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FIFTH REPORT ON SUCCESSION IN RESPECT OF TREATIES

by

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Alternative B

1. A succession of States shall not by reason only of its occurrence affect the continuance in force of obligations and rights arising from a treaty and relating to the user or enjoyment of territory of a party if it appears from the treaty or is otherwise established that the parties intended such obligations to attach indefinitely or for a specified period to the particular territory in question and such rights either:

(a) correspondingly to attach indefinitely or, as the case may be, for a specified period, to the territory of the other party as a particular locality;

(b) to be accorded to a group of States or to States generally.

2. In such a case the obligations and rights in question are to be considered as subject to any provisions of the treaty relating to such obligations or rights.

3. "Territory" for the purposes of the present article means all or any part of the land, internal waters, territorial sea, contiguous zone, seabed or air space of the party in question.

Commentary (Article)

1. The Special Rapporteur drew attention in his third report to certain categories of treaties often described as being of a territorial character and traditionally spoken of as possible exceptions to the general rule in article 6 that a successor State is not bound to take over treaties in force in respect of its territory at the date of the succession[1/]. Inter alia, he there noted that the devolution agreements and, still more, the unilateral declarations, which have featured in so many modern cases of succession, appear to assume that some of the treaties of the predecessor State would be binding upon the successor State. He further noted that, at any rate in the case of former British territories, the States in question appear to have had in mind categories of treaties variously referred to by writers as "treaties of a territorial character" or as "dispositive", "real" or "localised" treaties, or as treaties creating "servitudes". During the general debate on that report at the twenty-second session of the Commission, the majority of speakers commented upon the importance of treaties of a territorial character as an exception to the general rule that a new State is not ipso jure bound by the treaties concluded by its predecessor. At the same time some members underlined that these categories of

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1/ Special Rapporteur's Third Report (A/CN.4/224), paragraphs 16-18 of the commentary to article 6; and see also the Special Rapporteur's First Report (A/CN.4/202), the commentary to article 4.

treaties might also constitute an exception to the "moving treaty frontiers" rule dealt with in article 2 of the Special Rapporteur's second report. The Special Rapporteur pointed out that the whole question of these special categories of treaties had been reserved by him for study in a separate article in his next report; and that the Commission's earlier discussion in its work on the law of treaties of the problem of objective treaty-régimes would then need to be borne in mind. The present article and commentary are intended to provide a basis for the Commission's study of this question, the complexity of which is shown by the diversity of opinion among jurists.

2. The author of a well-known textbook on the law of treaties[2/] endorses the concept of "certain kinds of treaty obligations which by common consent must survive changes of sovereignty" and appears to regard it as covering a broad range of "treaties creating purely local obligations":

> "It is not easy to state the legal doctrine which attaches to this kind of treaty obligation its peculiar effect. For most of them it would suffice to say that the instrument from which they originate created rights in rem, against the whole world, whoever the sovereign of the territory affected might be, but this would not cover capitulations or semi-legislative provisions made as part of an international settlement ..... In many cases it suffices to invoke such principles as nemo dat quod non habet, nemo plus juris transferre quam ipse habet, and res transit cum suo onere, for when a State cedes a piece of territory over which it has granted to another State a right of transit or a right of navigation on a river, or a right of fishery in territorial or national waters, it cannot cede that territory unencumbered by that obligation."

3. Sir G. Fitzmaurice, on the other hand. a former Special Rapporteur on the law of treaties, seems to take a narrower view of the treaties covered by this concept. Writing on questions of succession arising out of the territorial clauses of the Peace Treaty with Italy, he expressed the view that as a general rule treaties of the predecessor State do not pass with ceded territory, and then observed with regard to multilateral treaties[3/]:

> "There may however be cases where, although the receiving State is not a party to a multilateral Convention affecting the ceded territory it may nevertheless be bound to apply its provisions to the territory on the same basis as before the territory was ceded, because the convention

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2/ McNair, Law of Treaties (1961), p.656.

3/ Sir G. Fitzmaurice, Recueil des Cours de l'Académie de droit international (1948 - II), Vol. 73, pp.293-5.

concerned has created a sort of servitude regarding, or a sort of status attaching to, the territory, which whoever is sovereign of the territory becomes automatically bound internationally to respect and give effect to. But in order to determine whether this is so or not, it is necessary to look very carefully at the convention concerned in order to see whether it is one affecting the international status of the ceded territory or of any river, canal, etc., within it, or whether it is merely one creating personal obligations for a given country in respect of that territory or things in it. Suppose there is a treaty to which a number of States are parties which provides that a certain locality in the territory of one of them - perhaps an island - is to be and remain demilitarised. Now it may be quite plain that the true effect of this is not that the island is to acquire the permanent status of demilitarised territory, but merely that State A, in whose territory it now is, is not to fortify it - in other words it is a personal obligation on A rather than a question of the international status of the island. On the other hand there are cases where it is clear that although only a limited number of countries are actual parties to the relevant convention, it was nevertheless the intention to create a permanent régime in the nature of a status for the locality in question. In the field of demilitarisation the conventions respecting the Aaland Islands in the Baltic afford a good illustration. There are also conventions providing for the free navigation of international waterways such as the Panama, Suez and Kiel Canals, and the Dardanelles and Bosphorus - there are conventions providing for free access to, liberty of commerce and navigation, user, and non-discrimination with respect to international rivers, such as the Rhine and Danube, or the Congo in Africa, which pass through the territories of several States. There may be conventions providing for free transit or carriage on certain railways and so forth. In this type of case it is clear that although the matter originally arose out of a convention, it has become one of status and has ceased to depend purely on contract. Any State which takes territory thus situated, takes it as it is and subject to the régime it is impressed with, whether that State is actually a party to the convention which originally created that régime or not."

A little later, turning to bilateral treaties, he added:

"It is desirable to revert to the question of servitudes impressing a given territory or something in it with a status of a permanent character which it is incumbent on any one taking the territory to respect and give effect to. This question has been discussed above in relation to multilateral conventions It does not often occur in the form of a bilateral treaty, but it can do so and can then give rise to very difficult questions. For instance statements of a general character are sometimes made by writers to the effect that all obligations locally connected with given territory pass to the receiving State if that territory is transferred, whereas in fact this is not always the case. Suppose that country A voluntarily cedes certain islands to country B, and there is attached to the cession a clause providing that the fishermen of country A shall continue to enjoy in the islands and its waters the same fishing rights as they enjoyed when the islands belonged to A. Such clauses are of common occurrence. There is one in the Italian Peace Treaty in reference to the Adriatic island of Pelagosa, ceded to Yugoslavia. Now suppose that a century or so later, country B in its turn cedes the islands to country C. In the absence of any express treaty provision does the obligation to grant fishing rights to the fishermen of A automatically pass from B to C, or would it come to an end on the ground that this obligation is personal to country B and does not devolve on C unless this is provided for in the treaty of cession between B and C? Some might answer that this is an obligation locally connected with the ceded territory and in the nature of a servitude on it Subject, however, to the exact wording of the original treaty between A and B creating these rights, the better view seems to be that in a case of this kind the parties were not intending to create for the islands the character of territory permanently available for the exercise of free fishing rights in general. They really only intended to create rights for a certain category of persons, though in respect of certain territory. But the essence of the matter was an obligation on country B to permit the fishermen of A to fish in certain localities, and not, so to speak, to alter or affect the status of those localities as such If this is so, it follows that as this is essentially a personal obligation, though its exercise may relate to certain territory, it does not pass to C unless this is specifically provided for in the treaty between B and C, or unless it is provided generally that C shall assume in respect of the islands all the obligations previously incumbent on B. Of course, it may well be that by virtue of its original obligation to A, B ought not to cede the islands at all, or ought only to do so subject to an express condition reserving the rights of A; and it may well be that A has a right to call on B to act accordingly, and would have a good claim for damages against B if B did not so act; but that is quite a

different question. What has to be considered in all such cases is not merely whether certain obligations relate to or are locally connected with the ceded territory, but whether they are of such nature, intended to be effective universally or quasi-universally, as to impress the territory or something in it with a character henceforth inherent in the territory and irrespective of whether any personal obligation in the matter has been assumed by the local sovereign. There are often to be found in the authorities statements that, on the principles of pacta tertiis nec nocent nec prosunt and of res inter alios acta, one country's right cannot be affected by what two other countries do, and that accordingly, in the type of case under discussion, the territory can only be transferred subject to that country's rights; and similarly there are the statements that, on the principles of res transit cum onere suo and nemo plus juris transferre potest quam habet, cessions of territory made in disregard of the rights of third countries cannot be effected or are illegal and invalid. Now these statements are often perfectly true, but a great deal depends on the particular facts they are applied to. Thus the statement that res transit cum onere suo may well beg the question, because the very issue may be whether the onus does in fact burden the actual res itself, or whether it is merely in the nature of a personal obligation incumbent on a particular State. Again, when it is said that cessions in disregard of third countries' rights are illegal, or that the territory can only be transferred subject to those rights, it is often not clear whether the writer means that the cession is actually null and void or whether he means that it must be read as subject to an implied condition reserving the third country's rights and binding the receiving State to go on giving effect to them; or again whether it is merely meant that the ceding State has acted wrongfully and is liable in damages to the third country. It would seem that the cession itself cannot be null and void, while the question whether it operates subject to an implied term in favour of the third country's rights does not arise since if the transfer is subject to this limitation, it will be precisely because the obligation is sufficiently bound up with the territory to have ceased to have a purely personal character, and consequently automatically to pass with it. If on the other hand the true nature of the obligation is personal, there is no juridical basis for reading into the transfer agreement an implied condition passing this obligation to the receiving State - rather the reverse because, strictly speaking, personal obligations incumbent on A in favour of B cannot or ought not to be transferred to C without B's consent. The real situation in such a case is either that A ought not to effect the cession at all, or that he ought not to do

so without B's consent, or alternatively that the cession does not affect his obligation i.e. he still remains bound in spite of it - which makes it incumbent on him to make the necessary arrangements with C to ensure that the obligation goes on being honoured. If he cannot or does not do this, either in the agreement of cession or by subsequent arrangement, he has got himself into a position where he can no longer carry out his obligations, and he is therefore in breach of them and liable to make reparation."

4. Criticizing the term "localized treaty" as too imprecise a description of the kinds of treaty involved, the writer of a modern text-book on succession of States[4/] expresses a preference for the term "dispositive" treaty; and his analysis of dispositive treaties then seems to have affinities with the position adopted by Sir G. Fitzmaurice:

"In the effort to cast the net more widely than the servitude conception permits, therefore, the term "dispositive" has come to be employed to designate a wide spectrum of treaties which create real rights. The criterion of dispositive character, once the argument is disengaged from the servitude conception, is admittedly elusive, but at least it can be agreed that the fundamental notion underlying the expression is that a territory is impressed with a status which is intended to be permanent (or relatively so), and which is independent of the personality of the State exercising the faculties of sovereignty. The Swiss Government asserted in its counter-memorial in the case of the Free Zones of Upper Savoy that dispositive treaties transfer or create a real right. And real rights in international law are those which are attached to territory, and which are in essence valid erga omnes. The restrictions imposed by the treaty are less of contractual character than equities in favour of the beneficiary States. A dispositive treaty is thus more of a conveyance than an agreement, and as such is an instrument for the delimitation of sovereign competence within the impressed territory. The State accepting the dispositive obligations possesses for the future no more than the conveyance assigned to it, and a Power which subsequently succeeds in sovereignty to the territory can take over only what its predecessor possessed. The basis of the restrictions imposed on the territory is therefore not destroyed by the change of sovereignty."

4/ D.P O'Connell, State Succession in Municipal Law and International Law (1967), Vol.II, pp.14-15; and International Law (1965) Vol.1, pp.432-3. See also I.A. Shearer, La Succession d'Etats et les traités non-localisés Revue générale de droit international public (1964) Vol.68, p.6.

5. A member of the Commission, writing in 1951[5/], voiced doubts as to how far treaties of a territorial nature constitute a true case of succession by operation of law and how far their continued observance by the successor State is a matter of political expediency:

> "La plupart des auteurs font valoir que la succession juridique apparaît à l'occasion de traités d'ordre territorial. Ce caractère est attribué aux traités portant sur des droits et des obligations rattachés directement au territoire lui-même, la personne du souverain du territoire n'ayant pas d'importance et la population qui y habite étant considérée comme un facteur secondaire. Ces qualifications semblent cependant défectueuses. Existe-t-il des traités permettant de faire abstraction du souverain du territoire et de la population? Le transfert des droits et des obligations prévus par les traités d'ordre territorial est, ou bien basé uniquement sur des raisons d'équité et d'opportunité, ou bien se trouve invoquée derechef la devise res transit cum suo onere. Ces motifs ne sauraient être considérés comme convaincants. Il s'agit en effet de savoir dans quelle mesure un Etat peut engager légalement des Etats successeurs éventuels et établir des charges territoriales et autres à leur détriment. Du moment où l'on accorde à l'Etat successeur une pleine liberté d'action en ce qui concerne les autres traités conclus par l'Etat prédécesseur, on peut se demander pour quelles raisons les traités dits d'ordre territorial seraient considérés autrement, puisqu'ils sont également de caractère personnel, leur origine et nature étant rattachées à un Etat déterminé et la différence entre eux et d'autres traités demeurant ainsi ambiguë.
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> De la pratique internationale en cette matière, il est difficile de tirer des conclusions certaines, ses manifestations étant rares et variées, et l'attitude favorable des Etats devant être attribuée à des raisons d'opportunité et non à une obligation juridique."

After referring to treaties providing for the military occupation of territory as a pledge for the territorial State's performance of obligations, he went on:

5/ E. Castien. Recueil des Cours de l'Académie de droit international (1951 - I), Vol. 78, pp.436-7; and Nordisk Tidsskrift for international Ret (1954) Vol. 24, pp.68-9. Cf. M. Udina, Recueil des Cours de l'Académie de droit international (1933 - II), Vol. 44, pp.704-750.

"Parmi les traités d'ordre territorial, on cite souvent, à titre d'exemple, les traités réglant les frontières. La doctrine est unanime à considérer que de pareils traités engagent le nouveau souverain du territoire. Il ne s'agit cependant pas d'une exception à la règle générale. Les traités concernant les frontières ayant été mis en exécution en établissant une situation juridique déterminée, celle-ci doit être respectée par le nouveau souverain du territoire au même titre que tout pouvoir territorial étranger.

De nombreux auteurs estiment que le caractère de traité d'ordre territorial doit être attribué également aux divers traités portant sur les transports, la pêche et la chasse. Ceux-ci diffèrent sensiblement des traités concernant les frontières du fait qu'ils prévoient une action continue c.-à-d. l'application des droits et l'exécution des obligations. La plupart des jurisconsultes estiment que ces traités engagent également les Etats successeurs. La pratique internationale confirme en effet cet avis. L'application continue de pareils traités par les Etats successeurs est cependant due le plus souvent à des raisons d'opportunité.

Une des questions de droit international les plus discutées est celle de savoir s'il existe des servitudes internationales. Par ces servitudes on entend habituellement les restrictions d'ordre territorial qui sont maintenues même si la souveraineté sur le territoire vient à changer. On estime généralement que des servitudes internationales ne sont pas constituées pour des raisons d'intérêt général. Il faut, en plus, leur attribuer un caractère unilatéral, l'autre partie contractante ne bénéficiant pas de droits territoriaux correspondants, et elles ne doivent pas s'appliquer au territoire entier de l'Etat en question. Les servitudes peuvent être négatives ou positives selon qu'une restriction est apportée au pouvoir exercé par un Etat sur une partie de son territoire ou que des droits y sont accordés à un Etat étranger quelconque. Les servitudes portent sur diverses activités ou sur l'obligation de s'abstenir de certaines activités. On les divise habituellement en deux catégories principales selon leur caractère militaire ou économique.

Il est certain qu'entre les Etats existent des restrictions d'ordre territorial du genre susmentionné dont bénéficie l'une des parties, mais on peut se demander si elles engagent les Etats tiers en tant qu'Etats successeurs. Wehberg se demande pour quelles raisons deux Etats seraient

empêchés de convenir entre eux de servitudes qui engagent également les futurs souverains du territoire. La liberté de traiter qu'accorde le droit international est, il est vrai, fort large, mais dans le cas présent il s'agit des droits des tiers. Il semble donc difficile d'admettre des servitudes internationales. En réalité, toutes les restrictions d'ordre territorial stipulées par les traités conclus entre les Etats ont seulement le caractère d'une obligation juridique et d'une force obligatoire qui limitent les effets juridiques des traités aux domaines des parties contractantes.

La pratique internationale peut évidemment admettre des restrictions purement territoriales apportées à l'exercice du pouvoir sur un territoire. Il n'est cependant guère possible de citer des cas convaincants d'une pareille pratique sous une forme généralement reconnue et obligatoire. Ces cas juridiques sont d'ailleurs rares et ils sont, d'une part, contestables, de l'autre, nettement négatifs. Dans la plupart de ces cas, les changements de souveraineté d'un territoire se sont produits entre les parties contractantes elles-mêmes et parfois, l'Etat successeur a accepté librement, par la suite, la charge en question."

6. Some other writers express hesitations in varying forms concerning a new State's automatic inheritance of this category of treaties. The author of a recent book[6/] on independence and succession in respect of treaties, for example, considers that the transmissibility of these treaties is subordinated to the principles of equality of States and self-determination, and concludes: "L'élément de la localisation n'indique qu'une plus forte probabilité de succession, inhérent au traité 'réel'. Mais il ne garantit pas à ce dernier une transmissibilité nécessaire et obligatoire dans tous les cas." The author of another recent book[7/] on succession in respect of treaties, while referring to "localised" treaties as

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6/ M.G. Marcoff, Accession à l'indépendance et succession d'Etats aux traités internationaux (1969), pp.205-6.

7/ A.G.M. Onory, La succession d'Etats aux traités (1968), pp.128-137.

"instruments qui engagent le plus spéoifiquement les nouveaux Etats indépendants", emphasizes that there have been some cases of their rejection and that the new State succeeds to possible "claims" by other States as well as to the treaties. In the case of boundary treaties, he observes that the dispute often concerns the maintenance or otherwise of rights guaranteed in connection with, and as a condition of, the settlement of the boundary and that the dispute over these rights tends to provoke the reopening of the boundary itself. In regard to boundaries another writer[8] indeed expresses the view that succession occurs only through the tacit agreement of the neighbouring State. The weight of opinion amongst modern writers, however, seems still to support the traditional doctrine that treaties of a territorial character constitute a special category which, in principle, are inherited by a new State[9]. Thus, after reviewing some of the recent practice alleged to be inconsistent with that doctrine, a jurist lecturing at the Hague Academy in 1965[10] said:

> ".... it appears that the material tends to support the traditional theory in this respect rather than to disprove it. Deviations from the rule of automatic succession to dispositive treaties seem to be due more to political considerations or to the operation of the clausula rebus sic stantibus than to a rejection of the rule of automatic succession. In fact many of the arguments which have been used to question the continued validity of specific treaties imply that automatic succession is not denied in principle.

8/ C. Rousseau, Revue générale de droit international public (1960) Vol. 64, p.616, citing M. Udina, Recueil des cours de l'Académie de droit international (1933 - II) Vol. 44, pp.748-9.

9/ See, in addition to Lord McNair, Sir G. Fitzmaurice and D.P. O'Connell, already cited in paragraphs 2, 3 and 4 of this Commentary: F.A. Vali, Servitudes of International Law (1958) pp.319-22; K. Zemanek, Recueil des cours de l'Académie de droit international (1965 - III) Vol. 116 pp.239-243; A. Ross, A Textbook of International Law (1947) p.127; P. Guggenheim, Traité de droit international public (1967) Vol. 1, p.226; J. Mervyn Jones, British Yearbook of International Law (1947) Vol. 24, p.362; Sir R. Hone, David Davies Memorial Institute, International Conference, 1960, p.18.

10/ K. Zemanek, loc.cit., p.242.

The real difficulty lies, however, in the exact determination of treaties coming under this rule ...".

7. Another recent writer,[11] on the other hand, while recognizing that a new State inherits the frontiers of its predecessor and also certain kinds of "real" obligations and rights, does not see in these cases an application of any principle of succession in respect of treaties. Boundary treaties, he says, are executed treaties and, as far as the executed provisions are concerned, it is not a case of succession in respect of treaties. As to the other kinds of "real" treaties, State succession is in his view only one of the possible explanations, and he prefers to regard them as cases of the "grafting of an international custom upon a treaty" or of a local custom or of a "good neighbour" rule. And he concludes that there is no genuine case of "succession" forming an exception to the "clean slate" rule.

8. The International Law Association, in its 1968 resolutions on succession of new States to the treaties of their predecessors,[12] has adopted yet another approach to this question. As already pointed out in the commentary to Article 7,[13] the Association takes as its starting point a presumption of the continuity of all the predecessor State's treaties which were in force with respect to the territory at the date of the succession; and under its resolutions both bilateral and multilateral treaties are to become binding on a new State unless, within a reasonable time, the latter contracts out by declaring that the particular treaty is not regarded by it as any longer in force. For this purpose the Association makes no distinction between treaties of a territorial character and other treaties; and thus does not endorse the

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11/ T. Treves, Communicazioni e Studi dell' Instituto di diritto internazionale e strainero dell' Universita di Milano, Vol. XIII.

12/ For the text of the resolutions, see the Special Rapporteur's Second Report (A/CN.4/214), Introduction, paragraph 15.

13/ Special Rapporteur's Third Report (A/CN.4/224), paragraph 4 of the commentary.

doctrine that treaties of a territorial character form a special class which are automatically binding ipso jure upon a successor State. This is underlined by its manner of dealing with the question of boundaries.[14] When a boundary treaty has been executed in the sense that the boundary has been delimited, the Association recognizes that a new State succeeds to the delimitation, which therefore determines the extent of its territory. But, like the writer mentioned in the preceding paragraph, it regards the treaty itself as having spent its force, so that the case is one of succession in respect of the boundary, as such, not of the treaty. On the other hand, where a boundary treaty provides for future action to delimit it, or provides for future reciprocal rights in relation to the boundary, the Association considers that the question whether the treaty is or is not succeeded to should be governed by the general presumption of continuity envisaged by it for all the treaties of the predecessor State.

9. The diversity of opinion amongst writers makes it difficult to discern whether and, if so, to what extent and upon what basis, international law today recognizes any special category or categories of treaties of a territorial character which are inherited automatically by a successor State. It may therefore be useful to recall three other cases in the law of treaties where the question whether treaties of a "territorial" character form a special category is posed. Two of these cases came under the Commission's notice during its work on the Vienna Convention, namely, treaties said to create "objective régimes" and treaties excepted from the rule in Article 62 regarding a fundamental change of circumstances; the third case, the effect of war on treaties, has not been considered by the Commission.

10. The question of treaties which provide for objective régimes was examined by Sir H. Waldock in his third report on the law of treaties with reference to the subject of treaties and third States,[15] and subsequently by the Commission at its

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14/ See paragraph 8 of the resolutions and paragraph 8 of the "Notes" to the resolutions.

15/ The Commentary to Article 63 of that report: Yearbook of the International Law Commission, 1964, Vol. II, pp. 26-34.

sixteenth session.[16] The outcome of the proceedings in the Commission on this question was summarized in its final report to the General Assembly on the law of treaties[17] as follows:

> "The Commission considered whether treaties creating so-called 'objective régimes', that is, obligations and rights valid erga omnes, should be dealt with separately as à special case. Some members of the Commission favoured this course, expressing the view that the concept of treaties creating objective régimes existed in international law and merited special treatment in the draft articles. In their view, treaties which fall within this concept are treaties for the neutralization or demilitarization of particular territories or areas, and treaties providing for freedom of navigation in international rivers or maritime waterways; and they cited the Antarctic Treaty as a recent example of such a treaty. Other members, however, while recognizing that in certain cases treaty rights and obligations may come to be valid erga omnes, did not regard these cases as resulting from any special concept or institution of the law of treaties. They considered that these cases resulted either from the application of the principle in article 32 or from the grafting of an international custom upon a treaty under the process which is the subject of the reservation in the present article".

Having regard to this difference of opinion, the Commission concluded that a provision recognizing, under certain conditions, the direct creation of an objective régime by a treaty of its own force would be unlikely to obtain general acceptance, and decided not to propose any special provision of that nature. Instead, it left the question of objective régimes to be resolved by the rules in what is now Article 36 of the Vienna Convention regarding treaties which provide for rights for third States and also by the process through which a treaty may become binding on a third State as the result of the grafting of an international custom upon the treaty. This way of dealing with the problem was accepted at the Vienna Conference, with the result that the concept of a special category of treaties which of their own force create objective régimes does not find any place in the Vienna Convention on the Law of Treaties.

16/ Ibid., Vol. 1, pp. 96-109.

17/ Report of the Commission for its eighteenth session, paragraph 4 of the Commentary to Article 34; Yearbook of the International Law Commission, 1966, Vol. II, p. 231.

11. The treaties in question, as the above-cited passage of the Commission's report indicates, are treaties of a territorial character: treaties for the neutralization or demilitarization of particular territories or areas, treaties providing for freedom of navigation in particular international rivers or waterways and the like. And it is clear that the general law of treaties, as now formulated in the Vienna Convention, does not attribute to these treaties any special effects in relation to third States by reason merely of their territorial character. But it by no means follows that the same must be true in relation to a successor State. The very question to be resolved in cases of succession is whether a new State is to be considered as wholly a stranger - as a third State - in relation to its predecessor's treaty or whether the fact that the treaty was previously in force in respect of the new State's territory creates some form of legal nexus between the new State and the predecessor's treaty.

12. In another context, the effect of a fundamental change of circumstances, the Commission and the Vienna Conference concluded that treaties establishing a boundary do form a special category which constitutes an exception to the general rule that such a fundamental change of circumstances may be invoked as a ground for terminating, withdrawing from or suspending the operation of a treaty.[18/] In consequence Article 62, paragraph 2(a), of the Vienna Convention expressly provides that the general rule does not apply in the case of a treaty which "establishes a boundary". This provision, it will be noted, confines the category of treaties falling under this exception to boundary treaties, and is not therefore expressed to cover other forms of treaties of a territorial character.[19/]

18/ See Report of the Commission on its eighteenth session, paragraph 11 of its Commentary to Article 59 of its Draft Articles on the Law of Treaties; Yearbook of the International Law Commission, 1966, Vol.II, p.259.

19/ Sir H. Waldock, as Special Rapporteur, had proposed that the exception should cover treaties effecting a "grant of territorial rights"; Second Report on the law of treaties, paragraph 17 of the Commentary to article 22; Yearbook of the International Law Commission, 1963, Vol.II, p. 85.

13. As to the effect of war on treaties, which has not been examined by the Commission, the modern law is uncertain, and the Special Rapporteur has no wish to be thought to express any opinion of his own on that topic without a thorough examination of it. He therefore confines himself to noting that a number of modern writers appear to regard the territorial, or perhaps more often the dispositive, character of certain kinds of treaties as a reason for rejecting the thesis that they are brought to an end by the outbreak of war.[20] These writers also appear to refer to this category in fairly broad terms, not limiting it to boundary treaties or other particular kinds of treaties of a territorial character.

14. The proceedings of international tribunals throw some, if not an entirely clear, light on the question of territorial treaties. In its second Order in the case concerning the Free Zones of Upper Savoy and the District of Gex[21] the Permanent Court of International Justice made a pronouncement which is perhaps the most weighty endorsement of the existence of a rule requiring a successor State to respect a territorial treaty affecting the territory to which a succession of States relates. The Treaty of Turin of 1816, in fixing the frontier between Switzerland Sardinia, imposed restrictions on the levying of customs duties in the Zone of St. Gingolph. Switzerland claimed that under the treaty the customs line should be withdrawn from St. Gingolph. Sardinia, although at first contesting this view of the treaty, eventually agreed and gave effect to its agreement by a "Manifesto" withdrawing the customs line. In this context, the Court said:[22]

> "... As this assent given by His Majesty the King of Sardinia, without any reservation, terminated an international dispute relating to the Treaty of Turin; as, accordingly, the effect of the Manifesto of the Royal Sardinian Court of Accouts, published in execution of the Sovereign's orders, laid down in a manner binding on the Kingdom of Sardinia, what the law was to be between the Parties; as the agreement thus interpreted by the Manifesto confers on the creation of the zone of St. Gingolph the character of a treaty stipulation which France is bound to respect, as she succeeded Sardinia in the sovereignty over that territory."

20/ E.g. Sir G. Fitzmaurice, Recuil des cours de l'Académie de droit international (1948 - II) Vol.73, p.312; McNair, Law of Treaties (1961) p.705; C. Rousseau, Droit international public (1953) p.59.

21/ (1929) P.C.I.J. Series A No. 22. The Free Zones Case was discussed at length by the Special Rapporteur in his third report on the law of treaties with reference to the effect of treaties on third States; See Yearbook of the International Law Commission, 1964, Vol.II, pp.20-4.

22/ At page 17 of the Order.

This pronouncement was reflected in much the same terms in the Court's final judgment in the second stage of the case.[23] Although the territorial character of the treaty is not particularly emphasized in the passage cited above, it is clear from other passages that the Court recognized that it was here dealing with an arrangement of a territorial character. Indeed, the Swiss Government in its pleadings had strongly emphasized the "real" character of the agreement,[24] involving the concept of servitudes in connexion with the Free Zones.[25] The case has, therefore, rightly been accepted as a precedent in favour of the principle that certain treaties of a territorial character are binding ipso jure upon a successor State.

15. What is not, perhaps, clear is the precise nature of the principle applied by the Court. The Free Zones, including the Sardinian Zone were created as part of the international arrangements made at the conclusion of the Napoleonic Wars; and elsewhere in its judgments[26] the Court emphasized this aspect of the agreements concerning the Free Zones. The question, therefore, is whether the Court's pronouncement applies generally to treaties having such a territorial character or whether it is limited to treaties forming part of a territorial settlement and establishing an objective treaty régime. On this question it can only be said that the actual terms of that pronouncement were quite general. A further point frequently raised in connexion with the problem of succession in respect of territorial treaties is whether, if it occurs, the succession is in respect of the treaty or in respect of the situation resulting from the execution of the treaty. The Court does not seem to have addressed itself specifically to this point. But its language in the passage from its Order cited above and in the similar passage in its final judgment, whether or not intentionally refers in terms to "a treaty stipulation which France is bound to respect, as she succeeded Sardinia in the sovereignty over that territory."

23/ (1932) P.C.I.L. Series A/B No. 46, p. 145.

24/ P.C.I.J. Series E, Free Zones of Upper Savoy and the District of Gex, vol. 3, p. 1654.

25/ Ibid., vol. 1, pp. 154 and 415.

26/ E.g. P.C.I.J., Series A/B No. 46 at p.148.

16. In the early days of the League, before the Permanent Court had been established, the question of succession in respect of a territorial treaty had come before the Council of the League of Nations with reference to Finland's obligation to maintain the demilitarization of the Aaland Islands. The point arose in connexion with a dispute between Sweden and Finland concerning the allocation of the Islands after Finland's detachment from Russia at the end of the first world war. The Council referred the legal aspects of the dispute to a committee of three jurists, amongst whom was Max Huber later to be Judge and President of the Permanent Court. The treaty in question was the Aaland Islands Convention, concluded between France, Great Britain and Russia as part of the Peace Settlement of 1856, under which the three Powers declared that "the Aaland Islands shall not be fortified, and that no military or naval base shall be maintained or created there." Two major points of treaty law were involved. The first, Sweden's right to invoke the Convention although not a party to it, was discussed by the Special Rapporteur in his third report on the law of treaties in connexion with the effect of treaties on third States and objective régimes.[27/] The second was the question of Finland's obligation to maintain the demilitarization of the islands. In its opinion[28/] the Committee of Jurists, having observed that "the existence of international servitudes, in the true technical sense of the term, is not generally admitted," nevertheless found reasons for attributing special effects to the demilitarization Convention of 1856:

> "As concerns the position of the State having sovereign rights over the territory of the Aaland Islands, if it were admitted that the case is one of 'real servitudes', it would be legally incumbent upon this State to recognize the provisions of 1856 and to conform to them. A similar conclusion would also be reached if the point of view enunciated above were adopted, according to which the question is one of a definite settlement of European interests and not a question of mere individual and subjective political obligations. Finland, by declaring itself independent and claiming on this ground recognition as a legal person in international law cannot escape from the obligations imposed on it by such a settlement of European interests.
>
> "The recognition of any State must always be subject to the reservation that the State recognized will respect the obligations imposed upon it either by general international law or by definite international settlements relating to territory".

27/ Yearbook of the International Law Commission, 1964, vol. II, pp. 22-3 and 30.

28/ League of Nations Official Journal, Special Supplement No. 3, October 1920, p.16.

Clearly, in that opinion the Committee of Jurists did not rest the successor State's obligation to maintain the demilitarization régime simply on the territorial character of the treaty. It seems rather to have based itself on the theory of the dispositive effect of an international settlement established in the general interest of the international community (or at least of a region). Thus it seems to have viewed Finland as succeeding to an established régime or situation effected by the treaty rather than to the contractual obligations of the treaty as such.

17. The case concerning the Temple of Preah Vihear,[29] cited by some writers in this connexion, is of a certain interest in regard to boundary treaties, although the question of succession was not dealt with by the International Court of Justice in its judgment. The boundary between Thailand and Cambodia had been fixed in 1902 by a treaty concluded between Thailand (Siam) and France as the then protecting Power of Cambodia. The case concerned the effects of an alleged error in the application of the treaty by the Mixed Franco-Siamese Commission which demarcated the boundary. Cambodia had in the meanwhile become independent and was therefore in the position of a newly independent successor State in relation to the boundary treaty (assuming that the emergence of a protected State to independence is a case of succession). Neither Thailand nor Cambodia disputed the continuance in force of the 1902 treaty after Cambodia's attainment of independence, and the Court decided the case on the basis of a map resulting from the demarcation and of Thailand's acquiescence in the boundary depicted on that map. The Court was not therefore called upon to address itself to the question of Cambodia's succession to the boundary treaty. On the other hand, it is to be observed that the Court never seems to have doubted that the boundary settlement established by the 1902 treaty and the demarcation, if not vitiated by error, would be binding as between Thailand and Cambodia.

18. More directly to the purpose is the position taken by the parties on the question of succession in their pleadings on the preliminary objections filed by Thailand. Concerned to deny Cambodia's succession to the rights of France under the pacific settlement provisions of a Franco-Siamese Treaty of 1937, Thailand argued as follows:[30]

29/ I.C.J., Reports, 1962, p. 6.

30/ I.C.J. Pleadings, Documents and Oral Arguments, 1959, vol. I, pp. 145-6.

> "Under the customary law of State succession, if Cambodia is successor to France in regard to the tracing of frontiers, she is equally bound by treaties of a local nature which determine the methods of making these frontiers on the spot. However, the general rules of customary law regarding State succession do not provide that, in case of succession by separation of a part of a State's territory, as in the case of Cambodia's separation from France, the new State succeeds to political provisions in treaties of the former State ... The question whether Thailand is bound to Cambodia by peaceful settlement provisions in a treaty which Thailand concluded with France is very different from such problems as those of the obligations of a successor State to assume certain burdens which can be identified as connected with the territory which the successor acquires after attaining its independence. It is equally different from the question of the applicability of the provisions of the treaty of 1904 for the identification and demarcation on the spot of the boundary which was fixed along the watershed."

Cambodia, although she primarily relied on the thesis of France's "representation" of Cambodia during the period of protection, did not dissent from Thailand's propositions regarding the succession of a new State in respect of territorial treaties. On the contrary, she argued that the peaceful settlement provisions of the 1937 Treaty were directly linked to the boundary settlement and continued:[31]

> "La Thailande reconnaît que le Cambodge est successeur de la France en ce qui concerne les traités à la définition et à la délimitation des frontières. Elle ne peut exclure arbitrairement du jeu de tels traités les dispositions qu'ils renferment quant au règlement juridictionnel obligatoire, dans la mesure où ce règlement est accessoire à la définition et à la délimitation des frontières."

Thus both parties seem to have assumed that, in the case of a newly independent State, there would be a succession not only in respect of a boundary settlement but also of treaty provisions ancillary to such settlement. Thailand considered that succession would be limited to provisions forming part of the boundary settlement itself, and Cambodia that it would extend to provisions in a subsequent treaty directly linked to it.

19. The case concerning Right of Passage over Indian Territory[32] is also of a certain interest, though it did not involve any pronouncement by the Court on succession in respect of treaty obligations. True, it was under a treaty of 1779 concluded with the Marathas that Portugal first obtained a foothold in the two enclaves which gave rise to the question of a right of passage in that case. But the majority of the Court specifically held that it was not in virtue of this treaty that Portugal was enjoying certain rights of passage for civilian personnel on the eve of India's attainment of

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31/ Ibid., p. 165.

32/ I.C.J. Reports, 1960, p. 6.

independence; it was in virtue rather of a local custom that had afterwards become established as between Great Britain and Portugal. The right of passage derived from the consent of each State, but it was a customary right, not treaty right, with which the Court considered itself to be confronted. The Court found that India had succeeded to the legal situation created by that bilateral custom "unaffected by the change of régime in respect of the intervening territory which occurred when India became independent".

20. State practice, and more especially modern State practice, now remains to be examined; and it is proposed to deal first with succession in respect of boundary treaties and then with the practice concerning other forms of territorial treaties.

21. Boundary treaties. Attention has already been drawn earlier in this commentary to article 62, paragraph 2 (a) of the Vienna Convention on the Law of Treaties which provides that a fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty "if the treaty establishes a boundary" (paragraph 12). This provision was proposed by the Commission as a result of its study of the general law of treaties. After pointing out that this exception to the fundamental change of circumstances rule appeared to be recognized by most jurists, the Commission commented:[33]

> "(11) Paragraph 2 excepts from the operation of the article two cases. The first concerns treaties establishing a boundary, a case which both States concerned in the Free Zones case appear to have recognized as being outside the rule, as do most jurists. Some members of the Commission suggested that the total exclusion of these treaties from the rule might go too far, and might be inconsistent with the principle of self-determination recognized in the Charter. The Commission, however, concluded that treaties establishing a boundary should be recognized to be an exception to the rule, because otherwise the rule, instead of being an instrument of peaceful change, might become a source of dangerous frictions. It also took the view that "self-determination", as envisaged in the Charter was an independent principle and that it might lead to confusion if, in the context of the law of treaties it were presented as an application of the rule contained in the present article. By excepting treaties establishing a boundary from its scope the present article would not exclude the operation of the principle of self-determination in any case where the conditions for its legitimate operation existed. The expression "treaty establishing a boundary" was substituted for "treaty fixing a boundary" by the Commission, in response to comments of Governments, as being a broader expression which would embrace treaties of cession as well as delimitation treaties."

The exception of treaties establishing a boundary "from the fundamental change of circumstances rule," though opposed by a few States, was endorsed by a very large majority of the States at the Vienna Conference.[34] The considerations which led the Commission and the Conference to make thus exception to the fundamental change of circumstances appear to apply with the same force to a succession of States, even though the question of the continuance of the treaty may then present itself in a different context. Accordingly, the attitude of States towards boundary treaties at the Vienna Conference on the Law of Treaties is believed to be an extremely pertinent element of State practice equally in the present connexion.

33/ Paragraph 11 of the Commission's commentary to article 59 of its draft (now article 62 of the Vienna Convention); Yearbook of the International Law Commission, 1966, vol. II, p. 259.

34/ E.E. Seaton and S.T.M. Maliti, "Treaties and Succession of States and Governments in Tanzania," paragraphs 30-35.

22. Attention has also been drawn earlier to the assumption apparently made by both Thailand and Cambodia in the Temple Case of the latter's succession to the boundary established by the Franco-Siamese Treaty of 1904 (paragraph). That this assumption reflects the general understanding concerning the position of a successor State in regard to an established boundary settlement seems clear. Tanzania, although in her unilateral declaration she strongly insisted on her freedom to maintain or terminate her predecessor's treaties, has been no less insistent that boundaries previously established by treaty remain in force.[35/] Furthermore, despite their initial feelings of reaction against the maintenance of "colonial" frontiers, the newly independent States of Africa have come to endorse the principle of respect for established boundaries. Article III, paragraph 3 of the Charter of the Organization of African Unity, it is true, merely proclaimed the principle of "respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence". But in 1964, with reservations only from Somalia and Morocco, the Assembly of Heads of State adopted a resolution which, after reaffirming the principle in Article III, paragraph 3, solemnly declared that "all Member States pledge themselves to respect the borders existing on their achievement of national independence". A similar resolution was adopted by the neutralist "summit" Conference held in Cairo later in the same year. This does not, of course, mean that boundary disputes have not arisen or may not arise between African States. But the legal grounds invoked must be other than the mere effect of the occurrence of a succession of States on a boundary treaty.

23. Somalia has two boundary disputes with Ethiopia, one in respect of the former British Somaliland boundary and the other in respect of the former Italian Somaliland boundary; and a third dispute with Kenya in respect of her boundary with Kenya's Northern Frontier District.[36/] Somalia's claims in these disputes are based essentially on ethnic and self-determination considerations and on alleged grounds for impeaching the validity of certain of the relevant treaties. She does not seem to have claimed that, as a successor State, she was ipso jure freed from any obligation to respect the boundaries established by treaties concluded by her predecessor State though she did denounce the 1897 treaty with Ethiopia in response to the latter's unilateral withdrawal

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35/ O.A.U. Document, A.H.G./Res. 16(1); and see S. Touval, Africa's Frontiers, International Affairs (1966), vol. 42, pp. 641-54.

36/ See D.P. O'Connell, State Succession in Municipal Law and International Law (1967) vol. II, pp.282-5; and S. Touval, op. cit. pp. 645-7.

of the grazing rights mentioned below. Ethiopia and Kenya, who is herself also a successor State, take the position that the treaties in question are valid and that, being boundary settlements, they must be respected by a successor State. The Somali-Ethiopian dispute regarding the 1897 treaty calls for more detailed comment. The boundary agreed between Ethiopia and Great Britain in 1897 separated some Somali tribes from their traditional grazing grounds and an exchange of letters annexed to the treaty provided that these tribes, from either side of the boundary, would be free to cross it to their grazing grounds. The 1897 treaty was reaffirmed in an agreement concluded between the United Kingdom and Ethiopia in 1954, article I of this agreement reaffirming the boundary and article II the grazing rights. Article III then created a "special arrangement" for administering the use of the grazing rights by the Somali tribes. In 1960, shortly before independence, a question had been put to the British Prime Minister in Parliament concerning the continuance of the Somali grazing rights along the Ethiopian frontier to which he replied:37/

> "Following the termination of the responsibilities of H.M. Government for the Government of the Protectorate, and in the absence of any fresh instruments, the provisions of the 1897 Anglo-Ethiopian Treaty should, in our view, be regarded as remaining in force as between Ethiopia and the successor State. On the other hand, Article III of the 1954 Agreement, which comprises most of what was additional to the 1897 Treaty, would, in our opinion, lapse."

The United Kingdom thus was of the view that the provisions concerning both the boundary and the Somali grazing rights would remain in force and that only the "special arrangement", which pre-supposed British administration of the adjoining Somali territory would cease. In this instance, it will be observed, the United Kingdom took the position that ancillary provisions which constituted an integral element in a boundary settlement would continue in force upon a succession of States, while accepting that particular arrangements made by the predecessor State for the carrying out of those provisions would not survive the succession of States. Ethiopia, on the other hand, while upholding the boundary settlement, declined to recognize that the ancillary provisions, though they constituted one of the conditions of that settlement, would remain binding upon her.38/

37/ Materials on Succession of States (ST/LEG/SER.B/14), p. 185.

38/ See D.P. O'Connell, op. cit., vol. II, pp. 302-4.

24. There are a number of other instances in which the United Kingdom has recognized that rights and obligations under a boundary treaty would remain in force after a succession of States. One is the Convention of 1930 concluded between the United States and Great Britain for the delimitation of the boundary between the Philippine Archipelago and the State of North Borneo. On the Philippines becoming independent in 1946, the British Government in a diplomatic Note acknowledged that as a result "the Government of the Republic of the Philippines has succeeded to the rights and obligations of the United States under the Notes of 1930".[39/]

25. Another instance is the Treaty of Kabul concluded between Great Britain and Afghanistan in 1921 which, inter alia, defined the boundary between the then British Dominion of India and Afghanistan along the so-called Durand line. On the division of the Dominion into the two States of India and Pakistan and their attainment of independence, the United Kingdom received indications that Afghanistan might question the boundary settlement on the basis of the doctrine of fundamental change of circumstances. The United Kingdom's attitude in response to this possibility, as summarized by it in Materials on Succession of States,[40/] was as follows:

> "The Foreign Office were advised that the splitting of the former India into two States - India and Pakistan - and the withdrawal of British rule from India had not caused the Afghan Treaty to lapse and it was hence still in force. It was nevertheless suggested that an examination of the Treaty might show that some of its provisions, being political in nature or relating to continuous exchange of diplomatic missions, were in the category of those which did not devolve where a State succession took place. However, any executed clauses such as those providing for the establishment of an international boundary or, rather, what had been done already under executed clauses of the Treaty, could not be affected, whatever the position about the treaty itself might be."

Here therefore the United Kingdom again distinguishes between provisions establishing a boundary and ancillary provisions of a political character. But it also appears here to have distinguished between the treaty provisions as such and the boundary resulting from their execution - a distinction made by a number of jurists. Afghanistan, on the other hand, contests altogether Pakistan's right to invoke the boundary provisions of the 1921 Treaty.[41/] She does so on various grounds, such as the alleged "unequal" character of the Treaty itself and the termination of the Treaty by Afghanistan by a notice given under the Treaty in 1953. But she also maintains that Pakistan, as a newly independent State, had a "clean slate" in 1947 and could not claim automatically to be a successor to British rights under the 1921 Treaty. In other words, she specifically denies that boundary treaties constitute an exception to the clean slate principle when the successor State is a "new" State.

39/ Materials on Succession of States (ST/LEG/SER.B/14), pp. 189-90.

40/ ST/LEG/SER.B/14, pp. 186-7.

41/ Materials on Succession of States (ST/LEG/SER.B/14), pp. 1-5.

26. There are a number of other modern instances in which a successor State has become involved in a boundary dispute. But these appear mostly to be instances where either the boundary treaty in question left the course of the boundary in doubt or its validity is challenged on one ground or another; and in those instances the succession of States merely provided the opportunity for reopening or raising grounds for revising the boundary which are independent of the law of succession. Such appears to have been the case, for example, with the Moroccan - Algeria,[42] Surinam - Guyana,[43] and Venezuela - Guyana[44] boundary disputes and, it is thought, also with the various Chinese claims in respect of Burma, India and Pakistan.[45] True, China may have shown a disposition to reject the former "British" treaties as such; but she seems rather to challenge the treaties themselves than to invoke any general concept of a newly independent State's clean slate with respect to the treaties, including boundary treaties.[46]

27. The weight of the evidence of State practice and of legal opinion in favour of the view that in principle a boundary settlement is unaffected by the occurrence of a succession of States is strong and powerfully reinforced by the decision of the Vienna Conference on the Law of Treaties to except from the fundamental change of circumstances rule a treaty which establishes a boundary. Consequently, it is thought that the present draft must also except boundary settlements both from the moving treaty-frontier rule and from the clean slate principle contained in article 6. Such an exception would relate exclusively to the effect of the succession of States on the boundary settlement. It would leave untouched any other ground of claiming the revision or setting aside of the boundary settlement, whether self-determination or the invalidity or termination of the treaty. Equally, of course, it would leave untouched any legal ground of defence to such a claim that may exist. In short, there mere occurrence of a succession of States would be considered neither to consecrate the existing boundary if it is open to challenge nor to deprive it of its character as a legally established boundary, if such it was at the date of the succession of States.

42/ D.P. O'Connell, Op.cit. vol. II, pp.289-91.

43/ Ibid., pp.274-5.

44/ Third Report (A/CN.4/224) paragraph 10 of the commentary to article 6.

45/ D.P. O'Connell, Op.cit. vol.II, pp.277-82.

46/ D.P. O'Connell, Op.cit. vol.II, pp.277-82.

28. If the view expressed in the previous paragraph is endorsed by the Commission, the question still remains as to how any rule to be adopted in regard to boundary treaties should be formulated. The analogous provision in the Vienna Convention appears in article 62 as an exception to the fundamental change of circumstances rule. Moreover, it is so framed as to relate to the treaty rather than to the boundary resulting from the treaty. For the provision reads "A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty: (a) if the treaty establishes a boundary". However, in the present draft the question is not the continuance in force or otherwise of a treaty between the parties; it is what obligations and rights, if any, devolve upon a successor State. Accordingly, it does not necessarily follow that here also the rule should be framed in terms relating to the boundary treaty rather than to the legal situation established by the treaty; and the opinion of jurists, as reflected in the resolution of the International Law Association, tends to favour the latter formulation of the rule. If the rule is regarded as relating to the situation resulting from the dispositive effect of a boundary treaty, then it would not seem properly to be an exception to article 6 of the present draft. It would seem rather to be a general reservation that a succession of States is not be considered as in itself affecting a boundary settlement established by treaty prior to that succession of States. Such a general reservation was indeed included, as article 4, in the Special Rapporteur's first report[47/] in the following form: "Nothing in the present articles shall be understood as affecting the continuance in force of a boundary established by or in conformity with a treaty prior to the occurrence of a succession".

29. Arguments can be adduced in favour of either form of provision. On the one hand, it may be said that to detach succession in respect of the boundary from succession in respect of the boundary treaty is somewhat artificial. Very often a boundary in thinly populated territory has not been fully demarcated so that its precise course in a particular area may be brought into question. In that event recourse must be had to the interpretation of the treaty as the basic criterion for ascertaining the boundary, even if other elements, such as occupation and recognition, may also come into play. Moreover, a boundary treaty

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47/ (A/CN.4/202), Yearbook of the International Law Commission, 1968, vol.II, p.

may contain ancillary provisions which were intended to form a continuing part of the boundary régime created by the treaty and the suppression of which on a succession of States would materially change the boundary settlement established by the treaty. Again, if the validity of the treaty or of a demarcation under the treaty was in dispute prior to the succession of States, it may seem anomalous to separate succession in respect of the boundary from succession in respect of the treaty. On the other hand, it may be argued that a boundary treaty has constitutive effects and establishes a legal and factual situation which thereafter has its own separate existence; and that it is this situation, rather than the treaty, which passes to a successor State, In this connexion, it may also be argued that a boundary treaty may contain provisions unconnected with the boundary settlement itself, and that it is only this settlement which should form an exception to the clean slate principle. It may at the same time be urged that some at least of the suggested objections may be overcome if it is recognized that the legal situation constituted by the treaty comprises not only the boundary delimitation but also such ancillary provisions as were intended to form an integral part of the régime of the boundary.

30. Having regard to the division of opinion on this point, the Special Rapporteur has prepared two alternative texts of article 22 on the question of the effect of a succession of States on boundaries. One is framed in terms of succession in respect of the treaty and the other in terms of succession in respect of the boundary situation. At the same time, for the sake of simplicity, he has thought it advisable to separate the question of boundary treaties from other forms of territorial treaties which, therefore, he has assigned to a separate article - article 22 (bis).

31. Other territorial treaties. In the commentary to article 6 attention has been drawn to the assumption which appears to be made by many States, including newly independent States, that certain treaties of a territorial character are an exception to the clean slate principle.[48/] In British practice there are numerous statements evidencing the United Kingdom's belief that customary law recognizes the existence of such an exception to the clean slate principle and also to the moving treaty-frontier rule. One such is a statement with reference to Finland which was reproduced in paragraph 3 of the above-mentioned commentary. Another is the reply of the Commonwealth Relations Office to the International Law Association cited in paragraph 17 of that commentary which runs as follows:

48/ (A/CN.4/224); Yearbook of the International Law Commission, 1970, vol.II, p.

> "Under customary international law certain treaty rights and obligations of an existing State are inherited automatically by a new State formerly part of the territories for which the existing State was internationally responsible. Such rights and obligations are generally described as those which relate directly to territory within the new State (for example, those relating to frontiers and navigation on rivers); but international law on the subject is not well settled and it is impossible to state with precision which rights and obligations would be inherited automatically and which would not be."

A further statement of a similar kind may be found in Materials on Succession of States[49], the occasion being discussions with the Cyprus Government regarding article 8 of the treaty concerning the establishment of the Republic of Cyprus.

32. The French Government appears to take a similar view. Thus, in a note addressed to the German Government in 1935, after speaking of what was, in effect, the moving treaty-frontier principle, the French Government continued:[50]

> "Cette règle souffre une exception importante dans le cas de conventions qui n'ont aucun caractère politique, c'est à dire qui n'ont pas été conclues en considération de la personne même de l'Etat, mais qui sont d'application territoriale et locale, qui sont fondées sur une situation géographique: l'Etat successor, quelle que soit la cause pour laquelle il succède, est tenu de remplir les charges qui découlent de traités de cet ordre comme il joint des avantages qui s'y trouvent stipulés."

Canada, again in the context of the moving treaty-frontier rule, has also shown that she shares the view that territorial treaties constitute an exception to it. After Newfoundland had become a new province of Canada, the Legal Division of the Department of External Affairs explained the attitude of Canada as follows:[51]

> "The view of the Government on the question of Newfoundland treaty succession has in the past been that Newfoundland became part of Canada by a form of cession and that consequently, in accordance with the appropriate rules of international law, agreements binding upon Newfoundland prior to union lapsed, except for those obligations arising from agreements locally connected which had established proprietary or quasi-proprietary rights, ..."

Some further light is thrown on the position taken by Canada on this question by the fact that Canada did not recognize air transit rights through Gander airport in Newfoundland granted in pre-union agreements as binding after Newfoundland became part of Canada.[52] On the other hand, Canada did recognize as binding upon her a

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49/ ST/LEG/SER.B/14, p.183.

50/ D.P. O'Connell, op. cit, vol. II, p.233.

51/ Succession of States in respect of Bilateral Treaties (A/CN.4/243), paragraph 85.

52/ Ibid., paragraphs 86-100.

condition precluding the operation of commercial aircraft from certain bases in Newfoundland leased to the United States before the former became a part of Canada. Furthermore, she does not seem to have questioned the continuance in force of the fishery rights in Newfoundland waters which were accorded by Great Britain to the United States in the Treaty of Ghent in 1818 and were the subject of the North Atlantic Fisheries Arbitration in 1910, or of the fishery rights first accorded to France in the Treaty of Utrecht and dealt with in a number of further treaties.

33. An instructive precedent involving the succession of newly independent States is the so-called Belbase Agreements of 1921 and 1951, which concern Tanzania, on the one hand, and Congo (Leopoldville), Rwanda and Burundi, on the other.[53/] After the first world war the mandates entrusted to Great Britain and Belgium respectively had the effect of cutting off the central Apian territories administered by Belgium from their natural sea-port, Dar-es-Salaam. Great Britain accordingly entered into an agreement with Belgium in 1921, under which Belgium, at a rent of one franc per annum, was granted a lease in perpetuity of port sites at Dar-es-Salaam and Kigoma in Tanganyika. This agreement also provided for certain customs exemptions at the leased sites and for transit facilities from the territories under Belgian mandate to those sites. In 1951, by which date the mandates had been converted into trusteeships, a further agreement between the two administering powers provided for a change in the site at Dar-es-Salaam but otherwise left the 1921 arrangements in force. The Belgian Government, it should be added, expended considerable sums in developing the port facilities at the leased sites. On the eve of independence, the Tanganyika Government informed the United Kingdom that it intended to treat both agreements as void and to resume possession of the sites. The British Government replied that it did not subscribe to the view that the agreements were void but that, after independence, the international consequences of Tanganyika's views would not be its concern. It further informed Belgium and the Governments of the Congo and Rwanda-Burundi both of Tanganyika's statement and of its own reply.[54/] In the National Assembly Prime Minister Nyerere explained[55/] that in Tanganyika's view: "A lease in perpetuity of

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53/ See D.P. O'Connell, op. cit, vol. II, pp.241-3; and E.E. Seaton and S.T.M. Maliti, Treaties and Succession of States and Governments in Tanzania (1967) paragraphs 118-21.

54/ Materials on Succession of States (ST/LEG/SER.B/14), pp. 187-8.

55/ E.T. Seaton and S.T.M. Maliti, op.cit, paragraph 119.

land in the territory of Tanganyika is not something which is compatible with the sovereignty of Tanganyika when made by an authority whose own rights in Tanganyika were for a limited duration." After underlining the limited character of a mandate or trusteeship, he added: "It is clear, therefore, that in appearing to bind the territory of Tanganyika for all time, the United Kingdom was trying to do something which it did not have the power to do." When in 1962 Tanganyika gave notice of her request for the evacuation of the sites, Congo (Leopoldville), Rwanda and Burundi, which had all now attained independence, countered by claiming to have succeeded to Belgium's rights under the agreements. Tanganyika then proposed that new arrangements should be negotiated for the use of the port facilities, to which the other thrice successor States assented; but it seems that no new arrangement has yet been concluded and that de facto the port facilities are being operated as before.56/

34. The point made by Tanganyika as to the limited character of the competence of an administering power is clearly not one to be lightly dismissed without, however, expressing any opinion on the correctness or otherwise of the positions taken by the various interested States in this case, the Special Rapporteur thinks it sufficient here to stress that Tanganyika herself did not rest her claim to be released from the Belbase Agreements on the clean slate principle. On the contrary, by resting her claim specifically on the limited character of an administering power's competence to bind a mandated or trusteeship territory, she seems by implication to have recognized that the free port base and transit provisions of the agreements were such as would otherwise have been binding upon a successor State.

35. In the context, at any rate, of military bases, the relevance of the limited character of an administering Power's competence seems to have been conceded by the United States in connexion with the bases in the West Indies granted to it by the United Kingdom in 1941; and this in relation to the limited competence of a colonial administering power. In the agreement the bases were expressed to be leased to the United States for 99 years. But on the approach of the West Indies territories to independence the United States took the view that it could not, without exposing itself to criticism, insist that restrictions imposed upon the territory of the West Indies while it was in a colonial status would continue to bind it after independence.57/

56/ O'Connell, op.cit, vol. II, p.243.

57/ A.J.Esgain, The New Nations in International Law and Diplomacy (1965, edited by W.V.O'Brien), p.78.

The West Indies for its part maintained that "on its independence it should have the right to form its own alliances generally and to determine for itself what military bases should be allowed on its soil and under whose control such bases should come."[58/] In short, it was accepted on both sides that the future of the bases must be a matter of agreement between the United States and the newly independent West Indies. In the instant case it will be observed that there were two elements: (a) the grant while in a colonial status and (b) the personal and political character of military agreements. An analogous case is the Franco-American Treaty of 1950 granting a military base to the United States in Morocco before the termination of the protectorate. In that case, quite apart from the military character of the agreement, Morocco objected that the agreement had been concluded by the protecting power without any consultation with the protected State and could not be binding on the latter on its resumption of independence.[59/]

36. Treaties concerning water rights or navigation on rivers are commonly regarded as candidates for inclusion in the category of territorial treaties. Among early precedents cited is the right of navigation on the Mississippi granted to Great Britain by France in the Treaty of Paris 1863 which, on the transfer of Louisiana to Spain, the latter acknowledged to remain in force.[60/] The provisions concerning the Shatt-el-Arab in the Treaty of Erzevun, concluded in 1847 between Turkey and Persia are also cited. Persia, it is true, disputed the validity of the treaty. But on the point of Iraq's succession to Turkey's right under the treaty no question seems to have been raised.[61/] A modern precedent is Thailand's rights of navigation on the River Mekong, granted by earlier treaties and confirmed in a Franco-Siamese treaty of 1926. In connexion with the arrangements for the independence of Cambodia, Laos and Viet-Nam, it was recognized by these countries and by France that Thailand's navigational rights would remain in force.[62/]

37. As to water rights, a major modern precedent is the Nile Waters Agreement of 1929 concluded between Great Britain and Egypt which inter alia provided:

58/ Ibid., p.79.

59/ Ibid., pp.72-6.

60/ D.P.O'Connell, op.cit., vol.II, p.234. Another early precedent cited is the grant of navigation rights to Great Britain by Russia in the Treaty of 1825 relating to the Canadian-Alaska boundary, but it is hardly a very clear precedent; ibid.,pp.235-7.

61/ Ibid., pp.247-8.

62/ Ibid., pp.251-2.

> "Save with the previous agreement of the Egyptian Government no irrigation or power works or measures are to be constructed or taken on the River Nile or its branches, or on the lakes from which it flows, so far as all these are in the Sudan or in countries under British administration, which would, in such manner as to entail any prejudice to the interests of Egypt, either reduce the quantity of water arriving in Egypt, or modify the date of its arrival, or lower its level."

The effect of this provision was to accord priority to Egypt's uses of the Nile waters in the measure that they already existed at the date of the agreement. Moreover, at that date not only the Sudan but Tanganyika, Kenya and Uganda, all riparian territories in respect of the Nile river basin, were under British administration. On attaining independence the Sudan, while not challenging Egypt's established rights of user, declined to be bound by the 1929 agreement in regard to future developments in the use of Nile waters.[63/] Tanganyika, on becoming independent, declined to consider herself as in any way bound by the Nile Waters Agreement. She took the view that an agreement that purported to bind Tanganyika for all time to secure the prior consent of the Egyptian Government before it undertook irrigation or power works or other similar measures on Lake Victoria or in its catchment area was incompatible with her status as an independent sovereign State. At the same time, she indicated her willingness to enter into discussions with the other interested Governments for equitable regulation and division of the use of the Nile waters. In reply to Tanganyika's Note the United Arab Republic, for its part, maintained that "pending further agreement, the 1929 Nile Waters Agreement, which has so far regulated the use of the Nile waters, remains valid and applicable." In this instance, again, there is the complication of the treaty's having been concluded by an administering power, whose competence to bind a dependent territory in respect of territorial obligations is afterwards disputed on the territory's becoming independent.

38. Analogous complications obscure another modern precedent, Syria's water rights with regard to the River Jordan.[64/] On the establishment of the mandates for Palestine and Syria after the first world war, Great Britain and France entered into a series of agreements dealing with the boundary régime between the mandated territories, including the use of the waters of the River Jordan. An agreement of 1922 provided for equal

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63/ D.P. O'Connell, op.cit., vol. II, pp.245-6.

64/ See generally D.P. O'Connell, op.cit., vol. II, pp.248-50.

rights of navigation and fishing, while a further agreement of 1923 stated that "all rights derived from local laws or customs concerning the rise of the waters, streams, canals and lakes for the purposes of irrigation or supply of water for the inhabitants shall remain as at present." These arrangements were confirmed in a subsequent agreement. After independence, Israel embarked on a hydro-electric project which Syria considered incompatible with the régime established by the above-mentioned treaties. In debates in the Security Council Syria claimed that she had established rights to waters of the Jordan in virtue of the Franco-British treaties, while Israel denied that she was in any way affected by treaties concluded by the United Kingdom. Israel, indeed, denies that she is either in fact or in law a successor State at all.

39. Some other examples of bilateral treaties of a territorial character are cited in the writings of jurists, but they do not seem to throw any clearer light on the law governing succession in respect of such treaties.[65] Mention has, however, to be made of another category of bilateral treaties which are sometimes classified as "dispositive" or "real" treaties. These are treaties which confer specific rights of a private law character on nationals of a particular foreign State; e.g. rights to hold land. The United States, for example, has in the past regarded such treaties as dispositive in character for the purposes of the rules governing the effect of war on treaties.[66] Without entering into the question whether such a categorization of these treaties is valid in that context, the Special Rapporteur doubts whether there is any sufficient evidence that they are to be regarded as treaties of a dispositive or territorial character under the law governing succession of States in respect of treaties. Whether dispositive effects such treaties may have in international law, they do not seem to have been regarded as territorial treaties for the purposes of succession.

40. There remain, however, those treaties of a territorial character which were discussed by the Commission in 1964 at its Sixteenth Session under the broad designation of "treaties providing for objective régimes" in the course of its work on the general law of treaties. The Special Rapporteur's examination of those treaties from the point of view of their effects upon third States may be found in his third report on the law

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65/ E.G. certain Finnish frontier arrangements, the demilitarization of Hünningen, the Congo leases, etc.; See D.P. O'Connell, op.cit., vol. II, pp.234-62.

66/ See Harvard Research draft on the law of treaties.

of treaties.[67] It is now, however, necessary to consider how they may affect a successor State the position of which, by reason of its special link with the territory that is the subject of the treaty, is somewhat different from that of a third State. Reference has already been made to two of the principal precedents in paragraphs 14 to 16 above in discussing the evidence on this question to be found in the proceedings of international tribunals. These are the Free Zones case and the Aulands question in both of which the tribunal considered the successor State to be bound by a treaty régime of a territorial character established as part of a "European settlement."

41. An earlier case involving the same element of a treaty made in the general interest concerned Belgium's position, after her separation from the Netherlands, concerning the obligations of the latter provided for by the Peace Settlements concluded at the Congress of Vienna with respect to frontier fortresses[68] on the Franco-Netherlands boundary. The Four Powers (Great Britain, Austria, Prussia and Russia) apparently took the position that they could not "admit that any change with respect to the interests by which these arrangements were regulated, has resulted from the separation of Belgium and Holland; and the King of the Belgians is considered by them as standing with respect to these Fortresses and in relation to the Four Powers, in the same situation, and bound by the same obligations, as the King of the Netherlands previous to the Revolution". Although Belgium questioned whether she could be considered bound by a treaty to which she was a stranger, she seems in a treaty of 1931 to have acknowledged that she was in the same position as the Netherlands with respect to certain of the frontier fortresses. Another such case is article 92 of the Final Act of the Congress of Vienna, which provided for the neutralization of Chablais and Faucigny, then under the sovereignty of Sardinia.[69] These provisions were connected with the neutralization of Switzerland effected by the Congress and Switzerland had accepted them by a Declaration made in 1815. In 1960, when Sardinia ceded Nice and Savoy to France, both France and Sardinia recognized that the latter could only transfer to France what she herself possessed and that France would take the territory subject to the obligation to respect

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67/ (A/CN.4/167 and Add.1-3) commentary to article 63; Yearbook of the International Law Commission, 1964, vol. II, pp.26-34.

68/ D.P. O'Connell, op.cit., vol. II, pp.263-4.

69/ De Muralt, The Problem of State Succession with regard to Treaties (1954) pp.41-5; D.P. O'Connell, op.cit., Vol. II, pp.239-41.

the neutralization provisions. France, on her side, emphasized that "these provisions had formed part of a settlement made in the general interests of Europe." The provisions were maintained in force until abrogated by agreement between Switzerland and France after the first world war with the concurrence of the Allied and Associated Powers recorded in article 435 of the Treaty of Versailles. France, it should be mentioned, had herself been a party to the settlements concluded at the Congress of Vienna, so that it could be argued that she was not in the position of a purely successor State. Even so, her obligation to respect the neutralization provisions seems to have been discussed simply on the basis that, as a successor to Sardinia, she could only receive the territory burdened with those provisions.

42. The concept of international settlements is also invoked in connexion with the régimes of international rivers and canals. Thus, the Berlin Act of 1885 established régimes of free navigation on both the Rivers Congo and Niger; and in the former case the régime was regarded as binding upon Belgium after the Congo had passed to her by cession. In the Treaty of St. Germain of 1919 some only of the signatories of the 1885 Act abrogated it as between themselves, substituting for it a preferential régime; and this came into question before the Permanent Court of International Justice in the Oscar Chinn case. As pointed out in a text-book,[70] Belgium's succession to the obligations of the 1885 Act appears to have been taken for granted by the Court in that case. The various riparian territories of the two rivers have meanwhile become independent States, giving rise to the problem of their position in relation to the Berlin Act and the Treaty of St. Germain. In regard to the Congo the problem has manifested itself in GATT and also in connexion with association agreements with the European Economic Community. Although the States concerned may have varied in the policies which they have adopted concerning the continuance of the previous régime, they seem to have taken the general position that their emergence to independence has caused the Treaty of St. Germain and the Berlin Act to lapse. In regard to the Niger, the newly independent riparian States in 1963 replaced the Berlin Act and the Treaty of St. Germain with a new convention. The parties to this convention "abrogated" the previous instruments as between themselves. In the negotiations preceding its conclusion there seems to have been some difference of opinion as to whether abrogation was necessary; but it was on the basis of a fundamental change of circumstances rather than of non-succession that these doubts were expressed.[71]

70/ D.P. O'Connell, op.cit., vol. II, p.308.

71/ T.O. Elias, American Journal of International Law (1969), vol. 57, pp.879-80.

43. The Final Act of the Congress of Vienna set up a Commission for the Rhine, the régime of which was further developed in 1868 by the Convention of Mannheim; and although after the first world war the Treaty of Versailles reorganized the Commission, it maintained the regime of the Convention of Mannheim in force. As to cases of succession, it appears that in connexion with membership of the Commission, when changes of sovereignty occurred, the rules of succession were applied, though not perhaps on any specific theory of succession to international régimes or to territorial treaties.

44. The question of succession of States has also been raised in connexion with the Suez Canal Convention of 1888. Egypt herself fully accepted that, as successor to the Ottoman Empire in the sovereignty of the territory, she was under an obligation to respect the régime established by the Convention and in 1957 expressly reaffirmed that obligation. The Convention created a right of free passage through the Canal and, whether by virtue of the treaty or of the customary régime which developed from it, this right was recognized as attaching to non-signatories as well as signatories. Accordingly, although many new States have hived off from the parties to the Convention, their right to be considered successor States was not of importance in regard to the use of the Canal. In 1966, however, it did come briefly into prominence in connexion with the Suez Canal Users Conference convened in London. Complaint was there made that a number of States, who were not present, ought to have been invited to the Conference; and, inter alia, it was said that some of those States had the right to be present in the capacity of successor States of one or other party to the Convention.[72/] The matter was not pushed to any conclusion, and the incident can at most be said to provide an indication in favour of succession in the case of an international settlement of this kind.

45. Some further precedents of one kind or another might be examined, but it is doubtful whether they would throw any clearer light on the difficult question of territorial treaties. Running through the precedents and the opinions of writers are strong indications of a belief that certain treaties attach a régime to territory which continues to bind it in the hands of any successor State. Not infrequently other elements enter into the picture, such as an allegation of fundamental change of circumstances or the alleged limit competence of the predecessor State, and the successor State in fact claims

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72/ Materials on Succession of States (ST/LEG/SER.B/14), pp. 157-8; D.P. O'Connell, op. cit., vol. II, pp. 271-2.

to be free of the obligation to respect the régime. Nevertheless, the indication of the general acceptance of such a principle remain. At the same time, neither the precedents nor the opinions of writers give clear guidance as to the criteria for determining when this principle operates. The evidence does not, however, suggest that this exception to the clean slate and moving treaty-frontier principles, assuming that it is recognized by the Commission, should embrace a very wide range of so-called territorial treaties. On the contrary, this exception seems to be limited to cases where one State by treaty grants, in respect of its territory or a particular part, rights of user or enjoyment, or rights to restrict its own user or enjoyment, which are intended for an indefinite or for a specified period to attach to the territory or particular parts of the territory of another State rather than to the other State as such, or, alternatively, to be for the benefit of a group of States or of States generally. There must in short be something in the nature of a territorial settlement.

46. In any event, the question arises here, as in the case of boundary settlements whether, if succession seems ipso jure, it is succession in respect of the treaty as such or succession in respect of the factual and legal situation - the régime - established by the dispositive effects of the treaty. The evidence would, it is thought, justify either approach; but it seems preferable that, whichever approach is adopted by the Commission in regard to boundary settlements, should also be adopted in regard to other forms of territorial settlements. Accordingly, the Special Rapporteur has prepared alternative texts also for article 22 (bis).