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FIFTH REPORT ON SUCCESSION IN RESPECT OF TREATIES

by

Sir Humphrey Waldock,
Special Rapporteur

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Article 19

Formation of Unions of States

[Use of terms (for addition to Article 1)

"Union of States" means a federal or other union formed by the uniting of two or more States which thereafter constitute separate political divisions of the united State so formed, exercising within their respective territories the governmental powers prescribed by the constitution.]

Alternative A

1. When two or more States form a Union of States, treaties in force between any of these States and other States parties prior to the formation of the union continue in force between the Union of States and such other States parties unless:

(a) the object and purpose of the particular treaty are incompatible with the constituent instrument of the Union; or

(b) the Union of States and the other States parties to the treaty otherwise agree.

2. Treaties, which continue in force in accordance with paragraph 1, are binding only in relation to that part of the Union of States in respect of which the particular treaty was in force prior to the formation of the union, unless the Union of States and the other States parties otherwise agree.

3. The rules in paragraphs 1 and 2 apply also when a State joins an already existing Union of States.

Alternative B

1. When two or more States form a Union of States, treaties in force between any of these States and other States parties prior to the formation of the union continue in force between the Union of States and such other States parties if

(a) in the case of multilateral treaties other than those referred to in article 7 (a), (b) and (c), the Union of States notifies the other States parties that it considers itself a party to the treaty;

(b) in the case of other treaties, the Union of States and the other States parties

(i) expressly so agree; or

(ii) must by reason of their conduct be considered as having agreed to or acquiesced in the treaty's being in force in their relations with each other.

2. Treaties, which continue in force in accordance with paragraph 1, are binding only in relation to that part of the Union of States in respect of which the particular treaty was in force prior to the formation of the union, unless the Union of States and the other States parties otherwise agree.

3. The rules in paragraphs 1 and 2 apply also when a State joins an already existing Union of States.

Commentary

1. The present article is concerned only with successions arising from the creation of a Union of States; questions of succession arising from the dissolution of a Union of States will be considered in the next article, dealing with the separation of a State into two or more States. Unions of States have been created in numerous forms in the past, and political and economic pressures seem certain to result in the emergence of further Unions of States in both familiar and new forms. The very variety of constitutional relationships which might be considered as falling within the concept of a Union of States makes it necessary at the outset to identify what is meant by this concept for the purposes of succession of States in respect of treaties.

2. A sharp distinction has to be made between Unions of States which create a new political entity only on the plane of international law and organization, and unions which also create a new political entity on the plane of internal constitutional law. Examples of the former category are the United Nations itself, the Specialized Agencies, the Organization of American States, the Council of Europe, Comecon and similar intergovernmental organizations which fall completely outside the concept of a union of States for the purposes of succession of States. Examples of the latter category are federations of States, such as the United States and Switzerland, and other constitutional unions of States, such as the former union of Egypt and Syria in the United Arab Republic, Tanzania and the former unions of Iceland and Denmark and of Norway and Sweden. Constitutional unions of this category fall clearly within the scope of the Commission's study of succession of States.

3. In addition, there are some hybrid unions which may appear to have some analogy with a Union of States but which do not, in the opinion of the Special Rapporteur, form part of the present topic. One such hybrid is the European Economic Community, the precise legal character of which is a matter of discussion amongst jurists. For present purposes, it must suffice to say that, while the EEC is not commonly viewed as a Union of States, it is at the same time not generally regarded as being simply a regional international organization. The direct effects in the national law of the Member States of regulatory and judicial powers vested in Community Organs gives to the EEC, it is said, a semblance of a quasi-federal association of States. Be that as it may, from the point of view of succession, the EEC appears without any doubt to remain on the plane of intergovernmental organization. Thus, article 234 of the Treaty of Rome 1/ unmistakably approaches the question of the pre-Community treaties of Member States with third countries from the angle, not of succession or of the moving treaty-frontier rule, but of the rules governing the application of successive treaties relating to the same subject-matter (Article 30 of the Vienna Convention on the Law of Treaties). In other words, pre-Community treaties are dealt with in the Rome Treaty in the context of compatibility of treaty obligations and not of succession or moving treaty frontiers. The

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1/ Peaslee, International Governmental Organizations, 2nd edition (1961), vol.1, p.583

same is true of the instruments which established the other two European Communities. 2/ Furthermore, the Treaty of Accession of 22 January 1972, 3/ which sets out the conditions under which four additional States may join the EEC and Euratom, deals with the pre-Accession treaties of the candidate States on the basis of compatibility of treaty obligations - of requiring them to bring their existing treaty obligations into line with the obligations arising from their accession to the Communities. Similarly, the Treaty of Accession expressly provides for the new Member States to become bound by various categories of pre-Accession treaties concluded by the Communities or by their original members and does not rely on the operation of any principle of succession or of moving treaty frontiers.

4. Numerous other economic unions have been created in various forms and with varying degrees of "community" machinery; e.g. the European, Latin American and other Free Trade Areas and the Benelux Economic Union. 4/ In general, the constitutions of these economic unions leave in no doubt their essential character as "intergovernmental organizations" rather than internal "unions" of States. In the case of the Belgo-Luxembourg Economic Union, if Belgium may be expressly empowered to conclude treaties on behalf of the Union, the relationship between the two countries within the Union appears to remain definitively on the international plane. 5/ Sometimes, as in the Liechtenstein-Swiss Customs Union, the relationship may seem to come to the very verge of what can be considered a relationship between two sovereign States. 6/ But in practice all these economic unions have been treated as unions on the plane of international organization alone, and not as creating political unions on the plane of internal constitutional law.

5. The topic entrusted to the present Special Rapporteur is "Succession of States in respect of treaties"; and it is his understanding that, whatever may be the problems of succession which arise in connexion with international organizations, they fall outside that topic. In consequence, it is only Unions of States on the plane of internal constitutional law with which the present report is concerned.

6. A second distinction has to be made between a union of mere territories or of a mere territory with a State and a union of two States, although all three cases may fall within the topic of succession of States. The reason is that, whereas the third case - a Union of two States - attracts the principles which are the subject of the present article, it is other principles in the draft articles which apply to the first two cases.

2/ Treaty Establishing the European Coal and Steel Community, Article 17 of the Convention on Transitional Provisions, United Kingdom Treaty Series (1972) Cmnd.4863, p.155; Treaty Establishing the European Atomic Energy Community, Articles 105-6, Peaslee, op.cit., p.428.

3/ Article 4; United Kingdom Treaty Series (1972), Cmnd.4862 - p.10.

4/ See generally D.W. Bowett, The Law of International Institutions, 2nd Edition, pp.150-230.

5/ See the Special Rapporteur's Third Report on the Law of Treaties [Yearbook of the International Law Commission, 1965, vol.II, p.22].

6/ P. Raton, Liechtenstein, History and Institutions of the Principality, English Edition (1970), pp.91-101.

7. Thus, a new State which results from the union of two or more territories, not already States, raises the issue whether it begins life with a completely clean slate in regard to treaties or whether it has any rights or obligations with respect to the continuance of the treaties formerly applicable to any of the territories of which it is composed. An example is Ghana, which was formed in 1957 from the amalgamation of two colonies, a colonial protectorate and a trusteeship territory, previously under the same administering Power, into a single independent State. In these cases, whether the new State is given a unitary or a federal constitution, there is no question of the continuity of the international personality of the individual component territories; for the territories had none prior to the creation of the new State. The problem in these cases is to determine how far and with what effect such a composite new State may notify its "succession" to a multilateral treaty or claim "novation" of a bilateral treaty under the provisions of Part II of the draft articles on the basis of the treaty's previous application to one or more of the territories of which it is composed. This is a matter which is thought by the Special Rapporteur properly to fall under Part II of the draft where it is not at present covered. At the same time there is a certain convenience in examining it in parallel with the question of Unions of States. Accordingly, the problem raised by a new State composed of two or more formerly dependent territories will be taken up immediately after the present article in an "excursus" and any special provisions there found necessary for such composite new States can in due course be introduced into Part II.

8. The second type of case - the uniting of a mere territory with an existing State - also falls under an earlier provision of the draft articles, namely, the moving treaty-frontier rule set out in article 2; and this is so whether the existing State is a unitary or a federal State. A modern instance is Newfoundland's entry into the Dominion of Canada as a new Province in 1949. Newfoundland, though a fully self-governing territory prior to its merger with Canada, was not considered as a State, and the case was dealt with as one covered by the moving treaty-frontier rule; in other words, the new Canadian Province of Newfoundland simply passed out of its previous treaty régime into the treaty régime of Canada. 7/ Another modern instance is the uniting of the former Italian colony of Eritrea with Ethiopia as an "autonomous unit" in a constitutional relationship designated as federal; and in this instance too the territory seems to have been regarded as simply absorbed into the treaty régime of Ethiopia. 8/

9. The present article, therefore, is concerned only with a union where the individual units were themselves States having separate international personality at the date of their entry into the union. So confined, Unions of States divide themselves into two main categories: (a) unions not essentially federal, and (b) federal unions. This classification is necessarily a broad one because in certain cases the question whether a Union of States is to be considered a federation may be a matter of appreciation. If a modern textbook may be correct in saying that "a union of States is ordinarily distinguished from a federation in the extent to which functions of government are

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7/ See Second Report, Commentary to Article 2, paragraph 6, [Yearbook of the International Law Commission, 1969, vol.II, p.53].

8/ Ibid.

concentrated in the central authorities", 9/ there is some room for argument as to precisely how far that concentration of functions must go to constitute a federal State. The same textbook indeed takes the view that for purposes of analysing the effect on treaties "the formal distinction between union and federation is of slight relevance". Nevertheless, the majority of jurists, including the writer of the textbook in question, examine the cases of non-federal and federal unions separately. The Special Rapporteur will do likewise, beginning with non-federal unions.

(a) Non-federal Unions

10. The "personal unions" referred to by many writers may be left out of account, because they do not raise any question of succession. They entail no more than the possession, sometimes almost accidental, by two States of the same person as Head of State (e.g. Great Britain and Hanover between 1714 and 1837), and they in no way affect the treaty relations of the States concerned with other States. In any event, they appear to be obsolete. 10/ So-called "real unions", on the other hand, entail the creation of a composite international person the particular character of which differentiates it from other types of new State for the purpose of succession. Such a union exists when two or more States, each having a separate international personality, are united under a common constitution with a common Head of State and a common organ competent to represent them in their relations with other States. A union may have some other common organs without losing its character as a "real" rather than federal union; but the essence of the matter for present purposes is the separate identities of the individual States and the common organs competent to represent them internationally in at least some fields of activity. 11/

11. Amongst the older cases of real unions that are usually mentioned are the Norwegian-Swedish union under the Swedish Crown from 1814 to 1905 and the Danish-Icelandic union under the Danish Crown from 1918 to 1944. In each of these cases, however, one of the two union States (Norway and Iceland respectively) had not been independent States prior to the union, and it is only in connexion with the dissolution of unions that these precedents are cited. 12/ Even so, the practice concerning the effect of their dissolution on treaties has a certain interest in the present connexion; for it underlines the significance of the separate personalities of the individual States in the context of succession. The chief precedents regarding the effect of the creation of a union on treaties are the modern ones of the unions of Egypt and Syria in 1958 and of Tanganyika and Zanzibar in 1964.

9/ D.P. O'Connell, State Succession in Municipal Law and International Law (1967), vol.II, p.71.

10/ See generally J.H.W. Verzijl, International Law in Historical Perspective (1969), vol.II, pp.133-140.

11/ For a historical account of real unions see J.H.W. Verzijl, op.cit., pp.140-159.

12/ The union of Austria and Hungary in the Dual Monarchy is another case sometimes cited, but again only in regard to the effect of a dissolution of a union on treaties.

12. Egypt and Syria, each an independent State and Member of the United Nations, proclaimed themselves in 1958 one State to be named "The United Arab Republic". 13/ At the same time the Provisional Constitution of the Republic laid down that the executive authority should be vested in the Head of State and the legislative authority in one legislative house. True, article 58 of the Constitution also provided that the Republic should consist of two regions, Egypt and Syria, in each of which there should be an executive council competent to examine and study matters pertaining to the execution of the general policy of the region. But under the Constitution the legislative power and the treaty-making power (article 56) were both entrusted to the central organs of the united State, without any mention of the regions' retaining any separate legislative or treaty-making powers of their own. 14/ *Prima facie*, therefore, the Proclamation and Provisional Constitution designed the UAR to be a new unitary State rather than a "union", either real or federal. This is, indeed, underlined by a comparison between the language of the UAR Constitution and that of the "Charter of the United Arab States" concluded by the new Republic and by the Yemen only three days after the Constitution of the UAR had been adopted. 15/ That Charter expressly provided that the "United Arab States" should be created as a "union" and that each member State of the Union should "preserve its international personality and its system of government". In practice, however, Egypt and Syria were generally recognized as in some measure retaining their separate identity as distinct units of the UAR.

13. This view of the matter was, no doubt, encouraged by the terms of article 69 of the Provisional Constitution, which read:

> "The coming into effect of the present Constitution shall not infringe upon the provisions and clauses of the international treaties and agreements concluded between each of Syria and Egypt and foreign Powers.
>
> These treaties and agreements shall remain valid in the regional spheres for which they were intended at the time of their conclusion, according to the rules and regulations of international law."

Article 69 thus in terms provided for the continuance in force of all the pre-union treaties of both Egypt and Syria within the limits of the particular region in regard to which each treaty had been concluded. Vis-à-vis third States, that provision had the character of a unilateral declaration which was not, as such, binding upon them. Third States were thus under an obligation to recognize the continuance in force of their pre-union treaties with Egypt and Syria only if (a) they were bound to do so under some rule of general international law or (b) they assented, expressly or by their conduct, to the continuance in force of those treaties under the conditions specified in Article 69 of the Constitution of the UAR.

13/ E. Cotran, *International and Comparative Law Quarterly*, (1959), vol.8, pp.346-390.

14/ For a text of the Provisional Constitution see *International and Comparative Law Quarterly* (1959), vol.8, pp.374-380.

15/ *Ibid.*, pp.387-390.

14. As to multilateral treaties, the Foreign Minister of the UAR made a communication to the Secretary-General of the United Nations in the following terms:

> "It is to be noted that the Government of the UAR declares that the Union is a single Member of the United Nations, bound by the provisions of the Charter, and that all international treaties and agreements concluded by Egypt or Syria with other countries will remain valid within the regional limits prescribed on their conclusion and in accordance with the principles of international law."

The response of the Secretary-General to this communication was, during the existence of the Union, to list the United Arab Republic as a party to all the treaties to which Egypt or Syria had been parties before the Union was formed; and under the name of the UAR he indicated whether Egypt or Syria or both had taken action in respect of the treaty in question. 16/ Upon the basis of what legal principle the UAR was to be considered a party to the treaties respectively of Egypt and Syria the Secretary-General did not explain: i.e. whether he considered the UAR as having a right to notify its succession to multilateral treaties (cf. the rule proposed in article 7 of the present articles), or whether he considered the united State of Egypt-Syria as _ipso jure_ bound to continue in force the pre-union treaties of Egypt and Syria in accordance with their terms. Some further light on the matter may, however, be obtained from the treatment accorded to the United Arab Republic in regard to membership of the United Nations. 17/ The notification addressed by the UAR to the Secretary-General had requested him to communicate the information concerning the formation of the united Republic to all Member States and principal organs of the United Nations and to all subsidiary organs, particularly those on which Egypt or Syria, or both, had been represented. The Secretary-General, in his capacity as such, accepted credentials issued by the Foreign Minister of the UAR for its Permanent Representative, informing Member States and all principal and subsidiary organs of his action in the following terms:

> "In accepting this letter of credentials the Secretary-General has noted that this is an action within the limits of his authority, undertaken without prejudice to and pending such action as other Organs of the United Nations may take on the basis of notification of the Constitution of the UAR and the Note of 1 March 1958" (the Foreign Minister's Note informing the Secretary-General of the formation of the united Republic).

The upshot was that the UAR "without objection took their seats in all the organs of the United Nations of which Egypt or Syria, or both, had been members"; and this occurred without the UAR's undergoing "admission" as a Member State. 18/ It seems

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16/ See _Succession of States in relation to General Multilateral Treaties of which the Secretary-General is the Depositary_ (A/CN.4/150), para.48 [_Yearbook of the International Law Commission, 1962_, vol.II, p.113].

17/ See _The Succession of States in relation to Membership of the United Nations_ (A/CN.4/149 and Add.1) [_Yearbook of the International Law Commission, 1962_, vol.II, p.104].

18/ _Ibid._

therefore that the Secretary-General and the other organs of the United Nations, acted on the basis that the UAR united and continued in itself the international personalities of Egypt and Syria. The Specialized Agencies, mutatis mutandis, dealt with the case of the United Arab Republic in a similar way. 19/ In the case of the ITU it seems that the UAR was considered as a party to the constituent treaty, subject to different reservations in respect of Egypt and Syria which corresponded to those previously contained in the ratifications of those two States. 20/

15. The practice regarding bilateral treaties proceeded on similar lines, in accord with the principles stated in article 69 of the Provisional Constitution; i.e. the pre-Union bilateral treaties of Egypt and Syria were considered as continuing in force within the regional limits in respect of which they had originally been concluded. Thus, in the Secretariat's study of Succession in respect of Extradition Treaties it is said that "in accordance with the position explicitly taken by the United Arab Republic treaties applicable to Egypt or Syria were generally considered to have remained in force unaffected by the changes in 1958 [and 1961]". 21/ Again, in the Secretariat's study of air transport agreements the conclusion is reached that "notwithstanding the formation of a unitary State with no relevant power reserved for constituent parts, the air transport agreements of Egypt and Syria continued to have effect". 22/ And the practice examined in its study of trade agreements shows that in this case also the commercial treaties of Egypt and Syria were considered as continuing in force within their regional limits notwithstanding the formation of the United Arab Republic. 23/ The same view of the position in regard to the pre-union treaties of Egypt and Syria was reflected in the lists of "treaties in force" published by other States. 24/ The United States, for example, listed against the United Arab Republic twenty-one pre-union bilateral treaties with Egypt and six with Syria.

16. A modern writer considers the case of the UAR to be somewhat anomalous. 25/

19/ See Whiteman, Digest of International Law (1963), vol.II, pp.987-990 and 1018-1025; and O'Connell, op cit., vol.II, pp.193-196.

20/ Succession of States to Multilateral Treaties (A/CN.4/225), para.108 [Yearbook of the International Law Commission, 1970, vol.II, p.89].

21/ Succession of States in respect of Bilateral Treaties (A/CN.4/229), para.147; see also paras. 130-131 [Yearbook of the International Law Commission, 1970, vol.II, pp.130 and 127].

22/ Ibid., (1971), (A/CN.4/243), para.190; see also paras.152-175.

23/ Ibid., (1971), (A/CN.4/243/Add.1), paras. 149-166 and 181.

24/ D.P. O'Connell, op cit., vol.II, pp.72-73.

25/ Ibid., p.74.

"It is difficult to place the UAR within any of the traditional categories of composite States. It was not a real union because the Republic was a State; nor was it a personal union, because whatever international personality of the constituent States survived was of very limited character. At the same time it was not a federation, since there was no classical distribution of legislative powers. In short, the arrangement was sui generis. This, however, does not necessarily invalidate analogies with other types of association."

While agreeing in substance with this comment, the Special Rapporteur doubts whether it is necessary to differentiate the UAR from a real union because the UAR was constituted as a "State". True, one well-known authority 26/ took the position that "a real union is not itself a State, but merely a union of two full sovereign States which together make one single but composite international person." That somewhat mystical view of real unions was not, however, universally shared, another well-known authority saying bluntly: 27/ "A real union is indistinguishable for international purposes from a federal union. It occurs when States are indissolubly combined under the same monarch, their identity being merged in that of a common State for external purposes, though each may retain distinct internal laws and institutions." Certainly, in the context of treaty relations the latter view seems to express the substance of the matter. The anomaly, if there was one, in the case of the UAR lay rather in the greater degree of the fusion of the identities of the two States in the central organs provided for in the Constitution. The separate identities of Egypt and Syria, which remained a political fact, found only very limited expression in the Provisional Constitution. For present purposes, however, and in the light of the treaty practice during the existence of the united Republic, the view generally taken of the case of the UAR as one of a Union of States seems reasonable and in accord with the facts.

17. The question remains, however, as to the legal basis on which the pre-union treaties of Egypt and Syria were considered as continuing in force within their respective regional limits. Was this viewed as resulting from the consent of the other parties to the treaties concerned or as occurring ipso jure by reason of the particular nature of the "succession" as a union of independence? The practice appears to be susceptible of either interpretation. But the uniformity of the recognition of the continuity of the pre-union treaties, together with the uniform recognition accorded by international organizations to the continuity of the membership of Egypt and Syria in the UAR, may perhaps indicate conduct based on the hypothesis of an actual rule of continuity in the case of such a union of independent States.

18. The uniting of Tanganyika and Zanzibar in the Republic of Tanzania in 1964 was also a union of independent States under constituent instruments which provided for a common Head of State and a common organ responsible for the external, and therefore treaty relations of the Union. 28/ The constituent instruments indeed provided for a

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26/ Oppenheim, International Law, 8th edition (1955), vol.I, p.171.

27/ Hall, International Law, 8th edition (1924), p.26. Cf. Fauchille, Traité de droit international public, 8th edition (1922), vol.I, part I, pp.233-234.

28/ E.E. Seaton and S.T.M. Maliti, Treaties and Succession of States and Governments in Tanzania, presented to the Africa Conference of International Law at Lagos, 1967, paras.26-28.

Union Parliament and Executive to which various major matters were reserved. Unlike the Provisional Constitution of the UAR, however, they also provided for a separate Zanzibar legislature and executive having competence in all internal matters not reserved to the central organs of the united Republic. Although, therefore, the constituent instruments prima facie contain federal elements, the case is commonly classified simply as a Union of States and appears to have been so regarded by Tanzania herself. 29/ On the other hand, the particular circumstances in which the union was formed complicate this case as a precedent from which to deduce principles governing the effect of the formation of a Union of States upon treaties.

19. If both Tanganyika and Zanzibar were independent States in 1964 when they united in the Republic of Tanzania, their independence was of very recent date. Tanganyika, previously a Trusteeship territory, had become independent in 1961; Zanzibar, previously a colonial protectorate, had attained independence and become a Member of the United Nations only towards the end of 1963. In consequence, the formation of the union of Tanzania occurred in two stages, the second of which followed very rapidly after the first: (a) the emergence of each of the two individual territories to independence, and (b) the uniting of the two, now independent, States in the Republic of Tanzania. This fact has to be kept in mind in interpreting the treaty-practice after the formation of the Union for the following reasons. Tanganyika, on beginning life as a new State, had made the Nyerere declaration by which, in effect, she gave notice that pre-independence treaties would be considered by her as continuing in force only on a provisional basis during an interim period, pending a decision as to their continuance, termination or renegotiation. 30/ She recognized the possibility that some treaties might survive "by the application of rules of customary law", apparently meaning thereby boundary and other localized treaties. Otherwise, she clearly considered herself free to accept or reject pre-independence treaties. The consequence was that, when not long afterwards Tanganyika united with Zanzibar, many pre-union treaties applicable in respect of her territory had terminated or were in force only provisionally. Except for possible "localized treaties", she was bound only by such treaties as she had taken steps to continue in force. As to Zanzibar, there seems to be little doubt that, leaving aside the question of localized treaties, she was not bound to consider any pre-independence treaties as in force at the moment when she joined with Tanganyika in forming the Republic of Tanzania. The Republic itself seems to have thought that treaties previously applicable to Zanzibar had survived the latter's independence by reason of a rule of customary law governing "protectorates"; but that the Zanzibar revolution at the beginning of 1964 had necessarily put an end to them. 31/ The thesis that a revolutionary change of government may produce a clean slate in regard to treaties is, however, very controversial, and is therefore a doubtful basis for regarding Zanzibar as relieved of pre-independence treaties. On the other hand, Zanzibar appears in fact to have been a colonial protectorate rather than a protected State, and on this basis she was not in

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29/ Ibid.

30/ See paragraph 1 of the commentary to article 4 of the present draft, Second Report (A/CN.4/214, Add.2) [Yearbook of the International Law Commission, 1969, vol.II, pp.62-63].

31/ See E.E. Seaton and S.T.M. Maliti, op.cit., paras.22-24.

any event bound to consider treaties previously applicable to the protectorate as continuing in force after independence. Accordingly, as neither the original nor the revolutionary government of Zanzibar had notified her succession to multilateral treaties or indicated her acceptance of the novation of bilateral treaties, Tanzania was justified, if for different reasons, in thinking that Zanzibar had joined the Union free of any obligation to continue in force her pre-independence treaties.

20. In a Note of 6 May 1964, addressed to the Secretary-General, the new united Republic informed him of the uniting of the two countries as one sovereign State under the name of the United Republic of Tanganyika and Zanzibar (the subsequent change of name to Tanzania was notified on 2 November 1964). 32/ It further asked the Secretary-General:

> "to note that the United Republic of Tanganyika and Zanzibar declares that it is now a single member of the United Nations bound by the provisions of the Charter, and that all international treaties and agreements in force between the Republic of Tanganyika or the People's Republic of Zanzibar and other States or international organizations will, to the extent that their implementation is consistent with the constitutional position established by the Articles of Union, remain in force within the regional limits prescribed on their conclusion and in accordance with the principles of international law."

This declaration, except for the proviso "to the extent that their implementation is consistent with the constitutional position established by the Articles of the Union", follows the same lines as that of the UAR. 33/ Furthermore, the position taken by the Secretary-General in communicating the declaration to other United Nations organs and to the Specialized Agencies was almost identical with that adopted by him in the case of the UAR, 34/ and, *mutatis mutandis*, the Specialized Agencies seem to have followed the precedent of the UAR in dealing with the merger of Tanganyika and Zanzibar in the United Republic of Tanzania. At any rate, the resulting union was treated as simply continuing the membership of Tanganyika (and also of Zanzibar in those cases where the latter had become a Member prior to the Union) without any need to undergo the relevant admission procedure. The treaty practice of Tanzania after the formation of the union necessarily reflected the special circumstances which have been mentioned in paragraph 19 above; even so, when closely examined, it seems to have parallels with the treaty practice in the case of the UAR.

21. As to multilateral treaties, Tanzania confirmed to the Secretary-General 35/ that the United Republic would continue to be bound by those in respect of which the

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32/ See *Multilateral Treaties in respect of which the Secretary-General performs Depositary Functions* (ST/LEG/SER.D.2), p.7, footnote 6.

33/ See paragraph 14 of the present commentary.

34/ *Ibid.*; and see *Multilateral Treaties of which the Secretary-General performs Depositary Functions* (ST/LEG/SER.D.2), p.7, footnote 6

35/ *Ibid.*

Secretary-General acts as depositary and which had been signed, ratified or acceded to on behalf of Tanganyika. No doubt, the United Republic's communication was expressed in those terms for the simple reason that there were no such treaties which had been signed, ratified or acceded to on behalf of Zanzibar during the latter's very brief period of existence as a separate independent State prior to the Union. In the light of that communication, the Secretary-General listed the United Republic as a party to a number of multilateral treaties on the basis of an act of acceptance, ratification or accession by Tanganyika prior to the Union. Moreover, he listed the date of Tanganyika's act of acceptance, ratification or accession as the commencing date of the United Republic's participation in the treaties in question. 36/ Only in the cases of the Charter of the United Nations and the Constitution of the World Health Organization, to which Zanzibar had become a party by admission prior to the Union, was any mention made of Zanzibar; and in these cases under the entry for Tanzania he also gave the names of Tanganyika and Zanzibar together with the separate dates of their respective admissions to the United Nations. 37/ In the other cases, the entry for Tanzania did not contain any indication that Tanzania's participation in the treaty was to be considered as restricted to the regional limits of Tanganyika.

22. Tanganyika, after attaining independence, notified her succession to the four Geneva Humanitarian Conventions of 1949 and was therefore a party to them at the time of the formation of the United Republic of Tanzania. 38/ Zanzibar, on the other hand, had taken no action with respect to these treaties prior to the Union. Tanzania is now listed as a party, but it seems that the question whether Tanzania's participation embraces Zanzibar as well as Tanganyika is regarded as still undetermined. 39/ Similarly, the Republic of Tanganyika but not Zanzibar had become a party to the Paris Convention for the Protection of Industrial Property (Lisbon text) prior to the formation of the United Republic. After the formation of the Union the Bureau listed Tanzania as having acceded to the Paris Convention on the basis of the Lisbon Text; but in this case also it was stated that the question of the application of the Convention to Zanzibar was still undetermined. 40/ The situation at the moment of

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36/ E.g. the Convention of 1946 on the Privileges and Immunities of the United Nations; the Convention of 1947 on the Privileges and Immunities of the Specialized Agencies; the Vienna Convention on Diplomatic Relations and its Optional Protocol; the Paris and New York Agreements of 1904 and 1910 for the Suppression of White Slave Traffic; the Conventions for the Suppression of the Circulation of Obscene Publications; the Agreement of 1963 Establishing the African Development Bank, etc. See Multilateral Treaties in respect of which the Secretary-General performs Depositary Functions (ST/LEG/SER.D/2), pp.32, 40, 45, 51, 146, 149, 157, 162, 187, 205, 215, 303, 312, 316, 323.

37/ Ibid., pp.7 and 167.

38/ Succession of States to Multilateral Treaties (A/CN.4/200), para.171 [Yearbook of the International Law Commission, 1968, vol.II, p.171].

39/ See United States publication "Treaties in Force" (1972), p.364, footnote 3.

40/ Succession of States to Multilateral Treaties (A/CN.4/200/Add.1), para.258, footnote 466 [Yearbook of the International Law Commission, 1968, vol.II, p.59].

union differed in the case of GATT, in that Zanzibar, although she had not taken steps to become a party prior to the formation of the Union, had been an associate member of GATT before attaining independence. Otherwise it was similar, as Tanganyika had notified the Secretary-General of her succession not only to GATT but to forty-two international instruments relating to GATT. After the union the United Republic of Tanzania informed GATT of its assumption of responsibility for the external trade relations of both Tanganyika and Zanzibar, and the United Republic was then regarded as a single contracting party to GATT. 41/ In the case of FAO also Tanganyika, before the Union, had taken steps to become a member while Zanzibar, a former associate member had not. On being notified of the union of the two countries in a single State, the FAO Conference formally recognized that the United Republic of Tanzania "replaced the former member Nation, Tanganyika, and the former associate member, Zanzibar". At the same time, the membership of the United Republic is treated by FAO as dating from the commencement of Tanganyika's membership; and it appears that Zanzibar is considered to have had the status of a non-member State during the brief interval between her attainment of independence and the formation of the United Republic of Tanzania. 42/ In ITU, the effect of the Union seems to have been determined on similar lines. Again, Tanganyika had become a party to the ITU Convention before the Union, while Zanzibar, which had formerly been one unit in a "group member" of British territories, had not done so. On being notified of the union, the General Secretariat of ITU communicated the notification to Member States with the comment: "Accordingly, with effect from 26 April 1964 [the date of the formation of the Union] the Republic of Tanganyika has been succeeded in respect of its membership of the ITU by the United Republic of Tanganyika and Zanzibar". The United Republic is listed in the Annual Report as a party to the Geneva Convention of 1959 as from the date of Tanganyika's accession, and there is nothing in the entry for Tanzania to indicate that her participation is restricted within the regional limits of Tanganyika. 43/

23. Bilateral treaties - leaving aside the question of localized treaties - in the case of Tanganyika were due under the terms of the Nyerere declaration to terminate two years after independence, that is on 8 December 1963 and some months before the formation of Tanzania. 44/ The position at the date of the Union therefore was that the great majority of the bilateral treaties applicable to Tanganyika prior to her independence had terminated. In some instances, however, a pre-independence treaty had been continued in force by mutual agreement before the Union took place. This was so, for example, in the case of a number of commercial treaties, legal procedure agreements and consular treaties, the maintenance in force of which had been agreed in Exchanges of Notes with the interested States. 45/ In other instances, negotiations

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41/ Ibid. (A/CN.4/200/Add.2), paras.373 and 382 [Yearbook of the International Law Commission, 1968, vol.II, p.84]. See also United States, Treaties in Force (1972), p.310.

42/ Succession of States to Multilateral Treaties (A/CN.4/210), paras.52 and 70 [Yearbook of the International Law Commission, 1969, vol.II, pp.38 and 42].

43/ Ibid. (A/CN.4/225), paras.111-112 [Yearbook of the International Law Commission, 1970, vol.II, p.90].

44/ E.E. Seaton and S.T.M. Maliti, op.cit., paras.36-41.

45/ Ibid., paras.56, 77 and 84.

for the maintenance in force of a pre-independence treaty which had been begun by Tanganyika prior to the date of the Union were completed by Tanzania after that date. 46/ In addition, a certain number of new treaties had been concluded by Tanganyika between the date of her independence and that of the formation of the union. 47/ Zanzibar, as previously explained (paragraph 19), was entitled to regard herself as not bound by bilateral treaties applicable in respect of her territory prior to independence, unless they had been "novated", i.e. continued by mutual agreement. 48/ In the case of visa abolition agreements, commercial treaties, extradition and legal procedure agreements, it seems that prior to the union Zanzibar had either indicated a wish to terminate the pre-independence treaties or given no indication of a wish to maintain any of them in force. 49/ In the case of consular treaties, seven of which treaties had been applicable in respect of Zanzibar prior to her independence, it seems that the consuls continued at their posts up to the date of the Union, so that the treaties appear to that extent to have remained in force, at any rate provisionally.

24. After the formation of the United Republic Tanganyika's new Visa Abolition Agreements with Israel and the Federal Republic of Germany were, it appears, accepted as ipso jure continuing in force. 50/ In addition arrangements concluded by Tanganyika for continuing in force pre-independence Agreements with five countries were regarded as still in force after the Union. In all those cases the treaties, having been concluded only in respect of Tanganyika, were accepted as continuing to apply only in respect of the region of Tanganyika and as not extending to Zanzibar. 51/ As to commercial treaties, the only ones in force on the eve of the Union were the three new treaties concluded by Tanganyika after her independence with Czechoslovakia, the Soviet Union and Yugoslavia. These treaties again appear to have been regarded as ipso jure remaining in force after the formation of the United Republic, but in respect

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46/ Ibid.; paras.70-73 and 89-90.

47/ Ibid.; paras.47 and 56.

48/ Tanzania, as mentioned in paragraph 19 of this commentary, appears to have put the termination of the treaties rather on the controversial ground of the effects of the revolution in Zanzibar.

49/ The suggestion has been made that the legal procedure agreements "being so non-political" would not necessarily have failed to survive the revolution "so that, presumably, they were to be considered as in force at the date of the union" [E.E. Seaton and S.T.M. Maliti, op.cit., para.81]. However, leaving aside the controversial point as to the effects of the revolution, it would be difficult to distinguish legal procedure agreements from visa abolition, commercial and extradition treaties on the ground of "non-political character". Moreover, the word "survive" is equivocal; the treaties might well have survived in the sense of being capable of being novated without yet having been kept in force.

50/ E.E. Seaton and S.T.M. Maliti, op.cit., para.48.

51/ Ibid.

only of the region of Tanganyika. 52/ In the case of extradition agreements understandings were reached between Tanganyika and some countries for the maintenance in force provisionally of these agreements. It seems that after the Union these understandings were continued in force and, in some cases, made the subject of express agreements by Exchanges of Notes. 53/ It further seems that it was accepted that, where the treaty had been applicable in respect of Zanzibar prior to her independence, the agreement for its "novation" should be considered as relating to Zanzibar as well as Tanganyika, even although it was not in force for Zanzibar at the date of the Union of the two Republics. And since these were cases of "novation" by mutual agreement, it was clearly open to the States in question so to agree. It may be added that after the union consular treaties applicable previously in relation to Tanganyika or to Zanzibar also appear to have continued in force as between the United Republic and the other contracting parties in relation to the region to which they had applied prior to the union. 54/

25. The constitutional arrangements setting up the United Arab Republic and the United Republic of Tanzania did not in either case leave any part of the treaty-making power in the States composing the Union. On the contrary the whole treaty-making power was in each case placed in the hands of the Government of the Union, which was also invested with a general power of legislation with respect to the territory of the Union. In each case the central organs of government of the Union were established at the capital of one of the two former States. In the case of the United Arab Republic a separate executive council was provided for the other region, Syria; in the case of Tanzania a separate local legislature was provided for the other region, Zanzibar. These arrangements would not in themselves be sufficient to distinguish these cases from other cases of the creation of a new State or of the incorporation of one State within another. The distinguishing elements of the present cases appear to be: (1) the fact that prior to each union both its component regions were internationally recognized as fully independent sovereign States; (2) the fact that in each case the process of union was regarded not as the creation of a wholly new sovereign State or as the incorporation of one State into the other but as the merging of two existing sovereign States into one; and (3) the explicit recognition in each case of the continuance in force of the pre-union treaties of both component States in relation to, and in relation only to, their respective regions. As already pointed out in paragraph 17 of the present commentary, a question arises as to whether the third of these elements is merely an automatic consequence of the existence of the first two or whether it is itself an essential part of the legal basis for the continuance in force of the pre-union treaties of the component States. If the latter view is taken, these cases are simply a particular application of the process of "novation". If the former view is accepted, then these cases constitute a specific category of succession where the pre-union treaties of the component States ipso jure bind the union government within the regions in regard to which they were applicable prior to the Union.

52/ Ibid., paras.64-65.

53/ Ibid., paras.62-72.

54/ Ibid., para.88.

The practice of the United Nations, the Specialized Agencies and other international organizations in regard to the continuity of membership in these cases, as noted in paragraph 17, appears to favour the existence of a rule of ipso jure continuity of treaties in this category of Unions of States.

26. Finally, attention is drawn to two points. The first is that in neither of the two cases did the constitutional arrangements leave any treaty-making power in the component States after the formation of the Union. It follows that the continuance of the pre-union treaties within the respective regions was wholly unrelated to the possession of treaty-making powers by the individual regions after the formation of the Union.

27. The second is that in her declaration of 6 May 1964 55/ Tanzania qualified her statement of the continuance of the pre-union treaties of Tanganyika and Zanzibar by the proviso "to the extent that their implementation is consistent with the constitutional position established by the Articles of Union". This proviso was reproduced almost word for word in paragraph 1 of the second resolution adopted by the International Law Association adopted in 1968 at its Buenos Aires Conference. 56/ It there appears as part of a general rule covering both unions and federations of States and "providing for the continuity of pre-union or pre-federation treaties within the regional limits prescribed at the time of the conclusion". Since the proviso comes into question also in connexion with federal unions, its consideration will be deferred until after the practice in regard to federal unions has been examined. It suffices here to observe that such a proviso is consistent with a rule of continuity of pre-union treaties ipso jure only if it does no more than express a limitation on continuity arising from the objective incompatibility of the treaty with the union of the two States as one State; and this appears to be the sense in which the proviso was intended in Tanzania's declaration. Otherwise, such a proviso would amount to a unilateral modification of the terms of the pre-union treaties not opposable to the other contracting parties without their agreement.

55/ For the relevant passages, see paragraph 20 above.

56/ Report of the Fifty-third Conference (1968), p.632; the text of the Resolutions is also given in the introduction to the Special Rapporteur's Second report (A/CN.4/214) [Yearbook of the International Law Commission, 1969, vol.II, p.48].

(b) Federal Unions

28. The International Law Association, as mentioned in the preceding paragraph, proposed in its second resolution one general rule covering both "unions" and "federations of States". Furthermore, the commentary on the resolution made it clear that the term "federations of States" was intended to embrace not merely federations formed by existing States but all composite states created in federal form. Two questions therefore arise: (1) whether unions of States and federations of States are governed by the same rule; and (2) whether federations formed by two or more States and federations formed from two or more territories fall under the same principles. If the answers to these questions must be sought primarily in the treaty practice, it seems desirable first to give a fuller indication of the nature of the proposals of the International Law Association in regard to unions and federations.

29. The relevant paragraphs of the ILA's resolution read:57/

> "In cases of unions or federations of States, treaties, unless they otherwise provide, remain in force within the regional limits prescribed at the time of their conclusion to the extent to which their implementation is consistent with the constitutional position established by the instrument of unions or federations.
>
> "In such a case where the treaty remains in force, the question whether the union or federation becomes responsible for performance of the treaty is dependent on the extent to which the constituent governments remain competent to negotiate directly with foreign States and to become parties to arbitration treaties therewith."

The report of the Committee responsible for drafting the resolution contained an explanatory "Note" which ran as follows: 58/

> "When a composite State is formed out of several previously separate States or territories, the problem of continuity of treaties of those States or territories arises. The Committee rejects the view that this continuity depends upon the form of the composition, i.e. federation or union, because at the present time there is a wide variation in the forms of composition, yet despite this variation there is an almost universal practice in favour of maintenance of treaties (for example the union between Egypt and Syria). It also rejects the view that continuity depends on whether or not the constituent entities retain some faculties of international intercourse

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57/ The resolution has a third paragraph dealing with the dissolution of unions or federations.

58/ Note 2 to the Interim Report of the Committee on the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors [Report of the Fifty-third Conference (1968), pp. 600-601].

(as in the case of Bavaria between 1871 and 1918) because, in fact, continuity has occurred even in the absence of such faculties. The Committee has not taken a position on the question whether treaty continuity depends upon consistency of a treaty with the constitutional position established by the instrument of union or federation, or whether treaties continue in force irrespective of the constitutional competence to give effect to them after the formation of the new entity. On the one hand, it may be argued that a State, if it may be exonerated from treaty obligations by being annexed to another State, may also be exonerated if its relationship with that other State is less than total absorption. On the other hand, it may equally cogently be argued that, since a State may not plead constitutional incapacity as an excuse for non-compliance with a treaty, escape from treaties is not achieved by a new constitutional relationship with another State. Even if continuity of treaties depends upon the consistency of a treaty with the constitutional position established by the instrument of union or federation, the question then arises whether a treaty lapses at the moment of union or federation because the subject-matter has fallen within the exclusive legislative competence of the central government or lapses only when the central government in fact legislates inconsistently with the treaty.

"The Committee has taken the position that treaties which remain in force affect only the territorial extent of the formerly separate State *or territories*. It should be pointed out that the union may be so complete that the territorial identity of the formerly separate States *or territories* is substantially lost. How a treaty can separately affect a territory which has little separate administrative identity is contraversial, yet this is what has occurred in the case of Somalia. The problem also arises in Ghana, Kenya and elsewhere where the new State is composed of both former Crown colonies and protectorates which were differently affected by treaties. Although no conscious decision seems to have been taken in any of these countries, the solution of the problem seems to have been to presume that the treaties applied to the Crown colony have extended to the former protectorate. It is not known if there were any British treaties which affected the Crown colonies and not the protectorates. 59/

"Respecting responsibility for treaty-performance, the Committee acknowledges that it is contraverisal whether the central or local government is responsible. However, it believes that, considering the machinery of international negotiation, the central government remains responsible unless the local government remains competent to negotiate internationally within the treaty field. Any other solution is likely, in the Committee's opinion, to be administratively abortive and to frustrate the implications of treaty continuity through the process of administrative change." (italics added).

59/ Here there is a parenthesis calling attention to a statement of Nigeria mentioned in Annex E to the Committee's report.

30. The ILA's rapporteur for the subject of succession is also the author of a modern textbook on succession of States 60/ which states the effect of entry into a federation on treaties in similar broad terms: 61/

> "The sole test of the effect of federation on treaties is the compatibility of a treaty with the federal structure, and this incompatibility may not arise until the federal instrumentalities bring it about. A federal society involves a dovetailing rather than a supersession of legal orders. The competence to transact and the competence to perform exist conjunctively in the total legal order at the international level, but exist disjunctively in the instrumentalities of government at the constitutional level. A lapse of treaties consequent upon federation is only to be presumed when a direct and constitutionally valid exercise of federal powers renders impossible the performance of the treaty obligations of the constituent States. Only in this case is there a proper analogy with the incorporation of territory in a unitary State through annexation or cession. If the federal legislature is constitutionally incompetent within the area of power affected by the treaty, no inconsistency with the treaty can occur, and therefore there can be no question about its survival."

31. The heterogeneous character of the practice in regard to federations admittedly renders difficult its analysis in terms of legal rules. Even so, and after giving every weight to the arguments and opinions set out in the two preceding paragraphs, the Special Rapporteur doubts whether the global treatment of unions of States, federations of States and federations of territories adopted in the resolution of the International Law Association is really in accord with the practice or consistent with principle. As pointed out in the Special Rapporteur's second report 62/, the resolutions of the International Law Association on succession in respect of treaties hinge upon a presumption of continuity, and this seems to be the case with its second resolution concerning unions and federations as well as with its first resolution regarding newly independent States. Indeed, the second resolution is formulated more in terms of a _rule_ of continuity. The term "continuity" tends to blur the fundamental issue of whether the maintenance in force of the treaty is a matter of right and obligation on the part of (a) the successor State and (b) the other party or parties to the treaty concerned. If the second resolution indeed seeks to lay down an absolute rule of _ipso jure_ continuity for all federations it is thought to go beyond State practice.

60/ D.P. O'Connell, _State Succession in Municipal Law and International Law_ (1967), vol. II of which deals with succession in respect of treaties.

61/ _Ibid._, p. 54.

62/ (A/CN.4/214 and Add.1 and 2), paragraph 23 of the Introduction [_Yearbook of the International Law Commission_, 1969, vol. II, p. 50].

32. As already emphasized in paragraphs 28-29 above, the commentary upon the International Law Association's second resolution indicates that the term "federations of States", as used in that resolution, covers all composite States created in federal form: i.e. it covers both federations of States, like Switzerland and federations of territories like Nigeria. But the basic treaty situation is not the same in both cases at the date of the formation of the federation. A sovereign State, when it joins a federation or union of States, has an existing treaty régime of its own - an existing complex of treaties to which it is a party in its own name. A mere territory may have an existing complex of treaties formerly made applicable to it by its administering Power; but in general these treaties are not treaties to which it is itself a party at the moment when it joins the federation. On the contrary, they are treaties to which the territory, if it were becoming a sovereign State instead of a unit of a federation, would be considered a party only after notification of succession in the case of a multilateral treaty or a novation in the case of a bilateral treaty. In other words, the underlying legal situations at the moment of federation are not the same in federations of States and federations of mere territories. Consequently, the proposition that succession in respect of treaties is governed by the same rule in both cases, is something which needs to be demonstrated from the evidence of State practice; and it is not clear that such is indeed the position revealed by State practice. Accordingly, it seems desirable to examine the cases of federations of States and federations of territories separately.

33. Cases of federations of States are not numerous and the treaty practice is not easy to interpret. One precedent is the formation of the German Federation in 1871 the treaty practice as to which is summarized in a modern textbook as follows:

> "The commercial treaties of the United States with the German States survived the formation of the Empire but not the annexation of Hannover by Prussia. However, the explanation of this is unclear since they were at times regarded as effecting the whole Empire. Most of the relevant provisions concerned shipping, and since the treaties were uniform, and the German navies and merchant marine were unified, there was no need to be specific whether the treaties survived as treaties of the States or as treaties succeeded to by the Empire. Two successive United States Secretaries of State doubted the theory that the surviving treaties bound the whole of the empire.
>
> "The treaties of commerce and navigation between the States or the Zollverein and the Netherlands, China, Chile, Siam and Turkey were regarded as in force after 1871, as were consular treaties with the United States, the Netherlands and Turkey. Extradition treaties also survived, and were given effect to in United States courts. The Bancroft treaties which concerned the treatment to be accorded in the German States to persons who had emigrated thence to the United States and returned, and which resolved conflicts of nationality, were the subject of diplomatic and judicial action up to the outbreak of war in 1917. Private law and judicial assistance treaties were also applied in the courts. In particular, the treaty of mutual relationship of 1856 between Baden and Switzerland had been the subject of revision and administration action, culminating in a decision in 1955 of the Swiss Federal Court that its relevant provision was still in force 63/. Numerous frontier relations treaties have also been considered at various times to have survived the events of 1871. The impression is that those events had no effect upon any treaties of any of the German States."

63/ Bertschinger v. Bertschinger, International Law Reports (1955) vol. 22, p. 141; and see Yearbook of the International Law Commission, 1963, vol. II., p. 113.

Various interpretations of this practice have been advanced but the prevailing view seems to be that the treaties of the individual German States continued either to bind the Federal State as a successor to the States within their respective regional limits or to bind the individual States through the federal State until terminated by an inconsistent exercise of federal legislative power 64/. It is true that certain treaties of individual States were regarded as applicable in respect of the federation as a whole. But these cases appear to have concerned only particular categories of treaties and in general any continuity of the treaties of the States was confined to their respective regional limits 65/. A further point is that under the federal constitution the individual States retained both their legislative and their treaty-making competence except in so far as the federal Government might exercise its over-riding powers in the same field.

34. The Swiss federal constitution of 1848 vested the treaty-making and treaty-enforcing powers in the federal Government. At the same time, it left in the hands of the Cantons a concurrent, if subordinate, power to make treaties with foreign States concerning "l'économie publique, les rapports de voisinage et de police"66/. The pre-federation treaties of individual Cantons, it seems clear, were considered as continuing in force within their respective regional limits after the formation of the federation 67/. At the same time, the principle of continuity does not appear to have been limited to treaties falling within the treaty-making competence still possessed by the Cantons after the federation. It further appears that treaties formerly concluded by the Cantons are not considered under Swiss law as abrogated by reason only of incompatibility with a subsequent federal law but are terminated only through a subsequent exercise of the federal treaty-making power 68/.

35. Another precedent, though the federation was very short-lived, is the foundation of the Greater Republic of Central America in 1895. In that instance El Slavador, Nicaragua and Honduras signed a Treaty of Federation constituting the Greater Republic; and in 1897 the Greater Republic itself concluded a further treaty of federation with Costa Rica and Guatemala, extending the federation to these two Republics. The second treaty, like the first, invested the Federation with the treaty-making power; but it also expressly provided "Former treaties entered into by the States shall still remain in force in so far as they are not opposed to the present treaty"69/.

64/ See O'Connell, op. cit. vol. II, p. 57; E. Castren, Nordisk Tidssknift for international Ret (1954), vol. 24, p. 67; McNair, Law of Treaties, 2nd Edition (1961), p. 629.

65/ De Muralt, The Problem of State Succession with regard to Treaties (1954), p. 78; O'Connell, British Yearbook of International Law (1963), vol. 39 pp.68-77.

66/ See Jean-François Aubert, Traité de droit constitutional suisse (1967), vol. 1, pp. 236-261.

67/ D.P. O'Connell, State Succession in Municipal Law and International Law (1967), vol. II, pp. 60-61.

68/ P. Guggenheim, Traité de droit international public (1933), vol. I, p. 310.

69/ See De Muralt, The Problem of State Succession with regard to Treaties (1954), pp. 83-84.

36. The notification made by the Soviet Union on 23 July 1923 concerning the existing treaties of the Russian, White Russian, Ukrainian and Transcaucasian Republics may perhaps be regarded as a precedent of a similar kind. The notification stated that "the People's Commissariat for Foreign Affairs of the USSR is charged with the execution in the name of the Union of all its international relations, including the execution of all treaties and conventions entered into by the above-mentioned Republics with foreign States *which shall remain in force in the territories of the respective Republics*". (Italics added). 70/

37. The admission of Texas, then an independent State, into the United States in 1845 also calls for consideration in the present context. Under the United States constitution the whole treaty-making power is vested in the federal Government, and it is expressly forbidden to the individual States to conclude treaties. They may enter into agreements with foreign Powers only with the consent of Congress which has always been taken to mean that they may not make treaties on their own behalf. The United States took the position that Texas' pre-federation treaties lapsed and that Texas fell within the treaty-régime of the United States: in other words, that it was a case for the application of the moving treaty-frontier principle 71/. At first, both France and Great Britain objected, the latter arguing that Texas could not, by *voluntarily* joining the United States federation, exonerate herself from her own existing treaties. Later, in 1857, Great Britain came round to the United States view that Texas' pre-federation treaties had lapsed. The reasoning of the British Law Officers seems, however, to have differed slightly from that of the United States Government 72/:

> "By the Federal constitution of the United States, treaties of commerce and navigation with foreign countries belong entirely to the Federal Government; and the entering into a separate treaty of commerce and navigation by any one of the United States with a foreign Power would be incompatible with the national constitution.
>
> "It follows that if an independent American State having a separate commercial treaty with a foreign Power is annexed to the United States, as a member of the Union, and such annexation is recognized by such foreign Power, the separate treaty merges in the general treaty of commerce (if any) subsisting between such foreign country and the Federal Union.
>
> "A General Treaty of Commerce and Navigation between Great Britain and the United States was concluded in 1815, and is still subsisting.

70/ See O'Connell, *op.cit.*, vol. II, p. 60, footnote 7.

71/ D.P. O'Connell, *British Yearbook of International Law* (1963), vol. 39, pp.79-82; McNair, *Law of Treaties* (1961), pp.629-632; and see a United States Note of 25 June 1897 to Japan concerning the United States annexation of Hawai cited in Moore's *Digest of International Law*, vol. 5, p. 349.

72/ For the text of the Opinion, see McNair, *Law of Treaties* (1961), pp. 630-632.

"Since that year, several States have been added to the American Union and each has been justly considered and treated as having acceded to, and being bound by, that General Treaty".

On this reasoning they concluded that a Texas - Great Britain Treaty of Commerce and Navigation no longer subsisted. Leaving aside the somewhat untechnical reference to the States' having "acceded" to the Federal Treaty, it seems that the British Law Officers regarded the continuance of the Texas Treaty as incompatible with a constitution which reserved the treaty-making power to the federal Government. The second paragraph cited above does not, it is thought imply that, in their view, this incompatibility would operate only when there was a federal treaty in force covering the same matter as the State treaty.

38. The formation of the Commonwealth of Australia as a federal State in 1901, on the other hand, is not thought to come into account in the present context. 73/ Apart from the questions of the statehood of the Colonies and of the Dominion, the very special role of the British Crown at that date in the treaty-making of the British Empire appears to preclude the use of this precedent as a basis from which to deduce rules applicable to federal unions generally.

73/ See generally D.P. O'Connell, British Yearbook of International Law (1963), vol. 39, pp. 82-91.

(c) Conclusions regarding unions of States

39. The precedents concerning Unions of States other than federal, if few, are comparatively recent. They appear to indicate a rule prescribing the continuance in force ipso jure of the pre-union treaties of the individual States within their respective regional limits and subject to their compatibility with the constitution of the Union. In the case of these precedents the continuity of the pre-union treaties was recognized although the Union constitution did not envisage the possession of any treaty-making powers by the States after the union. In other words, the continuance in force of the pre-union treaties was not regarded as incompatible with the Union merely by reason of the non-possession by the States after the union of any treaty-making powers under the constitution. The precedents concerning federal unions, if rather more numerous, are older and less uniform. Taken as a whole, however, and disregarding minor discrepancies, they also appear to indicate a rule prescribing the continuance in force ipso jure of the pre-federation treaties of the individual States within their respective regional limits. Precisely how far the principle of continuity was linked to the continued possession by the individual States of some measure of treaty-making power or international personality is not clear. That element was present in the cases of the German and Swiss federations and its absence in the case of the United States seems to have been at any rate one ground on which continuity was denied. Many authors were thus led to conclude that the continuance in force of pre-federation treaties was dependent on the possession of treaty-making powers by the individual States after joining the federation; and they tended to link the continuity of the treaties to the continued possession of treaty-making powers within the same fields as the treaties in question. 74/ A former member of the Commission, for example, wrote in 1951

> "Les traités conclus avec des Etats tiers par les Etats membres avant la constitution de l'Etat fédéral s'éteignent pour autant que les Etats membres sont privés du droit de traiter dans le domaine en question. Ces traités ne sont pas transférés ipso jure au nom de l'Etat fédéral, celui-ci, ainsi qu'il a été indiqué, constituant un nouveau sujet du droit international."

On the other hand, to the extent that they considered the principle of continuity to apply in these cases, writers seem to have regarded the treaties as remaining in force ipso jure rather than through any process of agreement.

40. Thus, the practice as a whole does not give clear guidance as to the rules to be adopted, so that the Commission's task may have in it some elements of progressive development. The first question is whether the same rules should apply to both federal and non-federal unions of States. On this point the Special Rapporteur agrees with the Committee of the International Law Association that the variety of constitutional forms on which unions rest, with their different gradations of federation. do not make it easy to draw neat distinctions between federal and other unions. Accordingly, if possible, a single solution for unions of States may be preferable.

74/ E.g., McNair, Law of Treaties (1961), p. 629; E. Castren, Receuil des cours de l'Académie (1951-I), p. 443.

41. The second question is whether, subject to certain qualifications, the basic rule should be the continuance in force of pre-union treaties ipso jure or through a process of agreement express or implied. This agreement would presumably derive either from a declaration of continuity made in connexion with the foundation of the Union or from a constitutional provision concerning continuity, plus the assent of the other parties to the treaties in question. This is a conceivable solution and one which would, perhaps, involve the least departure from the general rules formulated in Part II of the present draft (the differences would primarily be in regard to multilateral treaties). But both the treaty practice and jurists, as previously noted, appear to treat Unions of States as a case of ipso jure continuity in so far as any continuance in force of pre-union treaties occurs. The question is delicate because it is one where the rules of international law and of the constitution of the Union intersect; and the international rule is itself concerned with the effect on treaties of the constitutional change resulting from the formation of the Union. The argument for treating Unions of States as a special case is that, as sovereign States, they created a complex of treaty relations with other States and ought not to be able completely at will to terminate all those treaties by joining a federal or other union. In other words, the argument is that the principle of continuity should displace the "clean slate" principle in the case of the formation of a union and the moving treaty-frontier principle in the case of the addition of a State to a union. Today, this argument may, perhaps, be thought to have added force in view of the growing tendency of States to group themselves in new forms of association where the line between international organizations and unions of States becomes somewhat blurred.

42. The problem is to find a satisfactory formula for reconciling the principle of continuity with the new constitutional situation resulting from the formation of the Union. The formula suggested by the International Law Association[75] would allow the continuity of pre-union treaties "to the extent to which their implementation is consistent with the constitutional position established by the instrument of union or federation". This formula does not make it clear whether the limitation relates to "implementation" on the part of regional government under powers allowed to it by the new constitution or whether it relates more generally to implementation under the constitution as a whole. Nor is the uncertainty removed by the "Note" which the Committee of the International Law Association appended to the resolution (see paragraph 29 above). According to this "Note" the Committee had not "taken a position on the question whether treaty continuity depends upon consistency of a treaty with the constitutional position established by the instrument of union or federation, or whether treaties continue in force irrespective of the constitutional competence to give effect to them after the formation of the new entity." It may be that there was some difference of opinion in the Committee on this point, because the rapporteur of that Committee is himself on record as considering the constituent government's competence to perform the treaty as a crucial test of continuity (see paragraph 30 above). Indeed, he maintains that an exercise of federal powers by the central government subsequent to the federation may bring about a lapse of a pre-union treaty if its effect is to "render impossible the performance of the treaty obligations of the constituent States" (ibid.)

75/ The formula may have been inspired by the terms of Tanzania's notification to the Secretary-General which uses almost the same phraseology (see paragraph 23 of the present commentary).

43. It hardly seems acceptable that the continuity of a pre-union treaty should depend upon the mere distribution of the power to perform the treaty as between the regional government and the federal government, if the treaty is otherwise compatible with the constitution of the union; and still less that after the Union it should remain dependent on the federal government's not rendering performance of the treaty by the regional government impossible through an exercise of its federal powers. Such an approach to the question is thought to go too far in introducing internal constitutional provisions into a rule of international law, and in a manner which takes insufficient account of the rights of the other States parties to the treaty. The distribution of the power to implement treaties between central and regional governments is a matter which acquired some prominence in connexion with so-called "federal State clauses". But recourse to such clauses has always been a question of special agreement and federal clauses find no place in the general law of treaties as codified in the Vienna Convention. On principle, therefore, it is not thought appropriate to make the particular location in the constitution of the power to perform a treaty the criterion for determining its continuance in force after the formation of a union or federation. 76/

44. Linked to the point just considered is another: if a pre-union treaty of a constituent region continues in force, is it thereafter to be considered as a treaty of the Union State or merely of the region? On this point the resolution of the International Law Association pronounced that "the question whether the union or federation becomes responsible for performance of the treaty is dependent on the extent to which the constituent governments remain competent to negotiate directly with foreign States and to become parties to arbitration proceedings therewith." The Committee in its "Note" acknowledged the question to be controversial but believed that "considering the machinery of international negotiation, the central government remains responsible unless the local government remains competent to negotiate internationally within the treaty field." This conclusion of the Committee has also to be read in the light of its rejection 77/ of the view that continuity itself depends on "whether or not the constituent entities retain some faculties of international intercourse (as in the case of Bavaria between 1871 and 1918) because in fact continuity has occurred even in the absence of such faculties." (Presumably this last reference was to Egypt and Syria, Tanganyika and Zanzibar in whose cases continuity was recognized despite their lack of any treaty-making powers after the formation respectively of the U.A.R. and Tanzania). In short, the retention by the constituent region of some negotiating powers vis à vis foreign States, which formerly was advanced by writers as the criterion of the continuity of the treaties themselves is now adopted by the International Law Association as the criterion for determining whether the treaty continues as a union treaty or merely a treaty of the constituent region.

45. The question of the capacity of constituent units of a federation in treaty relations with foreign States is one of considerable delicacy, as is emphasized by the difficulties experienced in this connexion in attempting to include a rule in the Vienna Convention concerning the treaty-making capacity of federal States. Many federal States then showed a marked opposition to any recognition of any separate treaty-capacity for the constituent

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76/ Nor does this criterion appear in practice to have been applied by the U.A.R. or Tanzania in determining the continuity of pre-union treaties.

77/ See the Committee's "Note" reproduced in paragraph 29 of the present commentary.

units of a federation. 78/ Moreover, it seems that in federations where some faculty of entering into certain types of agreements with outside States is allowed to constituent units there is a strong tendency today to consider the agreements as made under powers delegated by the federal government. In other words, to the extent that such agreements are international agreements they are regarded as agreements made by the constituent units as organs of the federation itself. Accordingly, the Special Rapporteur does not think that the solution proposed by the International Law Association is one that can be adopted by the Commission with any hope of its being accepted by States. Almost any rule formulated on this point may attract criticism from some quarter. But the rule most likely to meet with acceptance and most consistent with modern practice is thought to be one which considers treaties that continue in force after the formation of a union as treaties of the Union State, although binding only in respect of the territory of one of its constituent units.

46. Even so, there remains the fundamental problem of formulating the condition under which continuity of pre-union treaties in fact occurs. The incompatibility of a treaty with the constitution of a Union of States may be of different kinds and degrees. It may be purely technical, as where the executive organs of the Union differ from those specified in the treaty for the implementation of its provisions; or it may be fundamental as where a trade treaty cuts across the unified economic régime envisaged for the Union. Another aspect of the problem is whether the principle of continuity can be considered applicable to all treaties or whether certain categories such as so-called "political" treaties have to be excepted. The difficulty here is to define the categories to be excepted. "Political" treaties, often referred to by writers as an exception, are susceptible of very varying definitions; and in drafting the Vienna Convention the Commission ultimately eschewed any division of treaties into categories on the basis of their subject-matter. In general, the Special Rapporteur feels that "compatibility of the object and purpose of the treaty" with the constitution of the new State may be as near as the Commission can get to a legal criterion for determining the limits of the principle of continuity. In dealing with questions of compatibility of treaties in general contexts the Vienna Convention refers to the "object and purpose" of the treaty. This criterion, although a broad one, is intended in the Vienna Convention to lay down an objective legal test of compatibility which, if applied in good faith, should provide a reasonable and practical rule. Great difficulties are likely to be encountered if an attempt is made to define in detail the conditions under which a pre-union treaty is to be considered as compatible with the constitution of the Union; and it therefore seems better to use the broad formula found in the Vienna Convention.

47. There is a further aspect of the problem. The constitution of a union may take the form of, or be based upon, a treaty; and in this case the provisions of article 30 of the Vienna Convention, which concerns the application of successive treaties relating to the same subject matter, require to be considered. Under paragraph 4 of that article, when the parties to a later treaty do not include all the parties to an earlier one, priority is given to the earlier treaty as between the parties to that treaty. In other words, if article 30 is applied to a treaty establishing a union, the pre-union treaties of each of the constituent States with other States parties necessarily have priority

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78/ At the Vienna Conference all special reference to federal States was removed from what is now article 6 of the Vienna Convention which simply proclaims that "Every State possesses capacity to conclude treaties."

over the constituent instrument of the Union. Thus, under article 30 they would continue in force even if they were incompatible with the constitution of the Union. This, as pointed out in paragraph 3 above, is the position in the case of unions, like the European Economic Community, which are inter-governmental rather than constitutional unions. The member States in these inter-governmental unions may be under an obligation _inter se_ to use their best endeavours to bring their pre-union treaties into accord with their obligations as members of the Union; but their pre-union treaties undoubtedly remain in force as between themselves and the other parties. Should the same principle, it may be asked, apply in the case of a constitutional "Union of States" established by treaty?

48. The question here posed is whether the formation of a "constitutional" union of States attracts a principle derived from the law of succession of States which displaces the ordinary principle in the law of treaties protecting the priority of an earlier treaty. The evidence, it is thought, indicates that it is a point at which principles of succession have an impact upon the principles of the law of treaties. In the first place, the continuance in force of pre-union treaties never seems to have been approached either by States or writers simply from the point of view of the priority to be given to an earlier instrument. Although there may have been some differences as to the criterion which should determine continuity, compatibility in one form or another with the new situation resulting from the formation of the Union has been advanced as the relevant criterion. Nor does any distinction ever seem to have been made in this context between a Union of States established by treaty and one constituted by other instruments. Indeed, to make such a formal distinction the basis for applying different rules of succession in the two cases could hardly be justified; for a constituent instrument not in treaty form may still embody agreements negotiated between the States concerned. Accordingly, it is believed that, whether the Union is established by a treaty or by other instruments, the continuance in force of pre-union treaties must depend on principles of succession; and that the problem is to determine exactly what are those principles.

49. In the light of all the foregoing considerations the Special Rapporteur has prepared: first, a new provision concerning use of terms to be added to article 1 and designed to specify what is meant by a "Union of States" for the purpose of the draft articles; and, secondly, two alternative texts of an article one of which takes as its basis _ipso jure_ continuity and the other tacit agreement.

50. The meaning to be attributed to the term "Union of States" is of critical importance since it will determine the scope of the case of succession here under consideration. In the opinion of the Special Rapporteur, the term should be so defined as to exclude confederations of States which do not result in the formation of a "united State" and intergovernmental unions such as the European Economic Community. It is also thought necessary to include the element of "separateness" as a constituent unit _after_ the formation of the union, as there does not seem to be any evidence of a principle of continuity where there is a complete absorption of the constituent States in a new unitary State.

51. As to the two texts of article 19 prepared for the Commission's consideration, alternative A starts from the standpoint that where there is a union of _States_, as above defined, the treaties of each constituent State in principle continue in force _ipso jure_. At the same time, however, this text recognizes that there is a limit to the operation of this rule where the object and purpose of a pre-union treaty are incompatible with the constituent instrument of the union.

52. Alternative B, on the other hand, starts from the standpoint that even in the case of a union of States there is no rule of _ipso jure_ continuity and that, as in the case of newly independent States, continuity is a matter of consent. In other words, under alternative B constitutional provisions or declarations proclaiming continuity, as in the cases of the United Arab Republic and Tanzania, would not be regarded as an expression of a _rule_ of continuity but as unilateral statements of intention, insufficient by themselves to effect continuity. Similarly, the older precedents of continuity (the pre-union treaties of certain German States and Swiss Cantons) would be regarded as explicable on the basis of the consent of the interested States. Consequently, under alternative B the same general rules would apply in the case of a union of States as in the case of "new States". The solution in alternative B has a certain attraction in that the somewhat delicate question of compatibility of pre-union treaties with the situation resulting from the formation of the union would be left to be settled by agreement of the Union of States and the other States parties; and it would clearly give a more flexible rule. But this would mean removing all _obligation_ of continuity (apart from the question of "territorial" treaties) in cases of unions of States.

53. Paragraph 2 is the same in both texts and provides that a treaty which continues in force binds the _Union of States_ but _in relation only to the territory in respect of which it was in force prior to the formation of the union_. The first point in this paragraph - that the treaty binds the Union - has been so stated for the reasons given in paragraph 45. The second point - that it binds only in relation to the territory in respect of which it was previously in force unless the Union of States and the other States parties otherwise agree - accords with the practice discussed earlier in the present commentary.

54. Paragraph 3 also is the same in both texts and simply provides that the rules set out in the previous paragraphs for the formation of a Union apply also to the case of an additional State's joining a Union after its formation.

Excursus A

States, other than Unions of States, which are formed from two or more Territories

Additional Article for inclusion at the end of Part II

When a new State has been formed from two or more territories, not themselves States, treaties which are continued in force under the provisions of articles 7 to 17 are considered as applicable in respect of the entire territory of the successor State unless:

(a) it appears from the particular treaty or is otherwise established that such application would be incompatible with the object and purpose of the treaty;

(b) in the case of a multilateral treaty other than one referred to in article 7(c), the notification of succession is restricted to the territory in respect of which the treaty was in force prior to the succession;

(c) in the case of a multilateral treaty of the kind referred to in article 7(c) the successor State and the other States parties otherwise agree;

(d) in the case of a bilateral treaty, the successor State and the other State party otherwise agree.

Commentary

1. The International Law Association, as pointed out in the commentary to article 19, grouped together all federations of States whether formed from a union of States or merely from two or more territories. This grouping, for the reasons there given, seems to assimilate two types of federation whose legal characteristics are essentially different from the point of view of succession of States. Although the Special Rapporteur has accordingly not thought it appropriate to deal with federations of mere territories under the head of Unions of States, it is clearly necessary to take account of composite States, including federations, formed of two or more territories. As pointed out in paragraph 7 of the commentary to article 19, the case of such composite States was not dealt with in the general articles concerning "new States" and now requires to be covered.

2. One example of such a composite State of a federal type is Nigeria which was created out of four former territories, namely the colony of Lagos, the two protectorates of Northern and Southern Nigeria and the northern region of the British Trust Territory of the Cameroons. The treaty situation on the eve of independence has been estimated by one writer as follows. 79/ Of the 78 multilateral

79/ D.P. O'Connell, British Yearbook of International Law (1963), vol. 39, p. 93. The figures given by this writer for multilateral and bilateral treaties add up to 300 treaties in force in respect of one or other part of Nigeria at the date of independence. Mr. Elias at the 629th meeting of the Commission indicated a slightly larger total - 334 [Yearbook of the International Law Commission 1962, vol. I, p.4].

treaties affecting parts of Nigeria before independence 57 applied to all territories, 31 to Lagos only, 3 to the two Protectorates only, 6 to both Lagos and the two Protectorates and 1 to the Trust Territory only. Of the 222 bilateral treaties, 151 applied equally to all four parts, 53 to Lagos only, 1 to the two Protectorates only, 13 to both Lagos and the two Protectorates, and 2 to the Trust Territory only. Nigeria is a State which entered into a devolution agreement with the United Kingdom prior to independence and has since notified or acknowledged her succession to a certain number of the above-mentioned multilateral and bilateral treaties. Neither in her devolution agreement 80/ nor in her notifications or acknowledgements does she seem to have distinguished between treaties previously applicable in respect of all four territories or only of some of them. Moreover, in notifying or acknowledging the continuance in force of any treaties for Nigeria, she seems to have assumed that they would apply to Nigeria as a whole and not merely within the respective regions in regard to which they had been applicable before independence. And both depositaries 81/ and other contracting Parties appear to have acquiesced in this point of view; for they also refer simply to Nigeria. 82/

3. The Federation of Malaysia is a more complex case, involving two stages. The first was the formation of the Federation of Malaya as an independent State in 1957 out of two colonies, Malacca and Penang, and nine Protectorates. 83/ The bringing of these territories together in a federal association had begun in 1948 so that post-1948 British treaties were applicable in respect of the whole federation at the moment of independence; but the pre-1948 British treaties were applicable in respect only of the particular territories in regard to which they had been concluded. The devolution agreement entered into by Malaya 84/ referred simply to instruments which might be held to "have application to or in respect of the Federation of Malaya". On the other hand, Article 169 of the Constitution, 85/ which related to the Federal Government's power to legislate for the implementation of treaties, did provide that any treaty entered into by the United Kingdom "on behalf of the Federation or any part thereof" should be deemed to be a treaty between the Federation and the other country concerned. Exactly what was intended by this provision is not clear. But in practice neither the Federation nor depositaries appear in the case of multilateral treaties to have related Malaya's participation to the particular regions of Malaya in regard to which the treaty was previously applicable. 86/ In the case of bilateral treaties the practice available to the Special Rapporteur does not indicate clearly how far continuance

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80/ For the text see Succession of States in relation to General Multilateral Treaties of which the Secretary-General is the Depositary (A/CN.4/150) [Yearbook of the International Law Commission, 1962, vol. II, p. 127].

81/ E.g. The Secretary-General's letter of enquiry of 28 February 1961 [ibid., p. 117].

82/ E.g. United States Treaties in Force (1972), pp. 179-180.

83/ See generally D.P. O'Connell, State Succession in Municipal Law and International Law (1967), vol. II, pp. 68-70.

84/ Materials on Succession of States (ST/LEG./SER.B/14), p. 76.

85/ Ibid., pp. 87-88.

86/ See the Secretary-General's letter of enquiry of 9 December 1957. [Yearbook of the International Law Commission, 1962, vol. II, p. 112]; and "Multilateral Treaties in respect of which the Secretary-General performs Depositary Functions" (ST/LEG./SER.D/2) where reference is made simply to Malaya as a party to certain of those treaties.

in force of pre-independence treaties was related to the particular regions in regard to which they were applicable. The United States "Treaties in Force" has footnotes to three United Kingdom treaties listed as in force in respect of Malaysia which state that they were made applicable to parts of Malaya on certain dates; but these seem intended to justify the inclusion of the treaties rather than to indicate regional limits of application. On the other hand, in correspondence concerning the continuance in force of the Extradition Treaty of 1931 the United States recited the extension of that treaty to each several part of the Federation before stating its view that the treaty has now to be regarded as in force between the United States and the Federation. 87/

4. The second stage of the federation occurred in 1963 when, by a new agreement, Singapore, Sabah and Sarawak joined the Federation, the necessary amendments being made to the constitution for this purpose. Article 169 continued as part of the amended constitution and was therefore in principle applicable in internal law with respect to the new territories; but no devolution agreement was entered into between the United Kingdom and the Federation in relation to these territories. In two opinions given in 1963 the United Nations Office of Legal Affairs regarded the entry of the three territories into the Federation as an enlargement of the Federation. The first concerned Malaysia's membership of the United Nations and, after reciting the basic facts and certain precedents, the Legal Secretariat stated: 88/

> "An examination of the Agreement relating to Malaysia of 9 July 1963 and of the constitutional amendments, therefore, confirms the conclusion that the international personality and identity of the Federation of Malaya was not affected by the changes which have taken place. Consequently, Malaysia continues the membership of the Federation of Malaya in the United Nations.
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> "Even if an examination of the constitutional changes had led to an opposite conclusion that what has taken place was not an enlargement of the existing Federation but a merger in a union or a new federation, the result would not necessarily be different as illustrated by the cases of the United Arab Republic and the Federal Republic of Cameroon ..."

If that opinion concerned succession in relation to membership, the second concerned succession in relation to a treaty - a Special Fund Agreement. The substance of the advice given by the Legal Secretariat is in paragraphs 3 and 4 of the opinion: 89/

> "As you know, the Agreement between the United Kingdom and the Special Fund was intended to apply to Special Fund projects in territories for the international relations of which the United Kingdom is responsible (see, e.g., the first paragraph of the preamble to the Agreement). In view of the recent changes in the international representation of Sabah (North Borneo) and Singapore, the United Kingdom Agreement may be deemed to have ceased to apply with respect to those territories in accordance with general principles of International law, 90/ and this would be true notwithstanding that the

87/ Materials on Succession of States (ST/LEG./SER.B/14), p. 230.

88/ United Nations Juridical Yearbook, 1963, (ST/LEG./SER.C/1), p. 163.

89/ Ibid. p. 178.

90/ McNair, Law of Treaties, Oxford, 1961, p. 638.

Plans of Operation for the projects technically constitute part of the Agreement with the United Kingdom under article I, paragraph 2, of that Agreement. Although the Special Fund could take the position that the United Kingdom Agreement has devolved upon Malaysia and that it continues to apply to Singapore and Sabah (North Borneo), this could well result in two separate agreements becoming applicable within those territories (i.e., the United Kingdom Agreement for projects already in existence and, as explained below, the Agreement with Malaya with respect to future projects), a situation which could give rise to confusion and should be avoided if possible.

"As regards the Agreement between the Special Fund and Malaya, it continues in force with respect to the State now known as Malaysia since the previous international personality of the Federation of Malaya continues and has no effect on its membership in the United Nations. Similarly, the Agreement between the Special Fund and the Federation of Malaya should be deemed unaffected by the change in the name of the State in question. Moreover, we are of the opinion that the Malayan Agreement applies of its own force and without need for any exchange of letters to the territory newly acquired by that State, and to Plans of Operation for future projects therein, 91/ in the absence of any indication to the contrary from Malaysia."

The Legal Secretariat thus advised that "Malaysia" constituted an enlarged "Malaya" and that "Malaya's" Special Fund Agreement, by operation of the moving treaty frontier principle, had become applicable in respect of Singapore and Sahab. This advice was certainly in accordance with the principle generally applied in cases of enlargement of territory, as is illustrated by the cases of the accession of Newfoundland to the Canadian Federation, 92/ and the "federation" of Entrea with Ethiopia. 93/ Moreover, the same principle, that Malaya's treaties would apply automatically to the additional territories of Singapore, Sabah and Sarawak, appears to have been acted on by the Secretary-General in his capacity as depositary of multilateral treaties. Thus, in none of the many entries for "Malaysia" in "Multilateral Treaties in respect of which the Secretary-General performs Depositary Functions" 94/ is there any indication that any of the treaties apply only in certain regions of Malaysia.

5. Similarly, in the case of other multilateral treaties Malaysia appears to have been treated simply as an enlargement of Malaya and the treaties as automatically applicable in respect of Malaysia as a whole. 95/ An exception is the case of GATT where Malaysia notified the Director-General that certain pre-federation agreements of Singapore, Sarawak and Sabah would continue to be considered as binding in respect of those States, but would not be extended to the States of the former federation of Malaya; and that certain other agreements in respect of the latter States would for the time being not be extended to the three new States. 96/

91/ Ibid., p. 633.

92/ See Second report (A/CN.4/214) paragraph 6 of the commentary to article 2 [Yearbook of the International Law Commission, 1969, vol. II, p. 53].

93/ Ibid.

94/ ST/LEG./SER.D/2.

95/ cf. Succession of States to Multilateral Treaties (A/CN.4/210), paras. 53 and 63 [Yearbook of the International Law Commission 1969, vol. II, pp. 38 and 41] and (A/CN.4/225) paras. 114-115 [Yearbook of the International Law Commission 1970, vol. II, pp.90-91].

96/ Ibid., (A/CN.4/200, Add.2) para. 371 [Yearbook of the International Law Commission 1968, vol. II, pp. 84-85].

6. The circumstances of the federation of Rhodesia and Nyasaland in 1953, which was composed of the colony of Southern Rhodesia and the protectorates of Northern Rhodesia and Nyasaland, were somewhat special so that it is not thought to be a useful precedent from which to draw any general conclusions in regard to the formation of composite States. The reason is that the British Crown retained certain vestigial powers with respect to the external relations of the federation and this prevents the case from being considered as a "succession" in the normal sense. 97/

7. States composed from two or more territories may equally be created in the form of unitary States, modern instances of which are Ghana and the Republic of Somalia. Ghana consists of the former colony of the Gold Coast, Ashanti, the Northern Territories protectorate and the trusteeship territory of Togoland. According to a modern writer 98/ there were no treaties, multilateral or bilateral, which were applied before independence to Ashanti, the Northern Territories or Togoland which were not also applied to the Gold Coast; on the other hand, there were some treaties which applied to the Gold Coast but not to the other parts of what is now Ghana. The latter point is confirmed by the evidence in "Multilateral Treaties in respect of which the Secretary-General performs Depositary Functions";99/ and in regard to bilateral treaties the above-mentioned writer 100/ states that of the nine United Kingdom treaties listed under Ghana in the United States "Treaties in Force" three had previously applied to the Gold Coast alone, one to the Gold Coast and Ashanti alone and only five to all four parts of Ghana.

8. After independence Ghana notified her succession in respect of a number of multilateral treaties of which the Secretary-General is the depositary, some being treaties previously applicable only in respect of parts of what is now her territory. There is no indication in the Secretary-General's practice that Ghana's notifications of succession are limited to particular regions of the State; and, similarly, there is no indication in the United States "Treaties in Force" that any of the nine United Kingdom bilateral treaties specified as in force vis-à-vis Ghana are limited in their application to the particular regions in respect of which they were in force prior to independence. Nor has the Special Rapporteur found any practice to the contrary in the Secretariat studies of succession in respect of multilateral or of bilateral treaties or in "Materials on Succession". In other words the presumption seems to have been made that Ghana's acceptance of succession was intended to apply to the whole of her territory, even although the treaty might previously have been applicable only in respect of some part of the new State.

9. The Republic of Somalia is a unitary State composed of Somalia and Somaliland. Both these territories had become independent States before their uniting as the Republic of Somalia so that, technically, the case may be said to be one of a union of States. But their separate existences as independent States were very short-lived and designed merely as steps towards the creation of a unitary Republic. In consequence,

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97/ See generally D.P. O'Connell, British Yearbook of International Law (1963), vol. 39, p. 95.

98/ D.P. O'Connell, ibid., p. 101.

99/ ST/LEG./SER.D/2.

100/ D.P. O'Connell, ibid., p. 102.

from the point of view of succession in respect of treaties the case has some similarities with that of Ghana, provided that allowance is made for the double succession which the creation of the Republic of Somalia involved. "The general attitude of the Somalia Government" it has been said, 101/ "is that treaties, when continued at all, apply only to the areas to which they territorially applied before independence". This is certainly borne out by the position taken by Somalia in regard to ILO conventions previously applicable to either or both of the territories of which she was composed. 102/ There were two such conventions previously applicable both to the Trust Territory and to British Somaliland and these Somalia recognized as continuing in force in respect of the whole Republic. Seven more conventions had previously been applicable to the Trust Territory but not to British Somaliland and a further six applicable to British Somaliland but not to the Trust-Territory. These conventions also she recognized as continuing in force but only in respect of the part of her territory to which they had been applicable. It is said that Somalia adopts the same attitude in regard to extradition treaties; 103/ and that she accordingly would refuse extradition of a person in the Trust Territory if extradition were sought under a former British extradition treaty applicable in respect of British Somaliland.

10. In general, Somalia has been very sparing in her recognition of succession in respect of treaties, as may be seen from the extreme paucity of references to Somalia in the Secretariat studies. It is also reflected in the fact that she has not recognized her succession to any of the multilateral treaties of which the Secretary-General is the depositary. 104/ As to those treaties, the position taken by the Secretary-General in 1961 in his letter of enquiry to Somalia is of interest. He listed nine multilateral treaties previously applicable in respect of both the Trust Territory and British Somaliland and said that, upon being notified that Somalia recognized herself as bound by them, she would be considered as having become a party to them in her own name as from the date of independence. He then added: 105/

> "The same procedure could be applied in respect of those instruments which either were made applicable only to the former Trust Territory of Somaliland by the Government of Italy or only to the former British Somaliland by the Government of the United Kingdom, provided that your Government would recognize that their application now extends to the entire territory of the Republic of Somalia."

101/ D.P. O'Connell, *ibid.*, p. 101.

102/ *Succession of States in relation to General Multilateral Treaties of which the Secretary-General is the Depositary* (A/CN.4/150), para. 106 [*Yearbook of the International Law Commission 1962*, vol. II, p. 119].

103/ D.P. O'Connell, *ibid.*, p. 101. The Secretariat Study of Succession in respect of extradition treaties does not contain any evidence regarding Somalia's recognition of the continuance of extradition treaties.

104/ *Succession of States in relation to General Multilateral Treaties of which the Secretary-General is the Depositary* (A/CN.4/150), para. 106, [*Yearbook of the International Law Commission 1962*, vol. II, p. 119].

105/ *Ibid.*, para. 103, at page 105.

This passage seems to deny to Somalia the possibility of notifying her succession to the treaties in question only in respect of the territory to which they were previously applicable. If so, it may be doubted whether in the light of later practice, it any longer expresses the position of the Secretary-General in regard to the possibility of a succession restricted to the particular territory to which the treaty was previously applicable.

11. The composite States discussed in the present Excursus are States which, although they may have made devolution agreements, have recognized or not recognized their succession to particular treaties as they deemed fit. Thus, the practice in regard to these composite States does not support any rule of ipso jure continuity such as, on one view of the matter, may be suggested by the practice in regard to the formation of unions of States. The practice rather indicates that the formation of a composite State of the present kind falls generally within the principles which govern newly independent States, and that the only special question which they raise is the territorial scope to be attributed to a treaty when it is recognized as remaining in force.

12. As is apparent from the preceding paragraphs, the question of territorial scope has been dealt with in one way in some cases and in a different way in others. Once, however, it is accepted that in this category of composite States succession is a matter of consent, the differences in the practice are reconcilable on the basis that they merely reflect differences in the intentions - in the consents - of the States concerned. The question then is whether in the case of a composite new State of this kind a treaty should be presumed to apply to its entire territory unless a contrary intention appears, or whether a treaty should be presumed to apply only in respect of the territory or territories in respect of which it was previously in force unless an intention to apply it to the entire territory of the new State appears. On balance, the Special Rapporteur thinks the former to be the more appropriate rule and the article which begins this Excursus has been drafted on that basis. At the same time, it seems necessary to except from the "entire territory" rule treaties the application of which to the new States entire territory would be incompatible with their object and purpose.