

Part 3

Foreign Policies of Federated
Entities

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6. Treaty-Making Powers and Foreign Relations of Federated Entities

A. Introduction

1. Foreign, or rather international, relations are generally regarded as the classical domain of the national or central level in federal systems. In principle this is (still) correct in most of these constitutions, particularly because the quality of federal entities as subjects of international law is (still) doubtful. However, there is wide diversification in treaty-making powers, as there is in the regulations on legislative implementation of the contents of international treaties. This has even resulted in the effect that the notion of “perforated sovereignties”¹ has emerged in the terminology of constitutional as well as international law, and also in that of political science.

2. The intention of this short essay is to give an overview² of that diversification within some selected model systems of federalism, in order to supply information for further discussions on potentially relevant elements for conflict solution in the Georgian/Abkhaz case. Thus, it is not the intention to draft any such solution or to suggest any model from those presented but maybe to give some indications on which elements might be more relevant than others.

3. Three main federal issues in the field will be comparatively described for each of the analysed constitutions; three others will be described summarily and on the basis of examples. The three main issues will be:

- (I) the central treaty-making power
- (II) the legislative implementation of the international obligation arrived at in the process of central treaty-making
- (III) the capacity of sub-national units to conclude international agreements.

The areas described selectively and summarily will be:

- (IV) cross-frontier regional co-operation
- (V) regional representation in foreign countries, and

- (VI) foreign political contacts, in particular visits of regional representatives in foreign countries (sometimes termed “para-diplomacy”), including twinning and partnership arrangements of federal entities.

The constitutional provisions and structures of selected federal systems to be reviewed under these headings will be those of:

- the United States of America,³ Germany,⁴ Belgium,⁵ Switzerland⁶ and Austria⁷
- as well as (briefly) those of Canada⁸ and Australia,⁹ these two latter constitutional systems specifically with regard to the fact that, in particular on the subject of foreign relations, they emerged from former colonial and imperial rule, thus having some specific legal and historical comparative relevance for states and regions in the former Russian and/or Soviet Empire in the areas concerned here.

The participation of sub-national units of federal states in the conduct of supra-national affairs will have to be excluded by definition, although they are of particular importance for federal Member States of the European Union. However, this is obviously not the case in the context of the Georgian/Abkhazian conflict, because the Commonwealth of Independent States is not a supra-national organisation, at least not yet.

B. Analysis and Comparison of Relevant Issues

I. Central Treaty Power

1. USA

Under Art. II Sec. 2 Cl. 1 of the United States Constitution the President has full power to make treaties. As regards the content of such treaties, that power is unrestrained and it covers the entire range of international agreements. However, to become valid in terms of constitutional law, such treaties and other agreements require the concurrence of two-thirds of the Senate, i.e. of those members of the Senate present and voting. Moreover, and specifically relevant here, there are certain limits on the federal treaty power vis-à-vis the States, which have been carved out by the U.S. Supreme Court in three general principles:

- The treaty-power may not encroach on the constitutional autonomy of the States.
- Its exercise is not to seek an excuse to raise domestic matters to the forefront of “foreign affairs”.
- The federal form of state must not be compromised.

2. Germany

Under the German Constitution, the Basic Law, the “relations with other states are... conducted by the Federation” (Art. 32 Sec. 1), but the Länder specifically concerned are to be consulted under Sec. 2 of that Article. Besides this, there is a specific mechanism that has emerged in federal practice regarding negotiations on federal treaties with content that touches upon exclusive legislative powers of the Länder generally. This mechanism will be referred to in more detail at a later stage, when the legislative implementation of central treaty-making powers will have to be analysed (in part II 2).

Under Art. 59 Sec. 2 of the Basic Law, treaties regulating “the political relations of the Federation” or relating to “matters of federal legislation” require the approval of “the competent legislative bodies”. This means that in all cases in which, under the provisions of the Constitution, the consent of the Federal Council as the second chamber (the *Bundesrat*, composed of the governments of the Länder) is required, such consent also needs to be given to treaties which fall into one of the aforesaid categories.

In the field of administrative agreements with foreign powers, the provisions relating to federal administration apply *mutatis mutandis*: While in this field the foreign service as such is a federal matter under Art. 87 of the Constitution, the administration of federal legislation in general is a matter within the responsibility of the Länder under Arts. 83 - 85. Hence, there is a need for Bundesrat approval of relevant administrative agreements in this area.

3. Belgium

The (relatively new) Belgian federal system represents the only constitutional structure in which the treaty-making power of the national level, while being the rule in terms of legal formulation, is divided by the Constitution itself between that level and that of the sub-national units, i.e. that of the Regions and Communities (the Flemish, the French and the German Community):

Under Art. 167 Sec. 1 of the Constitution, the King (and thus the national level) is in charge of foreign relations “without prejudice to the powers of the Communities and Regions” to regulate international co-operation. Those sub-national powers include the treaty-making power within the scope of the competences of the sub-national units, on which more detail will be given in part III 3 below.

Foreign Treaties on the national level require the consent of the Senate, which (under Art. 167 Sec. 2) in this field is on an equal footing with the Chamber of Deputies. The Senate, though not being a direct representation of the sub-

national units (as in the case of the German Bundesrat) comprises 21 (out of the total of 71) members, who are elected by the Community Parliaments (Councils). Because no detailed description of the rather intricate Belgian federal system can be given here, of course, it may suffice to state at this point that the three Belgian Communities (Flemish, Walloon and German) are mainly in charge of culture, in particular of language affairs, and education, while the three Regions (Flanders, Wallonia and Brussels Capital) have predominantly economic and environmental powers and functions. The sub-national units are competent to decide and to act.

4. Switzerland

Under Art. 8 of the Swiss Constitution it is the “sole right” of the Confederation “to conclude alliances and treaties”. Although this sounds entirely exclusive, there are exceptions which will have to be described in part III 4. Nonetheless, the federal treaty-making power is virtually unlimited, and ever since 1864 there has been a practice emerging in favour of the Confederation that this power also includes the right to make treaties “on matters basically falling within the cantonal sphere of competence and thus to supersede cantonal law”.¹⁰

5. Austria

Art. 10 Sec. 1 Cl. 2 of the Austrian Constitution states that legislation and administration are federal matters in “foreign relations including political and economic representation vis-à-vis the foreign countries, in particular the concluding of all treaties”. However, at the same time treaties of a political nature and those relating to legislation require the approval of the National Council (i.e. the Austrian Parliament) and the *Bundesrat* (i.e. the second chamber representing the Austrian Länder) as if in legislative procedure (Art. 50 Sec. 2 of the Constitution, which is thus very similar to the comparable provisions of Art. 59 of the German Basic Law).

6. Canada

Under the rules of Canadian constitutional law the conduct of foreign affairs, including the treaty-making power, is an entirely federal function of the executive on the basis of Letters Patent of the Crown of 1947, which constituted the office of Governor General with plenary delegation of the Royal Prerogative to

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conclude treaties. Hitherto that power had been held by Great Britain, since the British North America Act of 1867. However, regarding the scope of those powers in relation to the Provinces, the particular provisions and practices on the implementation of central treaty-making (described in part II 6) will have to be viewed in close connection with this general rule.

7. Australia

By way of judicial interpretation of Sec. 61 of the Australian Constitution, which vests the executive power in the Governor General, the treaty-making power has virtually become an unlimited function of the Commonwealth, i.e. the national level. This wide scope given to the federal level is also based on Sec. 51 Cl. 29, which gives the Commonwealth Parliament the power to legislate with respect to “external affairs”. This power is regarded as one implying the conduct of foreign relations in general.

II. Legislative Implementation of Central Treaty-Making

1. USA

In the United States, validly concluded treaties (i.e. treaties which have been made with the President and the Senate concurring) constitute “the supreme Law of the Land” along with the Constitution and US laws under Art. 6 Cl. 2 of the Constitution. This means that so-called self-executing treaties do not require implementation by legislation. Such treaties are those which are apt to be applied by a court as if they were legislative enactments.

Thus, they are contrasted with executory treaties. These are treaties which require “translation” into legislative form subject to US legislative federal procedure. That means, inter alia, that the Senate has to give its consent. However, “executive agreements” are not subject to consent by the Senate, and those agreements cover all fields in which legislation is not considered to be necessary. They can, thus, be concluded between the federal executive alone and that of foreign powers.

2. Germany

On the implementation of German federal law in general it has already been said that this is mainly and predominantly a matter for the Länder.

Unlike the American Constitution, the German Basic Law generally requires transformation of treaties into domestic law. (The only exception to this refers to the “general rules of international law”: these are even ranked above the Constitution itself under its Art. 25). The consequences of the need for transformation are manifold:

Regarding matters of federal legislation in general, the rules of Art. 59 Sec. 2 apply, which have already been described in part I 2. If foreign treaties touch upon matters within the exclusive legislative competence of the Länder, however, a still unresolved constitutional dispute has produced a federal practice by agreement between the Federation and the Länder, which is in many ways typical of the pragmatic approach practised in the German federal structure: The wording of Para. 3 of Art. 32. “Insofar as the Länder have power to legislate, they may, with the consent of the federal government, conclude treaties with foreign states” allows room for two different interpretations of the question of treaty-making powers in the fields of exclusive competence of the Länder. The Länder themselves maintain that this power resides alone and entirely with them and that the transformation of obligations arising from such treaties and other agreements into internal German law is, thus, also a matter within their exclusive competence. In contrast to this view, the Federation insists that it has concurrent competence in this field of the treaty-making power, irrespective of the allocation of corresponding functions in the area of transformation. While this dispute has never been settled legally, a mode of practice has been developed, which allows both sides to hold to their respective views without disturbing the conduct of business.

The basis of this arrangement, laid down in the so-called Lindau Agreement of 14 November 1957, is the assumption by the Länder that the Federation acts on their behalf when negotiating or signing foreign treaties which either partly or wholly regulate matters within their competence. In exchange for empowering the Federation to act on their behalf, the Länder have secured for themselves wide-ranging rights of participation, which deny the Federation the right to sign such treaties without previously securing the Länder’s unanimous consent. The institutional structures built on these principles have worked successfully and without serious disruption ever since the Lindau Agreement came into force.

The central institution in the operation of that Agreement is the Permanent Treaty Commission of the Länder. It meets on average once a month and consists of civil servants from the Länder Missions to the Federation (one from each of the sixteen). Their function is to communicate demands by the Länder concerning draft treaties of the kind described above to the Federal Government and to co-ordinate their recommendations both within and between the Länder (the function of co-ordination within the Länder being mostly performed by the Cabinet Offices, which then convey the results to the Missions). The proceed-

ings of the Treaty Commission generally commence with the examination of a draft treaty or agreement conveyed to it by the Foreign Office or by any other federal ministry negotiating or intending to negotiate terms with a foreign power or international organisation. Not infrequently the secretariat of the Commission (based in the Bavarian Mission) itself also approaches the Federal Government with the demand to be informed of negotiations which have become known to the Länder.

Under Point 3 of the Lindau Agreement, the participation of the Länder in the preparation of treaties touching upon any of their exclusive competences must be sought by the Federation “as early as possible, but certainly before final agreement is reached on the draft treaty text”. The consent of all the Länder must be secured before obligations created by the treaty achieve validity under international law. The legislative process of ratification under constitutional law, beginning with the treaty being sent to the Bundesrat, does not normally start in these cases before the Federal Government has asked for the consent of the Länder to be given. The Lindau Procedure thus ensures that any demands made by the Länder for the alteration of, or amendment to, the draft treaty text can be taken into account at a sufficiently early stage in the negotiations with the foreign power or international body concerned. If the Commission finds that the matter under review is one falling under Point 3 of the Lindau Agreement, it then decides on an opinion to be conveyed to the federal ministry in charge. If the solution reached by the federal ministry appears to be unsatisfactory to the Commission after further consultation by its members with the relevant departments of their respective governments, the original opinion or a modified version of it may need to be restated.

In any event, a final evaluation is given by the Länder through the Commission whenever conclusion of the treaty is pending. The Commission then decides whether it should raise objections to the treaty being signed — if need be by the threat of non-ratification in the federal legislative process via the *Bundesrat* — or whether recommendation for approval should be given to the Länder cabinets. As the suggestions of the Commission are in most cases taken on board by the Federal Government, a recommendation for approval is given in the overwhelming majority of cases.

Although the recommendation of the Commission must be unanimous, the Länder cabinets are nevertheless not bound to it. Despite this, up to now there has only been one case in which the consent of a Land cabinet was withheld after its representative in the Commission had been a party to unanimous recommendation for approval. After all the Länder cabinets have conveyed their consent to the Federal Government, the formal process of ratification can begin, which means that the document of ratification may be deposited under international law. The process of legislative approval of ratification under con-

stitutional law (Art. 59 Para. 2 of the Basic Law) may also begin earlier and run in parallel to the Commission's deliberations. Normally, however, it does not do so, and in any case the international process cannot be completed before proceedings are closed in the Commission and the consent of all of the Länder cabinets is given.

In matters in which treaties "touch upon the essential interests of the Länder" without necessarily being relevant to any of their exclusive competences (Point 4 of the Lindau Agreement) the Länder must once again be informed "as early as possible about the proposed conclusion of such treaties so that they can voice their demands in due time". Although in such cases the procedure of communication between the Treaty Commission and the Federal Government is the same as under Point 3 of the Agreement, the position of the Länder is naturally weaker here. Nevertheless, under the principle of federal comity (*Bundestreue*) the Federal Government is still obliged to take into account the opinion of the Länder and normally does so as far as it can in the course of negotiations.

All in all, therefore, the substantial effect of the Lindau Agreement has been that the Länder are directly involved in the negotiating process of the Federation relating to relevant treaties. Given the successful practice of the Permanent Treaty Commission, up to now there has been no reason to call in the Federal Constitutional Court to settle the (nonetheless legally unresolved) dispute underlying this solution. On the basis of that practice, therefore, the implementation and transformation of foreign treaty obligations within their fields of competence is thus a matter for the Länder.

3. Belgium

As a consequence of the division of the treaty-making power as directly provided for by the Constitution, questions of implementation, i.e. of transformation into domestic law, are not primarily relevant in the Belgian structure:

- Treaties concluded by the national level (with the consent of both chambers of parliament as described here under II 3) are transformed into national law by the relevant national institutions,
- while the Regions and the Communities (by their Councils) have the equivalent functions with regard to international agreements within their own treaty power under Art. 167 Sec. 3 of the Constitution.

However, there are intricate co-ordinating mechanisms to be observed before the sub-national entities are in a position to conclude a foreign treaty. These mechanisms will have to be described in more detail further below (in part III 3).

4. Switzerland

As in Germany regarding the Länder, the implementation of federal law in general is a matter of the Cantons in Switzerland. Consequently, that also applies to obligations of the Confederation originating from a foreign treaty concluded at the national level. Overlaps between the principally overarching national power of treaty-making and minor cantonal reservations in that field are, however, to be observed in certain processes of mutual consultation. These will have to be discussed, when those reserved cantonal powers come to be examined (in part III 4).

5. Austria

The Austrian Länder are obliged to take all measures within their field of functions (both in the areas of legislation and of administration) whenever it may be necessary to implement treaties concluded at the federal level. If they do not do so, the relevant powers automatically shift to the Federation under Art. 16 of the Austrian Constitution. Thus, legally the Austrian Länder appear to be powerless, even to the extent of the Federation breaking into their fields of competence by the power of treaty-making, so that a solution to that problem equivalent to the German solution by the Lindau Agreement does not exist here.

However, the Federation in practice regularly hears the views of the Länder concerned before concluding treaties affecting any of their own functions. Also, in specific matters civil servants of the Länder are included in the national delegations negotiating agreements with foreign powers.

6. Canada

In direct line with British Constitutional theory (and in contrast to American law), foreign treaties never establish rights and obligations within Canada unless enacted into domestic law by the appropriate legislature. By judicial interpretation of the Constitution (then still solely the British North America Act of 1867 as passed by the British Parliament), it was ruled in the *Labour Conventions Case of 1937*¹¹ that the power of the Federal Government to conclude foreign treaties does not carry with it the power to implement such treaties independently of its own constitutional powers, particularly those relating to legislation. That means that the Provinces need to legislate for implementation in the fields of their competence in order to implement international obligations.

There are no constitutional rules about their direct participation in concluding treaties, but consultations in that area always take place in the wide-ranging network of intergovernmental relations, which marks the structures of Canadian federalism. It needs to be noted in particular, however, that no such participation takes place through and by means of the second chamber, due to the fact that under constitutional law the Canadian Senate is not an institution which represents the Provinces with direct legitimacy.

7. Australia

Within the Commonwealth of Australia the legislative implementation of central treaty-making is politically a highly controversial matter. The legal situation that still prevails, however, gives the Commonwealth (i.e. the federal) Government a rather strong position in this field, which was very clearly backed by the High Court in the Dams Case of Tasmania of 1983¹²: In that case the Court established that the Commonwealth can also legislate on the implementation of foreign treaties in fields in which legislative competence otherwise belongs to the States. The effects of that decision breaking widely into the States' legislative autonomy have led to strong interest by the States in the German solution, through the Lindau Agreement and the Permanent Treaty Commission created under its terms. In particular, the report of a Constitutional Commission in 1998 recommended a closer look at that solution. The matter is still a central point in constitutional discussions in Australia, which i.a. materialised in proposals for a Special Premiers' Conference in 1992 regarding the necessity for consultation with the States and the creation of appropriate institutions within the structure of intergovernmental relations.

III. Capacity of Federated Entities to Conclude International Agreements

1. USA

In America the States are prohibited from entering into any treaty, alliance or confederation by Art. I Sec. 10 Cl. 1 of the Constitution. Nonetheless, the States are permitted to have lower-level external relations, to the extent that they may enter into an "agreement or compact" with a foreign power provided, however, that the United States Congress (i.e. the House of Representatives and the Senate concurring) consents to such a step. The practical effect of this arrangement is that so-called "non-political" external relations of the States are permitted under the supervision of Congress.

2. Germany

The German solution to the problem follows the line of the constitutional distribution of legislative competence. As already quoted, Art. 32 Sec. 3 of the Basic Law states that “insofar as the Länder have power to legislate, they may... conclude treaties with foreign states”. However, that rule also clearly states that they may do so only “with the consent of the Federal Government”. Within the German system of distribution of legislative powers this means that the Länder can conclude treaties in fields which

- are either not defined by the Constitution as exclusive powers of the Federation (Art. 73 BL), or
- have not been taken over by the Federation by making use of its concurrent powers (Art. 74 BL)

i.e. in those in which they are free to exercise their remaining exclusive powers (in some enumerated areas limited by the so-called framework legislation of the Federation under Art. 75 BL).

Details of this system of distribution cannot be discussed here. It needs to be noted, however, that the scope of the exclusive legislative powers of the Länder has been exposed to increasing pressure from the Federation ever since 1949, so that measures had to be taken by the Constitutional Reform Act of 1994 to limit and reverse that tendency.¹³

3. Belgium

Under Art. 167 Sec. 1 of the Belgian Constitution the federated entities are empowered to “regulate international co-operation” within the scope of their competence. That rule, therefore, establishes a clear convergence of internal and external powers of the sub-national entities to an extent not found in any other constitution.¹⁴ The setting of the Belgian system is based on the autonomy of the sub-states, Communities and Regions alike, which they can enjoy internally, but also externally (“foro interno, foro externo”), i.e. on the international level. If the sub-states are competent in a policy field, they can operate internationally in that same field. For some domains, the special law refers explicitly to international co-operation: the powers of the Regions also extend to foreign trade fields. The federal division of powers, fostered in the Constitution and the relevant institutional law, also applies to “mixed treaties”, i.e. which affect both the powers of the federal government and at least one federated entity. All of that naturally requires similar mechanisms for co-operation before and during the negotiations of treaties on all levels: Those mechanisms are established in the Interministerial

Conference on Foreign Policy, which comprises all relevant members (or their representatives) of the governments on Federal, Community and Regional level. This Interministerial Conference on Foreign Policy is assisted by a working group composed of personal advisers of the ministers and officials.

4. Switzerland

As an exception to the overarching rule of Art. 8 of the Constitution, stating that it is the “sole right of the Confederation to conclude alliances and treaties”, Art. 9 establishes a “cantonal right to conclude agreements... on... public economy, neighbourliness and police regulations, provided (they) contain nothing contrary to the Confederation or to the rights of other Cantons”. As a consequence, there is no exclusive cantonal agreementmaking power (such as in Germany under Art. 32 Sec. 3 of the Basic Law). Instead, in Switzerland only concurrent and subordinate powers exist for the Cantons, which means that there are such powers only inasmuch and as long as no federal treaty has already been concluded on the same topic.

On the exceptional matters referred to by Art. 9, there is a controversy as to the admissibility of their wider interpretation in legal literature. Moreover, even within the permitted cantonal fields negotiations with foreign partners have to be left to the national government (i.e. the Federal Council in Swiss terms), so that the Cantons are substantially powerless if the national government refuses to act as their agent. However (as would have to be presumed), here also extensive and similar networks of mutual consultation are at work. Their terms are laid down in the Federal Council’s “Directives on Pre-Parliamentary Legislative Procedure”.

5. Austria

Due to the overall predominance of the central government in foreign affairs of all kinds (see II 5 above) the Austrian Länder have, at least constitutionally, no legal capacity whatsoever to conclude international agreements themselves.

6. Canada

From primary constitutional sources the situation in Canada is not clear. Consequently the question of provincial treaty-making powers is dealt with in a controversial, and not infrequently also contradictory, manner. In particular, the Province of Quebec insists and practises the view that the capacity to conclude treaties must

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be regarded as concurrent with the power to implement them, and that accordingly the power to enter into international agreements is divided between the Federal Government and the governments of the Provinces. In the course of appeasement between the Federal Government and Quebec (due to the political implications of Quebec's threats to secede from Canada) other Provinces have increasingly followed suit, claiming that their rights cannot be less than those of Quebec.

7. Australia

The Australian States may make comparatively low-level arrangements with subjects of international law on commercial and cultural subjects, but they may not engage in foreign treaty-making. Their position is such a weak one particularly because they had no powers relating to foreign affairs before federation, with the enactment of the Constitution of the Commonwealth in 1901 by the Imperial Parliament in London. Until then and even later until the Statute of Westminster of 1931, all powers in foreign relations were neither with the States (the former Colonies before federation in 1901) nor with the Federal Government in Canberra, but with Great Britain. It is this situation to which Sec. 107 of the Australian Constitution refers in stating that the powers of the States (or Colonies respectively) continue as existing at the time of federation. Those powers then shifted from London to Canberra, but not to the State capitals, when the British Empire was superseded by the Commonwealth of Nations with the enactment of the Statute of Westminster. While in Canada that basically equal legal situation has been undergoing practical and gradual change under the impact of the Quebec problem (see above), no such change in favour of the sub-national entities has thus taken place in Australia.

IV. Cross-Frontier Regional Co-operation (examined selectively)

1. Germany

As far as regional co-operation in the field of cross-frontier relations refers to treaty-making, the powers of the Länder described above (see III 2) apply.

An innovation remarkable for its uniqueness has come into force with the Constitutional Reform Act of 1994: It created a new Sec. 1 a in Art. 24 of the Basic Law, which now gives the Länder the right to transfer sovereign rights to "trans-frontier institutions in neighbouring regions" regarding functional fields where they "have the right to exercise state powers and discharge state functions". As in the concluding of foreign treaties, the Länder require the consent of the Federal Government for such transfers of sovereign rights.

2. Switzerland

While the Swiss Cantons have rather limited powers in the areas of foreign treaty-making in general (see III 4 above), regional co-operation across national frontiers is the most significant area of cantonal foreign activity. It is even formalised by Art. 10 Sec. 2 of the Constitution: With particular regard to “neighbourliness” matters, the “Cantons may correspond directly with subordinate authorities and officials of foreign states”. However, their right to conclude agreements (as under Art. 9 described above) is also restricted in this field by the provision that it must not be exercised “contrary to the Confederation or to rights of other cantons”.

V. Regional Representation in Foreign Countries (examined selectively)

1. Germany

Without being mentioned in any way in the Basic Law, there are numerous liaison offices of the Länder in foreign countries, serving mainly economic interests (such as those of, for example, Hamburg in Singapore and in other comparable places). These offices do not enjoy any official status on a statutory basis, and they should not be confused with the missions or offices of the Länder serving their rights of participation and also lobbying functions within the context of the supra-national EU organisation.

2. Canada

With regard to liaison offices of the Canadian Provinces overseas and in the United States, the same applies, *mutatis mutandis*, particularly with respect to such offices of the Province of Quebec in Paris and London. They have nowadays been followed by the establishment of equivalent institutions of most of the other Provinces in places of specific interest to them.

3. Australia

Most of the Australian States have representations in London, in the nearby area of the Pacific Ocean and in fields of special economic interest to them.

VI. Regional Foreign Political Contacts or “Para-Diplomacy” (examined selectively)

1. Germany

Political representatives of the Länder have frequently regarded themselves — and they will certainly continue to do so — as being entitled to maintain informal relations with foreign states, i.e. relations below the level of formal diplomacy. There is nothing constitutionally to bar them from doing so as long as the principle of federal comity or loyalty (*Bundestreue*) is observed. This means in practice that the obligation to show mutual consideration flowing from that principle becomes relevant to the effect mainly

- that any political guidelines set in foreign relations by the Federation must not be counteracted, and
- that the Federal Foreign Office must in general be informed on the fact of such contacts (though not necessarily and in detail on their contents).

Another and most frequently utilised field of political contacts by sub-national entities beyond national borders is the numerous twinning and partnership arrangements which have been concluded by the Länder with regions, provinces, states or other equivalent territorial units of foreign states. The same applies to municipal authorities twinning directly with towns, cities, counties or other comparable local government units in foreign countries.

C. Conclusions

1. As has been shown by this necessarily brief and concise overview, the subject of treaty-making powers and foreign relations of federal entities covers a wide field and an even wider variety of both legal and structural arrangements, each embedded in the particular constitutional system. Thus, the adaptability of these arrangements to the field of conflict relevant here needs to be carefully considered by those concerned themselves.

2. It will have to be taken into account, however, that two positions in this field are obviously irreconcilable:

- The full claim of Art. 3 of the Constitution of the Republic of Abkhazia to be “a subject of international law” and the alleged ensuing capacity to “enter into treaty relations with other states” fully and unlimited, on the one hand, and
- the full power on foreign policy and foreign economic relations¹⁵ as a competence of a Federal Georgian Government, on the other hand, will hardly go together without compromise.

3. Beyond the numerous differentiations under constitutional law in the various federal states examined here it will have to be borne in mind in particular that under international law the Draft Article 5 of the Vienna Convention on the Law of Treaties of 23 May 1969 “to the effect of recognition of treaty-making power of federated entities provided this power was allocated by the Federal Constitution and exercised within the limits laid down by it” did not come to be incorporated into the Convention (due to opposition by Canada with regard to the Quebec problem). Nonetheless, Art. 3 of that Convention recognises that public legal entities other than states, such as, for example, federated entities, are empowered to conclude international agreements.

4. The consequence would seem to be that partnership and consultation models such as, in particular, the Belgian and the German ones centring
- on the (Belgian) Interministerial Conference on Foreign Policy¹⁶ and
- on the (German) Permanent Treaty Commission of the Länder¹⁷
might well be worth wider-ranging study than was possible in this context of an overview.

5. Whatever solution may result from further and future deliberations and (hopefully) agreements, one lesson of history and of constitutional practice would seem to be hardly disputable: federal systems, as well as structures approaching their main features (the European Union), have proved to be the most effective safeguards of peace if they have been handled in the spirit of “mutual considerateness” as part of a legal obligation that holds the system together (such as within the principle of federal comity in Germany).

6. In contrast to this, merely loose confederations of states lacking that legal bond or a comparable one within a constitutional structure have hardly ever been able to serve this purpose for any considerable time.¹⁸ That comparison even applies to structures which up to now are only quasi-federal, but which have never been only confederal in their approach to conflict management: it has been rightly said that the European Union has been the most effective peace movement since World War II. It could never have achieved that quality and success, if it had been built on the basis of merely confederal lines. Such lines are hardly definable and they would seem to be too vague and too shaky for the purposes of peacemaking and peacekeeping.¹⁹

7. The advantage of federal or even merely quasi-federal solutions would, therefore, seem to lie both in their flexibility, on the one hand, and in the binding force of their legal frameworks, on the other. This overview will have served its purpose if it has shown that such binding force can be adequately coupled with adaptability to the relevant issues of potential conflict.

Notes

- ¹ Ivo D. Duchacek, 'Perforated Sovereignties: Towards a Typology of New Actors in International Relations', in: Hans J. Michelmann and Panayotis Soldatos (eds.), *Federalism and International Relations - The Role of Subnational Units*, Oxford, Clarendon Press, 1990, pp. 1-33.
- ² For more detailed comparative studies see: Hans J. Michelmann and Panayotis Soldatos (eds.), op. cit.; Brian Hocking (ed.), *Foreign Relations and Federal States*, Leicester University Press, London and New York, 1993 (in particular: Greg Craven, 'Federal Constitutions and External Relations', pp. 9-26) and Bertus de Villiers, *Foreign Relations and the Provinces - An International Perspective*, Pretoria, HSRC Publishers, 1995.
- ³ Earl H. Fry, 'The United States of America', in: Michelmann, op. cit., pp. 276-298; John M. Kline, 'Managing Intergovernmental Tensions: Shaping a State and Local Role in US Foreign Relations', in: Hocking, op. cit., pp. 105-121; Earl H. Fry, 'The US States and Foreign Economic Policy: Federalism in the "New World Order"', in: *ibid.*, pp. 122-139; de Villiers, op. cit., pp. 79-94.
- ⁴ Hans J. Michelmann, 'The Federal Republic of Germany', in: Michelmann, op. cit. pp. 211-244; Uwe Leonardy, 'Federation and Länder in German Foreign Relations: Power-Sharing in Treaty-Making and European Affairs', in: Hocking, op. cit., pp. 236-251 (also in: Charlie Jeffery and Roland Sturm (eds.), *Federalism, Unification and European Integration*, Frank Cass, London 1993, pp. 119-135 and in: *German Politics*, Vol. 1 1992, pp. 119-135; updated German version: 'Auswärtige Beziehungen und Europäische Angelegenheiten im Bund/Länder-Verhältnis', in: Tilman Evers (ed.), *Chancen des Föderalismus in Deutschland und Europa*, Baden-Baden, Nomos Verlagsgesellschaft, 1984, pp. 137-157; de Villiers, op. cit., pp. 21-77.
- ⁵ Yves Lejeune, 'Belgium', in: Michelmann, op. cit., pp. 142-175; Frank Ingelaere, 'The New Legislation on the International Relations of the Belgian Communities and Regions', in: *Studia Diplomatica*, 1994, pp. 25-49.
- ⁶ Luzius Wildhaber, 'Switzerland', in: Michelmann, op.cit., pp. 245-275; de Villiers, op.cit., pp. 95-106.
- ⁷ Anton Pelinka, 'Austria', in: Michelmann, op.cit., pp. 124-143; Dietrich Katzenstein, *Die föderale Struktur der Bundesrepublik Österreich*, Bundesrat, Bonn 1957, pp. 81-83.
- ⁸ Elliot J. Feldman and Lily Gardner Feldman, 'Canada', in: Michelmann, op.cit., pp. 176-210; Louis Balthazar, 'Quebec's International Relations: A Response to Needs and Necessities', in: Hocking, op.cit., pp. 140-142; David K.M. Dymont, 'Substate Paradiplomacy: The Case of the Ontario Government', in: *ibid.*, pp. 153-169.
- ⁹ John Ravenhill, 'Australia', in: Michelmann, op. cit., pp. 77-123; Stuart Harris, 'Federalism and Australian Foreign Policy', in: Hocking, op. cit., pp. 90-104; de Villiers, op. cit., pp. 107-118.
- ¹⁰ Swiss Federal Tribunal as quoted by Wildhaber, op. cit., p. 251.
- ¹¹ A C 326
- ¹² Tasmania v. Commonwealth (1983) 158 CLR 1.
- ¹³ For details see Uwe Leonardy, 'The Institutional Structures of German Federalism', in: Charlie Jeffery (ed.), *Recasting German Federalism. The Legacies of Unification*, Pinter, London and New York, 1999, pp. 12-15; also *idem*, 'To be Continued: The Constitutional Reform Commissions from a Länder Perspective', in: Klaus H. Goetz and Peter J. Cullen (eds.), *Constitutional Policy in Unified Germany*, Frank Cass, London 1995, pp. 75-98.
- ¹⁴ That convergence is furthermore clarified by a quasi-constitutional, institutional law of August 8, 1980, amended in 1988, 1989 and from 1993 until 1997 (the in Belgium so called 'special law', for the qualified majority by which it was approved, namely a two third's majority of both

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federal chambers and a majority in both language groups, the Dutch and the French speaking members of parliament, according to article 4 of the Constitution). This institutional law was authorised by the articles 39, 127, 128 and 134 of the Constitution.

¹⁵ Art. 3 Sec. 1 e and f of the Georgian Constitution of 24 August 1995.

¹⁶ See Frank Ingelaere, *op. cit.* on this and other “coherence mechanisms”.

¹⁷ See Uwe Leonardy, *op. cit.*

¹⁸ To avoid misunderstandings of terminology it should be noted here that Switzerland calls itself a “Confederation” for traditional reasons of history only, while in all legal and practical reality it is, of course, a federation

¹⁹ As proven e.g. by the German Confederation (Deutscher Bund) of 1815 - 1866, which ended in war between Prussia and Austria.