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TREATY POWERS OF FEDERATED STATES AND INTERNATIONAL LAW

The concept of the « sovereign state » has been challenged for decades in international law. Attacks on this dominant paradigm have mostly taken the form of challenges to the idea that states are like black boxes, that independence requires that others should not be looking at what is going on inside their borders. The development of international human rights law since World War II has obviously been one of the most important vectors of change in that regard.

But there are even more fundamental challenges to state sovereignty as the dominant model of World order. Indeed, the Westphalian world is imagined as being populated with a series of sovereign entities. The recognition that the « sovereign state » is not the only political form structuring our political existence forces us to rethink how we conceive our world order. One of such political form is the Federation. Federations are composed of federated states as well as a central authority. Each level of government is autonomous within its own sphere of competence and is not subordinated to the other level of government but, instead, is coordinated. Both the federated states and the central authority take their legitimacy directly from the population they embody. Neither the federated states, nor the central authority can truly claim to be embodying the whole in all its aspects; they each have their own responsibilities and cannot be claiming to speak for the other level of government. The historian Samuel E. Morison provides us with a succinct and enlightening explanation of Federations. He writes that the central government, in a Federation, « is a government supreme within its sphere but that sphere is defined and limited. [...] The states are co-equally supreme within their sphere; in no legal sense are they subordinate corporations[1] ». In fact, some even suggested that Federations may not be « states » at all, but rather an altogether different political form[2].

This challenges the basic assumption that international law is in fact inter-« sovereign states » law. In other words, Federations challenge the basic ontology of the world order by suggesting that « sovereign state » may not be the only building block of that order[3]. We know that there were other entities populating the international legal order such as the old « mandates » and « trust territories ». But the latter were meant to be temporary and under the supervision of « sovereign state ». Confederations do not necessarily

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[1] S.E. MORISON, *The Oxford History of the United States, 1783-1917*, Oxford, Oxford University Press, vol. 1, 1927, p. 88.

[2] O. BEAUD, *Théorie de la Fédération*, Paris, PUF, 2007, p. 39-65.

[3] Other political forms such as empires and caliphates will not be examined here but also challenge the liberal model of the world order as being composed of individual states interacting with each other on the basis of formal equality.

challenge the basic international legal ontology to the extent that only their members are considered « sovereign state »; confederations present themselves as being an *association* of sovereign states. Federations are not of that nature and that is why Federations pose a deep challenge to the inter-« sovereign state » understanding of international law.

A Federation is a political form that does not rely on the idea of sovereignty, nor on a somewhat contractual theory associated with confederations. Rather, Federations are political forms built around ideas such as loyalty and solidarity between intertwined, nested, political communities. Federations, while they may historically result from an aggregation of previously discrete political units – be they former « sovereign state », colonies, administrative divisions, etc. – or from a devolutionary process whereby a political unit restructures itself to allow for the existence of federated entities, are not conceived as a group of political units merely tied together by a set of legal rules. Neither the center, nor the federated states, claim to capture fully the political identity of their members. The federal imaginary does not see the central authority – as in the unitary state's imaginary –, nor the associated states – as in the confederal imaginary – as possessing a total monopoly over the legitimate incarnation of the primary political self of the citizens. Indeed, the bonds that unite the different parts of a Federation are not contractual, they are *existential*. What matters is that the bonds that hold the Federation together, that give unity to the whole, *are imagined* as integral parts of *each* community involved, they are not seen as external to their very being. This is partly due to the fact that individuals who are members of each of the federated states are also *equally* members of the general political community composed of all individuals within the Federation. All the levels of government that are partners[4] in the Federation incarnate a different *political community*, but each relies on a common citizenry. This is key to distinguish between Federations and other forms of political organizations: Federations are composed of distinct and partially autonomous political communities that are existentially joined through shared internal rules that provide for their nested relationships. Therefore, no single authority can claim to have absolute legal control over any part of the territory or population of the « state » in question[5].

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[4] For the sake of simplicity of exposition, we are presenting Federations as being composed of only two levels of political communities. But this need not be. A Federation may be more complex and may count on many more levels of political communities. For example, while the Canadian Federation is often described as being composed of the central authority and the provinces, we have become increasingly aware that the three federal territories can no longer be simply considered as mere delegations of the central power, and the ongoing recognition of First Nations' right to self-determination will further complexify the Canadian model of federalism.

[5] Anecdotally, it is interesting to note that Her Majesty the Queen wears different hats – so to speak – as she embodies the Crown in right of Canada and the Crown in right of each provinces. That explains why the Crown in right of Canada may be opposing the Crown in right of another province in a lawsuit: *Liquidators of the Maritime Bank v. New Brunswick (Receiver-General),* [1892] A.C. 437 (Can.).

One could be led to believe that as long as Federation take care correctly of their internal matters, it should not bother other members of the international community how Federations have decided to organise their own « state ». However, the special internal arrangements of Federations do have consequences on their outside relations. Indeed, because federated states have exclusive powers over a series of matters, they also need to be able to deal with outsiders to fulfill effectively their own mandates. International cooperation is now more than ever needed to achieve what used to be seen as merely local or « domestic » goals. Increased mobility of capital, goods, persons and ideas have made it necessary for federated states to cooperate with other governments to efficiently deal with issues related to health, education, the environment, etc. No one should thus be surprised to see a rise in interest for what has been called « paradiplomacy » or multilayered diplomacy[6] – *i.e.* diplomatic interactions with entities that are not « sovereign state ». In light of all this, the question of the *jus tractatus* of federated states[7] is of increased relevance: to what extent can federated states make treaties?

Those who take the United States as their paradigmatic case of a federalist polity may very well miss an important aspect of Federations as they may mistakenly come to the conclusion that federated states have no powers to make treaties. After all, it is well-known that the Compact Clause of the

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[6] See, among others, I. DUCHACEK, D. LATOUCHE & G. STEVENSON (dir.), *Perforated Sovereignties and International Relations: Trans-sovereign Contacts of Subnational Governments*, New York, Greenwood Press, 1988; H.J. MICHELMANN & P. SOLDATOS, *Federalism and International Relations: the Role of Subnational Units*, Oxford, Clarendon Press, 1990; B. HOCKING, *Localizing Foreign Policy: Non-Central Governments and Multilayered Diplomacy*, London, Macmillan, 1993; P. SOLDATOS, « Cascading Subnational Paradiplomacy in an Interdependent and Transnational World », in D.M. BROWN & E. FRY (dir.), *States and Provinces in the International Economy*, Berkeley, Institute of Governmental Studies Press, 1993; L. HOOGHE (dir.), *Cohesion Policy and European Integration: Building Multi-Level Governance*, Oxford, Oxford University Press, 1996; M. KEATING & J. LOUGHLIN (dir.), *The Political Economy of Regionalism*, London, Frank Cass, 1997; É. PHILIPPART, « Le Comité des Régions confronté à la "paradiplomatie" des régions de l'Union européenne », in J. BOURRINET (dir.), *Le Comité des Régions de l'Union européenne*, Paris, Editions économica, 1997; F. ALDECOA & M. KEATING (dir.), *Paradiplomacy in Action: The Foreign Relations of Subnational Governments* London, Frank Cass, 1999; C. JEFFERY, « Sub-National Mobilization and European Integration: Does it Make Any Difference », *Journal of Common Market Studies* 38, 2000-1; B. KERREMANS, « Determining a European Policy in a Multi-Level Setting: The Case of Specialized Coordination in Belgium », *Regional & Federal Studies* 10-1, 2000; S. PAQUIN, « La paradiplomatie identitaire en Catalogne et les relations Barcelone-Madrid », *Études internationales* 57, 2002; *Id*., *Paradiplomatie et relations internationales. Théorie des stratégies internationales des régions face à la mondialisation*, Bruxelles, Peter Lang, 2004; G. LACHAPELLE & S. PAQUIN, *Mastering Globalization: New Sub-States's Governance and Strategies*, London, Routledge, 2005.

[7] Municipalities also have increased responsibilities in relation to such issues and are increasingly present on the international scene. While acknowledging this reality, this paper will only focus on federated states. To the extent that cities are "creatures of the state" and not federated states themselves, their formal powers depend on the powers the federated state possess and can delegate. That being said, a city may well enjoy a special status equivalent to a federated state within a Federation and would thus be treated as such.

American Constitution provides that « [n]o state shall enter into any treaty, alliance, or confederation » and that « [n]o state shall, without the consent of Congress […] enter into any agreement or compact with another state, or with a foreign power[.])[8] ». The clause on treaties, alliances, and confederations does not seem to have been seriously challenged over the years. On the other hand, the prohibition on « agreement or compact » has been applied with a large degree of flexibility. Duncan Hollis summarises the situation by saying that « foreign-state agreements » have, « to date, […] gone largely unconstrained and unsupervised[9] ». That being said, for all sorts of reasons, including the size of United States' internal market, American states have mostly focussed on domestic compacts. While American States are getting more involved at an international level than they were in the past, their presence is still limited compared to other federated states. Hollis, for example, claimed in 2010 that « over 340 [« foreign-state agreements » haven been] concluded by forty-one U.S. states since 1955[10] ». But the province of Québec alone boasts having concluded over 700 agreements with about 80 countries and federated states – agreements described as « binding » by the government of Québec[11].

The somewhat timid « foreign-state agreements » activity of American states may buttress a false impression that an American observer may have of the importance that international agreements have for federated states in many Federations. While the question of federated states' power to make treaties or other forms of « foreign-state agreements » may not have been at the forefront of American constitutional and international debates, it is one of great importance in other Federations. The American civil war may have settled which institutions embody the « national government », but many Federations are Federations precisely because of their multinational character. The *jus tractatus* of federated states (and their capacity to make non-legally binding political commitments) in this context amounts to the external extension of the necessary domestic powers that such states possess to maintain and foster their distinctive national character within the larger Federation.

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[8] U.S. Const., art. I, § 10, cl. 1 and 3. See F. FRANKFURTER & J.M. LANDIS, « The Compact Clause of the Constitution. A Study in Interstate Adjustments », *Yale Law Journal*, 34-7, 1925; J. RESNIK, « Afterword: Federalism's Options », *Yale Law & Policy Review/Yale Journal on Regulation* 465, 1996; J.E. HASDAY, « Interstate Compacts in a Democratic Society: The Problem of Permanency », *Fla. L. Rev*., 49-1, 1997; J. RESNIK, J. CIVIN, J. FRUEH, « Ratifying Kyoto at the Local Level: Sovereigntism, Federalism, and Translocal Organizations of Government Actors (TOGAs) », *Ariz. L. Rev*. 50, 2008; A.O'M. BOWMAN, « Horizontal Federalism: Exploring Interstate Interactions », *J. Pub. Admin. Res. & Theory* 14-4, 2004; D.B. HOLLIS, « The Elusive Foreign Compact », *Mo. L. Rev*. 73, 2008; *Id*., « Unpacking the Compact Clause », *Tex. L. Rev*. 88, 2009-2010.

[9] D.B. HOLLIS, « Unpacking the Compact Clause », *op. cit.*, p. 745.

[10] *Ibid*, p. 743.

[11] Québec, Ministère des Relations internationales et Francophonie, *International Agreements*, http://www.mrif.gouv.qc.ca/en/Ententes-et-Engagements/Ententes-internationales (last visited May 15, 2016).

Discussions of an internationally recognized *jus tractatus* for federated states are often welcomed in the United States and (English-) Canada with profound scepticism. At best, interlocutors appear ready to recognize the capacity of federated states to make non-legally binding political commitments or contracts. Capacity for federated states to conclude international treaties appears like an outlandish extravagance! This is why we will first examine what international law has to say about federated states' *jus tractatus* (I). In order to explicit such rules, we will present how different Federations (or quasi-federations) deal with the issue. After having discussed the legal issues raised by *the jus tractactus* of federated states, we will examine in the second part of this paper the policy considerations that justify such positions (II).

I. TREATY POWERS AND FEDERATED STATES: INTERNATIONAL LAW

Those who oppose recognizing federated states' power to make treaties tend to follow an argumentative path similar to this[12]: (1) X country is a « sovereign state » according to international law; (2) « sovereign states » are composed of entities that are exclusively embodied in one single and undivided international personality; (3) only that legal personality is allowed to make treaties at international law; (4) since only the central authority is habilitated to speak for all citizens (albeit only in its own fields of jurisdiction), it is the only one allowed to make treaties; (5) constitutions must necessarily follow those international rules; (6) doing otherwise would mean that federated states are otherwise « sovereign » and no longer part of a common « state ». This line of argument is completely wrong. Indeed (2), (5) and (6) are simply wrong, (3) begs the question and (4) is a *non sequitur*.

We will focus our analysis here on two mistaken claims (A) « sovereign states have only one undivided legal personality », and (B) « only sovereign states can make treaties ». The claim that « if federated states were allowed to make treaties, they would be considered "sovereign" » will be examined as part of claim (B). The key to understand the mistake at the heart of the negationist line of argumentation is the unwarranted claim that treaty-making power is an exclusive attribute of sovereign states.

A. Mistaken Claim number 1: Sovereign States Are Composed of Entities That Are Exclusively Embodied in One Single and Undivided Legal Personality

This claim relies on a confusion that was common among earlier publicists and consisted in erroneously equating « international personality » with

[12] See for example, in the Canadian context: B. LASKIN, « The Provinces and International Agreements », *Ontario Advisory Committee on Confederation: Background Papers and Reports*, 108, 1, 1967; J-Y. GRENON, « De la conclusion des traités et de leur mise en œuvre au Canada », *Can. Bar Rev*. 40, 1962; G.L. MORRIS, « The Treaty-Making Power: A Canadian Dilemma », *Can. Bar Rev*. 45, 1967.

« state sovereignty[13] ». This mistake is based on a « sovereignty bias », *i.e.* the idea that at international law, only « sovereign states » have an international personality. This is wrong. Having a « legal personality » means having the capacity to be a bearer of rights and obligations. International law is made of all sorts of legal entities having all sorts of different rights, powers and obligations[14]. The International Court of Justice recognised explicitly this phenomenon when it wrote in 1948:

> The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States[15].

This is not a new phenomenon[16]. For example, the League of Nations itself had a legal personality, so did « A » mandates[17] imposed on parts of the former Ottoman Empire. The simple fact is that international law does not limit itself to « sovereign states » even though those legal entities have been regarded in the Euro-American international legal tradition – at least since the demise of the Holy German Empire – as having the widest array of legal powers. But individuals, universities, municipalities, non-governmental or-

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[13] See A.L.C. DE MESTRAL, « Le Québec et les relations internationales », in *Québec-Communauté française de Belgique : Autonomie et spécificité dans le cadre d'un système fédéral*, Montréal, Wilson & Lafleur, 1991, p. 220, discussing the confusion between « state sovereignty » and « legal personality ».

[14] L. HENKIN, *International Law: Politics and Values*, Dordrecht, Nijhoff, 1995, p. 16-17 writes: « It has often been said that only states are subjects of international law. It is not clear what such statements mean, but whatever they mean, they are misleading if not mistaken » (cited in T.D. GRANT, « Defining Statehood: The Montevideo Convention and Its Discontents », *Columbia Journal of Transnational Law*, 37-2, 1999, p. 405).

[15] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. Rep. 174,p. 178.

[16] T.D. GRANT, « Defining Statehood... », *op. cit.*, p. 405 for example, refers to D. P. O'CONNELL, *International Law*, London, Stevens, 1970, where the latter writes p. 80: « A half century ago the international lawyers could content themselves with the proposition that "States only are subjects of international law" ». Grant also refers to I. SEIDL-HOHENVELDERN, *Corporations in and Under International Law*, Cambridge, Grotius Publications, 1987, p. 5 writing : « The idea that public international law addressed itself only to States and that therefore only States could be persons and subjects under public international law was not abandoned until the end of the nineteenth century » and to the famous Hans Kelsen who had already acknowledged that states were *not* the only subjects of international law in the reformulation of his *General Theory of Law and State*, Cambridge MA, Harvard University Press, 1949, p. 342-348. While these authors debate about when international started being populated by more than simply « sovereign states », one can question whether international law was *ever* only populated by such subjects except in the mind of certain jurists who simply dismissed many other entities as being mere « exceptions » or « aberrations ».

[17] Q. WRIGHT, « Sovereignty of the Mandates », *Am. J. Int. L.* 17-4, 1923, p. 696. This article is also quite instructive as to the difficulties then encountered in trying to locate « sovereignty » in the mandate system.

ganisations, multinational corporations, intergovernmental organisations, etc[18]. all benefit from having restricted forms of international status. Therefore, it is not surprising to read in standard international law books like *Oppenheim's International Law* that there is « no justification for the view that [member states of federations] are necessarily deprived of any status whatsoever within the international community: while they are not full subjects of international law, they may be international persons for some purposes[19] ». We can similarly read in Shaw's *International Law* that federated states may be regarded as having a « degree of international personality[20] ». In fact, let's remember that Byelorussia and Ukraine were admitted to the United Nations in 1945, while they were federated states within the Soviet Union[21].

Thus, although international law recognizes that state X has a legal personality, this in itself is not sufficient to demonstrate that it is the only entity to do so within its territory. In other words, the international status of the whole of a Federation does not in itself preclude its federated states from also having a form of international legal personality. Indeed, international law does not preclude federations from being composed of multiple overlapping legal personalities[22]. Therefore, even if a Federation's constitution was bound by internal rules to respect international law, in no way does international law force such Federation to possess only one single international personality for all possible purposes.

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[18] See for example T.D. GRANT, « Defining Statehood... », *op. cit.*, p. 405-406 wrote that « it does appear that modern developments have increased the relative legal status of such actors. Strengthening the role of the individual in international law is critical in this regard. Intermediate between states and natural persons, corporations, political or religious parties or movements, organized interest groups, transnational ethnic communities, and other nongovernmental organizations (NGOs) have proliferated and assumed a role in international society, and this development, too, has required writers to reassess what can constitute a person under international law ». In footnotes, he refers, among other sources, to the European Convention on the Recognition of the Legal Personality of International Nongovernmental Organizations 124, 1986; B.E. CARTER & P.R. TRIMBLE, *International Law*, Boston, Little, Brown, 1991, p. 411 *s.q.* (« States, international organizations, individuals, corporations, and other entities have varying legal status under international law »); J.I. HARNEY, « Transnational Corporations and Developing International Law », 1983 *Duke Law Journal* 748, 1983; P.K. MENON, « The International Personality of Individuals in International Law: A Broadening of the Traditional Doctrine », *J. Transnat'l L. & Pol'y*, 1992; D.J. ETTINGER, « The Legal Status of the International Olympic Committee », *Pace Y.B. International Law* 4, 1992.

[19] R. JENNINGS & A. WATTS, *Oppenheim's International Law*, vol. 1, Harlow, Longman, 1992.

[20] M.N. SHAW, *International Law*, Cambridge, Cambridge University Press, 1997.

[21] *Ibid.*, p. 196.

[22] It is true that the *Montevideo Convention on the Rights and Duties of States*, Dec. 26, 1933, 165 L.N.T.S. 19 states that (art. 2): « [t]he federal state shall constitute a sole person in the eyes of international law ». While other parts of the convention might embody customary law, Art. 2 does not necessarily reflect the contemporary practice of recognizing the multiplicity of international legal personalities both at the « supranational » and « infranational » levels in Europe. This should not come as a surprise since the ideas of the « state » and of the « government » have changed tremendously in the global regulatory age.

B. Mistaken Claim number 2: Only Sovereign States Have the Type of Legal Personality Necessary to Make Treaties at International Law

In its more extreme form, this claim can be illustrated by the late Professor Bora Laskin's opinion[23] according to which, « if a province presently purported on its own initiative to make an enforceable agreement with a foreign state on a matter otherwise within provincial competence, it would either have no international validity, or, if the foreign state chose to recognize it, would amount to a declaration of independence [.] [24] »! This helps to highlight the mistaken belief, held by certain commentators, that treaty-making is necessarily associated with « state sovereignty ». While the capacity to make treaties is certainly an attribute of « sovereign states[25] », it does not necessarily mean that only sovereign states possess that attribute. This is far from being the case. After all, no one would claim that international organizations are « sovereign » but, nonetheless, they clearly have the international capacity to make treaties [26].

The *Vienna Convention on the Law of Treaties*[27] provides at its Art. 6 that every *state* possesses the capacity to conclude treaties. However, it must be noted that the *Vienna Convention* is not meant to establish exhaustive rules about treaties: Art. 6 must be read as indicative of the type of entities covered by the Treaty rather than as indicative of the only entities capable of concluding treaties at international law. In effect, Art. 3 a) specifies that the *Convention* does not affect the legal validity of any other international agreement concluded between a state and any « other subject of international law[28] ».

So if entities « less than sovereign » can make treaties, how about federated states?

It appears very likely that federated states could be included in the word « state » for the purpose of the *Vienna Convention on the Law of Treaties*. This should not be surprising, since the constitution of many Federations explicitly recognize that their federated states have recognized treaty-making powers without such federated states being « sovereign states[29] »:

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[23] Bora Laskin would later become Chief Justice of the Supreme Court of Canada.

[24] B. LASKIN, « The Provinces and International Agreements », *op. cit.*

[25] *S.S. Wimbledon (Gr. Brit. v. Ger.)*, 1923 P.C.I.J. (ser. A) no. 1, para. 35.

[26] See the *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations*, Mar. 21, 1986, 25 ILM 543.

[27] *Vienna Convention on the Law of Treaties*, May 23, 1969, [1980] Can.T.S no. 37.

[28] *Ibid.*, art. 3 a).

[29] A report of the Venice Commission on this subject is very instructive. See European Commission for Democracy Through Law, *Federated and Regional Entities And International Treaties: Report adopted by the Commission at its 41th meeting*, Dec. 10-11, 1999, CDL-INF (2000) 3, http://www.venice.coe.int/webforms/documents/?pdf=CDL-INF(2000)003-e (last visited May 15, 2016) [ECDTL, *Federated And Regional Entities*].

Belgium's « Regions » and « Communities[30] », Argentina's provinces[31], Austria's *Länders*[32], Germany's *Länders*[33], Swiss Cantons[34], Bosnia and Herzegovina's two « Entities[35] », etc., and whatever you might want to call the Federation-like polity that arose out of the *Treaty on European Union and the Treaty on the Functioning of the European Union*[36], it is noteworthy that the text provides that while the European Union has *exclusive* treaty-making powers in certain areas, the Union's constitutive units nonetheless keep their treaty-making powers in a vast array of jurisdictions[37]. After all,

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[30] *Texte coordonné de la Constitution du 17 février 1994*, Moniteur belge (2nd ed., Feb. 17, 1994), updated January 31, 2014, art. 167A translation is provided by the Belgian House of Representative, *The Belgian Constitution*, http://www.const-court.be/en/basic_text/belgian_constitution.pdf (last visited May 15, 2016).

[31] See *Constitución Nacional De La República Argentina*, Convención Nacional Constituyente, ciudad de Santa Fe, 22 agosto 1994, art. 124 (1). A translation is provided by E.E. WALSH, School of Foreign Service, *National Constitution of the Argentine Republic*, Center for Latin American Studies, Georgetown University, http://pdba.georgetown.edu/Constitutions/Argentina/argen94_e.html (last visited May 15, 2016) (Political Database of the Americas).

[32] See *Österreichische Bundesverfassungsgesetze*, Bundes-Verfassungsgesetz (B-Vg), art. 16, § 1-3; art. 16, § 1. (Austrian Federal Chancellery, Austrian Federal Constitutional Laws (selection) (C. KESSLER & P. KRAUTH (dir.), *Austrian Federal Constitutional Laws (selection)/Lois constitutionnelles de l'Autriche (une sélection)*, Vienna, Bundespressedienst, 2000): //www.bmeia.gv.at/fileadmin/user_upload/bmeia/media/4-Oesterreich_Zentrale/182_bv_deu_eng_frz.pdf (last visited May 15, 2016) (Legal Information System of the Republic of Austria).

[33] *Grundgesetz für die Bundesrepublik Deutschland*, art. 32.3 (Deutscher Bundestag, Basic Law for the Federal Republic of Germany (Tomuschat, Currie & Kommers trans., German Bundestag, 2012), http://www.bundestag.de/blob/284870/ce0d03414872b427e57fccb703634dcd/basic_law-data.pdf (last visited May 15, 2016).

[34] *Constitution fédérale de la Confédération suisse*, Apr. 18, 1999, RO 101, art. 56. Unofficial English version of art. 56 is provided by the Federal Council, *Federal Constitution of the Swiss Confederation*, https://www.admin.ch/opc/en/classified-compilation/19995395/index.html (last visited May 15, 2016).

[35] *Ustav Bosne i Hercegovine*, art. I, § 3 provides that the two « Entities » are the Federation of Bosnia and Herzegovina and the Republika Srpska. Art. III § 2 (a) and (d). Constitutional Court of Bosnia and Herzegovina, *Constitution of Bosnia and Herzegovina*, http://www.ustavnisud.ba/public/down/USTAV_BOSNE_I_HERCEGOVINE_engl.pdf (last visited May 15, 2016).

[36] *Consolidated Version of the Treaty on the Functioning of the European Union*, Sept. 5, 2008, 2008 O.J. (C 115) 47 [*Treaty of European Union*] following the *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Union and the Treaty Establishing the European Communities*, Dec. 13, 2007, 2007 O.J. (C 306). The *Treaty of Lisbon* amended the *Treaty on European Union (Consolidated Version)*, Dec. 24, 2002, 2002 O.J. (C 325) 5 [*Treaty on European Union*] and the *Treaty establishing the European Community (Consolidated version)*, Dec. 24, 2002, 2002 O.J. (C 325) 33 [*Treaty establishing the European Community*] to bring significant changes to the institutional structures of the Union. Among them, there is the merger of the « three pillars » into one legal personality called the « European Union ».

[37] Under the *Treaty of European Union*, *id.*, art. 216-218, the Union's treaty-making powers remain an attributive jurisdiction. The *Treaty* specifies the scope and process of the Union's treaty-making powers. Nonetheless, the *Treaty*, at art. 3 al. 2 specifies: « "The Union shall

we have to remember that a preliminary version of Art. 6 of the *Vienna Convention* – then Art. 5 (2) of the *Draft Articles on the Law of Treaties* – explicitly recognized a *jus tractatum* to federated states *on the condition that the federal constitution granted them such powers*[38]. The International Law Commission, commenting on the *Draft Articles on the Law of Treaties*, declared that it

> considered that it was desirable to underline the capacity possessed by every State to conclude treaties; and that, having regard to the examples which occur in practice of treaties concluded by member States of certain federal unions with foreign States in virtue of powers given to them by the constitution of the particular federal union, a general provision covering such cases should be included.
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> […]
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> Paragraph 2, therefore, is concerned only with treaties made by a unit of the federation with an outside State. More frequently, the treaty-making capacity is vested exclusively in the federal government, *but there is no rule of international law which precludes the component States from being invested with the power to conclude treaties with third States*. Questions may arise in some cases as to whether the component State concludes the treaty as an organ of the federal State or in its own right. But on this point also the solution must be sought in the provisions of the federal constitution[39].

Art. 5 (2) was dropped from the final version of the Convention after being voted down following the active lobbying of Canada and other countries[40].

However, states that opposed the inclusion of Art. 5 (2) in the *Convention* did not do so on the basis that federated states could not make treaties, but rather opposed it mainly on the basis that making capacity solely dependent on the content of specific federal constitutions might be taken as an invitation to other states to pass judgment on the internal affairs of such Federations[41]. At any rate, it may be that the principles of the old Art. 5 (2)

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also have *exclusive competence* for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope » (emphasis added). While art. 216 al. 2 provides that « [international a]greements concluded by the Union are binding upon the institutions of the Union and on its Member States », the *Treaty* clearly contemplates that the constitutive units will retain their treaty-making powers.

[38] *Report of the International Law Commission on the Second Part of its Seventeenth Session and on its Eighteenth Session*, U.N. Doc. A/6309/Rev.l reprinted in *Y.B. Int'l.L. Comm'n*. II, 1966, p. 177, 178, U.N. Doc. A/CN.4/SER.A/1966/Add.1, art. 5 (2) (« States members of a federal union may possess a capacity to conclude treaties if such a capacity is admitted by the federal constitution and within the limits there laid down ») [*Draft Articles on the Law of Treaties with commentaries*].

[39] *Draft Articles on the Law of Treaties with commentaries*, *id.*, p. 192 (emphasis added).

[40] E. MCWHINNEY, « Book Review of *Les États Fédéraux dans les Relations Internationales: actes du colloque de Bruxelles*, Institut de sociologie, 26-27 février 1982 », *A.J.I.L.* 80, 1984, p. 999 reports that Art. 5 (2) « was deleted by a vote of the UN General Assembly in plenary session (66 votes to 28, with 13 abstentions) ».

[41] J.S. STANFORD, « United Nations Law of Treaties Conference: First Session », *University of Toronto Law Journal* 19-1, 1969, p. 61.

represent the orthodox position[42], but it appears that even this view may be too restrictive in light of current practices. As a matter of fact, it is dubious that *only* a « federal constitution » could grant treaty-making powers to constitutive subunits, as the cases of the Faeroe Islands and Greenland in Denmark[43] and the European Union illustrate[44].

In short, international law rule ends up following what the domestic law of each Federation (or quasi-federations) says. In other words, international law basically takes the view that it is up to domestic law to settle the issue as to whether or not subunits will have the capacity to make treaties. This is not surprising because states are so diverse in their internal power structures that international law has not developed standard rules as to which institutions can conclude treaties binding on their states[45]. While certain Federations may provide that federated states may use their *jus tractatus* under the supervision of the central authority to ensure a cohesive foreign policy of

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[42] I. BERNIER, *International Legal Aspects of Federalism*, Longman, 1973 and G. VAN ERT, « The Legal Character of Provincial Agreements with Foreign Governments », *Les Cahiers du droit*, 42-4, p. 1108.

[43] ECDTL, *Federated and Regional Entities*, *op. cit.* (« In almost all the states concerned, the entities' powers in relation to international affairs are based on the constitution. The only exception is *Denmark*, where the relevant powers of the Faeroe Islands and Greenland derive from laws on the self-governing status of those regions. In *Belgium*, the constitutional provisions are amplified by the special law on institutional reform of 8 August 1980 and by a number of "co-operation agreements" between the federal state and the regions or language communities »).

[44] Treaty-making powers are not granted to the European Union's constitutive states by the *Treaty of European Union*, quite the contrary. Treaty-making powers are taken to rest, by default, in the constitutive states of Europe and are thus recognized by their respective material constitutions. It is rather as a matter of exceptional devolution from the constitutive states to the European government that the latter would receive certain treaty-making powers through the *Treaty of European Union*, *ibid.* In other words, it would not be the « federal constitution » that would grant constitutive states their treaty-making powers because those states already possess their own treaty-making powers by virtue of their own constitution, but the « federal constitution » would rather operate the limited devolution to the central authorities of certain powers to make treaties on their own.

[45] It is, however, important to note that diverse international jurisdictional bodies have shown themselves more ready than in the past to open up the proverbial « black box » of the state and have directed their orders not to the state as such but rather directly to the institutions deemed to be in breach of international obligations. W. FERDINANDUSSE, « Out of the Black-Box? The International Obligations of State Organs », *Brooklyn Journal of International Law* 29, 2003, p. 80 writes that the « ICJ is not alone in its efforts to speak directly to relevant actors within the State. In fact, it is only taking the first cautious steps on a path where other international courts have made considerable progress ». Ferdinandusse discusses, among others, the cases of *LaGrand* (*Germany v. United States of America*), 2002 I.C.J. 9, para. 28 (Order of Mar. 3, 1999) where the International Court stated that « the Governor of Arizona is under the obligation to act in conformity with the international undertakings of the United States » and the advisory opinion in « Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights », Advisory Opinion, I.C.J. 62, 1999, p. 89-90 where the International Court quite clearly held that the international obligations were not only those of the state of Malaysia but also those of the state organs, namely those of the Malaysian *courts*. Ferdinandusse also discusses cases from the European Court of Justice, the Inter-American Court of Human Rights, the International Criminal Tribunal for the former Yugoslavia.

the whole, others, like Belgium, do leave their subunits free to conclude about any international agreements related to their domestic jurisdiction.

Some worry that recognizing treaty-making powers to federated states might help those states in achieving international recognition in the event of a declaration of independence. It should have become clear to everyone as a result of the foregoing discussion that this is simply a *non sequitur*. Those who have expressed this fear have never been able to point to a single case in which the prior capacity to make treaties of a seceding federated unit has either been determinative or has made the slightest difference in the decision of other states to recognize or not that unit as a new « sovereign state ». This is like hanging tightly to one's belt and suspenders out of fear of losing one's hat! Because of the difficulties in arriving at a fixed definition of what a « state » is in our rapidly changing international order, it appears, however, that the criteria for determining the existence of a state are no more than an incomplete list of « rules of thumb » for state recognition and that, in the end, what truly matters in the case of alleged secession is the political[46] and legally underdetermined act of recognition.[47]

II. TREATY POWERS AND FEDERATED STATES: POLICIES

This section will examine policy arguments and counter-arguments related to recognizing an independent *jus tractatus* to federated states. We will first show that, to the extent that Federations gain from « speaking with one voice » in the international arena, this does not entail that the central authority should be the one speaking for all (2.A). Once we have shown that there are no necessary connections between the needs for a Federation to speak with a common voice and giving central authorities plenary treaty-making powers, we will further show why it could actually be detrimental to Federations to recognize such general treaty-making powers to the center. In particular, we will highlight the need to align power with expertise (2.B.) and democratic accountability (2.C.). We will also demonstrate how recognizing a *jus tractatus* to federated states may help solving certain cooperation problems (2.D.)

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[46] Sir Hersch Lauterpacht famously wrote in 1947 that « [a]ccording to what is probably still the predominant view in the literature of international law, recognition of states is not a matter governed by law but a question of policy » (H. LAUTERPACHT, *Recognition in International Law*, Cambridge, Cambridge University Press, 1947, p. 65).

[47] For a similar opinion, see P.-M. DUPUY, *Droit international public*, Paris, Dalloz, 2004, p. 98. American officials have been quite blunt about this. For example, Robert J. Delahunty and John C. Yoo, respectively former Special Counsel and former Deputy Assistant Attorney General, with the Office of Legal Counsel in the Department of Justice during Georges W. Bush's presidency, wrote R.J. DELAHUNTY & J.C. YOO, « Statehood and The Third Geneva Convention », *Virginia Journal of International Law* 46, 2005, 131, 2005, p. 153: « When one surveys the practice of the United States in recognizing, not recognizing, or derecognizing states, it is obvious that our Government does not apply the Montevideo Convention tests of statehood in a value-neutral manner. On the contrary, our governmental practice reveals that the decision whether or not to recognize or derecognize a state is highly policy-laden ».

A. Many Ways to « One Voice »

The general policy claim made by those who would like to see the central authorities in a Federation have plenary powers to make treaties can be summarized by the words of G.R. Morris: « international affairs today is too crucial, complex and all-pervasive to permit the possibility of the nation speaking formally with more than one voice in any international matters of significance[48] ». While the importance, complexity and pervasiveness of international affairs today remains beyond doubt as a general notion, we do not believe, however, that this context necessarily calls for plenary treaty-making powers invested in the central authorities of Federations.

As a preliminary matter, it must be acknowledged that central authorities can, *in principle*, develop coherent positions on matters relevant to their own exclusive jurisdictions. However, as we will see later in the section dealing with the need to « align power with expertise » (2.B.) there are institutional constraints that make that internal cohesion hard to attain. Thus, dissonance between specific positions defended by the different parts of the central government is obviously to be expected. Although the central authorities have internal mechanisms to achieve coherence, cases will inevitably exist where different departments will take inconsistent views until coherence is finally achieved, if ever, by a central agency such as the Prime Minister's office. Therefore, while granting plenary treaty-making powers to the central authorities is often justified by the need to maintain internal coherence, centralising powers does not necessarily come with guaranteed consistency.

At the same time, federated states' participation in international relations does not, *per se*, preclude that singularity of « voice » of the Federation to which they belong.

« Cacophonic voices » emanating from Federations – or unitary states, for that matter – is ultimately caused by the lack of adequate means to coordinate several internal perspectives. The risk of cacophony may appear greater with Federations since federated states have exclusive powers over certain matters, However, to ensure a « singleness of voice », Federations, like any other polity, must find appropriate mechanisms to develop common policies, to prioritise among the several competing objectives and to select among incompatible policies and priorities advanced by the different actors. That being said, it is not at all clear why the central authority, when it has no jurisdiction on an issue and when it has not been called upon to do the job, could effectively and legitimately decide which federated state's interests should trump which other federated state's interest when they may conflict. This is particularly true in contexts where the central authority is not in a situation to create the incentives necessary for harmonizing all the positions.

There are other means to achieve coherence than having decisions dictated by the central authorities in a Federation. Take Belgium for example.

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[48] G.L. MORRIS, « The Treaty-Making Power: A Canadian Dilemma », *op. cit.*, p. 497.

The three « regions[49] » are responsible for both developing the foreign policies of the country and representing the country in international institutions on matters that pertain to their jurisdictions. Thus, when an issue is a « regional » matter, representatives of the regional governments are the ones representing Belgium as a whole and not the central government. To take another example, the « Council of Ministers of Education, Canada » (CMEC) was created in 1967 to coordinate provincial and territorial actions in relation to education[50]. This international role of the CMEC has long been recognized by the federal government. In 1977, the federal Foreign Affairs Minister concluded an agreement with the CMEC to the effect that the latter would be able to recommend the composition of the Canadian missions and to decide who would lead the missions to any international event in relation to education[51]. Also, this protocol, to which all provinces agreed, provides that it is the provinces, through consensus, that determine the Canadian positions over educational matters[52]. The CMEC also maintains a permanent secretariat to sustain Canada's relations with education-related international organisations[53].

Belgian regions have also developed mechanisms to produce such common policies. In order to deal with the possibility of not being able to achieve a common position on a subject, the three Belgian regions have found a powerful incentive to come up with an agreement: either they develop a common position or Belgium as a whole takes no position whatsoever on the issue[54].

While certain subjects might be amenable to such all or nothing approach, others might be less so. This mechanism would probably not be appropriate for most issues requiring a common position in Federations composed of a large number of units. However, in order to avoid deadlocks on certain issues, Federations can use something similar to the principle of « constructive abstention » developed by the European Union. The principle was developed and adopted with the *Treaty of Amsterdam*[55] as a way out of a difficult conundrum in the development of rules relating to European defence and security policy: how to accommodate the idea that states should

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[49] « Regions » are the functional equivalents of provinces in Canada.

[50] Canada, Council of Ministers of Education, *Programs and Initiatives: International*, http://www.cmec.ca/148/Programs-and-Initiatives/International/Overview/index.html (last visited May 15, 2016) [CMEC, *Programs and Initiatives*].

[51] S. PAQUIN, « Quelle place pour les provinces canadiennes dans les organisations et les négociations internationales du Canada à la lumière des pratiques au sein d'autres fédérations ? », *Can. Pub. Adm.* 48-4, 2005.

[52] *Ibid.*

[53] *Ibid.* The CMEC's website mentions that it has developed relations with a wide variety of education-related international organisations (CMEC, *Programs and Initiatives*, *op. cit.*).

[54] I would like to thank Stéphane Paquin for informing me about this mechanism.

[55] *Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and Certain Related Acts*, Oct. 2, 1997, 1997 O.J. (C 340) 1 (entered into force May 1, 1999) [*Treaty of Amsterdam*].

remain responsible for the decision of sending their own troops to combat while, at the same time, allowing Europe to develop a common defence position even in the face of a lack of unanimity? The solution is a decision-making procedure that allows for a state to abstain, thus not blocking the possibility of unanimity, while, at the same time not being bound to apply the decision taken collectively[56].

The adoption of a similar decision-making procedure by a Federation would result in the fact that one or more federated states could decide to abstain from the common position and that abstention would not count as negative votes for the purpose of reaching unanimity. If a federated state were to « constructively abstained » and made an official declaration pertaining to that abstention, that federated state would, moreover, not be bound by that decision. The minimum number of supporting federated states can be uniformly set or could vary according to the subject-matter of the decision to be taken. It might also be agreed, when setting up such a coordination mechanism, that federated state could retain their powers to make their own arrangements with the targeted partners if they disagreed with the majority of the other federated states on certain subject-matters.

The purpose behind this brief sketch of institutional options is simply to demonstrate that the « one voice » trope does not necessarily lead to the conclusion that the central authority must necessarily have plenary powers to make treaties; there are many other ways to achieve that objective.

B. The Need to Align Power with Expertise

Gerald Morris noted many years ago, when states were not organisations as complex as they are today, that « [e]ven a unitary state today has extreme difficulty in coordinating all aspects of its international relations[57] ». While it is true, as Morris also pointed out, that « some measure of consistency is essential if a nation's influence is to be used with any effectiveness in the pursuit of its objectives[58] », consistency should not come at the expense of expertise. Indeed, it is often worse to be wrong and resolute than to be right and wavering. Thus, while it may be important for Federations to be able to speak with one voice, granting a monopoly over the negotiating and conclusion of international agreements to the central organs of a Federation may actually impede the effectiveness of the process. In effect, to be effective, power has to be aligned with knowledge[59].

Let me take the Canadian case as an example of the difficulties that may face a Federation where the central government claims to have the exclusive

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[56] The amendment has been integrated in the consolidated version of the *Treaty on European Union*, art. 31(1), para 2.

[57] G.L. MORRIS, « The Treaty-Making Power: A Canadian Dilemma », *op. cit.*, p. 503.

[58] *Ibid.*

[59] The following reflection was triggered by a discussion that I had with Andrew Petter and I would like to thank him for that.

powers to make treaties (a claim that the Québec government consistently contests).

Currently, the federal government claims that it is under no legal obligation to consult provinces before concluding international agreements affecting provinces' legislative jurisdiction. The federal government has stated officially that it would not enter into treaties « dealing with matters within provincial jurisdiction […] without prior consultation with the Governments of the Provinces[60] » but refuses to recognize that it is bound by an obligation to consult[61]. If the federal government does not recognize an obligation to *consult* provinces when it negotiates treaties on matters *affecting* provincial subject-matters, nor does it recognize that it has an obligation to get provinces' *consent* before forming such agreements *related to* provinces' legislative powers. This basically means that the federal government is of the view that *it can conclude agreements on matters in which it has no expertise whatsoever.*

In fact, Ottawa's current position is quite anachronistic in light of the federal government's own structure. In effect, now that foreign affairs are not simply about the « high politics » of war and peace, but rather involve a wide range of domestic issues, foreign affairs have been « domesticated » and are now conducted by a wide range of departments – that is, where the expertise on the subject-matter lies. For example, Environment Canada has been involved at different levels of international relations for quite some time.

Even foreign affairs as such are divided in different portfolio within the federal government: there is a Minister of Foreign Affairs, a Minister of International Trade, a Minister of National Defence, and a Minister of International Development and La Francophonie. Moreover, even the more purely technical knowledge about the conduct of « foreign affairs » is scattered across several departments. Take, for example, the strong expertise that the

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[60] See Letter from the Legal Bureau of the Department of External Affairs of Canada to the Council of Europe (Feb. 1, 1985), reproduced in E.G. LEE, « Canadian Practice in International Law at the Department of External Affairs/La pratique canadienne en droit international en 1985 au Ministère des Affaires extérieures », *Can. Y.B. Int. L.* 24, 1987, p. 397.

[61] A series of attempts at recognizing such obligation were made in Parliament. However, they have all failed. The latest occasion was with Bill C-260, *An Act respecting the negotiation, approval, tabling and publication of treaties*, 1st Sess., 38th Parl., cls. 3-4 (2004) (as passed first reading by the House of Commons Nov. 3, 2004 and rejected on second reading by the House of Commons Sept. 28 2005) [*An Act respecting the negotiation, approval, tabling and publication of treaties.* The Bill was defeated 54 (yeas) to 216 (nays) [37 (absent or abstained)]. For previous efforts to have the obligation to consult, see among others: Bill C-313, *An Act respecting the negotiation, approval, tabling and publication of treaties,* 1st Sess., 37th Parl., cls. 4 (2001) (first reading by the House of Commons Mar. 28, 2001); Bill C-317, *An Act to provide for consultation with provincial governments when treaties are negotiated and concluded,* 1st Sess., 37th Parl., cls. 4 (2001) (first reading by the House of Commons Mar. 28, 2001) and Bill C-214, *Act to provide for the participation of the House of Commons when treaties are concluded*, 2nd Sess., 36th Parl., cls. 4 (1999) (rejected on second reading by the House of Commons June 13, 1999).

Department of Justice has developed on a variety of public international law issues such as war crimes and crimes against humanity.

One might have thought that the Department of Foreign Affairs had inherited the capacity to coordinate all the federal departments in their international relations. However, this has not happened. Pierre Elliott Trudeau's attempt in the 1970s to transform the then External Affairs Department into a central agency akin to the Department of Finance, or the Treasury Board, failed in large part apparently because the Department had very little other power, other than persuasive reasons, to impose its position on other departments[62].

Now, as Denis Stairs notes, « [s]ome of the Department [of Foreign Affairs]'s more reflective officials express concern that their role is now less about the making of foreign policy and more about providing support services to departments elsewhere in government[63] ». That is because the federal government is also realizing that the Department of Foreign Affairs simply cannot replicate the substantive expertise of all the other departments. This is the reality of modern bureaucratic politics. And because globalization implies that the frontiers between the domestic and international politics are blurring, it would be senseless anyway to try to develop two parallel federal governments – one dealing with internal issues and the other dealing with the same issues externally[64].

If the Department of Foreign Affairs cannot develop the expertise necessary to conduct federal relations with respect to subject-matters of federal jurisdiction, we can easily imagine the difficulties it faces in relation to provincial matters. And to the extent that provinces are not necessarily included in federal negotiations and that the federal government attempts to muzzle the provinces' international activity, Canada condemns itself at being, to a large extent, *reactive* and ill-informed on issues related to provincial jurisdiction.

Governmental initiatives being the products of expertise, means and incentives, the misalignment of power and expertise weakens Federations' ability to act judiciously on international matters when their central authorities do not allow the federated states to take their proper place in the decision-making process.

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[62] D. STAIRS, « The Conduct of Canadian Foreign Policy and the Interests of Newfoundland and Labrador », in *Collected Research Papers of the Royal Commission on Renewing and Strengthening Our Place in Canada 9* (Royal Commission on Renewing and Strengthening Our Place in Canada, vol. 2, 2003), http://www.gov.nf.ca/publicat/royalcomm/research/Stairs.pdf (last visited May 15, 2016) [Stairs, *The Conduct of Canadian Foreign Policy*].

[63] *Ibid*, p. 6-7.

[64] The Canada School of Public Service Action-Research Roundtable on Managing Canada-US Relations has produced a very instructive compendium that offers a snapshot of the different channels of collaboration between certain federal institutions and those of the United States. See D. MOUAFO, N. P. MORALES & J. HEYNEN, *Building Cross-Border Links: A Compendium of Canada-US Government Collaboration*, Ottawa, CSPS Action-Research Roundtable on Managing Canada-US Relations, 2004.

Furthermore, central authorities may not only lack the expertise to deal with issues under the responsibility of federated states, but they may also lack the legitimate incentives to do so.

C. The Need to Align Power with Democratic Accountability

To the extent that one considers democratic accountability an important value, allowing the central authorities to make treaties in relation to federated states matters is worrisome for at least two reasons.

The first one is that it allows for an « accountability mismatch »: voters have a harder time identifying who is to praise (or who is to blame) for the policies associated with the adopted treaties. This could have the effect, for example, of limiting the efforts put towards the negotiation and adoption of a treaty that would be popular only in one or a few federated states when the population of the other federated states is indifferent to the issue, for the mere reason that the central authority would not gain much across the country from investing resources in such a project. This phenomenon is further exacerbated if the treaty subject falls squarely within the exclusive jurisdiction of federated states and has no specific and stable constituency to which it appeals[65]. On the other hand, this would allow the federal government to get the credit for making a popular, yet costly, treaty while shifting to the provinces the expenses of implementation and the blame for not doing so appropriately. In short, if central authorities are not superior to the federated states and each has its own exclusive jurisdictions, the central authorities lack the democratic legitimacy to arbitrate between the preferences of federated states on such issues over which they have no legitimate power.

Second, this accountability mismatch has an important side effect on the issue of state responsibility at international law. Unless a Federation has clear internal rules about how to allocate the consequences of violations of treaty obligations *of the Federation* caused by a federated state, the entire Federation is bound to bear the burden of violation. While in the past, sanctions for not following international obligations were mostly diplomatic in nature, monetary damages are now more important as commercial and investment treaties have burgeoned. Unless the Federation possesses clear internal rules dealing with the allocation of responsibility in case of violation, the central authority has very good reasons to avoid making treaties for which it cannot be sure that adequate implementation will follow[66]. But apart from financial concerns, the issue of principle here is that the proper *demos* should bear the costs of its international wrongdoings. When one

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[65] This would help to explain, for example, the Canadian government's hesitant participation in the work of the Hague Conference on Private International Law (see R. DEHOUSSE, *Fédéralisme et relations internationals*, Bruxelles, Bruylant, 1991).

[66] This is why, recently, Europeans demanded that Canadian provinces take part in the negotiation leading up to the Comprehensive Economic and Trade Agreement between Canada and the European Union; European partners wanted to ensure that whatever deal Canada would accept, it could be implemented.

federated state is breaching international law on a matter related to her jurisdiction, it is inappropriate to impose collective punishment on the population of all other federated states. If the central government and the federated states are equal in status and they each embody distinct (although overlapping) political communities, responsibilities should fall squarely where it belongs.

D. The Need to Bind Oneself to be Free

States do not conclude agreements for their mere pleasure; they do so because they believe that those agreements will advance their interests. The flip side of this is that even if federated states did not count as « states » for the purposes of the *Vienna Convention on the Law of Treaties*, certain states might still be willing to conclude agreements with them if they consider that such agreements will further their interests. International law would not oppose it. As we have seen earlier, there is little doubt that federated states could be considered international subjects capable of entering into treaties. Therefore, sovereign states may be willing to consider a federated state as an international subject for the purpose of concluding mutually beneficial agreements.

The fact that there might be treaties between states and other international entities should only be surprising to those who still imagine treaties as being the highly formal agreements between monarchs otherwise living in a quasi-state of nature mainly controlled by customs and force. Times have changed and the ontology of that international arena has changed as well. Monarchs are no longer the only actors inhabiting that space and the needs of all the actors occupying that space require much more than a rudimentary social contract of non-aggression. The primary function of the vast majority of international agreements is no longer to set up and maintain *the conditions for internal governance* by protecting polities from external interventions; the bulk of international agreements are now meant to be, *by themselves, instruments of governance*.

That shift explains in part why international law as a whole has evolved from a system mostly based on custom to a system embodied in treaties[67]. And since international agreements are no longer used primarily to seal the peace but rather to make all sorts of functional arrangements, this also helps to explain the general trend in international law to move away from treaty formalism, towards the use of a multitude of more flexible instruments to facilitate and institutionalize functional agreements between a variety of governing institutions. In that context, treaty formalism is considered more

[67] Over 200,000 treaties or international agreements entered into by Members of the United Nations since the entry into force of the UN Charter (Dec. 14th, 1946) have been registered with the Secretariat. See United Nation Treaty Collection, *Overview*, https://treaties.un.org/Pages/Overview.aspx?path=overview/overview/page1_en.xml (last visited May 15, 2016).

of a hindrance to the ability of governments to take concerted actions effectively to accomplish their missions.

International relations are now a necessary aspect of any state's governance. Because our modern means of communication and transportation have increased our mobility, and because our economies are subject to evermore integrative forces, traditional domestic issues increasingly contain transnational aspects.

But for there to be *cooperation*, the instruments produced by the contracting parties will often need to contain more than mere *predictions* of what the parties will do in specified circumstances. In other words, such agreements will often have to be understood *as true commitments* in order to be effective. And that is because of the different forms of « collective action problems » that such agreements are trying to solve. Among those problems, there are those that arise from the difficulty of coordinating actions simultaneously, and others that arise from the difficulty of ensuring iterated cooperation over an extended period of time. Those different problems will call for different solutions.

In that sense, it is true that informative statements about what other players will do in specific future circumstances help to *coordinate* reciprocal actions by creating a focal point around which players can adjust their behaviour. In a classic coordination problem, it matters more to the players that everyone chooses an identical strategy, than what that specific strategy is. A good example of a coordination problem concerns the choice of the side of the road on which cars should be driving. If we assume that there are no intrinsic reasons for choosing one side over another, that is, that there are no reasons for preferring driving on one side or another apart from the behaviour of the other drivers, the problem becomes one of coordinating everyone's individual choice to avoid frontal crashes and to ensure the efficient use of the road[68]. In such circumstances, receiving information about the focal point should be sufficient for rational players to fall into line, since coordinating will bring about the biggest payoff for each one of them. In effect, in such situation, if one player does not act according to the coordinated solution, every player loses, including the defector. Thus, there are cases where it is true that parties might not want to be bound by any obligation but merely want to exchange information about the future behaviour of the players involved so as to adjust their own. But this particular case is far from covering all the possible contexts where cooperation is sought. Coordination is far from exhausting the range of problems that cooperation can address.

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[68] Obviously, this factual assumption may prove to be false. There might be physiological reasons to favour one side of the road to the other. For example, empirical experiments might one day demonstrate that the brain of most drivers is hardwired to react more swiftly to fast-moving objects coming from the left side than from the right (or vice versa). Also, it must be noted that once the habit of driving on one side of the road has acquired a certain degree of automatism among drivers, quitting that habit constitutes a significant cost that will go against switching sides.

Contrary to the coordination problem mentioned above, in cooperation problems, one player may increase her payoff by not following the statement she gave about her future behaviour. Thus, to understand why such a player may nonetheless go ahead and cooperate, we need to have recourse to a wider range of models. As we all know, game theory[69] has developed a series of models to analyse cooperation problems and examine ways to solve those problems. The famous « prisoner's dilemma[70] » is a model that could usefully be used to understand why players will cooperate with one another despite potential short-term gains (or avoidance of costs).

This model simplifies the situation where parties to an agreement want to achieve their respective objectives in a way that will offset the costs of making the international agreement and of providing the benefit sought by the other player. But if only one party cooperates, the cooperating party will have to pay for both the costs of making the agreement and of the consideration requested by the other party, without receiving anything in return, while the defecting party will have gained the same benefit as if both parties had actually cooperated but without paying for the costs of providing anything in return to the other player. Knowing this, both parties would rationally defect. If both parties defect, they only incur the costs of making the agreement and no one gains any benefit. But how could a state ensure that their partner will cooperate so that they could both achieve their optimal payoffs?

The first part of the answer is to be found in the fact that international players are rarely engaged in one-shot games but are rather engaged in repeated games. While this makes no difference for the coordination problem discussed initially – that is, the fact that one drives one's car more than once does not change one's strategy –, it makes a big difference in this context. In *iterated* « prisoner's dilemma » types of situation when the number of games is not known in advance, it might actually become rational for all players to cooperate right from the start if they are playing with the right players. The reason is that the possibility of punishment in the following round will threaten to diminish the total payoffs for the defector. Thus, the two players receive high payoffs over the long term as long as they are both capable of resisting the short-term temptation to defect. For this to be the case, it is important that players do not know in advance the number of iterations of the game. In effect, if players know ahead of time the number of iterations of the game, they will no longer have reasons to cooperate in the last round since there will be no possibility of future retaliation; and since

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[69] This interdisciplinary field, developed at the confines of mathematics, economics and politics, grew out of the path-breaking 1944 book by John von Neumann and Oskar Morgenstern entitled *Theory of Games and Economic Behavior.* Princeton University Press recently released a new edition of that classic: J. VON NEUMANN & O. MORGENSTERN, *Theory of Games and Economic Behavior*, Princeton, Princeton University Press, 60th—anniversary ed., 2004).

[70] We apparently owe the name of this non-zero sum game to the Princeton mathematics professor Albert William Tucker. However, the matrix itself was first introduced by Merrill Flood and Melvin Drescher of the RAND Corporation. See W. POUNDSTONE, *Prisoner's Dilemma*, New York, Doubleday, 1992, p. 8, 116-119.

everyone should rationally defect in the last round, there will be no reasons not to defect in the second to last, and the same reasoning applies back up to the first round. The same reasoning applies, moreover, if one player can unilaterally put an end to the iterated game. In other words, in such situations as when a player does not intend or is not seen as intending to participate in the iterated game, cooperation will not be possible because future defection will be assumed. That is why, for cooperation to be possible, it is necessary for players to be convinced that others are taking part in the iterated game. In fact, the very issue of keeping the game going or not can itself be conceptualised as being part of a larger collective action problem. So how can players ensure that they can be taken seriously when they inform the other party that they truly intend to participate in an iterated game?

In the absence of a third-party enforcer in international relations, different mechanisms have been developed over time to ensure that promises could be made credible. The classic example is that of the monarchs who exchange sons to guarantee a Peace Treaty[71]. They make their promise credible by making defection costlier to their own eyes than any possible benefit they may reap from defecting. Today's equivalent strategy is bond posting. If governments do not necessarily post bonds in the form of hard cash when they want to cooperate with others, they do something functionally equivalent: they enlarge « the shadow of the future[72] » by explicitly recognizing their engagement and thereby putting their reputation as trustworthy partners on the line[73]. In other words, they can turn their cheap talk into something credible by « bond posting » their reputation through formal acknowledgment of their engagement. If a government defects, not only does it risk retaliation in the form of « tit for tat[74] », but the other government gains the capacity to damage one important asset of the defector: its reputation as a good partner. On the flip side, the readiness to grant to the other party such a

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[71] This example is taken from A.O. SYKES, « The Economics of Public International Law » *U. Chi. L. & Econ*., Online Working Paper No. 216, 2004, p. 19-20, available at http://ssrn.com/abstract=564383 (last visited May 15, 2016). Thomas Schelling had mentioned hostage exchanges as a commitment device in a footnote to his article « An Essay on Bargaining », *American Economic Review* 46, 1953, p. 281, 300, but we had to wait for Oliver E. Williamson to give us a more detailed examination of the use of « hostages » as a credible commitment device (see O.E. WILLIAMSON, « Credible Commitments: Using Hostages to Support Exchange », *Am. Eco. Rev.* 73, 1983, p. 519).

[72] The expression is taken from R. AXELROD, *The Evolution of Cooperation*, New York, Basic Books, 1984. Axelrod uses that expression many times in his book.

[73] Because « reputation » is information about one's character as a game partner, it is highly valuable. The more a player has a good reputation for cooperation, the easier it might be to find willing partners to play with him. Thus, putting one's reputation on the line is a strong self-imposed deterrent against defection. That is why the willingness of the player to put such a valuable thing at the mercy of the other player also signals to them that he is committed to cooperate.

[74] « Tit for tat » is a classic strategy in iterated prisoner's dilemma games whereby one plays the same move as the other player played in the previous round: if the other player cooperated in the last round, one cooperates, if the other player defected, one defects in this round.

power over one's important asset signals one's "low discount rate".[75] It is important for "good players" to signal their low discount rate in order to attract similar potential partners.

But for all this to happen, there must be an *agreement* and that agreement must be publicly known, otherwise the players' reputation has not been made vulnerable. In effect, one's reputation could not be tarnished by the fact of not abiding by something by which she or he was not publicly known to be bound to abide by.[76] In other words, the agreement must be thought to create *valid obligations*. Thus, these formal and public engagements increase the costs of defecting to a point that might make it more expensive to defect than to cooperate (in that sense, it restricts the possible actions of a short-term utility maximizer) and signal to other possible partners that the players have a low discount rate, manifest in that they accept to post bond with their partners through the assumption of obligations.

But logically, for an *obligation* to arise, something more than the mere acts of will of the partners is necessary: there needs to be a secondary rule recognizing that these types of promises give rise to obligations. Otherwise, the mutual promises remain simple predictions about the players' future acts. H.L.A. Hart summarized that point nicely when he wrote:

> … in order that words, spoken or written, should in certain circumstances function as a promise, agreement, or treaty, and so give rise to obligations and confer rights which others may claim, *rules* must already exist providing that a state is bound to do whatever it undertakes by appropriate words to do. Such rules presupposed in the very notion of a self-imposed obligation obviously cannot derive *their* obligatory status from a self-imposed obligation to obey them[77].

Because we are talking about agreements between distinct international subjects that may not otherwise be subjected to the same « domestic law », the secondary rules that create those obligations are thus of an international character.

Thus, binding oneself does not necessarily mean diminishing one's capacity. In fact, it can be quite the opposite. While on the face of it, constraints are limits imposed on one's action, certain constraints can in fact

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[75] The concept of « discount rate » corresponds to the value attributed by an agent to future utility as opposed to present utility. An agent with a « low discount rate » is an agent that does not discount much the value of future utility as opposed to present one. The opposite, an agent with a high discount rate is an agent for which the present utility is worth much more than a future one. The highest the discount rate of an agent, the highest is the possibility for that agent to defect for a short-term benefit.

[76] The analysis as to whether or not a player intended to be bound is contextual. Each instrument must be examined on a case by case basis independently from « its particular designation » (*Vienna Convention on the Law of Treaties*, art. 1(1)). Thus, whatever the agreement is called, the decisive factor should be the intention of the parties in determining whether it has a binding effect.

[77] H.L.A. HART, *The Concept of Law*, Oxford University Press, 2nd ed., 1994, p. 225.

prove capacity-enhancing[78]. As we have just seen, international agreements may bring the benefits of cooperation, which would not be otherwise available. But a party will not necessarily be ready to convey to another a benefit unless that first party can be reasonably assured that the other party will hold up its end of the bargain. Thus, the ability to commit oneself and to offer some guarantees of such commitment are often necessary to be taken seriously by would-be partners. Thus, the capacity to *effectively* commit oneself enhances one's capacity to obtain the benefits of cooperation[79]. That's one of the reasons why federated states do need these benefits in our current world order.

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The American reader may be bewildered by the analysis of federated states capacities at international law and the policy arguments supporting such positions presented here. This may be in large part because, as Carl Schmitt suggested almost a century ago, the United States may « federal states without federal foundation » (*Bundesstaat ohne bündische Grundlage*). In his mind, this is what happens to a federal system when the « sovereignty » question gets resolved in favour of the central authority and the constitutional rules and institutions are not formally changed to reflect this « clarification » [80]. In such circumstances, Schmitt believed, the people of the entire former federal system are then taken, as a single unit, to be the true constituent power. Those who were thought as separate « peoples » represented by the federated states were somewhat mistaken. The federal foundation of what may have originated in a pact is then wiped out. Only the formal rules and institutions remain. Schmitt thought that this is what happened to the United States of America following the Civil War[81]. The Civil War was not only a war about slavery, it was a war about what the legitimate modes of belonging are in the American polity. He appears not to be alone in this; others have qualified the American political organisation as being largely a vestigial form of federalism[82]. Now, in the United States, the central government is described as the « national government » and states appear justified mostly by the fact that their smaller size allows for a proximity that may increase states' capacity to « serve » more efficiently their

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[78] There are many ways in which constraints can prove to be capacity-enhancing. Different forms of constraints can work to overcome passions, self-interest, hyperbolic discounting of future gains, or strategic time-inconsistency, and can be used to neutralize preference changes over time. See the two classics by Jon Elster on the topic: J. ELSTER, *Ulysses and the Sirens: Studies in Rationality and Irrationality*, Cambridge, Cambridge University Press, 1984 and *id.*, *Ulysses Unbound: Studies in Rationality, Precommitment, and Constraints*, Cambridge, Cambridge University Press, 2000.

[79] Obviously, putting one's reputation on the line and other forms of « bonds » will not always suffice to ensure respect for agreements and no general mechanism has yet been developed in the international arena to prevent all possible cases of « efficient breach ».

[80] C. SCHMITT, *Constitutional Theory*, Durham, Duke University Press, 2008, pt. IV.

[81] *Ibid.*

[82] See M.M. FEELEY & E. RUBIN, *Federalism. Political Identity & Tragic Compromise*, Ann Arbor, Michigan University Press, 2008, p. 152.

residents. While there may be all sorts of regional cleavages through that vast country, none appears to be strong enough push residents of a particular State to see themselves foremost as being members of that State and, only incidentally, and merely for functional reasons, members of the United States of America. Patriotism in the United States is attached to the center. The center embodies the primary existential community of Americans and the States are functional regimes or, at best, secondary existential communities.

Under such conditions, it may appear counterintuitive to imagine that a Federation's unity may depend on the fact that it provides enough autonomy to certain federated states. In particular, this may be most surprising in the field of international affairs where the marks of sovereignty were traditionally the deepest. But even without having to face with the same acuity the challenge of having to find ways to manage effectively several existential communities within a same polity, the United States will increasingly have to face the issue of federated states' capacity to engage with foreign governments. Indeed, with the world shrinking under our very eyes, horizontal governance become ever more necessary. Therefore, even if not for existential reasons, at least for functional reasons, Americans should be interested in the ways in which other Federations have managed their federated states' capacity to engage in « paradiplomacy ».

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