude agreements or compacts with a foreign power. This distinction in terminology between « *treaty* » and « *agreement* » can, however, not been explained by any helpful authority. Never was any agreement or compact challenged as a forbidden treaty (55). The office of the legislative council in a memo to the Senate foreign relations committee was probably correct when it regarded the difference between an agreement and a treaty as a question of policy rather than as one of strict legal consideration; whereby then the congressional consent as such was probably the most important validity factor (56). This leads one to conclude that at least a ius tractatuum in the « *wider sense* » has been reserved to the states.

11. THE SOCIALIST FEDERAL REPUBLIC OF YUGOSLAVIA

The treaty-making power appertains to the federation. Article 281 of the federal Constitution determines in its section 7 that the federation, through its agencies, shall conclude, ratify and ensure the enforcement of international treaties. The same principle is reiterated in article 1 of the Unified Law on the Conclusion and Implementation of International Treaties of 30 March 1978 (57). The six republics and the two autonomous provinces within the Serbian republic do not enjoy any separate ius tractatuum as such (58). However, the component units consent is needed for international treaties which necessitate the enactment of federated republic or provincial legislation or entail obligations for them. Moreover, the republics and autonomous provinces are empowered to engage in international cooperation with foreign states or international organisations (article 271, section 1 of the federal Constitution, art. 23 of the Unified Treaty Law of 30 March 1978 and article 271 section 1 of the federal Constitution respectively).

Whether these provisions can in turn be interpreted as a direct control over the federal treaty-making power, or would eventually also enable some form of an autonomous treaty-making role, will equally be discussed in the next chapters.

(55) See e.g. L. Henkin, Foreign Affairs and the Constitution, New York, 1972, p. 229-230, who concludes that a different constitutional treatment has lost all practical significance.

(56) U.S. Congress, Senate Committee on Foreign Relations, 82nd Congerss, 2d Sess., Report 1405.

(57) See Službeni List SFRJ nr. 55/1978 13.10.1978, p. 2217 et seq., German translation in 19 JfOR 1978 nr. 2, p. 283-291.

(58) See e.g. A. Peleš, O postupku zaključenja meotunarodnih ugovara SFRJ, sa posebnim osvrtom na usesce republika i pokrajina (with summary in French) 24 God. Pravnog Fak. u Sarajevu, 1976, p. 170; B. Kljajić, Prava i dužnosti republika i prokrajina u meotunarodnim odnosima na osnovu savremenih ustavnih rješenja, Arch. za Prav. i Drust. Nauke, 1977, NR. 2-4, p. 253, 256; A. Jelić, Foreign Relations under Yugoslavia's Constitutional System, 16 Int. Problems (Belgrad) 1975, p. 26; M. Mitić (ftn. 1), p. 27-42.

Chapter 2.

The Nature and Essence of the Treaty-making Power

SECTION A.
AN AUTONOMOUS AND INDEPENDENT IUS TRACTATUUM ?

Since all federated states which are subject of study here possess at least a national legal personality, there should not be too many disputes around their independent right to enter into private contracts or transactions of an international character (59). This is of course no sign of an independent ius tractatuum. However, the dividing line between contracts or agreements reigned by private municipal law or by public international law is not always that readily discernable (60). Moreover, the borderline between binding and non-binding agreements is not all that clear either (61). All this calls now for a further examination.

In such federal states where the constitutional provisions take a firm stand as to the exclusive federal ius tractatuum, one can hardly expect to find examples to the contrary in the practice. But this has not impeded, particularly in the more recent past, a fair number of federated states to engage in one way or another in some type of transnational activity. These activities are on the one hand characterised by their autonomous and at the same time independent character, free from any special authorisation. On the other hand, however, they are also marked by their informal and basically non-binding nature. Especially Austria is a good example of such a development, which may as well be an indication for a ius tractatuum « *in statu nascendi* » (62). Special reference should be made in this regard to the transnational joint ventures of federated states in the Alps region (ARGE Alp) — also including a German Land and Italian regions — and of federated states in the Alps and in the Northern Adriatic area (ARGE Alpen-Adria), the last one extending to other Italian regions and even to Yugoslav Republics (63). Their activities are principally based on resolutions, joint declarations and

(59) See e.g. (Australia) Burmester (ftn. 19), p. 264; (Austria) article 17 of the Federal Constitutional Law:; Fröhler et al. (ftn. 25), p. 43-48; Pernthaler (ftn. 2), p. 37-28; (Belgium) Y. Lejeune (ftn. 29), p. 25; (Canada) basically in reference to international economic activities, T.A. Levy, Provincial International Status Revisited, 3 Dalhousie L.J., 1976, p. 91, 98-99; P.R. Johannson, Provincial International Activities, 33 Internat. J., 1978, p. 369-371 (Federal Republic of Germany) H. von Mangoldt - F. Klein, Das Bonner Grundgesetz, II, 1964, p. 784; O. Rojahn to article 32, in I. von Münch, Grundgesetzkommentar, II, München, 1976, p. 271; (U.S.A.) A.A. Bruce, The Compacts and Agreements of States with One Another and with Foreign Powers, 2 Minn. L.R. 1917-18, p. 514-516; (Yugoslavia) Jelić (ftn. 58), p. 27.

(60) See e.g. K. Widdows, What is an Agreement in International Law, 50 Brit. Yb. of Intern. L., 1979, p. 144-149.

(61) Ibid., p. 124-144.

(62) See also supra (ftn. 26, 27).

(63) For reports on their activities, see Berichte, Institut für Föderalismusforschung der Länder Tirol, Voralberg und Salzburg, Wien, 2/1977, p. 81; 3/1978, p. 168-169; 4/1979, p.166-168.

« *gentlemen's agreements* » (64). Nevertheless, some scholars already adhere to the thesis that these commitments can become binding as some form of customary international law (65). This type of relations does definitely not encroach on the exclusiveness of the federal ius tractatuum. But one should indeed not overlook the fact that also external components as well as internal ones can belong to the pith and substance of especially the Austrian Länder competence (66).

The above mentioned transnational joint ventures in the Alps region and Northern Adriatic area reveal that such non-binding agreement activities also exist in Italy and in Yugoslavia. Jelić draws here the attention, be it not as such in connection with these activities, to the international cooperation clause in article 271 of the federal constitution, which provides for various forms of transnational contacts. He, however, remains silent as to their possible legal character (67).

Somewhat more complicated is the Italian situation. Morividucci not only refers to the informal pattern of such transnational relations, but equally mentions the rather negative attitude of the national government in casu. Indeed, some of these regional ventures risked to entail national foreign policy repercussions. Reference for example is here made to a foreign development aid arrangement between Lombardy and the Ethiopian province of Benadir. In any case, so the national government, the regions can make use of their autonomy in this field, but uncontrolled actions cannot be allowed (68). Here lies at present then also the main problem. Without challenging the foreign affairs powers of the nation, there are voices now favouring a truly autonomous transnational relations competence on the part of the regions, without strict guidelines or authorisations from Rome. The recent developments with the above mentioned circular of 1978 and decree of 1980 (69) have therefore received vivid critique from certain corners. In-

(64) See e.g. F. Matscher, Auf der Suche nach einer Rechtsform für die grenzüberschreitende Regionalpolitik, in Festschrift Lechner, Salzburg, 1978, p. 172.

(65) See e.g. Chr. Mader, Funktionen und Rechtsform transnationaler Zusammenarbeit, eine Studie anhand von Programm und Tätigkeit der Arbeitsgemeinschaft Alpenländer, 15 Jb. d. Diplom. Akad., Wien, 1979-1980, p. 105-108 especially then with the acquiescence of the federal authorities.

(66) See Pernhaler (ftn. 2), p. 39-46; Fröhler et al. (ftn. 25), p. 70-72. Other examples of informal arrangements exist between some Austrian Länder and Bavaria, Berichte, Institut für Föderalismusforschung (ftn. 63) 3/1978, p. 170-171; 4/1979, p. 170; see also Fröhler et al. (ftn. 25) p. 123 et seq. (schemes for potential development). Examples of such transnational activities are also reported with Hungarian districts, see Berichte, Institut für Föderalismusforschung (ftn. 63) 3/1978, p. 171-172.

(67) Jelić (ftn. 58), p. 32-33. The author does unfortunately not give concrete examples from the practice, existing or not ? See also the constitutional provisions in the constitutions of the SR Bosnia and Hercegovina, art. 308; the SR Croatia, art. 309(2); the SR Serbia, art. 313 (2)(3); the SR Slovenia, art. 317 (2)(3); the SAP Kosovo, art. 293(3); the SAP Vojvodina, art. 306(2). See for a more concrete picture of such transnational activities, B. Zasow, Ustavno - pravnata položba na republikite i na avtanonite pokrini vo odnosite so stranstvo (in Macedonian), 27 Prawna Misla, 1977, nr. 1, p. 35-46.

(68) Morividucci (ftn. 2) 2 Ital. Yb. of Intern. L., 1976, p. 209-216.

(69) See supra (ftn. 50-51).

deed, these regulations narrow the bases for transnational activity to the so-called « *attività promozionali* ». In reality the scope of such activity is much broader and — in the words of Morividucci — they have to be characterised as governed by a third kind of external affairs power, a power related to « *attività di mero rilievo internazionale* » or genuine regional transnational activities. Moreover, these regulations also introduce a whole national controlling machinery, which is a hindrance for their development (70).

A Belgian practice in this field could not be detected. But that does not mean that the problem is unknown here. In the early seventies, in the aftermath of the first reform of the Belgian state, comprising inter alia the introduction of an article 107 quater on the regionalisation of the country in the constitution, a special joint commission of the Senate and of the Chamber of Representatives had been set up in order to work out the necessary implementing legislation. This commission discussed the possibility of granting the regions the power to enter into international arrangements in the form of « *pré-accords* », which then later on could be transformed into internationally binding national agreements (71). But apart from that it also looked into such other forms of transnational relations as the enactment or adoption of similar legislation or regulations on the basis of reciprocity (72). Unfortunately, these initiatives did not find their way to the commission papers on the second reform of the Belgian state (1980) and have as such not yet materialised.

Nevertheless, especially this second means of international « *accord* » is not an uncommon feature in federated states with a common law tradition and basically deals then with administration of justice matters. So are there for example the reciprocal enforcement of maintenance orders, involving Australian states (73), Canadian provinces (74) and American states (75) and the reciprocal enforcement of foreign judgments (76). Are these now simply voluntary and complementary acts, non-binding and without legal character, as the Canadian Supreme Court pretended (77) ? Or is one faced

(70) See especially Morividucci (ftn. 2), p. 986-999; see also Cassese in favour of a more independent transnational competence (ftn. 48), p. 103, where an information duty should suffice.

(71) See also Fröhler et al. (ftn. 25), p. 72-76, 79-82, who equally propose a like pattern for Austria.

(72) Rapport 13.9.1973, Doc. Parl. Sén., sess. 1972-73 no. 427/1, p. 61-62; Doc. Parl. Chambre, sess. 1973-74, no. 669/1.

(73) See e.g. Doeker (ftn. 19), p. 216-217.

(74) J.G. Castel, Conflicts of Law, Toronto, 1975, p. 572-579.

(75) See e.g. Di Marzo (ftn. 1), p. 95-96.

(76) See e.g. on reciprocal enforcement of foreign child support judgments, M.N. Leich, Contemporary Practice of the United States relating to International Law, 75 AJIL, 1981, p. 946-948.

(77) A.G. for Ontario v. Scott (1956) S.C.R. 137. As to their possible character of unilateral acts, see critical Di Marzo (ftn 1), p. 94-96. As far as the British Commonwealth is concerned, J.E.S. Fawcett refers to the « inter se » doctrine of Commonwealth relations, in casu then some type of inter-common law jurisdiction agreements, Ibid, The Inter Se Doctrine of Commonwealth Relations, London, 1958, p. 5-6.

here with a « *traité escamoté* » as another Canadian, the constitutionalist J.Y. Morin states (78) ? Although the majority of the doctrine dismisses in this case and in most related cases any notion of a ius tractatuum, the matter actually calls for further investigation and this brings me finally to the core question, namely the possible presence of an independent ius tratatuum in federated states.

As regards Argentina, F.R. Teson refers to the existence of a limited treaty-practice, namely to four international provincial agreements, two within the sphere of cultural cooperation, the two others relating to town-planning (79). All four are autonomously and independently concluded « *non-political* » agreements of an administrative character (80). Consequently there should be no doubt as to their binding character.

In federations now where the constitutional foundation of an autonomous federated treaty-making capacity is subject to major controversies, as is the case in Australia, but even more in Canada, one cannot avoid turning to a study of the practice. In the case of Australia such practice is hardly existent. Apart from a few examples of reciprocal recognition of legislation between a state and another jurisdiction in matters of administration of justice, there is only one example, cited by Burmester (81), involving South Australia and Western Australia and related to an agricultural development agreement with Libya. The author calls this agreement one of a private nature, however, his assessment does not contain any criteria as such (82).

In contradistinction now to the minimal Australian state practice, the Canadian provinces offer quite a different picture. Swanson, who undertook a study for the U.S. State Department in the early seventies in US-Canadian state-provincial relations, came to the really astonishing number of 766 interactions and this in a wide range of areas. Although the majority of these activities was definitely of an informal and non-binding nature, about thirty percent was described as agreement or understanding and had been concluded by the way of some regularised procedure. The most important thing, however, was that virtually all of them had been entered into in an autonomous way, independent of any federal government authorisation. This

(78) J.Y. Morin (ftn. 15), p. 177.

(79) Teson (ftn. 16), p. 10. The two cultural agreements deal with language instruction : Santa Fé - France (1978) and Buenos Aires - Italy (1981). The two other compacts are between Entre Ríos and the Argentina-Uruguay international joint commission of Salto Grande (1974, 1976).

(80) Ibid., p. 11. The author, however, does not known whether the only constitutional requirement, namely to inform the federal Congress (or the President when Congress could not convene) of the treaty conclusion, has been abided by.

(81) Burmester (ftn. 19), p. 264.

(82) Ibid., p. 265-266 and denying state agreements an international public law character.

counts as well for the Canadian provinces (83) as for the U.S. states on the other side of the border (84). Notwithstanding the explicit U.S. Constitution stipulation that agreements or compacts are concluded with the consent of Congress. However the fact that Congress had not even taken notice of this activity raises questions about the necessity of such a consent. Is an agreement-making power, independent from federal control, constitutionally valid ? Henkin states in this context that consent can only be a prerequisite :

> « If a foreign agreement tends to give a state elements of international sovereignty, interferes with full and free exercise of federal authority or deals with a matter on which there is or might be national policy. » (85).

This does not only relate to non-binding or private law agreement-making, but as it stands, might also leave room for an independent state ius tractatuum as regards its local sphere of competence.

If these agreements and arrangements, many of them reciprocity or even mirror reciprocity agreements (86), were « *in se* » of a non-binding nature, or if binding, were definitely not governed by international law, then no problem as to their constitutionality would arise, neither in the U.S.A., nor in Canada. Is this, however, in conformity with reality, and if not, which conclusions have to be drawn ? A thorough examination is hampered by the virtual inexistence of case-law — never was any federated state agreement subject to a litigation (87) — combined with a generally uninterested doctrine, especially on the American side. But even if scholars voice their

(83) Swanson (ftn. 1), see also R.F. Swanson, Intergovernmental Perspectives on the Canada-U.S. Relationship, New York, 1978, p. 221-265; see Di Marzo (ftn. 1) p. 91-100. Whereas indeed the great majority of these interactions takes place between the United States and Canada, treaty relations with other countries are not excluded, see recently the Quebec-Venez uela intergovernmental agreement on the administration of justice, October 1980, see L. Louthood, Chronique des relations extérieures du Québec, 12 Et. Internat., 1981, p. 197; see further Levy (ftn. 59), p. 91, 98-99 and Johannson (ftn. 59), p. 369-371 on international economic agreements.

(84) See Swanson (ftn. 1); for a reference to transnational relations of U.S. states with Mexico, though strictly informal according to the author, see M.H. Jamail, Voluntary Organizations along the Border in Mexico-United States Relations, 34 Proc. of Am. Pol. Sc. Soc., 1981, p. 83.

(85) Henkin (ftn. 55) p. 233; U.S. Senate Doc. 232, 74th Congress, 2d Sess., p. 366, 368; U.S. Senate Doc., 39, 88th Congress, 1st Sess., p. 416-419.

See also Bruce (ftn. 59), but more strictly referring to matters of private law; contra E.C. carman, Should the States be permitted to make Compacts without the Consent of Congress ? 23 Cornell L. Quat., 1937-38, p 283; also critical and speaking of « *para-constitutional* », Blumenwitz (ftn. 1), p. 122-123.

(86) See for a further definition and description of their formal character, Di Marzo (ft. 1), p. 96-100.

(87) The only references — be it rather indirect — could be made to the above mentioned Scott's case (ftn. 77) and to a ruling of the Supreme Court of North-Dakota, this last one, however, concerning a transnational agreement between sub-divisions of federated states. The court considered the relationship as being one of a private nature, McHendry Country et al. v. Brady, 163 N.W. 540 (1917).

(88) Only R.S. Rodgers, The Capacity of the States of the Union to conclude International Agreements, 61 AJIL, 1967, p. 1024, hints at the possibility of international law agreements; Swanson (ftn. 83), p. 228-229 does not really see any international legal dimension.

opinion, as in Canada, the problem is disposed of in a rather superficial and mostly dismissing way (89). Last not least there is also the paucity of official policy statements (90). Therefore reference should be made to Di Marzo's work whose merit it has been to have dealt with the question for the first time in a substantive way (91). Hereby the author — apart from the Canadian and the U.S. practice — equally includes the German Länder and the Swiss cantonal treaties. Before assessing his views on the matter, I briefly want to turn to the Federal Republic of Germany and Switzerland.

These are on the one hand federations with a clearly constitutionally entrenched ius tratatuum on the part of their constituent states, but on the other hand it are also federations with firm provisions for federal control. There may definitely be an autonomous treaty-making power, but one can at the same time question whether there is also a potential for a treaty-making competence independent from the federal authorities ?

The rather rigidly applied article 32 III of the Basic Law leaves here little room for manoeuvering. Only the concordats with the Holy See can be concluded free from the federal government's consent (92). A minority opinion in the doctrine equally advocates the conclusion of administrative agreements without any federal control (93). The practice, however, learns that this only happened once and does definitely not fit into the treaty-making picture of the Länder (94).

(89) Apart from Bernier (ftn. 1), p. 58 and A. Jacomy-Millette, Le rôle des provinces dans les relations internationales, 10 Et. Internat., 1979, p. 1317-318 (however, Ibid. (ftn. 34), p. 71, defending a somewhat different thesis), who do not want to exclude an effect under international law, virtually no Canadian constitutionalist seems to be prepared to support such a view; some, nevertheless, defend a possible bindingness under municipal law, see e.g. R.J. Deslisle, Treaty-Making Power in Canada, in Ontario Advisory Committee on Confederation I, 1967, p. 132; Levy (ftn. 59), p. 97-88. The majority does not even perceive a legal nature as such, see e.g. McWhinney (ftn. 35), p. 14-15, ftn. 18 'the commitment is principally based on mutual benefits and convenience'; Gotlieb ftn. 34), p. 24; B. Laskin, Canadian Constitutional Law, rev. 4th ed. (A.S. Abel), Toronto, 1975, p. 219; J.G. Castel, International Law (Chiefly as Interpreted and Applied in Canada), Toronto, 1976, p. 194; Johannson (ft. 59), p. 366; P.W. Hogg, Constitutional Law of Canada, Toronto, 1977.

(90) There seems to exist some monitoring, especially on the part of the State Department, but no legal guidance is given by the federal government and that leaves some states with a sense of frustration, see e.g. Swanson (ftn. 82), p. 229. However, federal officials sometimes tend to discourage international state activities which purport to create « *international legal obligations* », see Rodgers (ftn. 88), p. 1023; Leich (ftn. 76), p. 948.

On the other hand the Canadian government has played down the problem and equally depicted such activities as non-legal in character, see P. Martin (ftn. 34), p. 26. To be mentioned is only a minor inquiry in the mid-sixties, see H.J. Lawford, Canadian Practice in International Law, 2 Can. Yb. of Intern. L., 1966, p. 221-222; see also Johannson (ftn. 59), p. 366.

(91) Di Marzo (ftn. 1), esp. p. 130-153.

(92) See e.g. von Mangolt-Klein (ftn. 59), p. 790; Rojahn (ftn. 59), p. 270.

(93) See e.g. E. Weiser, Compétences des Etats-membres de la République fédérale d'Allemagne en matière de conclusion et de mise en œuvre des accords internationaux, in Brossard et al. (ftn. 24), p. 142; T. Maunz, G. Dürig, R. Herzog, Grundgesetzkommentar, München, 1970, to article 32, p. 27-28.

(94) This happened in 1957 in an agreement between Bavaria and Austria on the re-entry into force of the 'Salinenkonvention' (GVBl 1958, p. 167). Indeed the attitude of the Bavarian state

Contrary to the German Länder, the Swiss cantons have concluded a rather impressive number of agreements without the — in article 112 section 7 of the Constitution written down — obligatory approval by the Federal Council (95). Normally official intercourse between the cantons and foreign governments has to take place through the agency of the Federal Council (art. 10, sec. 1 of the constitution), but direct contacts with subordinate authorities of a foreign state are allowed (art. 10, sec. 2 of the constitution). Consequently, the cantonal treaty-making power is in principe autonomous but not independent (96). The above mentioned independent treaty relations now encouter criticism but are not as such considered as an illicit excess of competence by the cantons. The fact that the federation has not vetoed these international interactions, upholds at least their internal but also external validity (97).

The conclusions as regards the independent treaty-making of the German Länder and the Swiss cantons do not pose any special problems as to the non-existence of such powers in the first case and the existence of a like competence — although not without controversy — in the second one. Nor is their bindingness under international law much of a problem (98). In principle relying on the intention of the parties in the legal wording of the agreement, Di Marzo, in an empirical examination of both Länder and cantonal agreements, also comes to the conclusion that there is a presumption in favour of their international legal and binding character (99).

This then leads to a parallel examination of Canadian provincial and U.S. state agreements. A number of them are so obviously voluntary or state that they are not legally enforceable, that they simply cannot qualify as treaties.

government was originally very critical on the need of the federal government's consent. Later on it accepted it on the basis of the federal comity principle, rather than within the framework of the article 32 III. See also F. Regehr, Die völkerrechtliche Vertragspraxis in der Bundesrepublik Deutschland, München, 1974, p. 140-141; Rojahn (ftn. 59), p. 283. Incorrectly Di Marzo (ftn. 1), p. 89-90, who overlooks the federal government's controlling function. Nothing of course prohibits the Länder to engage in non-binding arrangements with foreign states, see e.g. Fröhler et al. (ftn. 25), p. 53-54.

(95) See e.g. L. Wildhaber, Bundesstaatliche Kompetenzausscheidung in auswärtigen Angelegenheiten, in A. Riklin et al., Handbuch der schweizerischen Aussenpolitik, Bern, 1975, p. 248-250; Y. Lejeune, Recueil des traités cantonaux suisses, Berne, 1982.

(96) Contra O. Pinösch, Die Verteilung der Kompetenzen zum Abschluss von Staatsverträgen in der Schweiz, Diss. Leipzig, 1906, p. 34; see more general Bernhardt (ftn. 5), p. 61.

(97) See e.g. W. Schwarzenbach, Staatsverträge der Kantone mit dem Ausland, Diss. Zürich, 1926, p. 126-127; L. Wildhaber (ftn. 95), p. 249-250, referring to the transgression of powers problem; J. Witmer, Grenznachbarliche Zusammenarbeit, Das Beispiel der Grenzregionen von Basel und Genf, Zürich, 1979, p. 174.

(98) Wildhaber (ftn. 95), p. 250, explicitly referring to the international responsibility of the cantons; even Y. Hangartner, Sammlung des interkantonalen Rechts und des völkerrechtlichen Vertragsrechts der Kantone in Mélanges H. Zwahlen, Lausanne, 1977, p. 97-98, who criticizes the fact that so many of these « treaties » are not published endagering so their binding character, none the less abstains from rejecting their genuine treaty nature.

(99) Di Marzo (ftn. 1), p. 130-135. See also Widdows (ftn. 60), p. 137, « the language used must be the fundamental gauge to the parties' intention ».

Others, upon careful study of the legal phrasing of the parties' intentions, suggest nevertheless a binding nature. Di Marzo refrains from putting forwards any general presumption of a binding character, instead argues in favour of an individual evaluation (100). A binding character here, so Di Marzo further, cannot readily be equated with the existence of effects under public international law, but, if not so, which law is then applicable? Discarding the lex contractus as in the end too narrow in case of litigation and the concept of transnational law as a non-workable mixture of municipal and international law principles (101), Di Marzo resorts to a bifurcated solution : or the municipal law of conflicts, or public international law can be applicable. Here he argues, however, without any sound basis; namely referring to the requirement of an explicit federal consent in order to create international rights and obligations, he states that « *independently* » concluded agreements, if binding, are presumed to be subject to private international law (102). Without denying certain agreements or contracts such status and taking into account that the dividing line cannot always clearly be drawn (103), I, however, think that — if a constituent state concludes an agreement with a foreign government in which the governing law as such is not specified — there is an strong presumption in favour of public international law. It is indeed quite impossible to subject one sovereign, and the federated state is « *sovereign* » within its — be it limited — sphere of competence, to the other's domestic law without its agreement (104).

If one accepts this statement of principle, then there can be no doubt about the possible existence of autonomously and independently concluded federated state « *treaties* », this in the sense of article 2(a) of the Vienna Convention on the Law of Treaties, be it in Switzerland, in the United States of America, in Canada and potentially also in Australia. Quid now about their compatibility with the respective constitutional provisions? In the United States it is basically a question of the role of congressional consent which is, as pointed out above, in many — also transnational — relations not compulsory. In Australia, but essentially in Canada, it may on the one hand be a question of a tacit delegation by the federal government. On the other hand, it might also be the emergence of a new head of power embodied in constitutional usage, eventually in a constitutional convention. A like evolution, as far as an independent ius tractatuum is concerned, is however not yet dis-

(100) Di Marzo (ftn. 1), p. 135-136, 141-144. Although his scope of the study is wider also comprising the agreements concluded with the consent or/and on the basis of a delegation by the federal authorities.

(101) Ibid., p. 145-148.

(102) Ibid., p. 149-153.

(103) See also supra (ftn. 60).

(104) See also the Queensland Treaties Commission (ftn. 20), p. 28.

cernable in the other above examined federations with « *exclusive* » federal treaty-making powers (105).

The union republics of the Soviet Union are the only ones which actually enjoy a full fledged autonomous and independent treaty-making capacity within their sphere of competence. No consent of the federal authorities is required and there is no doubt about the binding international legal character of their treaties (106). So far so good for the legal theory « *stricto sensu*». The political practice shows a somewhat different picture. First there are only two republics actively involved in a treaty practice, the Ukraine and Byelorussia. Second, even that treaty-making activity is restricted to multilateral conventions related to their membership in the United Nations and its specialised agencies (107). The multilateral treaty practice of the other union republics is virtually inexistent (108). As far as the bilateral treaty practice of the union republics is concerned now, it is actually not worth mentioning. Apparently apart from Poland and Afghanistan, no other state has ever been their treaty partner (109).

As a result of such observations, one should be inclined to infer a serious discrepancy between the theory and the practice. That would, however, lead to a somewhat distorted conclusion. Indeed, « *stricto sensu* » article 80 of the union constitution may confer very extensive treaty-making powers on the republics. But article 80 interpreted in connection with the federal paramountcy (art. 74 of the union constitution), the largely concurrent federal powers — Uibopuu speaks here of only « *Restkompetenzen* » or power relics which remain with the union republics (art. 73 union constitution) — (110),

(105) An evolution towards an autonomous but dependent « ius tractatuum » cannot be excluded in Austria and to a lesser extent not in Italy either. A mention should be made here of the fact that Voralberg — as first Land in Austria — adhered to an international law compact on the « Neu Technikum Buchs », see Berichte, Institut für Föderalismusforschung (ftn. 63), 2/1977, p. 82. Already in 1945 Voralberg was party to an (invalid ?) international trade agreement, see Seidl-Hohenveldern (ftn. 24), p. 474. The fact, however, that the occupying authorities gave their consent and seen the fragile role of the newly installed government in Vienna, its validity should be upheld because of the need to act in an exceptional situation. See too D. Löffler-Bolka, Voralberg 1945, das Kriegsende und der Wiederaufbau, Bregenz, 1975, p. 143, 149, 176.

(106) See e.g. J. Huber, Le droit de conclure des traités internationaux, Lausanne, 1951, p. 37-38.

(107) For this treaty praxis, see Uibopuu (ftn. 1) p. 251-254. See also (for an update) Stand 31/12/1979, List of Signatures, Ratifications, Accessions etc... St/LEG/SER.D/13, p. 77, 83, 123, 125, 201, 221, 392, 396, 404, 407, 605, 613, 615. Tableau des ratifications des conventions internationales du travail, stand 1.1.1981 : the Byelorussian SSR ratified 43 conventions (35 are still in force). See also 1978 Tractatenblad (Koninkrijk der Nederlanden) 41, p. 132-33; Ibid. 42, p. 24-25 : both signed Protocol I and Protocol II additional to the Geneva Conventions of 12 August 1949 (protection of victims of international armed conflicts and of non-international armed conflicts).

(108) G. Belz, Das Prinzip des Föderalismus in der Sowjetunion, 12 JöR n.F., 1963, p. 269 refers to a signing of the Warsaw Pact by the Ukrainian SSR, the Byelorussian SSR, the RSFSR and the three Baltic republics, although none of them became a party as such.

(109) See e.g. Uibopuu (ftn. 1), p. 261-264, for a treaty list.

the integration of union republic and federal organs (art. 77 union constitution) and last not least the fact that article 70 of the constitution speaks of a unitary federal and multinational state, logically point towards an overriding federal involvment. This so-called« *unity of action and coordination principle* » makes independent union republic treaty initiatives to a great extent redundant (111). The reason why then only the Ukraine and Byelorussia make use of their ius tractatuum is actually one of practical policy. Their U.N. membership makes it all pretty uncomplicated (112).

However, notwithstanding the existence of an overriding federal ius tractatuum, a federated state, which has in casu been granted such substantial treaty-making powers in its own right, should not leave them virtually unused. Moreover, the basic meaning of a treaty-making capacity vested in a constituent state should be the conclusion of treaties or agreements within its genuine sphere of competence. A policy of parallelism, as practised in the Soviet Union, and leading to a duplication of the treaty-making power within the federation is incompatible with the « *raison d'être* » of the union republics' ius tractatuum. Finally, apparent attempts to put the blame for such treaty practice or lack of treaty practice on abroad, as for example Lukashuk does (113), pretending that further positive development of the international relations is needed and warning that a non-recognition of the union republics' treaty-making power would be a violation of international law, have to be emphatically rebuked. The problem on hand is clearly a Soviet Union and not a foreign one.

SECTION B. AN AUTONOMOUS BUT DEPENDENT IUS TRACTATUUM ?

The Canadian provinces and American states can, as examined above, under circumstances become holders of limited international rights and

(110) Ibid., p. 191-193.

(111) See e.g. I.I. Lukashuk, Parties to Treaties. The Right to Participation, 135 Rec. Cours, 1972, I., p. 262-263; B. Meissner, Die auswärtige Gewalt unter der neuen Verfassung der UdSSR, 19 JfOR, 1978 nr. 2, p. 18-19; D. Medvedović, O pravu sovjetskih saveznih republika da istupaju u medunarodnim odnisima (with French summary) 21 Zb. Prav. Fak u Zagrebu, 1971, p. 461; Nedbailo, v.a. Vassilenko, Mezhdunarodnaya pravosubeknost' Sovetskikh Soyuznuikh Respublik, SEMP, 1963, p. 102-105 (with English summary); this also explains for example why the Uzbek SSR hardly plays a role on the international scene, see A.N. Mikhailov, Uzbekskaya SSR - ravnopravnuii subekt mezhdunarodnogo prava, SEMP, 1972, p. 25-35 (with English summary). This is also the principal reason why the constitution does not provide for any federal consent or authorisation, see e.g. V.V. Aspaturian, The Union Republics in Soviet Diplomacy, Paris, 1960, p. 174.

(112) See also Uibopuu (ftn. 1), p. 250.

(113) Lukashuk (ftn. 111), p. 266; his views here are not unrepresentative for the Soviet doctrine in casu, see e.g. Nedbailo, Vassilenko (ftn. 111), Soviet Union Republics as Subject of International Law (summary), p. 108.

obligations, this independently from the consent of their respective federal authorities. Such independent exercise of a ius tractatuum is, however, not always the case. U.S. states have concluded a — be it fairly limited — number of international compacts or agreements with foreign entities after having been granted a Congressional consent. Although it can not be contended that in these cases this « *nihil obstat* » was really necessary. Indeed fear for a potential intrusion on the just supremacy of the United States or its political integrity would in any case have been unfounded (114). It is true that states seek to obtain the consent of Congress for inter-state compacts. Some of these compacts may contain clauses enabling foreign states or their constituent units to adhere (115). Also a separate Congressional consent can in these cases create such additional possibility (116). Especially in some cases of transnational road-or bridge-construction agreements such consent has been sought for (117). However, from all these examples, no clear conclusion can be drawn. There is nothing in the constitution on the mode and manner in which the consent should be given. It is generally accepted that it might even be implicit or be granted « *a posteriori* » (118). Moreover, seeking to obtain the consent of Congress might be a rather time-consuming procedure not save from additional complications. Consequently, states — in their transnational interactions — have in general refrained from using that avenue (119).

That seems also to be the main reason why the U.S. government and the Canadian government have (on two occasions) (120) exchanged notes, apparently to cover in international law transborder compacts entered into by

(114) See also Henkin (ftn. 55), p. 230.

(115) See e.g. art. II, B of the Great Lakes Basin Compact, 82 Stat. 414 (1968) (Ontario, Quebec); the Civil Defense Act, 64 Stat. 1245 (1951), encourages interstate compacts (sec. 201 (g)) in which also neighbouring countries can participate (sec. 203); Sec. 3 of Public Law 92-434, 86 Stat. 731 (1972), entails a global Congressional consent empowering states to enter into agreements with Canada, Mexico or their component units concerning the construction, maintenance or operation of international bridges, an additional approval by the Secretary of State is also required.

(116) The North Eastern Fire Compact, 63 Stat. 271 (1949), consent of Congress for the entry of New Brunswick, 66 Stat. 71 (1952).

(117) See here e.g. M.C. Rand, International Agreements between Canadian Provinces and Foreign States, 25 Univ. Tor. Fac. L. Rev., 1967, p. 78-81.

(118) See Virginia v. Tennessee 148 U.S. 503 (1893). See also Blumenwitz (ftn. 1), p. 120-121.

(119) See e.g. Blumenwitz (ftn. 1), p. 121; Henkin (ftn. 55), p. 233-34, refers here to the own state responsability in this matter. The state of Louisiana for example switched from a consent-seeking policy to an independent one when it intended to conclude a cultural agreement with Quebec, see Blumenwitz (ftn. 1), p. 118-119. For such complications, see the proposed Great Lakes Basin Compacts (1955), U.S. Senate, Sub-Committe of the F.R. Committee, Hearings, 84th Congress, 2d Sess. 1956, p. 4-8, 14, 17, 31-32.

(120) The continued existence of the N.Y. State - Canada agreement on the Buffalo and Fort Erie Public Bridge Authority (3, 11 April 1958), Can. T.S., 1958, nr. 10; when New Brunswick and Quebec became parties to the N.E. Forest Fire Compact (ftn. 119) in 1970, Department of External Affairs (CAN) press release 6, p. 29 (1970).

their constituent states. Such « *ad hoc covering* » agreements, to which will be returned in the Canadian practice, might serve a purpose as far as the clearing of the ultimate international responsibility problems are concerned. However, for the concrete international legal character of the federated states' agreements they are of little or no use. As a matter of fact, if one considers the federal government equally as partner to the agreement, the remarks on Soviet Union treaty-making duplucation may as well apply here too. The international federal consent — if needed— should suffice.

The fact of the Congressional consent and especially of the « *ad hoc covering* » agreements has also been taken up to prove that not the member-state in casu, but solely the United States of America was the real party to the agreement (121). The federated state acted thus only as agent. It is, however, clear that, apart from « *ad hoc covering* » agreements which have their own existence as a treaty — be it then a questionable one —, all other international compacts, agreements, arrangements, entered into by the individual U.S. states, cannot be deemed U.S. agreements as such. Nothing in the Congressional records nor in executive department documents supports this viewpoint (122). Last not least the Congressional consent itself constitutes a clear presumption in favour of the compacts' independent international bindingness.

Also in Canada, the potentially existent but limited treaty-making power of the provinces cannot always be exercised in an independent way. First, just as south of the border, the federal authorities have in a few cases authorised the conclusion of provincial agreements in the field of transnational highway- and bridge-construction, be it by Act of Parliament, be it by Order-in-Council, be it apparently even by simple communication (123). Second, in a few other cases, the federal government has used the «ad hoc covering » procedure, not only in the above mentioned exchanges of notes with the U.S. governnent (124), but, and this relates then to the most disputed chapter in the federal-provincial or better said federal-Quebec treaty-making « *débâcle* », to cover particularly « *ententes* » between Quebec and France (125). Third, within the federal government's supervisory arsenal appeared, around the same time as Quebec asserted its international role, the « accord-cadre » or « *umbrella-agreement* » device. Under such a Canada-third state framework-agreement the provinces can conclude more specified accords within their own sphere of competence. Although an « *entente* » or intergovernmental agreement should make mention of the umbrella under

(121) See e.g. Bernier (ftn. 1), p. 50.

(122) See also Di Marzo (ftn. 1), p. 127; M.D. Forkosch, the United States Constitution and International Relations : some Powers and Limitations Explored, 5 Calif. W. Int. L.J., 1974-75, p. 232-233 (ftn. 84).

(123) See e.g. Rand (ftn. 117).

(124) See supra (120).

(125) For a good survey of these problems in the mid-sixties, see e.g. M. Torelli, Les relations extérieures du Québec, AFDI, 1970, p. 280 et seq.

which it is concluded, especially the Quebec practice simply ignores this requirement.

Apart now from a few« *ad hoc covering* » agreements with the U.S. and the French government, hardly any other is known of. The same is true for the umbrella agreements. Apart from two with France and one with Italy, « *stricto sensu* », no other have been entered into (126). The legal character and usefulness of « *ad hoc covering* » has already been discussed above. That of « *umbrella-agreement-making* » is none the less somewhat different. Indeed, such an agreement deals with an own federal matter distinct from that of the provinces, but in as far as it relates to provincial agreement-making, the consent and the delegation of powers cannot be given by the « *accord-cadre* », but only by a — be it also implicit — internal act. A like clause in umbrella agreements can in addition never have the effect of authorising a foreign state to enter into treaty relations with the own component unit. It can at the most inform that state about the federal « *nihil obstat* ». Consequently, the real effect of such provisions is internal and the addressee is the constituent state (127).

There is equally a strong tendency in the Canadian doctrine contending that the real party to such provincial agreements is the federal government and that only Ottawa can conclude internationally valid treaties (128). The ultimate responsibility for these provincial agreements or « *ententes* » may lie in the hands of the federal government, but no one can deny the fact that the concluding party is the province and that it does so in its own name. Moreover, the federal government's umbrella is mostly not even mentioned (129). But whether it is a direct authorisation through a legislative or executive act, or an indirect one through the debatable means of an umbrella agreement or the even more criticisable post factum exchange of notes, the here examined provincial treaty practice is clearly based on an implied delegation of federal treaty-making powers, including the federal government's authorisation to exercise them. Equally here as in the U.S.A. this delegation and authorisation are a clear presumption in favour of the agreements' international binding character.

(126) For the official definition of « *ad hoc covering* » and « *umbrella* » agreement, see P. Martin (ftn. 34), p. 33-35. See more general Di Marzo (ftn. 1), p. 78-80, equally referring to an umbrella agreement with Belgium (1967) and Algeria (1966), although in these no reference is made to complementary provincial agreements.

(127) See P. Martin (ftn. 34), p. 27-28; Jacomy-Millette (ftn. 34), p. 78-84; Quebec intergovernmental agreements on social security with France and with Italy, 1979, (within umbrella agreements), Rapport annuel du ministère des affaires intergouvernementales du Québec 1978-1979, p. 54-55.

(128) See e.g. Bernier (ftn. 1), p. 58-59; Laskin (ftn. 89), p. 219; Castel (ftn. 89), p. 924-25; the viewpoint of the federal government, P. Martin (ftn. 34), p. 34-35, Contra : J.Y. Morin, International Law-Treaty-Making Power-Constitutional Law-Position of the Government of Quebec, 45 Can. Bar Rev. 1967, p. 172-173.

(129) See also Blumenwitz, however incorrectly assessing the role of the umbrella agreement as a treaty-making source (ftn. 1), p. 131-132.

Nevertheless and this counts for Canada as well as for the United States of America, the rather incoherent and impromptu way of the federal empowering and consenting devices — up to now fortunately without any conflict worth mentioning — needs to be replaced by more logical and comprehensive procedures !

A good exampte of this can be found in the Federal Republic of Germany. Article 32 III of the Basic Law explicitly provides for a federal controlling power in the form of a consent by the federal government. Not only legal but also opportunity factors can be taken into account here. This consent, in the form of a political decision of the cabinet, but subject to parliamentary control, has in principle a preventive function. It is a real « *nihil obstat* », not necessarily preceding the treaty conclusion, addressed to the Land and not to the Land's foreign treaty partner (130). Seen the fact that the discretionary powers of the « *Bundesregierung* » are broad, only a general refusal on its part would constitute an abuse (131). Thus as conclusion, with up to now only one exception (132): the German Länder ius tractatuum is an autonomous but dependent one (133). Although normally not part of the treaty-making competence as laid down in article 32 III of the Basic Law, Länder contracts or agreements of a private character — so a recent trend in the German doctrine (134) — can exceptionally fall under this head of power if their aim is closely related to the fulfilment of public duties. Moreover, also the conclusion of agreements with decentralised sub-divisions of states and public state corporations can — if endowed with some form of limited international personality — come under article 32 III of the Basic Law (135). Finally, and here does not exist any controversy, the Länder do not act

(130) See 'BVerfGE, 370 (the Port of Kehl case) 1953; Bernhardt (ftn. 5), p. 173-174; Skumski (ftn. 5) p. 17-18; von Mangoldt-Klein (ftn. 59), p. 793; Maunz, Dürig, Herzog (ftn. 93), p. 8, 22; G. Doeker, Foreign Relations and the Federal States : the Treaty-Making Power of Constituent Members of Federal States, in Festschrift Löwenstein, Tübingen, 1971, p. 113-114; Bernier (ftn. 1), p. 42; Blumenwitz (ftn. 1), p. 92; see for an extensive study, including an examination into the possible judicial control on this federal consenting power, P. Seidel, Zustimmung der Bundesregierung zu Verträgen mit auswärtigen Staaten gemäss Art. 32 III Grundgesetz, Berlin, 1975, p. 64-159; critical of this power, W. Leisner, A propos de la répartition des compétences en matière de conclusion des traités dans la République fédérale d'Allemagne, AFDI, 1960, p. 306-307.

(131) See e.g. Rojahn (ftn. 59), p. 287.

(132) See supra (ftn. 94).

(133) For the praxis, see e.g. Regehr (ftn. 94), p. 130-139; Rojahn (ftn. 59), p. 297-299; W. Rudolf, Völkerrechtliche Verträge über Gegenstände der Landesgesetzgebung, in Festschrift Armbruster, Berlin, 1976, p. 60-62; R. Bleicher, Staatsgrenzen überschreitende Raumordnung und Landesplanung, Münster, 1981, p. 108-119; for Berlin see e.g. K. Doehring, G. Ress, Staats- und völkerreichtliche Aspekte der Berlin-Regelung, Frankfurt am Main, 1972, p. 110-116, for **status** controversies (Land or no Land), see Ibid. p. 39-44, 57-59.

(134) See e.g. Rojahn (ftn. 59), p. 275; Bleicher (ftn. 133), p. 236-238; G.H. Reichel, Die auswärtige Gewalt nach dem Grundgesetz für die Bundesrepublik Deutschland vom 23 Mai 1949, Berlin, 1967, p. 158-159.

(135) See Reichel (Ibid), p. 155-156; Rojahn (ftn. 59), p. 271; J. Woehrling, La conclusion et la mise en œuvre des traités dans le fédéralisme allemand, 14 Rev. Jur. Thémis (Montréal), 1979-80, p. 102-103. This contrary to the opinion of the Bundesverfassungsgericht in the Port of Kehl case, 2 BVerfGE, 374 (1953).

as agents of the « *Bund* » (136). Their treaties and agreements are concluded in their own right.

In Switzerland, apart from a — be it criticised — independent cantonal ius tractatuum, the normal procedure in the treaty-making process also comprises a discretionary control function by the federal government, the Federal Council (art. 102 sec. 7 of the constitution). Since the official intercourse between the cantons and foreign governments normally takes place through the agency of the Federal Council (art.10 sec. 1 of the constitution), the approval provided for in art. 102 sec. 7 should not pose any direct problems. If, however, the Federal Council or another canton raises an objection to a specific treaty, and article 9 of the federal constitution clearly stipulates that such treaties shall contain nothing contrary to the confederation or to the rights of the other cantons, the Federal Assembly has to settle the dispute (art. 85 sec. 5 of the constitution). Up to now this has never occurred (137).

This signifies that in Switzerland the capacity to conclude treaties *(Vertragsbefugnis)* and the ability to actually enter into treaties *(Erklärungsbefugnis)* is normally divided (138), whereby this last power is conferred on the federal government. The treaty-making picture seems in consequence to be a bit confused and has given rise to many controversies in the doctrine. As a matter of fact, it is not always clear whether the treaty or agreement in casu has been entered into by the federation *in the name* of one or more cantons. The federal « *Erklärungsbefugnis* » is indeed rather broad and includes also the ratification of the treaty, after cantonal approval or ratification (139). Some authors state nevertheless that there is a basic presumption in favour of a cantonal treaty (140), others consider in principle the confederation to be the party to such treaties (141), yet others play down the problem as theoretical ingenuity, seen the overall federal government's responsibility (142). However, the correct approach can only be an individual case study in order to ascertain whether or not also the competent cantonal organ(s) have

(136) See e.g. von Mangoldt-Klein (ftn. 59), p. 788; Reichel (ftn. 134), p. 167; see also O.J. Lissitzyn, Territorial Entities other than Independent States in the Law of Treaties, 125 Rec. Cours 1968 III, p. 42.

(137) More general on cantonal treaty practice, see Lejeune (ftn. 95): Schwarzenbach (critical but older survey) (ftn. 97), p. 70-109.

(138) See on this expression « *Vertragsbefugnis* », « *Erklärungsbefugnis* », Blumenwitz (ftn. 1), p. 195, applying it to Switzerland, Ibid. p. 211-212.

(139) See e.g. Schwarzenbach (ftn. 97), p. 119-120; J.F. Aubert, traité de droit constitutionnel suisse, I, Neuchâtel, 1967, p. 260.

(140) For the older practice see e.g. in re Schmid, BGE 18 (1892) 198 at p. 203. See further E. His, Die Kompetenz der Kantone zum Abschluss von internationalen Verträgen (besonders Doppelbesteuerungsverträgen) 48 ZSR n. F., 1929, p. 65; F. Fleiner, Z. Giacometti, Schweizerisches Bundesstaatsrecht, Zürich, 1949, 815-816; Witmer (ftn. 97), p. 177.

(141) See e.g. Schwarzenbach (ftn. 97), p. 133; W. Burckhardt, Kommentar der schweizer Bundesverfassung vom 29 Mai 1874, Bern 1931, p. 94-95; M. Bridel, Précis de droit constitutionnel et public suisse, I, Lausanne, 1965, p. 252-253.

(142) See e.g. D. Katzenstein, Die föderale Struktur der Schweiz, Bern, 1961, p. 148; Wildhaber (ftn. 95), p. 247.

approved or ratified the treaty or agreement. If so, they have to be considered as the treaty-partner and only so can the extent of the autonomous but dependent cantonal traty-making practice be registered. This approach is not detrimental to the fact that indeed a few cantonal agreements have been concluded in the name of both the federation and the cantons (143).

Last but not least the Italian regions, which do not possess any treaty-making power yet, but have — for more than a decade now — been involved in some interesting activities in related areas, induce to a closer examination. In 1973 the region of Umbria and the district of Postdam (GDR) worked out a draft agreement of friendship and cooperation that was envisaged to come into force, be it of course not without having sought the approval of the national authorities. Rome, nevertheless, not at all pleased with such an international venture by a region, promptly instituted conflict of powers proceedings in the « *Corte Costituzionale* ». The nation's highest Court dismissed the government's argument of an « ultra vires » act by the Umbria region since it was only a draft agreement, but while affirming the exclusive national ius tractatuum, the Court did not clearly exclude the possibility of a regional ius tractatuum in the future. Although this of course not in the field of national foreign policy (144). Together with the promulgation two years later of the Presidential Decree 616, that for the first time recognised a regional competence in transnational affairs, the Italian doctrine was faced with a new and challenging constitutional feature. Some scholars took hereby a very restrictive stand (145). Others hinted in the direction of a decentralisation of foreign affairs functions (146) or of an association of the regions in the foreign affairs process (147). In a way they opted thus for a regional agency role. Yet others now did not exclude an own agreement-making power, be it then within national guidelines and with the authorisation of the national authorities (148).

Similar opinions have been voiced in Yugoslavia. This based upon the provisions of article 271, section 2 of the federal constitution, which provides — as already briefly mentioned — for a cooperation between republics and autonomous provinces and foreign states or international organisations, but clearly within the federation's foreign policy framework and its international commitments (149).

(143) See Morin (ftn. 15), p. 164-165; Bernier (ftn. 1), p. 45-46; as to the bicephalous Swiss party to such treaties, see Di Marzo (ftn. 1), p. 123-126, with a practical example on p. 85-86.

(144) See e.g. C. Talice, Rapporti internazionali e attivittà amministrative all' estero. Riserva dello Stato e attività consentite alle regioni, 128 Riv. Amm. della Rep. Ital., 1977, p. 729-731; G. Strozzi, Problemi di coordinamento tra diritto internazionale ed autonomie regionali. Le soluzione del D.P.R. 616, le Regioni, 1978, p. 933-934.

(146) G. Gessa, Le disposizioni generali del D.P.R. 24 Luglio 1977 n. 616, 30 Cons. di Stato, 1979, n. 3, p. 357.

(147) L. Condorelli, Articolo 4, Competenze dello Stato in A. Barbera e F. Bassini, I nuovo poteri delle regioni e degli enti locali. Commentario al Decreto 616 di attuazioni delle legge 382, Bologna, 1979, p. 109-110.

(148) See e.g. Morividucci 2 Ital. Yb. of Int. L. (ftn. 2), p. 223; Cassese (ftn. 48), p. 102-103.

(149) See e.g. Jelić (ftn. 58), p. 26; Kljajić (ftn. 58), p. 253-254; Mitić (ftn. 1), p. 28-29, excluding their international legal nature.

Chapter 3. The Scope of the Federated State's Treaty-Making Power

SECTION A. THE AREAS AND THE INTENSITY OF THE TREATY—MAKING ACTIVITY

The areas in which Canadian international provincial agreements can be concluded relate in principle to their exclusive or concurrent powers, as laid down in the B.N.A. Act (150) and shaped by judicial review. Whereas the transborder interaction, in so far as it has a potential effect under international law, covers a wide field : from administration of justice and agriculture, over environmental protection and energy, to transportation, the international treaty relations are basically restricted to cultural, educational and technical cooperation, whereby Quebec plays a nearly exclusive part. Quebec is also the only province employing a registrar for intergovernmental agreements, which are published in the annual report of the intergovernmental affairs department (151). Last not least two provinces, Quebec and New Brunswick are also members of an international organisation, the « agence de coopération culturelle et technique des pays francophones », in which they are *« gouvernement participant »* 152).

The German Länder have definitely a more limited treaty practice. Article 32 III of the Basic Law stipulates that Länder are competent to conclude treaties within their legislative sphere of competence. The « division of powers » articles, as laid down in the *« Grundgesetz »* (basically articles 30, 70-75) serve as guidelines for the delineation of this field. Moreover, point 2 of the 1957 Lindau Arrangement — to which will be returned later and which actually contains an unconstitutional transfer of competence (be it then a rather minor one) — comprises a federation friendly interpretation of matters which are in pith and substance, but not exclusively, federal (153).

Seen the fact now that article 32 III only refers to the legislative powers, one can ask whether this also includes a ius tractatuum in the administrative field. The doctrine answers this question in the affirmative and this with virtual unanimity (154). Indeed, if one examines the Länder treaty practice,

(150) See B.N.A. Act, section 92, especially nrs. 13 (property and civil rights), 16 (matters of a local nature), s. 93 (education), s. 95 (agriculture - concurrent).

(151) See supra ftns. (83), (117), (125), (129). See also rapport annuel, ministère des affaires intergouvernementales du Québec, 1978-79, p. 75-77, 7 international *« ententes »* are listed there, 2 with France, 1 with Italy, 2 with Gabon, 1 with Ivory Coast, 1 with the state of Vermont. Alberta also publishes a like report, although without any listing of its international agreements.

(152) See e.g. Bonenfant, Les relations extérieures du Québec, 1 Et. Internat., juin 1970, p. 86-89. Quebec is an original member, New Brunswick adhered to the convention establishing the *« agence »* in December 1977.

(153) Matters related to the application of articles 73(1) (5) and 74 (4) of the Basic Law. See also Regehr (ftn. 94), p. 150-156.

(154) See e.g. Bernhardt (ftn. 5), p. 168-173; von Mangoldt-Klein (ftn. 59), p. 785; Skumski (ftn. 5), p. 17; Reichel (ftn. 134), p. 159-166; Blumenwitz (ftn. 135), p. 96-97; some authors

one comes to the conclusion that the vast majority of them are as a matter of fact administrative agreements *(Verwaltungsabkommen)* within the competence of the Land executives. Even the few existing « *treaties* » or « *Staatsverträge* » do not relate to matters of Land legislation as such and would not have needed the approval of the Landtag (155). Bavaria (7), Baden-Württemberg (8), Rhineland-Palatinate (8) and Saarland (7) are the most active treaty-making Länder. Hesse, Bremen, Lower-Saxony and Schleswig-Holstein have yet to conclude their first international agreement. All Länder treaties, except one, have been concluded with neighbouring states (156) and cover such areas as public works, mining, hunting, fisheries, transnational parks, energy and environmental protection. Länder can also become members of international organisations, but only of such organisations which are of a strict technical nature (157). Here the Länder have not deployed any activity as yet.

In contradistinction to the German Länder practice, the Swiss cantons have concluded far over a hundred international treaties and agreements, more than half of them, however, not published. They cover fields so diverse as inter alia double taxation, police and administration of justice, the protection of copy rights, energy and technical cooperation (158). Moreover, they are not exclusively restricted to neighbouring countries. As a result now of the increase in federal powers in successive revisions of the constitution, coupled with a federal treaty-making activity in the cantonal field, the rather intensive cantonal treaty practice gradually but significantly diminished. However, in typical transborder relations, one should not underestimate the still existing treaty or agreement interactions with foreign partners. Article 9 of the federal constitution only refers to matters of public economy, neighbourly relations and police. This cannot be deemed to be a prohibitive enumeration, nor should the term « *exceptionally* » here have to mean that the canton has to refrain from treaty-activities. This term refers rather to an overall federal treaty-making power as will be seen later on. The majority of the doctrine indeed gives article 9 a broad interpretation and relates the cantonal ius tractatuum to its global sphere of competence which is however not so readily discernible in arts. 3, 11-17 of the federal constitution. While

also contend that this power to conclude administrative agreements can exceed the limits of the Länder sphere of competence, nl. in the field where Länder are empowered to implement federal legislation (arts. 84, 85 Basic Law) see e.g. Skumski (ftn. 5), p. 67; Blumenwitz (ftn. 1), p. 108. This, however, is very debatable since art. 32 III refers exclusively to the Land field of jurisdiction.

(155) See supra (ftn. 133). Rhineland-Palatinate has as only Land even concluded 4 such « *Staatsverträge* », see also Regehr (ftn. 94), p. 134.

(156) An agreement on development assistance (medical research) between Hamburg and Liberia is here the only exception, see Rojahn (ftn. 59), p. 298. See more general for a list: Fastenrath U., Auwärtige Gewalt im offenen Verfassungsstaat, in Dittmann A., Kilian M., Kompetenzprobleme der Auswärtigen Gewalt, Tübingen, 1982, p. 43-50.

(157) Therefore membership in a specialised U.N. Agency would be excluded; see also Rojahn (ftn. 59), p. 284-285.

(158) See supra (137).

such interpretation is definitely compatible with the older practice (159), in recent times it might have become somewhat more questionable. On the other hand, an overly restrictive interpretation of cantonal treaty-making to the area of mere neighbourly relations should not be adhered to either (160).

The material treaty-making powers of the Soviet Union Republics are, according to their respective constitutions, very large (161). Nevertheless, as examined above (162), a largely concurrent union jurisdiction, the principle of union paramountcy, and the centralised integration of republic and union organs, make it easy for the union to virtually completely occupy the field. Besides, the federal division of powers principle plays only a minor role in the Soviet doctrine. Without special delegation or authorisation, union republics can even enter into treaties related to the exclusive union field of competence since there are enough union checks and balances. The special case of the Ukrainian and Byelorussian membership in the U.N. amply proves this point (163). Apart from this special case, the complete union republic treaty practice is restricted to a few treaties with neighbouring states, basically in the field of road construction, forestry and agriculture (164).

Finally, in the limited number of cases where transborder agreements, by U.S. states can have effect under international law, a rather extensive area may be covered, as is of course also the case with their Canadian counterparts. This field is in principle under state jurisdiction, however, the dividing lines between federal and state powers are not always that readily traceable in U.S. constitutional law (165). That is also the reason why the delimitation of the states' field of competence in casu agreements and compacts is expressed in formula such as « *just supremacy* » of the United States, « *full and free exercise* » of federal authority (166).

(159) See e.g. Schwarzenbach (ftn. 97), p. 63; His (ftn. 140), p. 72-73; Burckhardt (ftn. 141), p. 94; Fleiner-Giacometti (ftn. 140), p. 344-345; Blumenwitz (ftn. 1), p. 110; contra Wildhager, Treaty-Making Power and Constitutions, Basel, 1971, p. 318; Di Marzo (ftn. 1), p. 30.

(160) See in that sense e.g. Wildhaber (ftn. 95), p. 248. However, see also the « *Totalrevision* » draft, art. 49 (2), (ftn. 53).

(161) See e.g. F.J.M. Feldbrugge, The Constitutions of the USSR and the Union Republics, Alphen a/d. Rijn, 1979, esp. p. 291-294.

(162) See supra Part I, Chapter 2, section A, the case of the Soviet Union.

(163) See also Medvedović (ftn. 111), p. 459-460.

(164) See supra ftns. (107), (108), (109).

(165) See e.g. Swanson (ftn. 83), p. 228, expressing some doubts as to possible intrusion into the federal sphere of competence. See more general L.H. Tribe, American Constitutional Law, New York, 1978, p. 224-421.

For the practice, see supra (ftn. 83).

(166) See supra (ftn. 85).

SECTION B., THE EXISTENCE OF AN EXCLUSIVE TREATY-MAKING POWER VESTED IN THE FEDERATED STATE ?

It should be clear from the Soviet Union survey and equally from the « *exceptional* » character of the compact clause in American constitutional law (167), that no exclusive union republic, respectively state treaty-making power exists. Also within the minority opinion in the Canadian-Quebec doctrine, which supports an already constitutionally established provincial treaty-making power (168), no distinct voices were raised in favour of such an exclusive provincial power in a specific area under provincial jurisdiction. On the other hand, the situation in Switzerland and especially in the Federal Republic of Germany calls for a closer examination.

The so-called federalist school in the Swiss doctrine, strong in the past (169) but virtually inexistent at present (170), defends indeed the existence of an exclusive cantonal treaty-making capacity. Thereby basically relying — apart from historical and teleological arguments — on a split between material and formal federal treaty-making. Article 8 of the constitution confers an overriding treaty-making ability *(Erklärungsbefugnis)* on the federation. Article 3, however, so the federalists, does not allow any concurrency or federal paramountcy in the division of treaty-making capacity *(Vertragsbefugnis)*. Such thesis has to be rejected, already for the principle reason that a general binary division of powers in material and formal ones is alien to the Swiss constitutional doctrine. Except of course if explicitly entrenched in the constitution, as is the case with article 9 and article 10 sec. 1 as regards typical cantonal treaty-making as such. Consequently, article 8 cannot be but an independent head of power with an overall scope, reversing the persumption in favour of a cantonal competence as stipulated in article 3 of the federal constitution. Besides, article 9 of the federal constitution speaks clearly of an exceptional cantonal treaty-making, the normal situation being that the federation takes the initiative. Last not least, apart from these theoretical contemplations, the praxis in the past decades is a clear example of the federation's concurrent and overriding treaty powers. These may of course not be abused and may not lead to a distortion of the federal-cantonal balance (171).

The Federal Republic of Germany is the only federal state in which the question whether or not the constitutent states have an exclusive ius tractatuum has not yet been solved. It is not my intention here to engage in a

(167) See Henkin (ftn. 55), p. 228 et seq.

(168) See supra (ftn. 41).

(169) See e.g. Schwarzenbach (ftn. 97), p. 26-64; His (ftn. 140), p. 36-67.

(170) See still Bridel (ftn. 141), p. 349-351.

(171) See e.g. Aubert (ftn. 139), p. 258; Wildhaber (ftn. 159) p. 310; Hangartner, Die Kompetenzverteilung zwischen Bund und Kantonen, Bern, 1974, p. 106-109; Witmer (ftn. 97), p. 169-170.

lengthy theoretical « *exposé* » of the pro's and contra's of an exclusive Länder treaty-making competence including references to the constitutional tradition, the preparatory works, the position of art. 32 III in relation to other articles in the Basic Law, the « *ratio constitutionis* » or grammatical or even teleological arguments. Therefore I will basically point at two — so I deem — arguments of principle. The first in favour, the other one against an exclusive Land ius tractatuum. On the one hand, article 32 III — as it stands — does not contain any other limitation than the reference to the Land sphere of competence. On the other hand, article 32 III — read in connection with article 32 I, which confers the general foreign affairs powers on the Bund as an exception to article 30 (the power presumption in favour of the Länder) — cannot as such in its turn be an exception to the exception, restricting the federal treaty-making power to its federal sphere of competence (172).

One has now to take into account that this stalemate situation did not only emerge in the doctrine, but equally soon in the practice, whereby several southern German Länder insisted on an exclusive treaty-making power within their sphere of competence. However, these Länder were not really prepared to engage on a full scale in treaty relations of their own and the federal government would probably not have approved of a like substantial engagement either. Therefore Bund and Länder were compelled to arrive at a compromise, which got its concrete form in the Lindau Arrangement of 14 November 1957. In exchange for minor concessions, actually transfers of powers to the federation — to which I have referred earlier (173) —, but principally in exchange for an overall delegation of Länder treaty-making capacity to the Bund, the Länder got a fully recognised and absolute right of consent to federal treaty-making in their exclusive sphere of competence. This means in concreto that the federal government, if it wants to enter into an agreement or treaty whose object is fully or even partially covered by Land jurisdiction, has to seek the preceding consent of the Land governments (point 3 of the said agreement). To facilitate this relationship, a group of Länder representatives had to be constituted as Bund-Länder interlocutors during the negotiations (point 4.2). This then became the standing Treaty Commission, which was installed in Bonn in July1958 (174).

(172) See e.g. defending an exclusive Länder ius tractatuum, Bernhardt (ftn. 5), p. 140-154; W. Rudolf, Internationale, Beziehungen der deutschen Länder, 13 ArchVR, 1966, p. 57-60; (in detail) Reichel (ftn. 134), p. 194-240; Maunz, Dürig, Herzog (ftn. 93), p. 9-17; Blumenwitz (also in detail) (ftn. 1), p. 84-91, 93-101; Bleicher (ftn. 133), p. 207-219. See on the other hand defending a concurrent and paramount federal treaty-making power, von Mangoldt-Klein (ftn. 59), p. 784-786; A. Bleckmann, Grundgesetz und Völkerrecht, Berlin, 1975, p. 204; Rojahn (ftn. .1), p. 266- 267, 287-289. Explicitly leaving the question open, see e.g. Seidel (ftn. 130), p. 61; Bernier (ftn. 1), p. 41-42.

(173) See supra (163).

(174) See e.g. H.O. Bräutigam, Völkerrechtliche Praxis der Bundesrepublik Deutschland im jahre 1957, 20 ZaöRV, 1959-60, p. 113-117 : C. Hirsch, Kulturhoheit und auswärtige Gewalt, Berlin, p. 63-84; Blumenwitz (ftn. 1), p. 101-103. On the functioning of this Standing Treaty Commission, see e.g. W. Busch, Die Lindauervereinbarung und die ständige Vertragskommission der Länder, München, 1969, p. 94-98.

The consequence of this compromise is that the Länder still retain their own treaty-making power, which exists further but now together with that of the Bund, who will now in most cases take the initiative (175). This arrangement can the best be described as a « *gentlemen's agreement* », as a « *modus vivendi* ». It explicitly leaves open the constitutional question of federal concurrency or Länder exclusiveness as such (point 1). Consequently, apart from a minor and indeed constitutionally debatable shift in the Bund-Länder power balance in point 2 of the Lindau Agreement, the pivotal section on delegation (not transfer of powers) in point 3 cannot be deemed unconstitutional (176).

SECTION C. EXCURSION. THE FEDERAL TREATY-MAKING POWER UNDER DIRECT FEDERATED STATE'S CONTROL

The concept « *direct federated state's control* » is actually the reverse of the situation examined in the section on the autonomous but dependent federated state's treaty-making power. Therefore it relates to the study of a possible dependent federal ius tractatuum. Since it is not within the purpose of this study to examin the characteristics of the federal treaty-making power, I nevertheless deem it necessary, within the global framework of the federated state's ius tractatuum, to look into the only possible form of a genuine co-treaty making responsibility between the constituent state and the federal or national authorities (177). Although it is in this case the federation which

(175) The delegation of powers is complete since the federation concluded the treaties in its own name. Contra : the viewpoint of the Bavarian State Government, which considers the delegation of powers as partial, only comprising a delegation of the « Erklärungsbefugnis », The actual treaty-making capacity would remain in the hands of the Länder. This is wishful thinking on the part of Bavaria, the text and especially the practice from the Lindau compromise contradict this; see also Regehr (ftn. 94), p. 163-164; Blumenwitz (ftn. 1), p. 190-191.

(176) See e.g. Weiser (ftn. 93), p. 133-135; Blumenwitz (ftn. 1), p. 103-106; Bleckmann (ftn. 172), p. 208-209; Rojahn (ftn. 59), p. 292-293. In order to erase doubts on the constitutionality of the Lindau Arrangement and equally to make it clear that the federal treaty-making power is indeed full and overriding, the « *Enquete Kommission* » on the revision of the Basic Law proposed the inclusion of a « too » together with the entrenchment of the Lindau transfer of powers and delegation of powers (point 2 and 3) in article 32 III, see Schlussbericht der Enquete Kommission « Verfassungsreform » des deutschen Bundestages, Beratungen und Empfehlungen zur Verfassungsreform. Vol. II, Bund und Länder, Bonn, 1977, p. 231, 239 - 241.

It is further not within the scope of this study to elaborate on the federal treaty praxis under the Lindau Arrangement, which is considerable, especially in the field of cultural agreements, see e.g. Rudolf (ftn. 133), p. 69-70; Regehr especially (ftn. 94), p. 159-173.

(177) This then apart from the few cases in which a real co-treaty-making exists, see e.g. in the case of Switzerland, Di Marzo (ftn. 1), p. 123-126, 85-86, in the case of USSR, Uibopuu (ftn. 1), p. 254-255; and supra Part I, Chapter 1, sec. A.; in the case of the Federal Republic of Germany, Blumenwitz (ftn. 1), p. 191 (German-Bavarian-Austrian treaty in 1956); in the case of Canada, co-treaty partners to the convention establishing the A.C.C.T., but not with the same status, see also supra (ftn. 162).

is holder of the treaty-making power, the component unit is a full partner in that it has to consent and thus can veto each federal treaty initiative. This then in contradistinction to all other forms of cooperative federalism in which the federation retains the overriding control over its treaty relations (178).

(178) For these various other forms of cooperation, see e.g.
In **Argentina,** consultations with authorities, Teson (ftn. 16), p. 6.
In **Australia,** where the Commonwealth government is faced with implementation problems, a machinery of consultation, especially in the field of the ILO conventions (already since 1947); see (ftn. 20) the Queensland Treaties Commission, first report p. 3-4, 22-25. See further on cooperation in negotiations, G.C. Sharman, The Australian States and External Affairs : an exploratory note, 27 Austr. Outlook, 1973, p. 308-309; Burmester (ftn. 19) p. 258 and 280-81, on a new arrangement between Canberra and the states (21.10.1977) enabling a better information flow on treaty matters to the states and providing for the inclusion of state representatives in Australian delegations.
In **Austria,** an amendment of the Federal Constitutional Law in 1974 (art. 10 (3)) stipulates that before the conclusion of treaties, which require implementing measures within the meaning of art. 16 or which in other ways touch upon the area of jurisdiction of the Länder, the Länder must be given opportunity to state their position. This was already in the practice so. These Länder powers are strictly of an advisory nature. See e.g. EB zur RV, 182 BlgNR, 13 GB, 15 (explicatory note to the constitutional amending bill), circular letter of the constitutional division of the federal Chancellery 21.1.1975, GZ 600472/2 - VI/1/75; H. Mayer, Die Kompentenzverschiebungen zwischen Bund und Länder, in H. Mayer et al., Neuerungen im Verfassungsrecht, Wien, 1976, p. 25-26; E. Härle, Die Kooperation bei völkerrechtlichen Verträgen im Bundesstaat, 59 Die Friedenswarte, 1976, p. 130-138, 141-142. A really advanced form of cooperation can be found — within a treaty framework — in the Austrian-German physical planning commission (since 1973), see Fröhler et al. (ftn. 25), p. 76-78.9
In **Belgium** article 81 of the Special Law of August 8, 1980 on Institutional Reforms provides for the association of the regional and also of the community executives with the negotiations of international agreements. This association is actually not much more than a non-binding preliminary consultation. However, this consultative phase is a compulsory one. Its non-observance leads to a referral of the matter to the concertation committee (art. 33 sec. 1 Ordinary Law on Institutional Reforms, 9 August 1980), see e.g. Lejeune (ftn. 2), p. 62-68; Van de Craen (ftn. 29), p. 546.
In **Canada** there exist different ways and means of federal-provincial cooperation in treaty matters, unfortunately most of them still on an ad hoc basis, see e.g. Jacomy-Millette (ftn. 89), p. 295. This notwithstanding the existence of a federal-provincial coordination division in the external affairs department, this since 1967. Reference can also be made to consultation procedures concerning international economic conferences (esp. GATT), to federal-provincial indemnity agreements (f.ex. within the framework of the Columbia River Treaty), to provincial participation in treaty negotiations and last not least to cooperation in the field of foreign development aid; see e.g. Canada-U.S. Relations, Standing Committee of the Senate Gr. Far. Aff., Dec. 1975, vol. I, nr. 21, p. 45-47, 49-50; P. Martin (ftn. 34), p. 33, 37-38; C.V. Svoboda, Federal-Provincial Cooperation in Development Assistance, Internat. Persp. May-Aug., 1978, p. 25-28.
As far as the **Federal Republic of Germany** is concerned, two basic patterns of cooperation can be distinguished. First there is the constitutionally entrenched right of a Land *« to be heard »* if a treaty affects its special situation (art. 32 II Basic Law). Second there is the consultation procedure foreseen in art. 4 of the Lindau Arrangement, broader in scope since it deals with the globality of the Länder interests. This also includes the practice that Land representatives can be member of the federal delegation in international conferences or treaty negotiations, this on the basis of a Bund-Länder compromise of 1968. Last not least in the area of international cultural relations, there exists a rather well developped Land participation; see e.g. Blumenwitz (ftn. 1), p. 222-223, 238-244; Härle (Ibid), p. 101-126, 142-143; H. von Meibom, Die Mitwitking der Länder im Bereich der auswärtigen Gewalt, 21 NJW, 1968 II, p. 1607-1610; Regehr (ftn. 59), p. 174-190; Rojahn (ftn. 59), p. 279-281.

Two scenarios are possible. The constitution or an implementing statute grant the federated state such power, or the federated state delegates its power to the federation, however, retaining a right of direct control. The only example of this last possibility has just been studied, namely the Lindau Arrangement in the Federal Republic of Germany. Eo ipso — and this should be emphasised — notwithstanding the fact that federal concurrency

Nothing in the **Italian** constitution prevents the regions from participating in certain treaty negotiations. Legal opinion actually supports their possessing a right to be consulted in treaty-matters affecting their sphere of competence or their interest. Consequently a contribution to the formulation of foreign policy in that regard is possible. See art. 52 of the Statute of Sardinia, which provides for an express consultation of the region in matters of commercial treaties. The other statutes for regions with a special status contain an implied consultation clause in that the president of the regional executive *(Giunta)* can attend national cabinet meetings whenever matters of direct concern to the region are discussed, see e.g. art. 21 Statute of Sicily; art. 47 Statute of Sardinia, art. 44 of the Valle d'Aosta Statute; art. 34 of the Statute of Trentino-Alto Adige; art. 44 of the Statute of Friuli-Venetia-Julia. See further Morividucci (ftn. 2), p. 206-207, favouring an extension of this regulation to all the regions.
Switzerland has a long tradition of cantonal consultation and participation in federal treaty-making. The mediating role of the Federal Council, already existent in the cantonal treaty-making process, lends itself to such practice. See a similar provision as in art. 32 II of the Basic Law in point 12b of the directives of the Federal Council concerning the preliminary procedure in matters of legislation (6.5.1970, BBl, 1970, I, 993); see further Katzenstein (ftn. 142), p. 147-149; L. Wildhaber External Relations of the Swiss Cantons, 12 Can. Yb. Intern. Law, 1974, p. 212-213; Härle (Ibid), p. 126-140; Witmer (ftn. 97), p. 171.
The **Soviet Union's** federal structure is characterised by an inherent institutionalisation of a centralised cooperation between the union and the republics. The domain of foreign affairs is here no exception. References can i.a. be made to the « ex officio » union republic representation in the organs in which the ius tractatuum is vested, nl. the President of the USSR Supreme Soviet (art. 120, 121/6) and the Council of Ministers of the USSR (art. 129/2; 136/6 of the constitution); the interbranch control by the union foreign affairs department (art. 135/2 constitution), the role of the permanent missions of the union republics at the seat of the federal government, and last not least the role of the commission for foreign affairs of the Soviet of the Union and the Soviet of Nationalities. See also the Law on the Procedure for the Conclusion, Execution and Denunciation of International Treaties, 6.7.1978 (English translation) 17 ILM 1978, art. 7, 14. See also Aspaturian (ftn. 111), p. 134-159, 164, 171; Meissner (ftn. 111), p. 23-29; Michailov (ftn. 111), p. 36; I.I. Lukashuk, Völkerrechtssubjektivität der sowjetischen Unionsrepubliken 15 Osteur. Recht 1969, p. 338-339.
Although there is no *« expressis verbis »* union-state cooperation practice in the **United States of America** in this field, there are consultations with states on an ad hoc basis if their interests are particularly affected, e.g. in the case of border treaties. In such cases state representatives are invited to join the federal delegation. A coordinating role in this cooperation plays the annual Conference of Governors and the special assistant to the Secretary of State for liaison with the Governors in the field of foreign affairs. See e.g. Bernier (ftn. 1), p. 197-198, see also N.P. Mitchell, State Interests in American Treaties, Richmond Va, 1936, p. 16-51, 150-156.
In **Yugoslavia** the cooperation principle in treaty matters is clearly stipulated in art. 271 sec. 1 of the federal constitution. Apart from a federated republic and a provincial right of treaty initiative (art. 4/3), articles 23 to 30 of the Unified Treaty Law (see ftn. 57) contain rather large powers of consent on the part of the republics and the autonomous provinces. See also art. 286 sec. 5 of the federal constitution. See further Jelić (ftn. 58), p. 23-25; Kljajić (ftn. 58), p. 252; Mitić (ftn. 1), p. 33-40. See further in the constitutions of SR Bosnia and Hercegovina : art. 307; SR Croatia : art. 332 (8); SR Macedonia : art. 299 (9); SR Montenegro : art. 309; SR Serbia : art. 313 (1); SR Slovenia : art. 317 (1); SAP Kosovo : art. 293 (1); SAP Vojvodina : art. 306)(1).

or Länder exclusiveness have been left untouched, this arrangement is in so far a concession to exclusive Länder treaty-making powers in that an absolute right of consent on their part has been recognised (179).

Finding examples of the first scenario is more difficult. There exists nevertheless a rather interesting case in Yugoslav constitutional law. Articles 23 and 27 of the Unified Law on the Conclusion and Implementation of International Treaties of 1978, putting into effect article 271 (1) of the federal constitution, provide for an explicit consent by the competent organs of the republics or autonomous provinces to the conclusion of federal treaties, which might affect them or for whose performance republican or provincial legislation would be necessary. This consent, however, is only in so far a veto right in that it can prevent the federation from entering into a treaty on secondary matters, not however in that it could impede Belgrad from concluding a treaty which is deemed indispensable to realise the aims of Yugoslav foreign policy (180).

Apart from this Yugoslav example, does now the Belgian constitutional constellation also leave room for such a co-treaty-making responsibility under the form of a direct control by the French and Flemish communities ? At first sight no, since the approval or assent by the respective Councils, which is indeed for all treaties or agreements within their sphere of competence compulsory (181) in so far as they relate to international cooperation in cultural, educational and personalised matters (182), does not constitute an authorisation or « nihil obstat » for ratification at the address of the King or the national government (183). Consequently, *« stricto sensu »* there does not exist a veto right on the part of a community.

However, stating that the assent is devoid of any legal effect (184) would be a grave understatement. Without assent these treaties cannot become enforceable in the internal community legal order. This would not be that serious since in most of such treaties or agreements the community would not be affected or its citizens no obligations imposed upon. But once again the binary devolution of powers is not free from surprise effects. Indeed, in the end an executive organ inevitably has to supplement a legislative one, and we

(179) See also Blumenwitz (ftn. 1), p. 104-106.

(180) See also Mitić (ftn. 1), p. 39-40.

(181) See art. 59bis § 2, 1 and 2 and § 2bis of the constitution and articles 4 and 5 of the Special Law on Institutional Reforms (8.8.1980).

(182) See e.g. Y. Lejeune, L'assentiment des conseils culturels aux traités internationaux de la Belgique relatifs à la coopération culturelle, 14 R.B.D.I., 1978-79, p. 200-203, equally referring to the multiple consent or assent in the case of the so-called mixted treaties *(rationi loci* or *ratione materiae* relating to more than one sphere of competence). See critical on the requirement of consent, J. Verhoeven, Les formes de la coopération culturelle internationale et la loi du 20 janvier 1978, J.T., 1978, p. 375-377.

(183) See e.g. Lejeune (ftn. 29), p. 23; Van de Craen (ftn. 29), p. 545. The assent can the best be described as an « acte de haute tutelle ». It does not transform international law into community law.

(184) See e.g. Lejeune (ftn. 182), p. 204-205.

have now entered this stage (185). This means that in the first place not the King but the community executive has to honour the international obligations which arise from the treaty in casu. Consequently, the national treaty-making power in such cultural, educational and personalised matters, although plenary in theory, is in reality nothing more but a « *nudum ius* » (186), and exactly this evolution now sheds a different light on a co-treaty-making responsibility between national and community authorities.

PART II. THE INTERNATIONAL ASPECTS OF THE FEDERATED STATE'S IUS TRACTATUUM

Apart from German Länder constitutional law, which contains a — be it limited — set of principles on the exercise and role of Länder treaty-making, most of the other examined constituent states hardly offer any comprehensive insight into their internal treaty-making procedures and the place of their ius tractatuum in internal law. Consequently, the subsequent examination cannot be but selective and will in general refrain from theoretical speculations (187).

1. CANADA

Because no canadian constitutional text contains anything on provincial treaty-making power for the simple reason that this power is only potentially existent in constitutional customary law or derives from a federal government's delegation of power, one has to look at individual provincial legislation in order to find anything on its concrete exercise.

According to the Canadian constitutional tradition, the treaty-making capacity is vested in the head of the executive, in casu the Lieutenant-Governor, and exercised through the Cabinet, the Lieutenant-Governor-in-Council. Only in a limited number of agreements a formal procedure is used. Herein of course also lies a strong presumption in favour of their bindingness. This procedure can « *grosso modo* » be described as follows : a « *general* » act like a reciprocal enforcement of judgments act or a motor vehicle act, but also an act « *ad hoc* », for example for the conclusion of an

(185) See e.g. Van de Craen (ftn. 29), p. 525-528.

(186) The Flemish Council has e.g. given such assent to the European Charter « Sport for all », which is a bit strange of a case since it concerns a recommendation by the Council of Europe and not as yet a convention, on 24 April 1981 (Mon.b. 19.6.1981, p. 7898). Definitely more important is the assent to the «Verdrag over de Nederlandse Taalunie » (Dutch Linguistic Union Treaty) on 24 July 1981 (Mon. b. 10.9.1981, p. 11241), the treaty was ratified on 27.1.1982 and it came into force on 1 April 1982, and to the International Covenant on Economic, Social and Cultural Rights (1966), Decree of 25 January 1983 (Mon. b. 26.2.1983, p. 2702). Also the Council of the French Community assented to this U.N. Covenant, Decree of 8 June 1982 (Mon. b. 15.10.1982, p. 12011).

(187) See in that regard for example the « *language instruction agreements* » in Argentina (Santa Fé and Buenos Aires), these were solely within the sphere of competence of the provincial government. Whereas the Entre Ríos compacts with the international joint commission of Salto Grande were subject to approval by the provincial parliament, Teson (ftn. 16), p. 11-12.

agreement on the construction of a bridge, contains an article authorising the Lieutenant-Governor-in-Council or someone designated by him to enter into a international agreement. On basis of this a cabinet member or senior civil servant can conclude the compact. The then concluded agreement may then be ratified by an order-in-council.

All provinces have a coordinating body for intergovernmental affairs, be it a simple coordinating officer, or a unit in the premier's office, or even as in the case of Alberta, Saskatchewan, Ontario and Quebec a department (188). In Alberta and Quebec the act organising such a department equally deals with intergovernmental agreements (189). In Alberta in a too general way but in Quebec the provincial « *entente* »-making power is subject to a number of regulations. « *Ententes* » are normally signed by the minister for intergovernmental affairs and subsequently approved and ratified by the Lieutenant-Governor-in-Council. No mention is made of a possible role of the National Assembly, probably because the great majority are executive agreements (190).

2. THE UNITED STATES OF AMERICA

In the United States of America only six state constitutions refer to intergovernmental relations (191) and only two of these explicitly include intercourse with foreign states. These are the Michigan constitution, but then only referring to Canada and its political sub-divisions and the Virginia constitution, which refers generally to foreign states. In Michigan such international interaction has to be authorised by law, in Virginia the foreign intercourse power is vested in the Governor. In a few traceable cases, for example relating to public works' compacts or in the case of the Louisiana-Quebec cultural agreement, the state legislature authorised, voted even the appropriation of funds, or at least consented to the conclusion of the compact. (192). Seen the fact now that only a limited number of them are potentially binding under international law and that state constitutional law is completely silent, it is very difficult to borrow principles from the federal constitutional law as regards the distinction between types of agreements or even regarding the rule that a state agreement should be considered as the supreme law of the state (193).

3. THE FEDERAL REPUBLIC OF GERMANY

Of all the eleven Länder constitutions eight vest the treaty-making power in the head of the executive, the Minister-President, in West-Berlin the

(188) See e.g. Lawford (ftn. 90), Rand (ftn. 117), Di Marzo (ftn. 1), p. 70-74.

(189) See supra (ftn. 46).

(190) See arts. 15-21 of the I.A.D. Act, S.Q. 1974, c. .15. See also A. Jacomy-Millette, l'Etat fédéré dans les relations internationales : le cas du Canada, 14 Can. Yb. Intern. L. 1976, p. 17-19.

(191) See the constitutions of Alaska : art. 12, sec. 2; Hawai : art. 16, sec. 5; Michigan : art. 3, sec. 5; Oklahoma : art. 6, sec. 8; Texas : art. 4, sec. 10; Virginia : art. 5, sec. 7, 3°.

(192) See e.g. Rand (ftn. 117), p. 78-80; Rodgers (ftn. 88), p. 1027-1028, Ibid., Conclusion of Quebec-Louisiana Agreement, 64 AJIL, 1970, p. 380.

(193) See also Forkosch (ftn. 122).

Governing Mayor; the three others : Bremen, Hamburg and North-Rhine Westphalia in the Land government (194). West-Berlin will however be excluded from this study because of its special status (195). Only the Bremen constitution falls short of a specific treaty-making clause, so the principles laid down in art. 59 II of the Basic Law are in analogy applicable. The constitution of Baden-Württemberg (art. 50), Bavaria (art. 72.2), Hamburg (art. 43), Hesse (art. 103), North Rhine-Westphalia (art. 66), Saarland (art. 97) and Schleswig-Holstein (art. 25.2) all make the distinction between executive agreements and agreements or treaties relating to legislative matters. Only the last ones need the approval of the Landtag. The constitutions of Lower-Saxony (art. 26.2.) and of Rhineland-Palatinate (art. 101) according to the doctrine and practice, which is only relevant in the case of Rhineland-Palatinate, do not make such clear distinction.

The approval of the Landtag has to be given in the form of a law, except in Bavaria where it is a Landtag resolution. In all the Länder does such act — which has up to now only been adopted in Rhineland-Palatinate in a few cases — authorise the ratification by the Land government and transform the agreement or treaty into domestic Land law. Indeed in the great majority of cases only executive agreements have been concluded which have been implemented by a governmental order. Apart from the Hesse constitution, which contains a rather remarkable article (67.2) stipulating that treaty legislation shall take precedence over Land law, other constitutions adopt the principle laid down in the Basic Law (art. 59 II) that Land treaties or agreements rank equal in status with ordinary Land law or Land executive orders (196).

4. THE SWISS CONFEDERATION

In the Swiss cantons there exists first of all an interesting feature of direct democracy, also in treaty matters, namely the referendum. Such a referendum can be compulsory and/or optional for all treaties or for only a certain category of treaties, namely those which modify cantonal ordinary or constitutional law, which are of a special importance, or entail financial burdens exceeding certain sums. Fourteen cantonal constitutions also provide for a so-called referendum of the authorities, meaning that the cantonal parliament or a group of its members may call a referendum (197). Another

(194) Whereby the Bremen and Hamburg Land Government are called Senate (arts. 118.1 and 43 Land constitution respectively). Since the Länder do not possess a « *ius legationis* » as such, the treaty negotiations have to be conducted by ad hoc appointed Länder representatives whom have been given full powers for their specific missions, or through the agency of the Bund, see e.g. Doeker (ftn. 130), p. 113; Weiser (ftn. 93), p. 140-141.

See further Baden-Württemberg (art. 50); Bavaria (art. 47.3); Hesse (art. 103); Lower-Saxony (art. 26.1); North Rhine-Westphalia (art. 57); Rhineland-Palatinate (art. 101); Saarland (art. 97); Schleswig-Holstein (art. 25.1).

(195) See supra (ftn. 133); see also Woehrling (ftn. 135), p. 105 (89), instead of the consent of the German federal government, that of the Protecting Powers is probably needed.

(196) See e.g. Sonn (ftn. 9), p. 119-126; Regehr (ftn. 94), p. 130-138; Bleckmann (ftn. 172), p. 227; Woehrling (ftn. 135), p. 104-106; Di Marzo (ftn. 1), p. 89-90.

(197) A compulsory referendum must take place in the cantons of Zurich, Lower Unterwald, Glarus, Soleure, Appenzell (Outer Rhodes), Grisons, Aargau, Thurgau, Valais, Jura (art. 77f).

interesting feature is that the treaty-making power is in a number of cantons not vested in the executive but in the cantonal parliament, which then not only approves but also authorises the conclusion of a treaty or agreement. Moreover the approval by the cantonal parliament is not equivalent to a cantonal statute and does not transform the treaty or agreement into domestic cantonal law. A cantonal agreement is an independent source of law. The majority of the cantonal constitutions does not provide for the conclusion of executive agreements. Only exceptionally a cantonal government is granted a distinct power to enter into such an agreement (198).

5. THE U.S.S.R.

Article 80 of the U.S.S.R. Constitution, attributing the union republics the « ius tractatuum », can be found back in an identical wording in the constitutions of the 15 union republics, promulgated in April 1978 (199). In addition to this general treaty-making power, each union reiublic constitution contains in its catalogue of powers another reference to its general foreign affairs competence (200). The treaty-making power as such is vested in the presidium of the Supreme Soviet of the union republic (201), whereas the Council of Ministers of the union republic exercises leadership in the field of relations of the republic with foreign states and international organisa-

An additional optional one is provided for in Lower Unterwald and in the Jura (art. 78/c). An optional one exists for all treaties (Lucerne, Schwyz), or for special treaties, or for these which relate to legislative matters (Bern, Uri, Basle City and Neuchâtel). An optional referendum is held in Fribourg, Schaffhausen and St. Gall in the case a treaty contains additional financial burdens. Finally the so-called referendum of the authorities may take place in Zurich, Berne, Lucerne, Uri, Schwyz, Zug, Soleure, Basle City, Schaffhausen, St. Gall, Grisons, Aargau, Thurgau, Vaud. See L. Wildhaber, Rapport suisse, Colloque : Les Etats fédéraux dans les relations internationales, Bruxelles, 1982, p. 9-10.

(198) See e.g. Wildhaber (Ibid.), p. 10; Di Marzo (ftn. 1), p. 90-91; See also, although not complete and up to date, Z. Giacometti, Das Staatsrecht der schweizerischen Kantone, Zürich, 1941, p. 386, 483-485.

See further as to cantonal constitutional provisions : Berne : art. 26 (4); Zürich : art. 31 (1); Lucerne : § 50; Uri : art. 59 (g); Schwyz : § 42; Upper Unterwald : arts. 70 (13), 76; Lower Unterwald : art. 65; Glarus : art. 44 (7), 52 (12); Zug : § 47; Fribourg : art 52 (1); Soleure : art. 31 (2); Basle City : § 39 (f); Basle Rural : §§ 18 (3), 23 (2); Schaffhausen : arts. 42 (2), 66 (1); Appenzell (Outer Rhodes) : art. 48 (5); Appenzell (Inner Rhodes) : art. 30 (4); St. Gall : art. 55 (6); Grisons : art. 33; Aargau : art. 33 (c), 39 (d); Thurgau : § 36 (e); Vaud : art. 52 (3); Valais : art. 44 (10); Neuchâtel : arts. 39 (1), 52; Geneva : art. 128 (1)(2); Jura : art. 84 (b), 92, 2 (a).

(199) Namely in art. 75 of the constitution of the RSFSR and the Tadzhik SSR, as well as in the constitutions of the Kazakh SSR (art. 71); Estonian SSR (art. 72); the Kirgiz, Moldavian, and Turkmen SSR (art. 73); the Armenian, Azerbaidzhan, Byelorussian, Latvian and Ukrainian SSR (art. 74); the Georgian, Lithuanian and Uzbek SSR (art. 76).

(200) See art. 72 (15) in the constitution of the RSFSR, for the other union republics, see Feldbrugge (ftn. 161), p. 294.

(201) See art. 115 (14) in the constitution of the RSFSR (ratifies and denounces treaties), for the other republics see Feldbrugge (Ibid.), p. 309.

tions (202). However, there still does not exist any union republic legislation equivalent to the union law on the procedure for the conclusion, execution and denunciation of international treaties (203).

PART III. THE FEDERATED STATE'S TREATY-MAKING POWER IN CONFLICT

As far as federated state agreements are concerned with a (potentially) binding character under international law, I will in this last part briefly elaborate on the international legal effects of an equally potential but at present still very theoretical « *ultra vires* » conflict. Indeed, up to now no practical case is known of such conflict, caused by an over-stepping — be it by the federation, be it by the federated state — of their respective treaty-making sphere of competence.

Chapter I. Excess of Competence by the Federation

The principal condition for such an encroachment upon the component unit's sphere of competence is the lack of a concurrent and overriding federal treaty-making power, or in case such power exists, the absence of the obligatory federated state consent or cooperation.

As examined above, only the division of treaty-making powers in the Federal Republic of Germany may leave room for such a potential conflict. However, also there the conflicting views have been reconciled in a « *modus vivendi* », the Lindau Arrangement, as discussed above. The absolute consent requirement in this Bund-Länder compromise may be seen as a last but important remnant of exclusive Länder powers. But even this Länder consent has not been left unaffected by the « *concurrency-exclusiveness* » conflict. Indeed, on the one hand it may be regarded as only a procedural limit if one defends the viewpoint of the concurrent federal ius tractatuum; on the other hand, it may also be considered as a substantive limit affecting the treaty-making capacity of the Bund as such, if one defends the existence of an exclusive Land ius tractatuum (204). This distinction is important if one wants to assess the effects in international law of a trespass by the federation, namely a breach of

(202) See art. 125 (5) of the RSFSR constitution, for the other union republics, see Feldbrugge (Ibid.), p. 314.

(203) See also T. Schweisfurth, Die Neuregelung der Vertragsgewalt (Treaty-making Power) in der Sowjetunion, 41 ZaöRV, 1981, .P. 370-371, who expects such legislation in the future, in the first place then for the Byelorussian SSR and the Ukrainian SSR. It remains to be seen, so the author, whether of not the other republics will also enact a like law.

(204) See for the definition of procedural and substantive limit, Di Marzo (ftn. 1), p. 154.

point 3 of the Lindau Arrangement and the conclusion of a treaty without Länder consent. Blumenwitz is the only scholar who has examined this problem up to now. However, he does not distinguish between the substantive and procedural character of the Länder consent which the Bund encroached upon. The author reaches the conclusion that such a treaty is only voidable, seen the presumption in international law that a sovereign state is endowed with full treaty-making powers. The Länder can now invoke such voidability, but seen the fact that they are devoid of any « ius legationis », they will have to compell the Bund to do so, this of course only by the means of internal judicial recourse (205). This seems indeed to be the only plausible solution. Although if one considers the Länder consent as being a substantive limit, imposed on the Bund —as a large part of the German doctrine still does — the normal result of a breach by the Bund would have been the voidness of the treaty-making and not the voidability. However, the basic presumption of full international personality of the federation precludes any voidness or nullity as such.

Definitely less complicated is the case in Yugoslavia where the federation is holder of full treaty-making powers. A non-observance of the cooperation or consent procedure (206) in matters of no specific significance for Yugoslav foreign policy can only lead to a voidability of the federal treaty with the above described consequences.

It is obvious that the situation is cleared if the federated state(s), instead of invoking the invalidity, approve(s) of the federal treaty « *post factum* ».

Chapter 2.
Excess of Competence by the Federated States

In all examined federal states does the federation possess its own exclusive treaty-making sphere of competence. Moreover, it mostly exercises a control on the constituent state's treaty-making power. These are the two limits the component unit has to respect. The one is definitely of a substantive nature dealing with the capacity as such, the other one is more of a procedural or a formal nature since it leaves intact the federated treaty-making power as such.

This distinction, however, is not supported by everyone in the doctrine. There is a not to be underestimated current, especially among German scholars, to consider the federal consent as equally a substantive component of the constituent state's treaty power (207). However, these authors by generally referring to « *invalidity* », do not seem to realise the consequences of such interpretation. A material or substantive excess of competence by the constituent state leads, on basis of the « *renvoi* » of international law to the

(205) See Blumenwitz (ftn. 1), p. 205-211.

(206) See supra (ftn. 180).

(207) See e.g. Rudolf (ftn. 172), p. 70-71; Rojahn (ftn. 59), p. 287; Reichel (ftn. 134), p. 168-169; Blumenwitz (ftn. 1), p. 170.

respective constitutions, to the conclusion of the nullity of the treaty. Indeed, an entity enters into an agreement for which it is devoid of any personality. It is indeed correct to state that article 46 of the Vienna Convention on the Law of Treaties cannot even *« de lege ferenda »* be applied here since not a manifest violation of internal law is at issue, but an absence of any legal competence altogether (208). Nevertheless already considering the federal government's consent as an inherent part of the federated state's ius tractatuum is not conform with its real function as preventive federal supervision. The German Constitutional Court was firm on this point in the Port of Kehl case (209) and was in that respect followed by the doctrine in its vast majority, even including these who now consider the consent as a substantive instead of as a formal limit on Länder treaty power (210). Moreover, this is also the meaning of the Swiss doctrine as regards the consent of the Federal Council to autonomously concluded treaties by the cantons (211). But then contrary to the critical attitude of the Swiss doctrine, the German majority opinion, who indeed considers the consent of the Bund as being of a formal nature, regards a Land treaty concluded in violation of it as valid in international law, instead of as voidable; thus only valid if the federal government does not veto it or approves of it later on (212).

Where in the case of an over-stepping of its capacity by the constituent state, art. 46 of the Law of Treaties Convention could not be applicable, in case of the breach of the consent requirement it can definitely be referred to *« per analogiam »*. The consent requirement can be regarded as part of the internal law of the state, in casu here the global federal state. And this distinction between formal and substantive limit is also made in the doctrine, but a subsequent distinction between voidness and voidability can hardly be found (213).

Consequently, the voidibility was already controversial in the case of a breach of a normal limit, the voidness as such seems to be equally disputable as a legal result in the case of a breach of a substantive limit in the absence of any capacity. Therefore, two points must be stated clearly. First, the conclusion without federal consent — if it is required — leads as a manifest violation of the internal law to a voidable treaty (214). Second, the conclu-

(208) See Blumenwitz (ftn. 1), p. 167; Reichel (Ibid.). Contra Di Marzo (ftn. 1), p. 166-167, incorrectly interpreting the omission of art. 5 (2) in the Vienna Convention on the Law of Treaties as the absence of a renvoi to national constitutions, consequently, applying art. 46 of the said convention to the two situations of excess of competence (procedural and substantive).

(209) BVerfGE 2, 369-370, see more in detail Di Marzo (ftn. 1), p. 162-164.

(210) See supra (ftn. 134).

(211) See Wildhaber (ftn. 178, Switzerland), p. 220; Witmer (ftn. 97), p. 174.

(212) See Ibid. (ftn. 211); see for this German opinion : e.g. Doeker (ftn. 130), p. 115; Leisner (ftn. 130), p. 207; Maunz, Dürig, Herzog (ftn. 93), p. 21-22; Dreher, Die Kompetenzverteilung zwischen Bund und Ländern im Rahmen der auswärtigen Gewalt nach dem Bonner Grundgesetz, Diss. Bonn, 1970, p. 82-83. But also Wildhaber (ftn. 159), p. 306.

(213) See e.g. Doeker (Ibid.); Seidel (ftn. 130), p. 88.

(214) See also Di Marzo (ftn. 1), p. 164, 167.

sion by the federated state of an agreement outside its sphere of competence leads to voidness. I realise that this is indeed a hard sanction, but the absence of any personality or capacity cannot be tolerated by international law (215).

In the case of voidibility, the treaty exists and apart from the federal government, the third party, who contracted with the constituent state, may equally invoke the invalidity — although this is highly improbable — on the grounds of fraud or error (art. 48 of the Law of Treaties Convention), but will be estopped from any action — and this is more probable — if it had known about the non-authorisation by the federal government (216). In the case of voidness, the treaty has simply never existed. However, in both cases the procedure of article 65 et sequitur of the Law of Treaties Convention must be followed in order to really attain the results on invalidity laid down in article 69 of the said convention (217).

Finally, the situation in Canada and in the USA is largely analogous to the German and Swiss one, to which is primarily made reference here, with this important difference that the federal consent requirement can in a number of cases not been seen as a limit as such. Moreover, if there is a consent or authorisation in Canada, it is normally coupled with a delegation of treaty-making powers to the province(s), turning it into a substantive requirement, with the potentially harsh consequences of voidness as seen above.

CONCLUSIONS

During this study of eleven federations we have been faced with diverse patterns of international intercourse by federated or constituent states. Only a limited number of them could be characterised as binding — or at least potentially binding — under international law. Among these federated states, the Swiss cantons and the German Länder occupy a core place, not in the least caused by a long standing tradition of treaty relations. This in contradistinction to U.S. states and Canadian provinces for which international activities are a rather recent phenomenon, Without any strong traditions in this field are also the Soviet Union republics, whereby union republic sovereignty was indeed the most apt solution — at least in theory — to accomodate the variety of nationalities. Apart from these five, centripetal forces in other federations have in recent times also encouraged component units to acquire a real interest in transnational activities. Nevertheless, in which direction this evolution will go is as yet hard to tell.

About four concluding points should be briefly put forwards. First, the disparity in interaction intensity. Constituent states with an international tradition tend to follow a rather restrictive pattern, whereas the newcomers

(215) See in that sense also Bernier (ftn. 1), p. 118-119, but after all pleading in favour of a voidability. Contra and favouring only a voidability, Di Marzo (ftn. 1), p. 166-168.

(216) See also Di Marzo (ftn. 1), p. 157; Bernier (ftn. 1), p. 119.

(217) See more general e.g. J.A. Frowein, Zum Begriff und zu den Folgen der Nichtigkeit von Verträgen im Völkerrecht, Festschrift Scheuner, Berlin, 1973, p. 117 et seq.

take advantage of the steadily increasing internationalisation trend. The Soviet Union republics form a chapter apart, which has already been dealt with in the course of the study. Second, the vast majority of these interactions concerns neighbourly relations — I leave now the notorious Quebec example aside — and transborder problems of an administrative, technical or economic nature. Third, this is of a main importance, there exists a general under-estimation of the binding — even more — the international legal binding character of a number of constituent states' agreements or arrangements. The reason for that seems to be twofold. On the one hand, contrary to a legal and organisational infrastructure for treaty-making on the level of the federation, most constituent states improvise and insufficiently realise the need for more coherence in their external relations. On the other hand, there is a virtually complete absence of any litigation prone disputes of conflicts. This last phenomenon should actually be welcomed but does, deplorably, nor incite to engage in a better understanding of the matter which might not remain so unproblematical in the future. This is at least something this paper hopes to have contributed to. Fourth, especially in the area of transborder relations such activities should in general be considered as a positive evolution. One may not forget that equally on lower regional or even municipal levels transnational interaction is not a tabou anymore. This development has even induced the Council of Europe to adopt an « *Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities* » (218). In discussions and studies on new ways and forms of transborder cooperation by such sub-divisions, the applicability of a new form of administrative international law has even been brought up.

Therefore, on federated state level of federal states (but also of new forms of federations — as the one the European Community is hopefully moving towards — this should not be left out of sight here) room should be provided for a made to measure and genuine international dimension of the existent domestic powers, this i.a. translated into a real « *ius tractatuum* ». A clearer and better defined organisational, but in the first place legal, framework should be established for treaty relations, compatible with the general federal foreign policy powers, but not as such a-political in nature either. Last but not least, as far the prerequisite for control or authorisation are concerned, one should seriously ponder over their sense and actual necessity. Indeed, each federation has its constitutionally entrenched system of checks and balances for both its levels of government. An additional federal control if its concerns the genuine external dimension of the constituent state's sphere of competence should not as such remain undebatable. Consequently, in this field international law, federal constitutional law and federated constitutional law have not yet answered all questions. A number of tasks still await us.

(218) Madrid, 12 May 1980, see e.g. Tractatenblad van het Koninkrijk der Nederlanden, 1980, nr. 129.