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TREATY-MAKING CAPACITY OF COMPONENTS OF FEDERAL STATES FROM THE PERSPECTIVE OF THE WORKS OF THE UN INTERNATIONAL LAW COMMISSION

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ABSTRACT: The submitted paper concerns the treaty-making capacity of components of federal (non-unitary) states. As the division of powers in respect to the conclusion of international treaties between a federal state and its components is based on the provisions of internal federal law, the authors decided to start the consideration of the topic with the presentation of selected appropriate internal law regulations of federal states. Although the study concentrates on an analysis of Swiss and German constitutional rules on the subject, the provisions of i.a. Belgian, US and Canadian law are also commented upon. Therefore it apparently seems to be an important legal question.

The treaty-making capacity of components of federal (non-unitary) states was comprehensively discussed during the International Law Commission preparatory works on the regulation on the law of treaties. The provisions dedicated to that issue formed part of the reports prepared by each of the ILC Special Rapporteurs on the subject. The paper presents

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the draft propositions submitted by them, the views of ILC members, and responses received from states.

The final draft of ILC articles on the law of treaties contained a paragraph concerning the issue at stake (than art. 5 § 2 of the draft) stipulating that member states of a federal union may possess such capacity only if such capacity is admitted by the federal constitution and within the scope defined therein. Nevertheless, this issue was omitted in the 1969 Vienna Convention on Law of Treaties (VCLT). Art. 6 of the VCLT on the capacity of States to conclude treaties does not mention the rights of components of federal states. It consists of one paragraph simply stating that every State possesses the capacity to conclude treaties. And the term 'state' for the purposes of that regulation possesses the same meaning as i.a. in the Charter of the United Nations, that is a State for the purposes of international law, or a state in the international meaning of that term.

This does not mean however that territorial units forming a part of a federal state cannot conclude international agreements. But, this issue depends both on the provisions of internal law of the given state and on the practice of the states recognising the potential rights of the components of the federal (non-unitary) states in respect to conclusion of the treaties.

1. Preliminary notes

Within the jurisprudence, the debate on the treaty-making capacity of federal (non-unitary) states, from the perspective of international law, centres around their legal and factual status. Nahlik recognised the multiplicity and duality of legal entities, the latter expressing itself through the division into a central government and state components, as typical features of federalism which affect the way that federations exercise their treaty-making capacity.[1] The aforementioned components can operate under various names, such as states, cantons, or lands. In the case of a federation, the potential scope of sovereign powers conferred on states with respect to concluding international treaties (if applicable) is regulated at the constitutional level. It is worth noting, in this context, that the Polish jurisprudence on the subject features a classic paper by Antonowicz,

[1] S.E. Nahlik, *Wstęp do nauki prawa międzynarodowego [The Introduction to the International Law]*, Warszawa 1967, p. 175.

dedicated to the international law status of states, wherein he stresses that components of federal states should not be referred to as states. He concludes that 'as components of a federal state are not states in the sense of international law, it is not justified to define them as 'component states' or 'particular states'.[2] At the same time, however, Antonowicz points out that this approach is quite frequently encountered in the international law jurisprudence, and his fellow countrymen have expressed opinions to the contrary, as seen in a number of textbooks by renowned authors, including Ehrlich, Klafkowski, and Skubiszewski, among others.[3] The reason for this phenomenon can be found in the use of the contentious term in two different meanings by international and national law, as highlighted by Antonowicz.[4] It should be reiterated that such terms as 'state' or 'sovereignty' can be used both by international law and national law – specifically, by constitutional law – of individual states meaning different things. No state can be forbidden from referring to its components as the 'states' or even 'sovereign states.' However, these terms will not be synonymous with the same terms as they are used in international law.

In this context, one has to mention the Soviet Union, whose constitution allowed individual republics to act independently of each other in international relations. This was used by the Belarusian Soviet Socialist Republic and the Ukrainian Soviet Socialist Republic to become parties to the Charter of the United Nations and, consequently, UN members. Since the Charter stipulates that only states can become members, it can be concluded that the UN Charter recognised the Belarusian SSR and the Ukrainian SSR as entities equivalent to states. This is despite the fact that as components of a state – namely, the Soviet Union – they were not states within the meaning of international law.[5]

The division of power between the federal state and its components, with respect to concluding international treaties, is based on the provisions of internal federal law. While discussing the situation of components of federal states in terms of these states acting as parties to international

[2] L. Antonowicz, *Pojęcie państwa w prawie międzynarodowym [The Notion of a State in the International Law]*, Warszawa 1974, p. 50.

[3] Ibid.

[4] Ibid., pp. 47-48.

[5] The issue of the Soviet Union republics' participation in international law and international relations is discussed in more detail by Karski in a paper entitled *Rozpad Związku Radzieckiego a prawo międzynarodowe [The Dissolution of the Soviet Union and the International Law]*, Warszawa 2015, pp. 76-83.

agreements, Grant defined four models of authorisation to conclude international treaties by federal authorities.[6] The first model assumes the admissibility of agreements concluded by components of federal states within the scope of their competences. The second provides for agreements whose conclusion is not detrimental to the interests of federal authorities and does not challenge their supremacy. The third model allows for agreements on local issues. The fourth requires *ad hoc* authorisation by federal authorities. However, in considering such a division, it should be noted that the observed solutions may exhibit features typical of more than one model. Examples of such a situation can be found in Switzerland and Germany, where, on the one hand, the components have a certain degree of autonomy and are empowered to conclude international agreements within the scope of that autonomy, and, on the other, such agreements may not infringe upon the interests of the federation. Additionally, the federation wields the power to prevent agreements from being concluded, either by vetoing them or by requiring that prior consent of the federal government be obtained in order for the agreements to be valid.

2. Treaty-making capacity of components of federal states from the perspective of selected internal regulations

Switzerland, not unlike Germany (in the years 1815-1866) and the United States (in the years 1776-1787), was a confederation (1815-1848) before its transformation into a federal state. The process of tightening cooperation between individual cantons, affecting the scope of their autonomy with respect to concluding international agreements, seems to also be reflected in the constitution. Its symptoms can be found in article 3 of the Swiss Constitution of 1999, confirming the sovereignty of the cantons insofar as their sovereignty is not limited by the Federal Constitution and stipulating that the cantons may exercise all rights which are not entrusted to the federal authorities.[7] The Constitution defines a federation as an entity

[6] T. Grant, *Who Can Make Treaties? Other Subjects of International Law* [in:] D.B. Hollis (ed.), 'The Oxford Guide to Treaties', Oxford 2012, pp. 128-129.

[7] Constitution of Switzerland. Adopted on 29.5.1874; in force until 31.12.1999, available at http://www.servat.unibe.ch/icl/sz01000.html (accessed on 30.1.2017).

authorised to handle foreign affairs.[8] However, it allows the cantons to conclude agreements between each other (so-called concordats) and with foreign partners. The admissibility of concluding international agreements directly by the cantons results from article 56(1) of the Constitution, indicating that the cantons may conclude agreements with foreign states on matters that lie within the scope of their powers.[9] In this context, it should be added that article 9 of the previous constitution (1874) stressed that, exceptionally, cantons retain the right to conclude treaties with foreign states, further stipulating that such treaties may concern matters of the public economy, neighbourly relations, and the police force, provided that they contain nothing that could undermine the confederation or the rights of other cantons.

Similar provisions can be found in the 1999 Constitution, whose article 56(2) stipulates that concluded agreements must not conflict with (i) the law, (ii) the interests of the confederation, or (iii) the law of other cantons. Section 3 of the same article also contains provisions authorising the representatives of cantons to directly engage with lower ranking foreign authorities, stressing that in all other cases any contact between the cantons and the foreign states should only take place through the confederation. This authorisation is supplemented by section 2, which provides for the requirement to notify the confederation of any agreements, prior to their conclusion. Thus, Aleksandrowicz correctly concludes that the article at issue does not require the agreements concluded by the cantons to be approved by the confederation but rather lays down the requirement to notify the confederation of an intent to enter into agreements with foreign partners.[10] Nevertheless, it should be added that a possible consequence of such notification is the Federal Council or another canton vetoing the conclusion of the agreement, which makes the conclusion of

[8] Such provisions can be found in article 54(1) of the 1999 Constitution. In addition, article 166(2) of the Constitution further specifies that international agreements ought to be concluded with the consent of the Federal Assembly. The only exception concerns agreements with respect to which an international agreement or law stipulates that they should be concluded by the Federal Council. This exception applies, as discussed later in this paper, to international agreements concluded by cantons. Ibid., pp. 56 and 92.

[9] Ibid., p. 56.

[10] M. Aleksandrowicz, *System prawny Szwajcarii. Historia i współczesność [Legal System of Switzerland. History and Presence]*, Białystok 2009, p. 173.

such agreements contingent on the consent of the Federal Assembly.[11] Thus, it would be difficult to argue with Aust, who is of the opinion that international agreements can be negotiated independently by the cantons but require the approval of the Federal Council prior to their signing.[12] It should also be emphasised that, in practice, this is a relatively widespread and significant phenomenon. It is estimated that the cantons have concluded approximately 140 international agreements, regarding technical and administrative issues, with the majority of them being bilateral agreements with neighbouring countries.[13]

A similar model can be found in Germany, where article 32(1) of the Basic Law for the Federal Republic of Germany of 23.5.1949 contains a general rule indicating that the relations with foreign states are to be conducted by the Federation.[14] However, it also contains two special provisions referring to the situation of federated states. Section 2 provides for a requirement to consult a federated state prior to the conclusion of any agreement containing references to the 'special circumstances' of the federated state. Thus, while the federation remains the decision-maker with respect to concluding such agreements, the agreements may only be executed upon consulting the interested federated state.

The subsequent section of article 32 contains provisions confirming the powers of individual federated states to conclude international agreements with foreign states. Such agreements may be concluded within the scope of the internal legislative powers of a given federated state, and their conclusion requires the consent of the federal government. Interestingly, Barcz indicates that 'the literature emphasises the unique character' of the aforementioned right, while the discussed provision 'neither justifies nor enacts that right but rather leaves it to the powers of the federated states.'[15] It seems that the position at issue should be regarded as a consequence of the general rule determining the sovereign rights of federated states, as confirmed in article 30 of the Basic Law, according to which: 'Except as

[11] See: article 186(3) in conjunction with article 172(2) of the Swiss Constitution of 1999.

[12] A. Aust, *Modern Treaty Law and Practice*, 2nd Ed., Cambridge 2007, p. 64.

[13] See: A. Aust, op. cit., p. 64; T. Grant, op. cit., p. 129.

[14] Basic Law for the Federal Republic of Germany.

[15] J. Barcz, *System prawny RFN wobec norm prawa międzynarodowego. Doktryna i praktyka konstytucyjna [Legal System of FRG in Relation to International Law Rules. Doctrine and Constitutional Practice]*, Warszawa 1986, p. 140.

otherwise provided or permitted by this Basic Law, the exercise of state powers and the discharge of state functions is a matter for the *Länder*.'

Barcz points out that the provisions of article 32(2) of the Basic Law of the Federal Republic of Germany indicate that, upon the consent of the federal government, the federated states (lands) may conclude international agreements regarding three types of issues.[16] These include, firstly, matters with respect to which they have legislative power, assuming that the Basic Law does not confer the jurisdiction over such matters on the federation; secondly, matters within the concurrent legislative power, to the extent that the federation has not exercised its legislative power by enacting a law to the contrary, and lastly, matters within the exclusive legislative power of the federation, to the extent that they are expressly authorised to do so by a federal law (see article 71 of the Basic Law).[17] Pursuant to the provisions of article 32(3) of the Basic Law, respective legislative authorisation is considered to entail the authorisation to conclude international agreements. It should also be emphasised that, although article 32(3) of the Basic Law does not mention the lands' capacity to conclude administrative agreements, 'the doctrine commonly adopts that these lands do have this power.'[18] The final conclusion is that, in the case of Germany, there are dozens of agreements concluded by the lands and, not unlike in the case of Switzerland, these are mainly agreements concluded with neighbouring countries on matters concerning various technical issues.[19]

The typical features of the first model can also be found in the Belgian Constitution of 1831, following its amendment in 1993. Article 1 states that Belgium is a federal state composed of communities and regions, and subsequent articles define three communities: the Flemish Community, the French Community, and the German-speaking Community, as well as three regions: the Flemish Region, the Walloon Region, and the Brussels Region.[20] As far as the matter of concluding treaties is concerned, the Constitution delineates the power of federal authorities, indicating in article 167(2)

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[16] J. Barcz, *Federalna struktura Republiki Federalnej Niemiec a jej członkostwo we Wspólnocie Europejskiej [Federal Structure of FRG and its Membership in the European Community]*, Opole 1992, p. 33.

[17] Article 71 [Exclusive legislative power of the Federation] On matters within the exclusive legislative power of the Federation, the *Länder* shall have power to legislate only when and to the extent that they are expressly authorised to do so by a federal law.

[18] More details in: ibid., pp. 33-34.

[19] A. Aust, op. cit., p. 64.

[20] Belgian Constitution.

that treaties take effect only upon receiving the approval of the federal Houses and are concluded by the King. The Constitution, however, stipulates immediately thereafter that this procedure does not apply to treaties concluded by the Community and Regional Governments 'regarding matters that fall within the competence of their Parliament.' The subsequent provision stipulates that such treaties take effect after they have received the approval of relevant Community or Regional Parliament. Therefore, in light of these provisions, the governments of individual regions and communities are authorised to conclude international agreements within the scope of powers conferred on particular Parliaments and upon their consent. Aust notes that the exclusive powers of the regions encompass a wide range of issues, including water resources and environmental protection. He mentions two agreements, concluded in 1995 by the Flemish Region with the Netherlands regarding the protection of the Scheldt and Meuse rivers, as examples of exercising the power to conclude agreements, which were registered with the United Nations Secretary General based on an application filed by the Netherlands.[21] It should be emphasised that the conclusion of international agreements by the regions does not release the federation from its responsibility for the potential non-performance or incorrect performance thereof.[22]

The method that the Constitution of the United States of America provides for the authorisation of state components is also worth noting. While the Constitution confers the right to conclude treaties on federal authorities, article 1(10)(2) thereof allows for the conclusion of treaties or agreements with other states or countries by particular states, with the legal effect of such treaties being contingent on the approval by Congress. Current practice indicates that international agreements concluded pursuant to this procedure concern mainly local issues, such as the construction and maintenance of international roads and bridges.[23]

The remaining authorisation models, as regards the treaty-making capacity of federal state components, can be found in the legislation of such

[21] A. Aust, op. cit., pp. 65-66.

[22] Ibid., p. 66.

[23] In 1957, the Congress adopted a resolution granting consent to the conclusion of an agreement between the state of New York and Canada. A year later, consent was also granted to the state of Minnesota for it to hold negotiations and execute an agreement with Canadian province of Manitoba regarding a motorway. L.F. Damrosh, L. Henkin, R. Crawford Pugh, O. Schachter, H. Smit, *International Law. Cases and Materials,* 4th Ed., St. Paul, Minn. 2001, pp. 468-469.

countries as Bosnia and Hercegovina,[24] the United Arab Emirates,[25] or even Canada, where examples of authorisation granted *ad hoc* can be found.[26]

3. Treaty-making capacity of components of federal states in light of the preliminary works of the UN International Law Commission on a draft of the Law of Treaties

It should be noted that the preliminary drafts of the Law of Treaties proposed by the first of the four rapporteurs of the Commission, who studied the subject in the years 1949-1966, did not contain a direct reference to the treaty-making capacity of the units of territorial division forming a part of federal states. Nevertheless, such references were made indirectly. A proposal submitted by Brierly was based on a construct indicating that while, in principle, all states have treaty-making capacity, in some cases and with respect to particular treaties, it can be limited.[27] In the subsequent version of the report, published in 1952, Brierly left out the part on the restrictions concerning the treaty-making capacity of some states, without resigning, however, from the part indicating that the treaty-making capacity of a state can be limited with respect to some treaties.[28] The justification of the proposed article in the third report by Brierly also contains a direct reference to the situation of the units forming a part of federal states.

[24] Article III(2) of the Constitution of Bosnia and Herzegovina of 1995 allows its territorial units to establish relations with neighbouring countries, encompassing the option of concluding international agreements on the condition that such agreements do not affect the sovereignty and territorial integrity of Bosnia and Herzegovina. T. Grant, op. cit., p. 130.

[25] The Constitution of the United Arab Emirates of 1971 allows individual Emirates to conclude agreements with neighbouring countries and regions with regard to matters of local and administrative nature, subject to these agreements not being contrary to the interests or legislation of the federation. Such agreements may be concluded upon notifying the Supreme Council of the federation, which has the right to veto their conclusion. Ibid., pp. 130-131.

[26] Such a situation occurred in 1981 when Canada, while concluding an agreement on social insurance with the United States, authorised Quebec to conclude a separate agreement with the USA due to a different pension system operating in that province. The agreement was concluded in 1983. Ibid., p. 131.

[27] ILC Yearbook, 1950, vol. II, p. 230.

[28] ILC Yearbook, 1952, vol. II, p. 50.

The author emphasises that members of a confederation or a federation alike may or may not possess treaty-making capacity 'according to the circumstances.'[29] It seems to mean that their treaty-making capacity depends on some authorisation to operate on an international plane, which derives from internal regulations adopted at the constitutional level, indicating, among other things, that:

> the member States of the Federal State of Germany, under the German Constitution as it existed before the World War, retained their competence (...) to conclude international treaties between themselves without the consent of the Federal State, and they also retained the competence to conclude international treaties with foreign States as regards matters of minor interest.[30]

He also added that 'under the Weimar Constitution of 1919, Bavaria retained her right to maintain diplomatic relations with the Holy See.'[31]

An exhaustive paper regarding the admissibility of treaties concluded by federal states was presented by the second rapporteur on this issue, Lauterpacht, who, in his first report from 1953, proposed that the issue of treaty-making capacity should be considered in conjunction with the issue of their invalidity. The admissibility of treaties concluded by member states was the subject of deliberations in the commentary to the articles of the aforementioned draft law. Article 1 laid out the key definitions related to the subject, indicating states and state organisations as the entities authorised to conclude treaties, while article 10 dealt with the treaty-making capacity of states, as one of the criteria for determining the validity of a treaty. In the commentary, the rapporteur drew attention to the existence of constitutional regulations authorising 'members of the federation' to conclude agreements with each other and, to a smaller extent, with foreign states. Referring to the case law of German and Swiss courts, he also emphasised that, in principle, the relations between federation members were subject to the review of their respective supreme courts, based on the standards of international law.[32]

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[29] Ibid.

[30] Ibid.

[31] Ibid.

[32] As clear examples of this trend, he indicated two verdicts issued in the 1920s by German Staatsgerichtshof in the Bremen v. Prussia case (Annual Digest, 1925-1926, case No. 266) and by the Swiss Federal Court in the Thurgau Canton v. St. Gallen Canton case

Article 10 of the draft law provided that a treaty was invalid if the agreement was concluded in violation of international restrictions imposed on the treaty-making capacity of the parties.[33] Lauterpacht indicated the member states of a federal state (defined by him as subordinate states) as belonging to the category of entities whose treaty-making capacity could be regarded as controversial. He explained that the right of subordinate states to conclude treaties is based on the assignment of competences by a federal state, which, pursuant to international law, is entitled to determine the scope of the treaty-making capacity of its internal units. The correctness of the concept of assigning such competences is defined, in the rapporteur's opinion, by a requirement (arising from the constitutional regulations of a federal state) of federal level authorisation for agreements concluded by federated states in conjunction with the requirement that such agreements be compliant with the interests of the remaining members of the federal state.[34] Thus, in Lauterpacht's opinion, a lack of correct federal authorisation automatically results in the agreement being invalid in the absence of treaty-making capacity.[35] The jurisprudence of the law of treaties defines this as one of the reasons for the unlimited formal invalidity of a treaty.[36]

A similar opinion was expressed by another rapporteur of the Commission, Fitzmaurice, who quite extensively reviewed the issue of the treaty-making capacity of the members of a federal state within the scope of the draft law of treaties. In article 8(3) of his draft submitted in 1953, Fitzmaurice emphasised that the components of a federal state do not have separate treaty-making capacity and act based on the authorisation of the federal state. Moreover, he pointed out that even when the organisational units conclude agreements in their own name, they, in fact, act as agents (representatives) of a federal state, and it is the federal state which – as an entity of international law – is effectively bound by the agreement and responsible for the performance thereof.[37]

Fitzmaurice, therefore, refused to recognise components of federal states as entities with limited international law capacity, concluding that

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(Annual Digest, 1927-1928, case No. 289), which applied the *rebus sic stantibus* principle with respect to the 'member states of a federal state.' ILC Yearbook, 1953, vol. II, p. 95.

[33] Ibid., p. 137.

[34] Ibid., p. 139.

[35] Ibid.

[36] J. Sandorski, *Nieważność umów międzynarodowych [Nullity of International Treaties]*, Poznań 1978, pp. 24 and 29.

[37] ILC Yearbook, 1958, vol. II, p. 24.

any action undertaken on the international forum by such components should be interpreted exclusively as having been undertaken by the entire federal state and carried out by either its authorities or duly authorised representatives. The scope of such authorisation results from regulations at the constitutional level.

In the 1962 report, Waldock, the fourth rapporteur, regarded the issue of federal member states' capacity to conclude agreements seriously enough to dedicate a separate paragraph to this subject, as part of an article on the capacity to become a contracting party. In the comments, he referred to the opinions of his predecessors, noting that while Fitzmaurice believed that the treaty-making capacity of the constituent states may result exclusively from regulations at the constitutional level, Lauterpacht emphasised that sanctioning such capacity on the part of constituent states could lead to agreements between constituent states being recognised as international agreements.[38] Waldock's solution was an attempt to bring these two viewpoints together. To each of them, he dedicated a separate part of a paragraph on the treaty-making capacity of a federal state. The first part, in principle attributing treaty-making capacity to a federal state, admitted, exceptionally, of the conclusion of international agreements by the constituent states, assuming that such capacity was limited to actions authorised by a federal state and undertaken on its behalf, making the authorities of constituent states act as either agents or authorities of the federal state.[39] The second point of the paragraph in question went a step further, indicating that treaty-making capacity may be possessed not by a federal state as a whole but rather by its individual constituent parts, provided that such capacity results from the constitution and the given part of the federation or the union is a member of the United Nations or, alternatively, if the possession of independent treaty-making capacity by such a constituent part is deemed admissible both by the federation, or the union, and the other party to the agreement.[40] At the same time, how-

[38] ILC Yearbook, 1962, vol. II, p. 36.

[39] Article 3(2)(a). In the case of a federation or other union of States, international capacity to be a party to treaties is in principle possessed exclusively by the federal State or by the Union. Accordingly, if the constitution of a federation or Union confers upon its constituent States power to enter into agreements directly with foreign States, the constituent State normally exercises this power in the capacity only of an organ of the federal State or Union, as the case may be. Ibid.

[40] Article 3(2)(b). International capacity to be a party to treaties may, however, be possessed by a constituent State of a federation or union, upon which the power to enter

ever, Waldock decisively opposed the notion of describing the agreements concluded between the constituent parts of a federal state as international agreements. He stressed that such agreements are concluded pursuant to the provisions of the constitutional law of a given state and none of the agreements was submitted for registration.[41]

4. Works on a draft regulation concerning the treaty--making capacity of the constituent parts of a federal state during the 14th session of the UN International Law Commission in 1962

The rapporteur's proposal was thoroughly criticised during the works of the Commission in 1962. The primary objection concerned its length, which seemed excessive when compared to a model example, presented by Amado,[42] of a concise proposal contained in the Harvard draft convention on the Law of Treaties from 1935, which only stated that treaty-making capacity is, in principle, due to all states, though it may be limited with respect to certain treaties.[43] The degree of complexity of the matter can be demonstrated by the fact that the draft of article 3, regarding treaty-making capacity, was discussed at the 14th session of the UN International Law Commission at as many as four meetings, with two meetings dedicated exclusively to that issue (meetings 658 and 666). Another indication is the fact that it had to be referred to the Drafting Committee twice, in order to bring the wording of the Commission's conclusions in line with the spirit

into agreements directly with foreign States has been conferred by the Constitution: (i) If it is a member of the United Nations, or (ii) If it is recognized by the federal State or Union and by the other contracting State or States to possess an international personality of its own. Ibid.

[41] Ibid., p. 37 [para. 4].

[42] He spoke in favour of adopting reasonably concise wording of the article on treaty-making capacity, indicating, not unlike H.W. Briggs, that the matters regulated thereby ought not to venture into issues that were to be discussed in another part of the draft, dedicated to the assessment of the validity of a treaty. Additionally, he declared himself prepared to support any proposal that could result in the article being narrowed to the issue regulated thereby. ILC Yearbook 1962, vol. I, p. 194 [paras 103 and 107].

[43] Article 3. [Capacity to make treaties]. Capacity to enter into treaties is possessed by all States, but the capacity of a State to enter into certain treaties may be limited. ILC Yearbook, 1950, vol. II, p. 243.

of the discussion. The task was not easy, as reflected by the minutes of the relevant meetings, which contain a vast array of opinions presented by members of the Commission. The likelihood of success appeared to be low, considering the conclusions reached during the session: while the Commission members had managed to reduce the article in length, only the first paragraph of the draft was met with general approval, adopted by 18 votes in favour, with just one abstaining vote. The remaining paragraphs, on the other hand, were adopted either by a small majority (as was the case with the then paragraph 3, adopted by nine votes in favour, with seven votes against and three abstaining votes) or a minimum majority (in the case of the then paragraph 4, adopted by the majority of but a single vote, with nine votes in favour, eight votes against, and two abstaining votes).[44] It should also be added that the then paragraph 2 was rejected by the same marginal majority of votes.[45] Perhaps this is the reason for the matters contemplated in the aforementioned paragraph resurfacing in 1965, when the Commission revisited the article.

During the discussion, some accused the rapporteur of taking too broad an approach to the subject and unnecessarily contemplating matters that constitute the domain of constitutional law.[46] Others expressed opinions to the contrary, arguing that, due to terminology-related concerns regarding the types of federal states, it might be necessary to stipulate that 'for the purpose of determining the treaty-making capacity of certain types of state, the provisions of the constitution were decisive.'[47] Subsequently, Jiménez de Aréchaga pointed out that the adoption of regulations allowing a federal state to refer to its constitution might be used by that state to evade its obligations under international agreements.[48] Similar risks were mentioned by Ago,[49] who added that, in the case of treaty-making capacity being limited as a result of the conclusion of an international agreement imposing on a given state the obligation to refrain from concluding certain types of agreements, a potential infringement of that ban would not affect

[44] ILC Yearbook, 1962, vol. I, p. 243 [para. 65].

[45] Ibid.

[46] This was the position of G. Amado, who used it to justify his support for the amendment submitted by H.W. Briggs. Ibid., p. 61 [para. 49].

[47] This opinion was expressed by M. Bartos, who agreed with A. Verdross's observation that the phrase '*federation or other form of union of States*,' used by the rapporteur in paragraph 1, was open to interpretation. Ibid., p. 60 [para. 44].

[48] Ibid., p. 65 [para. 13].

[49] Ibid., p. 66 [para. 23].

the validity of the agreement itself, instead giving rise to international liability due to the infringement of the former.[50]

The inappropriate use of the term 'state' to describe constituent parts of a federal state was also emphasised during that session of the Commission. Jiménez de Aréchaga noted that:

> if the component units of a federal state were regarded as states, the Commission would be proposing a rule the consequence of which would be that all federal states would have to enact laws forbidding their component units to conclude treaties, whereas the existing situation was precisely the reverse, in that only those component units authorized to do so could conclude treaties.[51]

A solution, presumably meant to enable the determination of treaty-making capacity without the need to analyse the constitutional solutions of particular states, was proposed by Briggs, who presented an amendment regulating the matters contemplated in paragraphs 2(b) and 3(b) of the draft, regarding (i) the conclusion of agreements by the component states of a federation or a union and (ii) the conclusion of agreements by dependent states, respectively. In the amendment, Briggs assumes that the treaty-making capacity of what he describes as 'not fully independent entities' depends both on such capacity being recognised by a state, or a union of states, of which the entity constitutes a part or by a state which represents the entity in international relations, as well as on other contracting parties accepting '[the entity's] possession of that international capacity.'[52] Furthermore, Briggs proposed to remove paragraph 2(a), pointing out that states with a federal government normally conducted their 'foreign relations through the central government, but the question was not one of international law but of constitutional law or even of policy.'[53] He added that if the paragraph was meant to apply to a confederation of states rather than an independent state, then paragraph 1 offered sufficient protection, simultaneously allowing the states to delegate some of the relevant powers to the confederation.[54] Therefore, he deemed the adoption of a separate provision to regulate the situation redundant, as it would have been purely descriptive. It should be noted that similar conclusions were reached by

[50] Ibid., p. 67 [para. 24].
[51] Ibid., p. 65 [para. 15].
[52] Ibid., p. 59 [para. 26].
[53] Ibid., p. 59 [para. 22].
[54] Ibid., p. 59 [para. 23].

a number of other members of the Commission, which opened the way to seeking terms that would allow for a more concise wording of the article at issue. The Rapporteur himself decided to re-edit and significantly shorten his proposal, which now stipulated, *inter alia*, that while the capacity to conclude treaties under international law is possessed by every state, or other subject of international law, it may 'be limited by the provisions of its internal constitution or by the provisions of any international instrument restricting or defining its functions or powers.'[55] Ultimately, Gros, who chaired the meeting, proposed to refer both texts to the Drafting Committee and so it was agreed.[56]

Article 3 was discussed again during the 658th meeting of the Commission. The article consisted of four, albeit more concise than in the past, paragraphs. The first two determined the scope of the treaty-making capacity of states and other subjects of international law; the third described the situation of a federation, and the fourth referred to the possibility of international organisations concluding treaties.[57] While paragraph 1 set forth a general rule indicating the treaty-making capacity of states, the remaining two paragraphs enumerated the potential limitations of this rule. Paragraph 2 stated that treaty-making capacity can be limited pursuant to the provisions of a respective treaty. Paragraph 3, on the other hand, indicated that the treaty-making capacity of a federation depends on its constitution.

In the case of federal states, the remarks of Commission members concentrated, this time, mainly on terminological issues. For example, Verdross remarked that the term 'federation' is ambiguous and proposed to replace it with the term 'federal state.'[58] Castren argued that the scope of paragraph 3 should not be limited to federations, as there were many other unions of states, whose members did not have unlimited right to conclude treaties. He proposed a new wording of this paragraph, indicating that, in the case of a union of states, the 'capacity to conclude treaties depends on the constitution or on the treaty forming the basis of the union.'[59] Briggs, on the other hand, proposed to delete the second and third paragraph entirely, pointing out that in the case of paragraph 3, in its assumed wording,

[55] Ibid., p. 65 [para. 8].
[56] Ibid., p. 71 [para. 91].
[57] Ibid., p. 193 [para. 87].
[58] Ibid., p. 193 [para. 88].
[59] Ibid., p. 193 [para. 92].

the capacity to conclude treaties depended on a national constitution, yet the special rapporteur had drafted the article in his original form based on the premise that international capacity could not be conferred by the constitution of a federal state alone. He also added that the term 'federation' might be appropriate in the case of a union of states based on a treaty.[60]

The rapporteur of the draft attempted to summarise the remarks of the Commission members. He pointed out that while his proposal was considered too lengthy, the current version of the article was not only reduced in size but also based on entirely different premises. He cited paragraph 3, referring to national constitutions, as an example, since he believes that the text should be limited to international aspects.[61] Waldock proposed new wording for this provision, noting that 'in a federal state, the capacity of the federal state and its component states to conclude treaties depends on the federal constitution.'[62] Ultimately, Commission members rejected the proposal to delete paragraphs 2 and 3, adopted the wording of paragraph 3 proposed by the rapporteur, and referred the whole of article 3 back to the Drafting Committee, for the second time.[63] Further reading of the minutes from the 14th session of the Commission can lead to the conclusion that the result of the voting was symptomatic of the later fate of paragraph 2. While twelve Commission members voted in favour of upholding paragraph 3, with 8 votes against (and 1 abstaining vote), the motion to reject paragraph 2 met with the same number of votes in favour and against the rejection (seven each). Interestingly, the same number of Commission members decided then to abstain from voting. Therefore, the key to retaining paragraph 2 was to alter it in such a way as to persuade as many members of the latter group as possible of the rightness of that regulation.

The discussion on the wording of article 3 continued at the 666th meeting of the Commission. No changes had been introduced to the version of paragraph 2 and paragraph 3 presented by the Drafting Committee,[64] and, once again, the content provoked intense emotional response. The works focused mainly on the rather unfortunate wording of paragraph 3, which indicated that, in the case of a federal state, the constitution of

[60] Ibid., p. 193 [para. 95].
[61] Ibid., p. 194 [para. 102].
[62] Ibid., p. 194 [para. 113].
[63] Ibid., p. 195 [paras. 117-119 and 121].
[64] Ibid., p. 240 [para. 16].

that state should determine the treaty-making capacity not only of the federal state components – referred to as component states – but also of the federal state as a whole. Even though it seems that such wording was intentional and meant to allow for treaty-making capacity to be divided between the entire federal state and individual parts thereof, during the discussion, it was correctly pointed out that the treaty-making capacity of a state does not arise from the provisions of its internal law. This issue was addressed by Briggs, who argued that a state with a federal government is a sovereign state, and its situation is regulated by paragraph 1 of the draft article; therefore, a federal state has treaty-making capacity pursuant to international law. He described the attempts to determine its situation under paragraph 3, by attributing the source of treaty-making capacity to internal laws, as a 'misunderstanding.' Furthermore, Briggs filed a motion to delete all paragraphs of article 3, save for paragraph 1.[65]

A competing motion was submitted by Verdross, who, recognising the problematic nature of the definition presented by Waldock and upheld by the Drafting Commission, proposed a solution which would refer exclusively to the treaty-making capacity of member states of a federal state. He proposed to delete from the paragraph the fragment suggesting that it might concern the determination of the treaty-making capacity of a federal state as a whole and to introduce a new term – 'member states of a federal state' – to refer to territorial units whose scope of treaty-making capacity could be regulated by a federal constitution.[66] This proposal was supported by the majority of Commission members participating in the discussion, including Tunkin,[67] Bartos,[68] Ago,[69] Yasseen,[70] de Luna Garcia,[71] and Waldock, who submitted the amended correction to the correction of his own proposal (it has to be acknowledged that a number of versions had already been made by then).[72] The applicant himself explained that international law does not differentiate between various types of potential members of a federal state and that his correction will cover all cases, from states which are nothing more than units of internal division to states which enjoy a

[65] Ibid., p. 240 [paras. 17-18].
[66] ILC Yearbook, 1962, vol. I, p. 241 [para. 22].
[67] Ibid., p. 241 [para. 23].
[68] Ibid., p. 241 [para. 30].
[69] Ibid., p. 241 [para. 34].
[70] Ibid., p. 242 [para. 49].
[71] Ibid., p. 242 [para. 51].
[72] Ibid., p. 242 [para. 36].

high degree of autonomy, such as two Socialist Soviet Republics (Ukraine and Belarus), which are members of the United Nations.[73]

A rather interesting argument by Tunkin is also worth mentioning here. Despite being a supporter of Verdross' correction himself, Tunkin mentioned that in the case of 'state members of a federal state, the presumption should be that, unless they were placed under a restriction by the federal constitution, international law did not put any obstacles in the way of their concluding treaties.'[74] This idea was immediately challenged by Waldock, who deemed it 'difficult.' He stressed that presuming the existence of a full treaty-making capacity on the part of member states of a federal state based on the absence of restrictions imposed by its federal constitution, would create a very delicate situation, as constitutions rarely contain provisions of this type, with the absence of the treaty-making capacity of member states of a federal union being inferred from the very nature of such a union.[75]

The last issue worth mentioning concerns the final rejection of paragraph 2, envisaging the possibility of restricting treaty-making capacity pursuant to the provisions of a treaty referring to that capacity. As we remember, the general attitude to this paragraph was not the most enthusiastic, as demonstrated in the previous vote, when the designed provision survived essentially by the majority of one. This time, however, Briggs set the direction of the discussion at the very beginning, proposing that paragraphs 2, 3, and 4 should be rejected entirely. Later on, the concerns of Commission members were further reinforced by El-Erian, who, in principle, spoke in favour of deleting the entire paragraph, adding that if a decision was made to leave the paragraph in, it would suggest – in line with the already quoted article 3 of the 1935 Harvard draft – the introduction of a provision allowing for the possibility of restricting treaty-making capacity exclusively with respect to the conclusion of certain types of treaties.[76] Waldock's explanations were to no avail, as he tried to convince his interlocutors that the intention was to be made more specific in a provision added at the end of paragraph 2, stipulating that the restriction of treaty-making capacity may occur only pursuant to the provisions of a treaty regulating the issue. He gave an example of a treaty which placed

[73] Ibid., p. 242 [para. 47].
[74] Ibid., p. 241 [para. 23].
[75] Ibid., p. 242 [para. 37].
[76] Ibid., p. 241 [para. 26].

treaty-making capacity under the control of an organ common to several states.[77] Further on, he explained that the paragraph at issue was added for the purpose of taking into account the emergence of agreements of constitutional type, establishing, among other things, customs unions or common markets, and associated with surrendering a part of state sovereignty to the common activities of a group of states.[78] Another interesting view was expressed by Ago, who indicated that, though the treaties of the above type predominantly contain an obligation to abstain from concluding certain treaties rather than correctly-understood restriction of treaty-making capacity, there are still cases where international agreements establish unions of states, or some sort of special relations between them, affecting the restriction of treaty-making capacity of the states that are parties to such treaties. Ago also added that, in his opinion, the article in question would be incomplete without a reference to this type of agreement.[79] We should also mention a remark made by Rosenne, who represented the extreme view and wanted the entire article to be rejected. He argued that paragraph 1 simply states the obvious, while paragraphs 2 and 4 concern the validity and interpretation of other agreements, and paragraph 3 deals with the issue of interpreting state constitutions.[80] Thus, some Commission members believed that regulation of this issue should be combined with determining the premises of the validity of the treaty.

Tunkin's argument is also worth noting. While supporting the deletion of the planned provision, he indicated the possibility of using this legal construct to introduce restrictions for weaker states,[81] which could be a sort of concealed form of the earlier condemned regulation regarding dependent states. This way, as mentioned above, at the end of the 14th session of the Commission, the scope of the planned article 3 was limited to just three paragraphs. The treaty-making capacity of states was regulated by

[77] Ibid., pp. 241-242 [para. 35].

[78] Ibid., p. 243 [para. 59]. It should be added that, while justifying his draft of Article 3 at the 640th meeting of the Commission, Sir H. Waldock had already indicated that by introducing the term of the union of states he meant not only classical unions, such as the ones between Norway and Sweden or between Denmark and Island (in which the component states maintained treaty-making capacity, though some treaties were concluded on behalf of both parties), but also new forms of state unions, such as the European Economic Community. Ibid., p. 64 [para. 3].

[79] Ibid., p. 243 [para. 62].

[80] Ibid., p. 243 [para. 63].

[81] Ibid., p. 242 [para. 44].

the first two. They subsequently contained a general rule and the exception regarding the situation of member states of a federal union (as this term was ultimately adopted by the Drafting Committee[82]), whose treaty-making capacity was intended to depend on a federal constitution.[83]

5. Remarks of the states submitted before the 14th session of the UN International Law Commission

The planned article on treaty-making capacity was again revisited at the 17th session of the UN International Law Commission in 1965. The Commission started its deliberations having already received the analysis of remarks to the draft submitted by the states in question. These states were consulted during the process of drafting the article, pursuant to articles 16 and 21 of the Commission's Statute. The opinions submitted by 1 March 1965 by thirty-one states were subsequently discussed and included in the fourth report of the rapporteur submitted before the 17th session of the Commission.[84] Only three of these states submitted remarks to the planned article dedicated to the treaty-making capacity of member states of a federal union. These states were: Finland, Israel, and Japan. The opinion of Israel was the shortest; it proposed the deletion of the paragraph referring to this issue, stating that it is redundant for the necessary determination of treaty-making capacity.[85]

The Japanese government also proposed the deletion of paragraph 2. Japan argued that it does not add a great deal to the regulation covered by paragraph 1 and in addition might be misleading. The paragraph seemingly did not mention another element of international treaty-making capacity, namely the need to recognise that capacity by another party or other parties of the agreement.[86] The Japanese government therefore remarked that in its opinion the constitutional determination of treaty-making capacity of member states of a federal union should be supplemented by recognition of

[82] From then on, the draft uses the term 'federal union,' which appears in the literature on the subject also as 'federal state,' forming a part of the category of federal states.

[83] ILC Yearbook, 1962, vol. II, p. 164.

[84] ILC Yearbook, 1965, vol. II, p. 6.

[85] Ibid., p. 17.

[86] Ibid.

their international capacity by other states, which can also occur through the conclusion of an international agreement that a given member state of federal union is a party to.

On the other hand the Finnish government did not demand the removal of paragraph 2, proposing modification instead, taking into account that the treaty-making capacity of members of union of states can result both from its constituent treaty and constitution. It is worth noting that while the discussed provision referred to member states of a federal union, the Finnish government used another term when speaking about the union (federation) of states. This difference is worth noting because it illustrates the problems with the terminology accompanying the Commission members during work on the draft law. It seems however that while the version contained in a proposed draft of the UN International Law Commission from 1962 was clearly inclined towards regulating the situation of the division of treaty-making capacity between the entire federal state and its components, defined in this case as member states, the proposal of the Finnish government aimed at opening up a discussion on the situation observed in the case of a union (federation) of the states, whose scope would not necessarily have to be narrowed to federal states, thus reopening the discussion on the purposefulness of a separate (apart from a general rule indicated in paragraph 1) regulation of the situation of unions of states in the form of a confederation.

It should be noted, however, that out of the thirty-one states which submitted comments to the draft, discussed in Waldock's fourth report, only three deemed it appropriate to address the paragraph at issue. Thus, it would appear that the remaining states accepted the solution proposed in 1962. It is even more interesting that for a change the rapporteur himself in the report from 1965, while indicating the decisive narrowing of the article in relation to the draft proposed by him during 14th session of the Commission, proposed the deletion of the entire article, pointing out a precedence of the absence of the determination of the capacity to enter into diplomatic relations in the Vienna Convention from 1961. He stressed that he does not believe in the purposefulness of – as he defined it – partial regulation of this issue and he defined the possibility of reaching a general consensus for a more detailed determination of this matter as highly doubtful.[87] Therefore, the Commission started its works in 1965 with a recommendation to reject the entire article presented by the rapporteur

[87] Ibid., p. 18.

in light of the generally marginal opposition of states to the planned regulation. Thus it can be concluded that the draft began to have a life of its own in this respect.

6. Works of the UN International Law Commission on the matter of treaty-making capacity of member states of a federal union during the 17th session in 1965

Article 3 of the draft was discussed at the 17th session of the UN International Law Commission in the course of four meetings, not including the fifth meeting (meeting no. 816), when the final version prepared by the Drafting Committee was adopted. The article took up the entire meeting 779, as well as a part of the following meeting, and was subsequently referred to the Drafting Committee, only to be revisited at meeting no. 810. The discussion, which lasted until the middle of the next meeting, once again ended with the draft being referred to the Drafting Committee for the purpose of preparing the final version the article. The amount of time dedicated to this matter demonstrates, therefore, on the one hand, the continuing interest in this subject among Commission members and, on the other, the problems with reaching a consensus.

The discussions concerning terminology were particularly animated, during which the members discussed the purposefulness of keeping the term 'federal union,' which as we remember appeared in a version of the draft prepared during the 14th session of the UN International Law Commission. Verdross wondered if the planned regulation would concern both a federal state and federation of states[88]. Tunkin spoke in favour of returning to the term: 'federal state,' while Reuter,[89] Yasseen,[90] and Waldock[91] deemed it proper to keep the term: 'federal union,' which ultimately prevailed. At the end of the debate, when it was known that pursuant to paragraph 1 the entire article will concern exclusively the treaty-making capacity of states, Reuter remarked it will not be possible to achieve a consensus as long as Commission members continue to argue about their

[88] ILC Yearbook, 1965, vol. I., p. 245 [para. 29].
[89] Ibid., p. 246 [para. 42].
[90] Ibid., p. 246 [para. 43].
[91] Ibid., p. 248 [para. 77].

different understanding of the terms instead of contemplating the actual consequence of the regulation. This could be summarised in turn so that the first of the maintained paragraphs has anti-colonialist and a second pro-federalist undertone. He also noted that it should be explained what the Commission 'meant by colonialism and federalism, by making it clear at least that federalism was characterized by reciprocity.'[92]

During the first of the meetings dedicated to the analysis of the provisions of article 3, an animated discussion took place between supporters and opponents of keeping paragraph 2 dedicated to the treaty-making capacity of member states of a federal union and the discussion was ultimately won by supporters of the first option. The arguments presented during the discussion stressed a different understanding of the term 'federal union.' For example, Ago who spoke in favour of keeping paragraph 2, remarked that access of a state to the union always somewhat limits treaty-making capacity[93] and added that the absence of the clause limiting the scope of the treaty-making capacity of states would automatically mean that in the case of a federal union each of them would have the capacity to conclude treaties.[94] He also added the additional difficulty associated with the double meaning of the word 'state,' which can mean both a state as a subject of international law and a state which had personality for internal purposes only.[95] This problem was also mentioned by Castren indicating the situation of states, which do not have treaty-making capacity by being independent provinces or states.[96] In turn, Tunkin also spoke in favour of keeping paragraph 2 using the wording defined by the Drafting Committee, which worked for a long time, and remarked that as the restrictions of treaty-making capacity should result from internal law, therefore there are no obstacles for them to establish a federation, in which member states would have treaty-making capacity.[97] A completely opposite view was taken by de Luna, who justified the need to delete paragraph 2 by the fact that its current meaning allowed the limitation of the treaty-making capacity of member states of a federal union pursuant to the provisions of internal law. He also stressed that if a state was completely deprived of treaty-making capacity it would cease to

[92] Ibid., p. 252 [para. 40].
[93] Ibid., p. 24 [para. 21].
[94] Ibid., p. 28 [para. 76].
[95] Ibid.
[96] Ibid., p. 29 [para. 80].
[97] Ibid., p. 25 [para. 39].

be a state.[98] The statements of the Commission members indicated mainly a significant difference of opinions regarding the very nature of treaty-making capacity of the components of a federal union. The key question concerned the basis of admissibility and restrictions of this capacity, including a key question whether such a possibility should result from internal law regulations if these have the rank of constitutional regulations.

In the heat of the discussion some Commission members tried to point out the practical aspects of the analysed issue, including the need to take a position on the issue mentioned in the last sentence of paragraph 3 of the remarks to the planned article in its version from 1962, which attributed key significance to answering the question of who would be a party to an agreement concluded by a component of a federal union. Rosenne raising this concern stressed that without clarifying this issue it would be better not to adopt paragraph 2.[99]

The subsequent meeting of the Commission, at which members returned to discussing draft article 3, started with Lachs's statement, who extensively justified the purpose of keeping the article dedicated to treaty-making capacity and with the indication that this capacity is due to every state as a consequence of adopting the principle of the sovereign equality of states defined in the United Nations Charter.[100] Subsequently on the initiative of the Chairman[101] it was resolved to refer the article to the Drafting Committee with the motion to delete from the contents of paragraph 1 any references to the treaty-making capacity of the subjects of international law other than states and to delete paragraph 3 regarding the treaty-making capacity of international organisations.

The version prepared by the Drafting Committee consisted this time of just two paragraphs, with the first of them envisaging that treaty-making capacity is due to every state, while the second one conditioned the treaty-making capacity of member states of a federal union on the provisions of a federal constitution.[102]

The question of whether a member state concludes the treaty for itself or for the entire federal state continued however to be unanswered and consequently Rosenne stressed that in this situation his concerns whether

[98] Ibid., p. 29 [para. 78].
[99] Ibid., p. 29 [para. 87].
[100] Ibid., p. 30 [paras. 2-5].
[101] Ibid., p. 31 [para. 16].
[102] Ibid., p. 245 [para. 28].

paragraph 2 is accurate and useful, had still not been clarified.[103] It seems that such persistent returning to the issue brought a result, somewhat calling the rapporteur of the draft to the board, who noted that in respect to this issue it could be assumed that the answer could be different e.g. in Switzerland depending whether a lawyer answering this question would adopt the perspective of the federation or of the canton.[104] This balanced answer can be regarded as satisfactory insofar that though it does not provide a ready formula, it indicates the need of an individual approach to the situation of member states of individual federal unions. The clear directions were given however by Verdross, who noted that paragraph 2 should be construed so that the term 'member state' should have the meaning attributed in accordance with internal law.[105]

From this perspective the conclusion of an international agreement by a member state of a federal union would be understood as the decentralisation of treaty-making capacity and the federal state acting through its decentralised body would be the subject of the concluded treaty. This view was not however commonly shared and the statements of Commission members demonstrated that they admitted the possibility of the occurrence of a separate international law capacity of member states of a federal union and pondered instead on the source thereof. In this context the key question would be if the treaty-making capacity being the explicit evidence of the legal capacity of a federal union can result just from a federal constitution or whether it requires some other form of recognition by other members of the international community.

Further discussion regarding the future fate of paragraph 2, which took place during the 810th and 811th meeting of the Commission very quickly set the direction of the discussion by presenting two opposite views. The first was decisively against the introduction of a provision conditioning the existence of the treaty-making capacity of member states of a federal state on the provisions of a federal constitution, thus supporting the deletion of paragraph 2. The Commission members indicated inter alia that the treaty-making capacity of member states results from international law rather than from the constitution,[106] and that such a delicate matter should

[103] Ibid., p. 246 [para. 37].
[104] Ibid., p. 248 [para. 75].
[105] Ibid., p. 246 [para. 49].
[106] Such a position was taken by J.M. Ruda, who stressed 'that the treaty-making capacity of a member State of a federal union depended on whether it fulfilled the

not be left within the domain of constitutional law,[107] or that the status of member states, provided they are states, is regulated in sufficient manner by paragraph 1 of this article.[108] Elaborating on this issue, Pal added that if the given entities lose their state status by forming a part of a federal state than their status should not be regulated at all by this draft as it concerns treaties concluded between states, unless the idea would be to determine the capacity of member states regardless of whether they are states in the meaning of international law.[109] There were also views presented, which though did not call for the removal of paragraph 2, were still critical in respect to the contents thereof. Verdross pointed out that the treaty-making capacity of member states is not deduced from a constitution, but from international law, 'under which the capacity to conclude treaties was dependent on the effective power to do so.'[110] In turn, Jiménez de Aréchaga assessed the discussed rule as unsound – from a scientific perspective, and dangerous – from a political perspective.[111] He stressed that it would mean the abdication by international law of one of its main functions, that of determining the scope of its own subjects and allocation of that right to individual states. He further continued to explain that whether a given member state has or does not have the capacity to enter into treaties does not depend exclusively on the provisions of internal law, but also on recognition by other states.[112] He associated political consequences with the influence that the federal state might have secured for itself by amending its own constitution resulting in the creation of new member states, on the operation of international organisations, e.g. customs unions, through the multiplication of entities for voting purposes.[113]

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requirements for being regarded as a State under international law.' He also added, that 'it was for international law to determine whether the entity constituted a State or not and, if it did, what was its treaty-making capacity. That capacity would not depend on the terms of the federal constitution; it was determined by international law, which took the constitution into account.' (ibid., p. 247 [para. 50]). A similar view was taken by G. Amado, who noted that in that case 'what was in issue was not the capacity of States members of a federal union, but that of States regarded as such 'for the purposes of international law'. (ibid., p. 246 [para. 39]).

107 See: P. Reuter. Ibid., p. 246 [para. 42].

108 See: R. Pal. Ibid., p. 246 [para. 41].

109 Ibid.

110 Ibid., p. 245 [para. 29].

111 Ibid., p. 245 [para. 30].

112 Ibid., p. 245 [para. 31].

113 Ibid., p. 245 [para. 32].

Therefore, while a group of Commission members criticising the solution proposed in paragraph 2 was rather large, the supporters of the opposite opinion proposing the adoption of paragraph 2 in unchanged form were rather in retreat. The view to keep the proposed solution was supported only by: Tunkin (who stressed that the written federal constitution is a deciding factor in determining whether a given component of federal state is or is not a state), Bartos (who pointed out that the provision corresponds to an actual phenomenon because the participation of members of a federal state in international relations is a fact and additionally it determines the criteria for determination of treaty-making capacity of member states by stipulating that it depends on a constitution), and Yasseen and Pessou, who saw the discussed provision as the correct answer of the Commission to current association and federation trends.[114]

The discussion was clearly dominated by opinions critical to the provisions of paragraph 2. However compromise proposals were proposed rather quickly. Thus Ago proposed to highlight the fact that the capacity of a member state is usually limited. According to his proposal, paragraph 2 would have new wording, according to which: 'The capacity of member States of a Federal union to conclude treaties and the limits of that capacity depend on the federal constitution.'[115] Jiménez de Aréchaga however correctly indicated that this correction does not solve the problem because member states would continue to be able to participate in conventions and international conferences preparing these conventions despite not meeting the criterion of independence.[116] He also supported the view of Ago, who mentioned that a solution could simply concern not establishing relations with a state that it would wish to recognise as a full member of the international community. However he correctly noticed that such actions would be mainly applicable in the case of bilateral agreements, whereas the problem under discussion was connected rather with that of participation in multilateral treaties.[117]

A correction proposed by Tsuruoka could have been a solution to this problem, who pointed out that in his opinion article 3 in its entirety should be deleted, but if paragraph 1 was to be retained, the subsequent paragraph should read that a federal constitution is empowered to determine in detail

[114] Ibid., answer, pp. 245 [para. 34], 246 [para. 40], and 246 [paras. 43-44].
[115] Ibid., p. 247 [para. 55].
[116] Ibid., p. 247 [para. 60].
[117] Ibid., p. 247 [para. 61].

the scope of the treaty-making capacity of a member state subject however to meeting a preliminary assumption in the form of recognition of that capacity by international law.[118] This correction was positively received by Ago, who noted that though he was also in favour of deleting the entire article, he could also support the correction proposed by Tsuruoka.[119] Other members of the Commission[120] referred however to version proposed by Ago. The latter argued that the discussed paragraph does not introduce any new rule and he stressed when speaking to Amado that if Brazil has decided to empower components of the state, envisaging in the constitution their treaty-making capacity, then it would be recognised because international law stipulates a rule referring in such cases to internal law.[121] Amado replied that it was utopian to claim that member states could become states in the meaning of international law only as a result of making respective changes to a constitution.[122]

Waldock also spoke on this issue and supporting the correction proposed by Ago stressed that he would be afraid to adopt a version, which would allow one to conclude that in the Commission's opinion member states of a federal union in principle have treaty-making capacity.[123] Responding to concerns of Jiménez de Aréchaga regarding the multiplication of artificial entities changing the structure of votes within international organisations as a result of the changes made to the constitution, he stated 'that any attempt of that kind would inevitably meet with opposition.'[124]

The applicant of the correction (Ago) proposed in his response to modify it in order to avoid the impression that the Commission decided

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[118] Ibid., pp. 247-248 [para. 62].

[119] Ibid., pp. 248 [para. 65].

[120] For example G. Tunkin supporting this correction pointed out a material practical aspect thereof concerning the fact that as a result of this solution states entering into negotiations with such a member state of a federal union will be clear in respect to treaty-making capacity of such a member state. He also added that member states of federal states are generally states even if they have limited capacity to conclude treaties. Ibid., p. 247 [paras. 57-58].

[121] Ibid., p. 248 [para. 64]. This statement was immediately responded to by E. Jiménez de Aréchaga, who agreeing in principle, stressed that it does not mean that these changes would not require recognition by other states, which would have the full right and obligation to determine whether the letter of the constitution corresponded to reality and whether member states were truly independent states. Ibid., p. 248 [para. 66].

[122] Ibid., p. 248 [para. 67].

[123] Ibid., p. 248 [para. 75].

[124] Ibid., p. 248 [para. 76].

to recognise the unconditional treaty-making capacity of member states. Should it be adopted, the text of paragraph 2 would indicate that: 'The existence of the capacity of member States of a federal union to conclude treaties and the limits of this capacity depend on the federal constitution.'[125] At this point, meeting no. 810 was adjourned without holding any formal voting on the submitted corrections.

It is worth noting that a little earlier Chairman (Bartos), pointing out the practical aspect of the discussed issue, referred to the example of Bavaria, which pursuant to the German constitution from 1871 was entitled to conclude international agreements and which has exercised this right to conclude a concordat with the Vatican. He also gave the current example of Quebec, which 'relying on its own interpretation of the Canadian Constitution, was proposing to conclude a cultural agreement with France.'[126] He also pointed out that if despite the controversial nature of that right the other party has recognised the capacity of a part of the federation to conclude that agreement, it could have been accused of interfering in the internal affairs of a federal state.[127] Rosenne also referred to this issue and said 'that the question under discussion would become more than an academic issue, if, for example, a doubtful treaty was presented to the Secretary-General for registration.'[128] However, he added that most likely neither France nor Quebec would do so, because neither party to that agreement regards it as a treaty.[129] These agreements, not being treaties, therefore could be informal international agreements defined as e.g. a Memorandum of Understandings (MOU).[130]

The subsequent meeting of the Commission (no. 811) started from the submission of a counterproposal by Verdross, who insisted on adding an explanation to the contents of the planned article that the treaty-making capacity of a member state results from international law rather than from internal law. To this end he proposed the deletion of paragraph 2 and the addition of a provision to paragraph 1 indicating that: 'This capacity may be

[125] Ibid., p. 249 [para. 78].
[126] Ibid., p. 248 [para. 68].
[127] Ibid.
[128] Ibid., p. 248 [para. 71].
[129] Ibid.
[130] See more in: T. Kamiński, *Nieformalne porozumienia międzynarodowe jako instrumenty międzynarodowe niewiążące prawnie [Informal International Agreements as Non-binding International instruments]* [in:] B. Jagusiak (ed.), 'Współczesne wyzwania europejskie' [Contemporary European Challenges], Warszawa 2008, pp. 85-98.

limited by an international convention or by the constitution of a federal State.'[131] He also said that this correction is intended to cover cases of both traditional federalism and a modern model as well, giving the European Economic Community and the League of Arab States as examples. This formula was supposed to exclude situations, which should stay outside the domain of the UN International Law Commission, namely those federations, within which the treaty-making capacity of the components thereof was based on internal law and where the decentralisation of treaty-making capacity occurred.[132]

Thus this correction proposed a return to a solution referring to the possibility of restricting treaty-making capacity as a result of the conclusion of a respective international agreement, which was rejected by the Commission in 1962 (at that time as paragraph 2 of the planned article). This argument was immediately raised by Waldock, who essentially without getting into a substantive analysis of the problem[133] proposed its rejection, somewhat for formal reasons, though actually there were no obstacles – apart from the decision of the Commission members – to return to this proposal. A proposal made by Castren intended to introduce a change to Verdross's correction in a manner allowing for its scope to cover also forms of a state other than a federation, did not gain a great deal of support either. Contrary to appearances the adoption of that proposal would not have been of just a cosmetic nature, because its author proposed providing for restrictions of the treaty-making capacity of states resulting from international agreement or 'the constituent act of a union of States,'[134] which would lead the deliberations of the Commission definitely closer to the analysis of the status of a confederation rather than the federal union of the states. Perhaps for this reason this proposal was essentially not discussed.

A decisive position taken by Jiménez de Aréchaga should also be mentioned. He proposed the rejection of paragraph 2 in its entirety,[135] and additionally pointed out to the Commission the possibility of the emergence

[131] ILC Yearbook, 1965, vol. I., p. 249 [para. 5].

[132] Ibid., p. 249 [paras. 5-7].

[133] He reiterated that the Commission 'had taken the view that cases of this kind did not give rise to international incapacity but only to international responsibility.' Ibid., pp. 249-250 [para. 9]. H.W. Briggs, G.I. Tunkin, and M.K. Yasseen (reply: pp. 250 [paras. 16 and 20] and 251 [para. 30]) spoke against adopting A. Verdross's correction.

[134] Ibid., p. 250 [para. 15].

[135] Ibid., s. 250 [para. 13]. Under the influence of the development of the discussion and subsequently filed corrections he agreed in the end to withdraw it (pp. 251-252

of so-called 'paper federations' being a potential result of the adoption of paragraph 2 introducing what he called a very novel thesis enabling the creation of any number of international subjects by making changes to their own constitution.[136]

A viewpoint presented by Yasseen was the key to achieving a consensus. He wisely pointed out that the rejection of paragraph 2 would not change anything as the member states of federal unions conclude treaties in (international) practice. He also added that the absence of the determination of this issue would clearly diminish the significance of the draft of the Commission, and moreover he proposed an interpretation of paragraph 2 indicating that international law referring to a constitution is the actual source of the treaty-making capacity of a member state of a federal union.[137] Therefore, it would be a reference to the internal law at the constitutional level that defines in detail the fact of a member state either having or not having treaty-making capacity. The real source of that rule would come however from international law, whose legal norm was actually only discovered by the Commission and thus it should have a common character.

Yasseen's proposal was supported by Ago, who immediately submitted a correction to paragraph 2, whose purpose was to indicate that treaty-making capacity results from international law, while the constitution may define the scope thereof. The correction stated that: 'state members of a federal union may have a capacity to conclude treaties within the limits indicated by the federal constitution.'[138] Moreover, this correction was also accepted by Verdross as a compromise solution defining it as very similar to the proposals filed by him and Castren.[139]

Before sending the text back to the Drafting Committee, the floor was taken by the rapporteur of the Draft, who stressed that paragraph 2 deals with a highly significant political issue due to the controversy of the treaty-making capacity of components of some federal states. Waldock rightly noticed that in this situation any position taken by the UN International Law Commission is associated with a risk of a potential reference to this

[para. 38]) when formally requested by S. Rosenne (p. 251 [para. 26]) to put it on hold until the final version of the provision proposed by the Drafting Committee is known.

[136] Ibid., p. 251 [para. 35].

[137] Ibid., p. 251 [paras. 28-29]. The existence of an international law norm referring to the provisions of internal law has already been mentioned. See footnote 120.

[138] Ibid., p. 251 [para. 32].

[139] Ibid., p. 251 [para. 33].

position made in order to undermine the continuing existence of a federation. He identified however the issue of 'paper federations,' mentioned earlier by Jiménez de Aréchaga,[140] as the other potential problem. He proposed to refer the wording of paragraph 2 to the Drafting Committee placing an emphasis on the proposal made by Ago, which allows stressing that both the restrictions and the existence itself of treaty-making capacity depends on the federal constitution.[141] Ultimately, at the Chairman's request a decision was made to ask the Drafting Committee to prepare a proposal considering the positions presented during the discussion.[142]

The version of article 3, which came back from the Drafting Committee, was presented by the rapporteur during the 816th meeting of the Commission. The new wording of the article confirmed in paragraph 1 the right of any state to conclude treaties, whereas paragraph 2 in the case of the member states of a federal union stipulated that this capacity can be due to such member states if it is conferred by a federal constitution and within the scope defined therein[143]. The proposed version of paragraph 2 therefore determined that though international law admitted in principle the conclusion of treaties by the member states of a federal union, still in a specific situation this right was possessed by a federal union, which was capable of defining in a federal constitution not just the scope but the admissibility itself of the occurrence and the performance of treaty-making capacity by its member states. Both paragraphs of article 3 were voted on separately, with the first of them passed with 11 votes in favour, 2 votes against and 2 abstaining votes and the second one passed with 7 votes in favour, 3 votes against and 4 abstaining votes. Article 3 in its entirety was adopted by the same majority of votes.

7. Final remarks

The final version of the draft adopted by the Commission in 1966 made no changes to the content of the article discussed in this paper. Therefore, the provision at issue allows for the existence of the treaty-making capacity of member states of a federal union, which may be exercised irrespective

[140] Ibid., p. 252 [para. 45].
[141] Ibid., p. 252 [para. 47].
[142] Ibid., p. 252 [para. 51].
[143] Ibid., p. 280 [para. 3].

of the capacity of the union as a whole. However, both the existence of this right and its scope was meant to be contingent on the provisions of a federal constitution determining this matter. Comments on the article (at the time, article 5 of the draft) indicated that, for the purposes of that regulation, the term 'state' should have 'the same meaning as in the Charter of the United Nations, the Statute of the Court, the Geneva Conventions on the Law of the Sea and the Vienna Convention on Diplomatic Relations; i.e. 'it means a State for the purposes of international law,'[144] or a state in the international meaning of the term. With respect to paragraph 2, comments clarify that even though, in principle, the right to conclude treaties belongs to a federal government, there is no rule in international law which would prohibit the assignment of such rights to member states of a federal union.[145] However, the last sentence of the comments has not changed from the already quoted version from 1962 and indicates that in the event that it is uncertain whether a given agreement was concluded by a member state on its own behalf or on behalf of a federal state, the solution to this problem should be sought in the provisions of a federal constitution.[146]

As we know, this provision was not included in the text of the Convention on the Law of Treaties, provoking an intense emotional response during the Vienna conference.[147] The article survived in an unchanged form since the first session of the conference in 1968, when the participants managed to reject the corrections aimed at deleting both paragraphs thereof, only to give in to the criticism a year later. In 1969, the matter was revisited, *inter alia*, on the initiative of the Canadian delegation, arguing that paragraph 2 had the potential to interfere with the internal affairs of federal states by usurping the right to interpret their constitutional solutions.[148] Following a heated discussion, this paragraph was ultimately rejected by 66 votes in favour, with 28 votes against and 13 abstaining votes, while paragraph 1 (currently, article 6) was adopted by 88 votes in favour, with 5 votes against and 10 abstaining votes.[149]

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[144] ILC Yearbook, 1966, vol. II, p. 192 [para. 4].

[145] Ibid., p. 192 [para. 5].

[146] Ibid.

[147] More details in: S.E. Nahlik, *Kodeks prawa traktatów [The Code of the Treaties]*, Warszawa 1976, pp. 97-100.

[148] L.F. Damrosh, L. Henkin, R. Crawford Pugh, O. Schachter, H. Smit, op. cit., p. 469.

[149] M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Leiden–Boston 2009, p. 128.

Thus, the issue of the treaty-making capacity of states has been defined in article 6 of the Vienna Convention on the Law of Treaties of 1969. It is contained in section 1 Part II of the convention which, despite being dedicated to the conclusion of treaties, provides only a relatively brief confirmation of every state's capacity to conclude treaties.[150] This does not mean that territorial units forming a part of a federal state cannot conclude international agreements. This issue depends however both on the provisions of internal law of the given federal state and on the practice of the states recognising potential rights of the components of the federal (non-unitary) states in respect to conclusion of the treaties.

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[150] Vienna Convention on the Law of Treaties, concluded in Vienna on 23.5.1969, 1155 *U.N.T.S.* 331, 8 I.L.M. 679.