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## Participation of Sub-national Units in the Foreign Policy of the Federation

### 1. INTRODUCTION

Federalism consists of a delicate balance between the unity and the diversity of its components. This is especially true with regard to foreign policy. Although the principle of the unity of the federal state under international law does not go against the development of external relations specific to the sub-national units – whether or not they are governed by international law – it does, however, imply fulfilling the state's international obligations and safeguarding the coherence of its foreign policy (Lejeune, 1988, 13).

There are, it is true, few sub-national units that have been granted powers at international level under the constitution of the federal state to which they belong. Rather than claiming for themselves the use of equivalent legal instruments, sub-national units have often preferred to be effectively associated with the way their state conducts its international relations. With this in mind, various techniques for participating in the federation's foreign policy attempt to reconcile the formal monopolisation of the management of this policy by central government with due consideration of the specific interests of the constituent units.

This paper is concerned with the legal aspects of this participation. It confines itself to presenting various national rules or practices which have been set out under the following headings: conclusion of treaties; representation at international level; activities of the European Community (EC); sovereignty or exclusive jurisdiction over adjacent sea areas; jurisdictional settlement of international disputes involving the federation. But before undertaking this review, it may be useful to set the matter within a wider context, that is the obligation on the partners in a composite state to cooperate loyally.

### 1.1. Scope of the topic

*1.1.1. Cooperative federalism and foreign policy.* What is known as "federal loyalty" entails an obligation to adopt federalist behaviour within the federation (Lejeune, 1994). Nowadays, federalism does actually require cooperation both among the sub-national units and between the sub-national units and central government. In this regard, Article 44 of the Swiss constitution of 18 April 1999 provides that:

- 1 The Confederation and the Cantons shall collaborate, and shall support each other in the fulfilment of their tasks.
- 2 They owe each other mutual consideration and support. They shall grant each other administrative and judicial assistance.

The federation is not the only kind of composite state in which the issue of the collaboration between central government and the sub-national units is raised or, more particularly, the issue of the participation of these entities in decisions on foreign policy. For the purposes of this paper, we shall designate as "composite" any state in which there are groups of people authorised by the central government to establish their own legal system and modify it themselves in future. This kind of state grants these groups legal personality under public law and establishes them in legal communities on which it bestows certain legislative, administrative and even jurisdictional powers.

In each composite state, no matter which category it belongs to, its constitutional law or political practice may establish mechanisms to ensure information, dialogue and cooperation between the state and (some of) its constituent entities to facilitate the conduct of external relations. These are techniques the use of which bears witness to a type of political behaviour similar to that found in cooperative federalism.

As an example, Article 55 of the Swiss constitution sets out the principle that the cantons should participate in decisions coming under the jurisdiction of the confederation in the foreign relations area:

- 1 The Cantons shall participate in the preparation of decisions of foreign policy which concern their powers or their essential interests.
- 2 The Confederation shall inform the Cantons timely and fully, and consult them.
- 3 The position of the Cantons shall have particular weight when their powers are concerned. In these cases, the Cantons shall participate in international negotiations as appropriate.

The Federal Law of 22 December 1999 on the Participation of the Cantons in the Foreign Policy of the Confederation (LFPC) details and clarifies the methods by which the cantons can participate in the decisions of the confederation on the subject of foreign policy. As stated in the first article of this act:

- 1 The Cantons shall participate in the preparation of decisions on foreign policy which concern their powers or their essential interests.
- 2 The essential interests of the Cantons are particularly concerned when the foreign policy of the Confederation affects important tasks to be performed by the Cantons.
- 3 The participation of the Cantons must not hinder the Confederation's ability to act in the sphere of foreign policy.

In Belgium, the international autonomy of the regions and the communities must be combined with a concern for coordinating their initiatives and those of the federal government. To achieve this coherence, Article 31bis of the Ordinary Act on Institutional Reforms of 8 August 1980 lays down the creation of an Interministerial Conference on Foreign Policy (CIPE) where the Belgian foreign minister and the regional and community ministers responsible for international relations meet on an equal footing. The federal government is obliged to provide the regional and community governments with regular information on its foreign policy. This conference is the preferred venue where the foreign policies of the Belgian state and its constituent parts can be coordinated by consensus and without primacy of the federal authority. Should the occasion arise, the Consultation Committee, composed "in order to respect linguistic parity", of six members of the federal government (including the Belgian Premier who chairs the committee) and six ministers representing the regional and community governments, is called on, solving by way of consensus the difficulties that the CIPE itself has not smoothed away.

*1.1.2. Foreign policy and European integration.* The relations between the composite states or their constituent parts and the EC should be discussed separately on account of their closeness and their specific characteristics.

As a matter of fact, the interaction between the policies of the EC institutions and the policies of the member states has taken on a "domestic" dimension that has replaced the traditional modes of international cooperation. It is characterised by a growing interdependence between the two levels of power and a complete interweaving of their respective areas of competence. This "domestic" dimension presupposes a European "milieu" different from the community of states.

The most appropriate way of characterising the current EC structure in legal terms would seem to be as a confederation initially given the "legal trappings" of international organisations, in which the states remain sovereign but have created an integrated legal space. The relations between the member states and the EC are therefore no longer really "foreign" affairs.

This being the case, European integration raises the same problems for sub-national units and public groupings granted a similar status as the conduct of external relations by composite states: a guarantee must be given

that the interests of regions will be taken into account in the European decision-making process because, formally, only member states of the European Union (EU) are party to this process.

## 2. THE PARTICIPATION OF SUB-NATIONAL UNITS IN THE CONCLUSION OF THE FEDERATION'S TREATIES

The mechanisms listed range from the preliminary information procedure and the preparation of negotiating positions to the ratification of treaties, via active and direct participation in preliminary discussions, signature, and parliamentary approval of these treaties.

### 2.1. *The preliminary information and consultation procedure, preparation for negotiations and possible participation in these negotiations*

Current Swiss constitutional law is probably the most detailed regarding the mechanisms for involving sub-national units in the negotiation of treaties. It is enough to quote here Articles 3-5 of the Swiss LFPC:

#### Article 3 Informing the Cantons

- 1 The participation of the Cantons in the foreign policy of the Confederation shall be based on the mutual exchange of information.
- 2 The Confederation shall inform the Cantons timely and fully of foreign policy plans which concern their powers or their essential interests.
- 3 The information on the foreign policy of the Confederation must be drawn up so as to assist the Cantons to give the foreign policy of the Confederation a better foundation in their domestic policy.

#### Article 4 Consulting the Cantons

- 1 During the preparation of foreign policy decisions which concern their powers or their essential interests, the Confederation shall consult any Cantons that request this. It may also consult them on its own initiative.
- 2 As a general rule, it will consult the Cantons before commencing negotiations. This consultation will complete the consultation procedure with regard to international treaties.
- 3 The Federal Council shall take account of the views of the Cantons. These views shall be given particular weight in areas concerning the powers of the Cantons; where the Federal Council deviates from the views of the Cantons, it shall communicate to them the main reasons for so doing.

#### Article 5 Participation of the Cantons in the preparation of negotiating positions and in the negotiations

- 1 If the powers of the Cantons are affected, the Confederation shall involve representatives of the Cantons in the preparation of the negotiating positions as well as, as a general rule, in the negotiations.

- 2 It may do so if the powers of the Cantons are not affected.
- 3 The Cantons shall propose their representatives who shall be appointed by the Confederation.

### 2.2. *Participation in the negotiation, signature and ratification of treaties*

Leaving aside ancient cases where certain treaties were signed concurrently by the plenipotentiaries of the Swiss Federal Council and the canton concerned (Lejeune, 1984, 143), it is Belgium's current constitutional law that provides the most striking example of such participation.

A cooperation agreement signed on 8 March 1994 between the federal, regional and community authorities laid down the procedure for concluding treaties dealing simultaneously with matters concerning federal, regional or community powers. These kinds of treaties are called "mixed" because the exclusive international jurisdiction of the regions and the communities prohibits the federal government from concluding them alone, which would constitute an encroachment on the area reserved for these sub-national units.

The CIPE, referred to above, is first called upon to decide by consensus whether the treaty being drafted is mixed. The federal government has to inform the conference that it wishes to open bilateral or multilateral negotiations with a view to concluding such a treaty. A regional or community government may also take the opportunity to ask the federal government to undertake an initiative in this regard. The conference may decide to enter into international negotiations even if one of the sub-national units does not envisage taking part. It will decide, again by consensus, on the composition of the Belgian delegation, which will consist of representatives of the regional or community governments on an equal footing with the federal representatives, but under the "coordinating leadership" of the federal foreign ministry or the relevant Belgian ambassador. Full powers are granted by the foreign minister, subject to the formal agreement of the regional or community ministers responsible for external relations.

Following the signature of the treaty by the representatives of the federal government and the sub-national units,<sup>2</sup> the consent of all the competent parliamentary assemblies is required; the task of ratifying the treaty is ultimately reserved for the King.

In this way, the participation of Belgium in international legal relationships will no longer be allowed to encroach upon the exclusive jurisdiction of the sub-national entities without their explicit consent. The Belgian system of mixed treaties is a good and highly effective way of organising the participation of the sub-national units in the conclusion of federal treaties.

In law, as the King alone is empowered to ratify, with the assent of the parliamentary assemblies of the regions and communities involved, any treaty that partially concerns non-federal matters, the kingdom must be

considered Belgium's sole contracting party. The normal practice of the EU in international treaties confirms this: Belgium declared officially about the treaties it concludes as a member state of the EU that the kingdom as such is bound in all cases, in respect of its whole territory, by the provisions of the treaties it has concluded, and that it will therefore bear full responsibility for compliance with the obligations entered into in these treaties.<sup>3</sup>

### 2.3. *Participation in the parliamentary approval and implementation of treaties*

In general, federations have the treaties that impinge upon their sub-national units' area of competence approved by the second chamber, which represents them. However, mixed treaties in Belgium require not only the assent of the federal chambers, but also the assent of the parliaments of the communities or regions involved.

As far as the implementation is concerned, international law is not concerned with the way in which countries organise this implementation, but it does not allow them to invoke provisions of their internal legal systems to shirk their international obligations. It is therefore for the constitutional law of each federation to determine which of its organs are competent to implement treaties, but a federal state may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with its obligations under international law.

## 3. PARTICIPATION OF SUB-NATIONAL UNITS IN THE INTERNATIONAL REPRESENTATION OF THE FEDERATION

The international relations that concern sub-national units may also include the right to maintain diplomatic or consular relations and the right to take part in international conferences or join international organisations.

### 3.1. *Participation in diplomatic representation*

It is constitutional law which must decide whether the state will or will not allow its constituent entities to maintain diplomatic or consular relations with members of the international community. In times past, such an authorisation enabled the soviet republics of Ukraine and Byelorussia to maintain permanent missions to the United Nations (UN) (1945-1990), and before that the member states of the German Empire to establish legations alongside the Empire's legation or to maintain special legations to countries where there was no German embassy (1871-1918).

In contemporary constitutional practice, sub-national units no longer have a genuine autonomous right of representation. It is true that many re-

gions maintain delegations, agencies or liaison offices either to international organisations like the European Communities (Heichlinger, 1999), or in a few major cities in Europe, the United States or Asia. However, these relations are not reciprocal, as the exchange of "representatives" between a region and an independent country are unknown in practice; they therefore take on a specific form which does not allow them to be classed as diplomatic or consular relations.

Consequently, some composite states are involving these regions more and more closely in their own diplomatic representation to foreign states or to international organisations.

This is the policy pursued by Belgium. Under a cooperation agreement which they concluded on 18 May 1995 with the federal government, Belgium's regions and communities appoint representatives, called "community or regional attachés", in Belgian diplomatic and consular posts to foreign states or to international organisations. The federal foreign minister arranges for these representatives to be included on the list of Belgian diplomatic and consular agents abroad or Belgium's representatives to international bodies. These representatives are subject to the same rights and duties as their federal colleagues and perform their duties under the diplomatic authority of the head of post, whom they must inform of their activities, but they receive their instructions from their own authorities. The formula had been used regularly since 1986, at least as far as the French-speaking community and Flanders were concerned. Similarly, Belgium's communities and regions have appointed "attachés" or "delegates" within Belgium's permanent representation to the EU.

Both Austria's Länder and Spain's autonomous communities also enjoy an institutionalised presence in their respective permanent representations to the EU. Unlike the individual representation of each Belgian community or region, they are represented collectively.

### 3.2. *Participation in international conferences and organisations*

3.2.1. *Pursuing activities that come under both federal and sub-national jurisdiction.* The international institutions very often engage in their activities in an area that goes beyond matters considered exclusively federal in terms of the domestic legal system. It is also appropriate to involve sub-national units in representing their country within the organs of these inter-governmental organisations.

In Austria, Belgium, Canada, Germany, Switzerland and, to a lesser extent, Australia and the United States, the sub-national units are involved not only in preliminary policy making, but also in representing the federal government within technical conferences and organisations (United Nations Educational, Scientific and Cultural Organization (UNESCO), Organisation for Economic Cooperation and Development (OECD), International Labour

Organization (ILO), World Health Organization (WHO), Food and Agriculture Organization (FAO) etc.) whose activities cover some of the areas that come under their jurisdiction (Couvreur, 1983; Lejeune, 1984, 60). The same is true within a large number of border commissions.

In Belgium, under a framework cooperation agreement of 30 June 1994, the federal foreign ministry is responsible for organising a general and systematic dialogue with the sub-national units. Where the agenda requires it, the Belgian delegations will include representatives from each community involved, both at ministerial level and at technical level. They are headed by the permanent federal representative or any person designated by virtue of the principally competent community or communities. Only the positions resulting from the dialogue may be presented in the context of the international organisation concerned. Contacts are required if Belgium's attitude has to be modified urgently while in session. If no agreement can be reached on a new Belgian point of view the president of the delegation takes a position *ad referendum*. Persistent disagreement between the federal and sub-national authorities may justify the abstention of the Belgian representative during a vote.

3.2.2. *Pursuing activities that come under sub-national jurisdiction only.* Still on the subject of Belgium, the regions and the communities occupy the seat reserved for the kingdom in international conferences and organisations whose range of activities covers solely regional or community areas of competence.

In a forum where issues are debated which generally come under the exclusive jurisdiction of only one of Belgium's communities, that community will represent Belgium. According to another formula, the arrangement is – more rarely – that the government is represented simultaneously by a federal delegation and a delegation from a community. This path, opened up by Canada and Quebec in the Inter-governmental Agency of the Francophonie, was borrowed by Belgium and the French-speaking community, starting in 1986, during the summits held periodically by the Heads of State and Government of Countries Using French as a Common Language.

When issues that are the exclusive domain of all three communities are debated in an international forum, Belgium is exclusively represented by one of the three communities, which have organised a rota system that allows their respective governments to represent Belgium in turn (Lagasse, 1997; Sran, 2001).

#### 4. PARTICIPATION OF SUB-NATIONAL UNITS IN THE ACTIVITIES OF THE EU

In the early 1990s, all the member states of the EU that are federal (Germany, Austria, Belgium) or have a strong regional structure (Spain, Italy, United

Kingdom) adopted highly formalised procedures in order to enable their sub-national units to participate in EU policy making (Engel, 2001). In this respect, the approach in Austria and Germany corresponds to a centralised cooperative federalism. The Belgian system shows another philosophy: cooperation between federal and regional or community authorities in the municipal sphere must work out Belgium's point of view by way of consensus.

#### 4.1. Participation in the Community decision-making process

4.1.1. *Preparing the federation's position.* In Belgium, the cooperation agreement "concerning the representation of the Kingdom of Belgium on the Council of Ministers of the European Union", concluded on 8 March 1994, governs the overall participation of the regions and communities in coordinating Belgium's policy on Europe.

At the heart of the mechanism is the interaction between the need to achieve a consensus within the state and the autonomous action of the federal government, the regions and the communities at European level. Representatives of the federal government, the regions and the communities participate on equal terms in the preliminary administrative coordinating meetings which are organised on a regular basis by the federal foreign ministry's Department of European Affairs (P11) "to determine the Belgian position, both from the general point of view and for each item on the agenda of the Council of the European Union", whatever the composition of those meeting. If it is found to be impossible to reach agreement, the issue in dispute is submitted to the CIPE, which settles it in accordance with the consensus procedure. Otherwise, the matter is brought before the Consultation Committee. However, internal coordination generally works well and the necessary consensus is most often achieved.

The operation of the system is strengthened by the prior establishment of positions in numerous sectoral ministerial conferences, as well as by tri-lateral coordination meetings between the sub-national units.<sup>4</sup> These positions are then "formalised" at a coordination meeting at P11.

Within the Council, the minister representing Belgium can only take up a position on matters that have been discussed at a preliminary meeting. In the absence of any consensus, the minister must abstain. The same rule already applies upstream of the Council meetings, for Belgium's permanent representative or his deputy at the Permanent Representatives Committee (COREPER).

In Germany, the procedure followed today dates back to the legislative assent to the Single European Act of 1986 but did not take on its present form until the new Article 23 of the Basic Law ("European Article") of December 1992, and the Act of 12 March 1993 on Collaboration between the Federation and the Länder in the Business of the EU (EUZBLG). Before that, Germany had a "participation procedure for the Länder" based on the principle of unanimity, which proved to be inappropriate.

The current German system is characterised by the use of the Bundesrat (Senate) and the principle of majority decisions to adopt a position on the proposed rules of EC law, including any projects that come under the exclusive internal jurisdiction of the Länder (Klatt, 1999; Morawitz and Kaiser, 1994; Müller-Terpitz, 1999).

According to Article 23 of the Basic Law:

(2) The ... Länder, by their representation in the Bundesrat, participate in matters of the European Union. The Government has to thoroughly inform ... the Bundesrat at the earliest possible time ...

(5) Insofar as, in the area of exclusive legislative competence of the Federation, interests of the Länder are affected or insofar as, for any other reason, the Federation has legislative competence, the Government takes into consideration the statement of the Bundesrat ...

At the heart of this complex consultation process we find both a search for a point of view shared by the federation and the Länder and, quite often, the problem of the correct classification for a Community project in accordance with the categories specified in Article 23. In fact, this provision draws a distinction among the types of "consideration" given to the statement of the Bundesrat, between types which are "simple" and types deemed "as decisive, where the legislative powers of the Länder, the structure of their administrative authorities, or their non-contentious administrative procedures are centrally affected" (§ 5). If the consideration given is deemed to be "decisive" this means that the federal government is supposed to base its negotiating position on the opinion of the Bundesrat.

The numerous divergences as to the classification of cases on the basis of this distinction have never given rise to serious political conflicts or a jurisdictional verification, and the consultation procedure has become practically routine for the Bundesrat. However, the essential positions taken are the result of consensus obtained at various sectoral ministerial conferences and, on the more important matters, as part of the Conference of the Minister-Presidents of the Länder, before being formally decided on in the Bundesrat (Engel, 2001).

The participation of the Länder in the meetings that determine the instructions to be given to the German representative at COREPER, or the German negotiating position for certain formations of the Council is also provided by representatives of the Länder appointed by the Bundesrat.

In Austria, the procedure for ensuring participation of the Länder was introduced by means of a revision of the constitution in 1992, and included in the new article of the Federal Constitutional Act on Europe (Article 23d) in 1994. It was supplemented by an agreement between the federation and the Länder, concluded on 12 March 1992, under the terms of which the "administrative" treatment of Community files is entrusted to

a liaison office for the Länder (Verbindungsstelle der Länder). Also worthy of note is a treaty between the Länder, which came into force on 4 April 1993 and gave rise to the Integrationskonferenz der Länder, in which each Land is represented by its head of government (with voting rights) and by the president of its parliament (with no voting rights), but which has been practically inactive to date (Unterlechner, 1997; Fischer, 2000, 117–141).

According to Article 23d, § 1, of the Federal Constitutional Act:

The Federation must inform the Länder without delay regarding all projects within the framework of the European Union which affect the Länder's autonomous sphere of competence or could otherwise be of interest to them and it must allow them opportunity to present their views within a reasonable interval to be fixed by the Federation ...

Under Article 23d, § 2, which was inspired by German practice, the federation is bound by a "uniform opinion of the Länder on a project established within the framework of the European Union and affecting matters in which legislation is in the hands of the Länder". It can only depart from this opinion "for imperative reasons of foreign and European policy". The content of these "uniform opinions" is drawn up at the Heads of Government Conference or during sectoral conferences held by the Länder. To date, the federal government has always formally adopted these opinions, with one exception.

In the Austrian system, the liaison office for the Länder is the key institution. Formally, it has no power of coordination on the ground: it has to confine itself to providing the flow of information. However, as the office is responsible for conveying the "uniform opinion" to the Federal Chancellery, it acts as a filter. In addition, it participates, at the request of the Länder, in meetings called to set out the instructions to be given to the Austrian representative at COREPER; it makes available to the Länder some of their joint representatives (Gemeinsame Ländervertreter) on the committees of the EU and coordinates both their appointment and their activities.

*4.1.2. Participating in federal representation at the Council of Ministers.* In Belgium, obtaining prior internal consensus on the Belgian position is the sine qua non for a division of labour between the federal government, the regions and the communities at European level. Article 203 of the Treaty Establishing the European Community, the current terms of which were set out in the Maastricht Treaty, allows a minister delegated by all the sub-national units in a country to represent this country in the Council of Ministers of the European Union. It is, in effect, a kind of "lex Belgica" which has enabled Belgium to transpose its internal legal system to European level. In fact, Article 81, § 6, of the Special Act on Institutional Reforms provides that "the (regional and community) governments shall be

authorised to bind the (federal) State within the Council of the European Communities, where one of their members represents Belgium, as laid down in a cooperation agreement”.

The cooperation agreement of 8 March 1994, as referred to above, governs the systematic sharing of Belgian ministerial representation on the Council between the federal and sub-national authorities, taking into account the different configurations of the Council. In Annex I of the agreement, the configurations of the Council are arranged into several categories from the point of view of the internal power-sharing arrangement. In the Category I Councils (exclusive jurisdiction of the federal authorities, e.g. the “General Affairs” Council and the Council of Economic and Finance Ministers (ECOFIN)), Belgium is represented solely by the federal government; in Category II (mainly within federal jurisdiction, such as energy and social affairs), it is represented by a federal minister accompanied by a “minister-assessor” representing all the sub-national units; in Category III (matters mainly covered by the communities or regions), by a minister from one of the sub-national units assisted by a federal minister-assessor; in Category IV (exclusively regional or community matters, such as culture and youth), solely by a minister from one of the sub-national units. The modification of the municipal power sharing in July 2001 led to the conclusion of a cooperation agreement in May 2002 creating two new categories: fishery, reserved for the Flemish region (Category V), and agriculture, where Belgium is henceforth represented by a federal minister accompanied by two “ministers-assessors”: one Flemish, the other Walloon (Category VI).

It should be noted that the Council, which meets at head of state and government level, normally comes under Category I, which is also the case for the European Councils.

The “sitting” minister represents Belgium for a complete session of the Council, which rules out any change in the conduct of the negotiation (Bribosia, 1999, 85–144).

The regions and the communities have agreed to represent Belgium in the Council on a six-monthly rota system, on the basis of strict equality among all the sub-national units, including the small German-speaking community. This system applies both when the regional or community minister is the “sitting” minister (Categories III and IV) and when he is attending as an assessor (Category II). The system reconciles the principle of equality among all the sub-national units with the specific interests of each one, with Wallonia more often sitting on the “Industry” Council, Flanders on the “Culture” Council and the German-speaking community on the “Tourism” Council, which satisfies each community’s interests.

It should be pointed out that neither the sharing of representation among the federal and sub-national authorities according to subject, nor the rota system among regions or communities apply to working groups, whose membership is arranged informally. In the subjects entirely under its jurisdiction, each community or region may in fact send its expert to sit

alongside those from the other sub-national units. In the event of disagreement among them, these experts will express a reservation without giving reasons, so as not to disclose problems of a purely internal nature to the other delegations.

In Germany, Article 23, § 6, of the Basic Law provides that:

the Federation shall delegate the exercise of rights of the Federal Republic of Germany as a member of the European Union to a representative of the Länder nominated by the Bundesrat if exclusive legislative competencies of the Länder are centrally affected.

Section 6, paragraph 2, of the Act on Cooperation between the Federation and Länder in European Union Matters (EUZBLG) states that only one representative of ministerial rank can be nominated by the Bundesrat. However, the rule only concerns the transfer of the conduct of negotiations during sessions of the Council, not the presidency of the German delegation. In practice, the federal government has mostly refused to transfer the conduct of negotiations to the Länder, even in the case of projects that incontestably fell within their exclusive jurisdiction.

Section 6 of EUZBLG also applies very widely to working groups. The federation and the Länder have shared lists of EC committees and projects to which representatives of the Länder are nominated. The distinguishing feature of German practice is the fact that these representatives are nominated not by the sub-national units themselves, but by the Bundesrat (Engel, 2001).

In Austria, Article 23d, § 3, of the Federal Constitutional Act allows “a representative nominated by the Länder to take part in the decision-making process in the Council”. It should be noted that this is not a real transfer of the “conduct of negotiations”, like the possibility offered in Germany by the Basic Law. To date, this possibility has not yet been exploited, partly because the federal government has (almost) always followed the “uniform opinion” of the Länder. By contrast, regular recourse is made to Article 8 of the agreement of March 1992, which provides that representatives of the Länder can be included in the Austrian delegation during meetings of working groups.

#### 4.2. Partnership in European regional policy

4.2.1. *Participating in the work of the Committee of the Regions.* The Committee of the Regions, currently governed by Article 263 of the Treaty of Rome as amended by the Treaty of Nice, is made up of representatives of regional and local bodies who either hold a regional or local authority electoral mandate, or are politically accountable to an elected assembly. Its members are appointed by the Council for four years at the suggestion of the member states.

The committee is consultative in nature and is currently made up of 222 members. Belgium and Austria each have 12 seats, while Germany has 24.

Belgium has opted for representation by its communities and regions alone, unlike Germany, whose delegation is made up of 21 representatives of the Länder and 3 representatives of the municipalities (EUZBLG, § 14), and Austria, whose representation calls for one candidate per Land and three candidates proposed jointly by the Austrian Association of Towns and Cities and the Austrian Association of Municipalities (Federal Constitutional Act, Article 23c, § 4).

4.2.2. *Participating in structural interventions of the EU.* EU policy to reduce the disparities between the levels of development of the various regions of the EC is now set out in Articles 158 to 162 of the Treaty of Rome. Under these provisions, the four structural funds (European Regional Development Fund (ERDF), European Agriculture Guidance and Guarantee Fund (EAGGF) guidance section, European Science Foundation (ESF), Financial Instrument for Fisheries Guidance (FIG)), the European Investment Bank and the other existing financial instruments are placed at the service of regional policy, each according to the specific provisions that govern it.

Operating on the principle of partnership, EC action will henceforth be based on:

close consultation between the Commission and the Member State, together with the authorities and bodies designated by the Member State within the framework of its national rules and current practices, namely: the regional and local authorities and other competent public authorities; the economic and social partners; any other relevant competent bodies within this framework. (Article 8 of Regulation 1260/99/EC of 21 June 1999 laying down general provisions on the structural funds)

The partnership concerns all the stages of the action, for example determining zones eligible to benefit from Community aid, working out development or re-conversion plans to identify the needs of these zones, establishing Community Support Frameworks, setting up operational programs, monitoring and evaluation of operations by committees, reports and inspections.

In Germany, Austria and Belgium, most of the priority objectives set for the actions co-financed by the structural funds fall within the powers assigned in whole or in part to the sub-national units. It is they who not only prepare, design and implement the programs, but also follow them up in partnership with the European Commission.

#### 5. PARTICIPATION OF SUB-NATIONAL UNITS IN EXERCISING THE "INHERENT" RIGHTS OF THE FEDERATION OVER ADJACENT SEA AREAS

Coastal states exercise full and complete sovereignty over the adjoining sea area, known as "territorial sea", subject to the right of innocent passage of

foreign ships or aircraft and to certain restrictions imposed on their jurisdiction in this regard. On the other hand, they exercise some sovereign powers and exclusive or preferential rights beyond their territorial sea (exclusive economic zone, fishery conservation zone or continental shelf).

The present era has been witness to claims of this kind, emanating not only from independent states, but also from some sub-national units (Lejeune, 1984, 62-69). This may be surprising but, all things considered, the question of extending the jurisdiction of these authorities to adjacent sea areas is naturally within the scope of the powers of coastal states over the parts of the sea subject to their sovereignty or their exclusive jurisdiction. As international law does not regulate the distribution of state powers in the countries concerned, it would not be able by itself to grant to the central government either the monopoly of state sovereignty over coastal waters or the monopoly of sovereign rights over its exclusive economic zone or its continental shelf.

No international law objection could therefore be made against granting specific powers on the territorial sea to the sub-national units under federal law, nor against any incorporation of the territorial sea into the territory of the sub-national units on whose shores it laps. Both solutions can be found in comparative law. It is the task of federal constitutional law to determine the maritime borders of the sub-national units and the powers they would be authorised to exercise on the territorial sea.

Neither do the powers exercised by some sub-national units beyond the external boundary of the territorial sea, for example by setting conditions for exploiting natural resources, constitute autonomous manifestations with regard to the federations of which they form part. The sub-national units that act in this way are of necessity passing themselves off to the international community as organs of their respective federations.

In reality, it is the federations that are exercising, with the aid of the sub-national units, their exclusive jurisdiction or their sovereign rights over the spaces in question (Lejeune, 1984, 401). And it is their constitution that grants these powers.

#### 6. PARTICIPATION OF SUB-NATIONAL UNITS IN THE JURISDICTIONAL SETTLEMENT OF INTERNATIONAL DISPUTES INVOLVING THE FEDERATION

As they are not sovereign states, sub-national units do not have the right to lodge a complaint with an international court concerning the conduct of a foreign state or an international organisation which in their opinion constituted an internationally wrongful act causing them loss or damage, whether directly or indirectly. In particular, EU law refuses the sub-national units of Germany, Austria and Belgium direct access to the Court of Justice of the European Communities to cancel decisions made by the Parliament,

the Council and the Commission to which they object.<sup>5</sup> If it wishes to remedy this lack of "active legitimation", the country's internal legal system has to endeavour to arrange indirect access to the European Court for its constituent parts.

In Germany, the EUZBLG of 12 March 1993 provides that, on request of the Bundesrat, the federal government should make use of the possible remedies that law provided for in the Treaty on European Union "in so far as the legislative powers of the Länder are affected by an action or deficiency of the Union's organs and in so far as the federation does not have the right to legislate" (§ 7).

In Belgium, the Special Act on Institutional Reforms allows any region or community to obtain federal authority for its claim, whereby the state endorses it and takes it to "international or supra-national" justice (Art. 81, § 7), i.e. in practice essentially to the Court of Justice. When the dispute concerns the exercise of exclusive community or regional powers, the sub-national unit concerned has the right to compel the federation to use its right to go to court at their request and on their behalf: even if there has been no consensus within the CIPE, the federal government must "summons the juridical person under international law without delay" (Art. 81, § 7). When the dispute concerns matters that come only in part under the domestic jurisdiction of the regions or the communities, the federation and the sub-national unit concerned must take the decision jointly to summons the person under international law in the name of the Belgian government. The methods by which actions are brought were determined by a cooperation agreement signed on 11 July 1994.

The Special Act on Institutional Reforms does not address the hypothesis of actions brought by a European institution or another member state against Belgium, confining itself to providing that the community or region concerned must have been "involved" by the Belgian government in all of the procedure (Art. 16, § 3, 2). This involvement could only mean the right granted to the community whose conduct is in dispute to decide alone on the line of argument to be adopted before the Court.

## 7. CONCLUSION

The federal systems for allowing the sub-national units to participate in the federation's foreign and/or European policy are quite different from one another in nature. In certain cases the participation of sub-national units can be seen as compensation for the powers they have lost. In other cases, allowing the sub-national units to participate in the drafting of the international or European rules to be implemented may be seen as the solution to the problem of the failure of these units to implement international or European law.

The imagination of politicians and lawyers is inexhaustible when it comes to devising methods likely to give the sub-national units mediated access to the international or European scene!

## NOTES

- 1 Here we are thinking of regions with special status.
- 2 Any region or community party to a mixed treaty can also mandate a federal minister or a Belgian ambassador to sign the treaty on its behalf. In this way, the Belgian foreign minister's signature on the Treaty of Amsterdam of 2 October 1997 and the Treaty of Nice of 26 February 2001 also binds the Belgian regions and communities.
- 3 See the statement by Belgium at the Council meeting on 9 November 1998 in the Official Journal of the European Communities C 351, 18.11.1998.
- 4 The coordination meetings between regions or communities are held on request, informally and not regularly. They are conducted by the region or community in charge of the case on the basis of the rota system established under the cooperation agreement of 8 March 1994. There is, for example, an Interregional Cell for the Environment (CELINE), which plays a major part in this regard.
- 5 According to the case law of the Court of Justice, however, the regions can, like "any legal entity or individual person", appeal against any decisions directed towards them and against any decisions that concern them directly and individually.

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## Implementation of International and Supra-national Law by Sub-national Units

### 1. INTRODUCTION

In recent years, some standard assumptions of federal systems have come to be questioned. One, asserting the pre-eminence of the national government and dismissing the relevance of the sub-national units in the conduct of foreign relations, has been particularly contested. This has compelled a reassessment of the role of sub-national units in the implementation of international and supra-national law. The subject has attracted serious attention in the United States and Europe, facilitating novel solutions from practitioners and the judiciary.

Given the intensity of the scrutiny already received and the variety and complexity of the solutions evolved to meet the challenges in numerous political contexts, what follows is only a synoptic presentation of the salient features of the problem posed. Discussion on the implementation of international and supra-national law by sub-national units must obviously commence with the position in that regard of the national governments that compose the sub-national units. Courts in different federal jurisdictions have consistently used international law principles as one of the sources of their decisions. However, the sense of obligation to invoke and apply that law complementarily, or in substitution of national law, has varied depending on the legal system of the country.

#### 1.1. *The primacy of international law*

In the United States, courts have routinely applied customary international law. Consolidating earlier decisions, the United States Supreme Court famously held in the *Paquete Habana* case that: