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PILOT PROJECT OF THE COUNCIL OF EUROPE ON STATE PRACTICE REGARDING STATE SUCCESSION AND ISSUES OF RECOGNITION

REPORT PREPARED UNDER THE AEGIS OF THE
Ad Hoc COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW (CAHDI)

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FOREWORD

State succession and recognition are crucial issues of international relations and the position of States regarding these issues varies considerably.

The *Pilot Project of the Council of Europe on State Practice regarding State Succession and Issues of Recognition*, carried out under the aegis of the *Ad Hoc* Committee of Legal Advisers on Public International Law (CAHDI), represents a unique exercise, the first of its kind.

It encompasses the practice of sixteen member States of the Council of Europe and provides significant information about these States' position vis-à-vis the new European architecture following the developments of 1989.

On the basis of the information gathered, under the aegis of the CAHDI a report was prepared by the Max Planck Institute for Comparative Public Law and International Law (Germany), the T.M.C. Asser Institute (the Netherlands) and the Erik Castrén Institute of International Law and Human Rights (Finland).

This co-operative effort casts fresh light on the difficult issue of how States approach questions of succession and recognition and the Pilot Project documents illustrate the findings of the report.

With this report the Council of Europe wishes to contribute in a practical manner to the celebration of the United Nations Decade of Public International Law (1989-1999) and to facilitate the understanding of how States can help to build a stable and peaceful international community by paving the way for the progressive development of international law in this area.

Daniel Tarschys
Secretary General of the Council of Europe

INTRODUCTION

The Pilot Project on State Practice regarding State Succession and Issues of Recognition was approved by the *Ad Hoc* Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe in March 1994. It covers the period from 1989 to 1995. 16 member States of the Council of Europe submitted national reports, namely: Austria, Belgium, the Czech Republic, Denmark, Finland, France, Germany, Greece, Italy, the Netherlands, Norway, the Slovak Republic, Sweden, Switzerland, Turkey and the United Kingdom. The last report was received in May 1998. The length of the reports and the number of documents referred to and/or annexed to the report vary significantly.

National contributions to the Pilot Project were prepared in accordance with the “Guidelines for documentation on State practice relating to State succession and issues of recognition” adopted by the Council of Europe. They were to contain, where relevant, official documents and statements made by all three branches of government, i.e. the executive, the legislative and national courts and tribunals.

On the basis of the information gathered at its 15th meeting (Strasbourg, March 1998), the CAHDI decided on the preparation of a report by the Max Planck Institute for Comparative Public Law and International Law (Germany), the T.M.C. Asser Institute (the Netherlands) and the Erik Castrén Institute of International Law and Human Rights (Finland), with the aim of analysing the practice of the contributing member States. Given the fact that the most important issues of recognition and state succession arose in a European context, and considering that national reports focused to a large extent, if not exclusively, on the cases of Germany, the Union of Soviet Socialist Republics (USSR), the Socialist Federal Republic of Yugoslavia (SFRY), and the Czech and Slovak Federal Republic (CSFR), both the analysis as well as the reproduction of documents are deliberately limited to those cases mentioned. However, reference is made to other cases and documents dealing with developments that took place outside Europe in the period concerned.

The report deals in separate chapters with: recognition of States and governments (Chapter 2), State succession in respect of treaties (Chapter 3) and State succession in respect of other matters (property, archives and debts, and nationality) (Chapter 4).

In each of these chapters, the four main cases of State succession mentioned above are discussed and the Council of Europe’s member States’ practice is illustrated as reflected in their national contributions to the Pilot Project or in other suitable sources.

In order to avoid duplication, chapters 2-4 are preceded by a general Introduction (Chapter 1) including basic information, dates and events about the cases that will be dealt with later.

The analysis of the information gathered in the framework of the Pilot Project is followed by overall conclusions, which are intended to summarise the main findings resulting from analysis of the various materials.

The report is complemented with substantial documentary appendices, including selected texts of the Pilot Project: national contributions in the form of short national files, original documents sent in by the respective national rapporteurs, excerpts from such documents, etc. This selection is intended to be as representative as possible of the Pilot Project and therefore covers not only the different cases of state succession and the different issues addressed in the core of the report, but also other cases.

It should be noted that the views expressed in the following chapters are those of the authors and do not necessarily reflect the position of individual States or of the CAHDI as a whole with regard to the interpretation of these situations and events referred to therein.

The CAHDI and the Secretariat of the Council of Europe are grateful to Professor Martti Koskenniemi, Dr. Jan Klabbers, Dr. Olivier Ribbelink and Dr. Andreas Zimmermann for their co-operation in carrying out this valuable work, which will be a useful tool for researchers and scholars and a source of inspiration for States in conducting their international relations and contributing to a better international community.

Strasbourg, September 1998

György SZENASI
Chairman of the CAHDI

Guy DE VEL
Director of Legal Affairs

CHAPTER 1: GENERAL INTRODUCTION

Martti Koskeniemi, Jan Klabbbers, Olivier Ribbelink and Andreas Zimmermann¹

1.1 Introduction

The topic of the law of State succession appeared, after the near-completion of decolonisation, to have outlived its utility. No one expected much more to happen regarding State succession, and when the Dutch Government submitted the 1978 *Vienna Convention on Succession of States in respect of Treaties*² to the Second Chamber of Parliament for approval, it introduced the Convention by pointing to its possible contribution to the stabilisation of international law, while acknowledging that the topic was "not really urgent." This was in March 1990.³ Shortly thereafter, instances of State succession in Europe alone⁴ dominated the headlines for a number of years, and issues related in one way or another to State succession still reverberate across the front pages.

The Council of Europe *Ad Hoc* Committee of Legal Advisers on Public International Law (CAHDI) which brings together the Legal Advisers to the Foreign Ministries of the Member States of the Council of Europe, approved in March 1994 a project to gather instances of State practice relating to State succession with the object of gaining some conceptual and legal clarity. This Pilot Project, as it was to be called, received a warm response, and in the end 16 Member States of the Council of Europe submitted materials drawn from their practice.⁵

As the analytical reports will demonstrate, both the scope and the origins of submitted practice diverged widely. While under the "*Guidelines for documentation on State practice relating to State succession and issues of recognition*"⁶, the Council of Europe's Member States were expected to submit materials drawn from the executive, legislative and judiciary branches of government, it turned out that most materials concerned relevant action taken by the executive. Moreover, most of the materials related to issues of recognition and State succession in respect of treaties; by contrast, succession in respect of State property, debts, archives and nationality was the topic of only a handful of the documents submitted.

International lawyers usually rely on the practice of States for two main reasons. One is, that written rules find their ultimate test in practice; practice will reveal how useful, or just, or practicable, a written rule is. Second, practice may also dictate, up to a point at least, what future behaviour is deemed desirable. Where no written rules exist, or where practice diverges considerably from existing written rules, practice may transform itself into law. In other words, today's practice may provide normative guidance with respect to future actions.

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²UN Doc. A/CONF.80/31

³Document NL/10. In December 1994, the Government withdrew its bill of approval, arguing that the Convention had "lost its value as regards the codification and development of the rules of international law in the field ...", see Doc. NL/48. Translation in 27 *Netherlands Yearbook of International Law* (1996), at 240.

⁴Not counting the gaining of independence by Namibia (1990) and Eritrea (1993), and the unification of North and South Yemen (1990).

⁵Austria, Belgium, the Czech Republic, Denmark, Finland, France, Germany, Greece, Italy, the Netherlands, Norway, the Slovak Republic, Sweden, Switzerland, Turkey, and the United Kingdom.

⁶CAHDI (94) 19

However, precisely when it comes to issues of State succession, some doubt arises whether it is likely that practice will have such a law-making or even law-confirming effect. Cases of State succession, so the argument goes, are simply too diverse to warrant the drawing of any general conclusions or, what eventually amounts to the same, are so diverse as to allow only the drawing of conclusions of such generality as to make them unsuitable as guidelines for practice.⁷ Nonetheless, two general conventions on State succession have been drawn up, and a third instrument is in preparation. Yet, the 1978 Vienna Convention on Succession of States in respect of Treaties took almost 20 years before it attracted the required 15 instruments of ratification allowing it to enter into force⁸; the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts has yet to enter into force⁹; and only time will tell what will become of the ILC's draft articles on Nationality of Natural Persons in relation to Succession of States¹⁰.

The law on recognition of States is not very well settled, and is treated in the textbooks as the battleground of two largely irreconcilable theories: the declaratory theory (which holds that recognition merely amounts to acknowledgement of what is already an established fact), and the constitutive theory (which, by contrast, argues that recognition constitutes the basis of acceptance of a new State as a member of the community of States). The confusion is enhanced by the interplay of such notions as *de facto* and *de iure* recognition, recognition of governments rather than States, and issues of implied and collective recognition. Indeed, one often hears the argument that recognition is a political rather than a legal act.¹¹ This argument, however, circumvents the normative dilemmas concerning questions about the regulation of membership of the international community, and about the effects political changes in the international world should have on domestic courts and other authorities. With this in mind, it is of special interest to see what the practical effect is of such developments as the issuing of guidelines for recognition by the European Community (EC).¹²

Most of the materials submitted dealt with issues of State succession in recent years in Europe. The main factual aspects of the unification of Germany and the dissolution of the Soviet Union, Yugoslavia, and Czechoslovakia will be outlined below.

1.2 Germany

Germany found itself, at the close of the Second World War, divided into four zones of occupation, under the authority of four occupying powers: the United States, the United Kingdom, France, and the USSR. The first three zones were to become the Federal Republic of Germany (FRG) or West Germany, and the USSR-governed zone became the German Democratic Republic (GDR) or East Germany. However, Berlin remained under the joint control

⁷See D.P. O'Connell, "Reflections on the State Succession Convention", 39 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1979), 725-739.

⁸The 1978 Convention entered into force on 6 November 1996, and still has only 15 parties (28 May 1998).

⁹The 1983 Convention has only five signatories (28 May 1998).

¹⁰The *International Law Commission* has adopted a set of draft articles in first reading at its 1997 session. A *European Convention on Nationality*, with some provisions on State succession, was concluded on 6 November 1997 within the framework of the Council of Europe. The text is to be found in 37 *International Legal Materials* (1998), 44-55; and European Treaty Series No. 166.

¹¹Sir Hersch Lauterpacht opened his classic study *Recognition in international law* (Cambridge 1947), with the observation, still believed accurate, that "[a]ccording to what is probably still the predominant view in the literature of international law, recognition of States is not a matter governed by law but a question of policy."

¹²"Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union" of 16 December 1991, text a.o. in 31 *International Legal Materials* (1992), 1485; and e.g. in Doc. UK/68.

of the four Allied Powers.

The partitioning met with much resistance, and the FRG never gave up hope that someday Germany would be united again. In the end, spurred by a massive migration of East Germans to the west as well as by internal constitutional law obligations, unification (or re-unification, as many Germans are wont to put it) was sealed on 3 October 1990.

On 18 May 1990, the two States had already agreed to establish a monetary, economic and social union, which was to become effective as of 30 June 1990.¹³

The next big step was taken in Moscow on 12 September 1990, when the two Germanies reached an agreement with the four occupying powers: the *Treaty on the Final Settlement with respect to Germany*, often referred to as the "2 + 4" treaty. Perhaps the most important provision of this treaty is its article 7, terminating all rights and responsibilities of the four occupying powers in relation to both Berlin and Germany as a whole.¹⁴

Within two weeks, this was followed by two agreements between France, the United Kingdom (UK), the United States (US), and the Federal Republic of Germany, on matters relating to Berlin, including the presence of armed forces¹⁵, and three days after those agreements were concluded, on 28 September 1990, the same four parties concluded an agreement providing for the termination of most of the agreements which had governed relations between the Federal Republic and its three occupying powers, the "relations" and the "settlements" conventions, respectively.¹⁶

Earlier, on 31 August 1990 the two German States had concluded a Unification Treaty¹⁷ which, in accordance with article 23 of the *Grundgesetz* of the FRG, provided that the various *Länder* comprising the GDR were to accede to the FRG, with the former East and West Berlin being merged into a separate *Land*. This Unification Treaty also details the various points of departure concerning issues related to succession. Thus, articles 11 and 12 regulate the fate of treaties to which either of the two German States was a party, with article 11 basically continuing the treaties to which the old FRG was a party, and article 12 providing for consultations with treaty partners with a view to deciding upon the fate of treaties to which the former GDR was a party.

Chapter VI of the Unification Treaty deals, in outline, with succession in respect of debts and property, the basic idea being that the united Germany would succeed to both the assets of the former GDR and to its debts, including those of State-run enterprises such as the railways (Deutsche Reichsbahn) and the postal service (Deutsche Post). A Special Fund was created to service the debts incurred by the GDR, to be abolished at the end of 1993.

The use of the name Germany in the text refers to the united Germany, that is, as per 3 October 1990, as opposed to the use of FRG and GDR regarding events and situations before that date.

1.3 Union of Soviet Socialist Republics (USSR)

After it had become clear that the USSR was no longer viable, underlined by a failed *coup d'état* in August 1991, the Baltic States were the first to declare their independence. On 20

¹³The text of the agreement is reproduced in 29 *International Legal Materials* (1990), 1108.

¹⁴Reproduced in *ibid.* at 1186.

¹⁵Reproduced in 30 *International Legal Materials* (1991), 445 and 450, respectively.

¹⁶Reproduced in *ibid.*, 454.

¹⁷Reproduced in *ibid.*, 457.

August Estonia declared itself to be an independent State, followed a day later by Latvia, while Lithuania had already on 11 March 1990 declared its independence.

Recognition of the independence of the Baltic States followed quickly, partly perhaps due to their anomalous legal position within the USSR: recognised by many as *de facto*, but not *de iure*, part of the Soviet Union. Their independence was sealed by their admission to membership of the United Nations in September 1991.

Most of the remaining republics comprising the former USSR were, in December 1991, to smoothen the path to independence by creating the Commonwealth of Independent States (CIS).¹⁸ Founded by Belarus, the Russian Federation and Ukraine, the CIS was eventually to consist of those three States plus Azerbaijan, Armenia, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan, and Uzbekistan.

The various documents concluded in connection with the establishment of the CIS regulated some issues of succession, but only to a limited extent and not always unequivocally. Thus, the CIS Agreement of 8 December laid down, in its article 12, that the Member States undertook to discharge the international obligations incumbent upon them under treaties and agreements entered into by the former USSR; the Alma Ata Declaration of 21 December 1991, however, added the rider that this was to be done in accordance with the members' respective constitutional provisions.

The situation was, however, nuanced by the claim of the Russian Federation to be the continuing State ("gosudarstvo-prodolzatel") of the former USSR, instead of just a successor State, similar to the other CIS member States. This claim, which must be taken to mean that the Russian Federation guarantees the continuity of all rights and obligations of the USSR under international law, was soon accepted by the international community. Hence, the Russian Federation simply took over the seat of the former USSR in many international organisations, including the UN Security Council. The Russian Federation, consistent with this position, has declared that it will continue to honour the international treaties concluded by the former USSR.

Another nuance was created by the claim of the three Baltic States, who claimed to continue their pre-1940 Statehood. Consequently, these States have thus not claimed succession to the property of the former USSR, have remained outside the negotiations on the fate of the debt of the former USSR, and have not been held to succeed to the treaties of the USSR.

In this respect, proper rules of succession would apply only to the eleven remaining former Soviet republics. Their practice, it appears, has however been far from uniform.

The Alma Ata Declaration also established a unified command of strategic military forces, although later problems would arise relating to the USSR's Black Sea fleet. Earlier, on 4 December 1991, an agreement had already been reached on succession to the foreign debts and assets of the USSR, stipulating joint and several liability. In the end, partly based on the preference of the USSR's western creditors assembled in the "Paris Club", the Russian Federation was to assume the entire debt of the USSR, on condition that it also acquired the USSR's properties abroad.

1.4 Socialist Federal Republic of Yugoslavia (SFRY)

In the summer of 1991, hostilities broke out in the Socialist Federal Republic of Yugoslavia, following proclamations of independence by some of the constituent republics. Both Slovenia and Croatia had proclaimed independence in June 1991; in Macedonia, a referendum in

¹⁸Both the tripartite Declaration proclaiming the CIS and the CIS Agreement, as well as a number of other pertinent documents, are reproduced in 31 *International Legal Materials* (1992), 142.

September 1991 showed support for independence, and in Bosnia and Herzegovina, parliament had adopted a sovereignty resolution in October of the same year which was, however, contested by the Serbian population of the republic. On a request from the Chairman of the EC-sponsored Conference on Yugoslavia, the so-called Badinter Commission (set up by that same Conference) found on 29 November 1991, "that the Socialist Federal Republic of Yugoslavia is in the process of dissolution".¹⁹

In July 1992, the Badinter Commission reached the conclusion that the process of dissolution had been completed. Consequently, the Commission found that "the SFRY no longer exists."²⁰ Instead, a number of new States had been created. Croatia, Slovenia, and Bosnia and Herzegovina had met with general recognition, and had been admitted as new members of the United Nations on 22 May 1992. These States have generally accepted *ipso facto* succession to treaties of the former SFRY subject, however, to their constitutional provisions. In many cases, the fate of bilateral treaties has been decided between the parties concerned.

Serbia and Montenegro too had, so the Commission underlined, created a new State, the Federal Republic of Yugoslavia (FRY). Thus, the Commission denied Serbian claims that the FRY is identical with, that is, the continuation of, the former SFRY: the FRY was to be regarded as merely one of the five successors to the SFRY.

Where continuity was denied, and where hostilities so greatly influenced relations between the various former SFRY republics, it soon became evident that issues of succession to State property, debts and archives would not be regulated smoothly, and in its ninth opinion the Badinter Commission, inspired by the work of the Conference's Working Group on Succession Issues (the so-called Watts group), issued a number of guidelines to be followed by the five successors. They were to achieve an equitable solution, drawing on the principles embodied in the two conventions on succession, and share property, assets and debts of the former SFRY in an equitable manner.²¹

That proved easier said than done. Agreement turned out hard to reach even on issues such as the very definition of State property. The FRY claimed, in essence, that property generated on the basis of former State authority was to be regarded as State property; the other successor States considered this far too wide a definition. While it is clear that the federal debts of the SFRY were relatively small, agreements on a division thereof were always made conditional on agreement concerning the division of property.

When it comes to succession in respect of treaties, perhaps the most notorious examples concern treaties for the protection of human rights.²² Thus far, the International Court of Justice has steered clear of deciding whether or not, in certain cases, the principle of *ipso iure* continuity prevails.

1.5 Czech and Slovak Federal Republic (CSFR)

By comparison, the dissolution of the Czech and Slovak Federal Republic has given rise to few legal problems. Both entities agreed on the process and the modalities of dissolution, and as from 31 December 1992, two new States have come into existence; neither has claimed to be the continuation of the former CSFR.

¹⁹The text of the first 10 opinions of the Badinter Commission is reproduced in 92 *International Law Reports* 162. The passage quoted is to be found at 166.

²⁰Opinion # 8.

²¹Opinion # 9.

²²See Menno Kamminga, "State Succession in respect of human rights treaties", *European Journal of International Law* (1996), 469-484.

Both new republics have recognised, as a matter of general principle, that treaty obligations would be subject to the *ipso iure* continuity rule. When it comes to membership of international organisations, both new republics have generally opted to apply for admission as independent States. With respect to property and debts, the Czech Republic and the Slovak Republic have based their agreement largely on the ratio of their populations.

1.6 Conclusion

As indicated above, the factual circumstances of the four selected cases on which materials have been submitted differ markedly, as have the responses of the international community at large. It remains to be seen to what extent the practice gathered by the CAHDI may contribute to conceptual and legal clarification. The following three chapters (plus a short conclusion) will indicate in what respects the collected practice of the Member States of the Council of Europe contributes to the law on State succession and recognition.

Those chapters will be followed by selected documents from the practice of the Council of Europe's Member States. In an important sense, this document section will be the heart of this volume, as the documents collected offer a unique view on what it is that States actually do, and how they do it.

At this point, however, some remarks must be made about the selection of documents, as well as about the analysis of the documents in the following chapters.

A first remark concerns the fact that both the selection and the analysis concentrate on the CAHDI materials, that is, on the documents received. Only in a few instances, where it was considered relevant for the discussion, reference is made to other documents and/or texts.

Since not all member States of the Council of Europe have participated in the Pilot Project, and since the amount of available material differs strongly between the participating States, there will be, perforce, differences in the discussion of the selected cases of State succession.

Several States have delegated the collection of materials to research institutes or universities, such as, among others, the Max Planck Institute for Comparative Public Law and International Law, the T.M.C. Asser Instituut, and the Université Libre de Bruxelles, while other selections have been prepared by Ministries of Foreign Affairs. The former selections were generally more extensive and diverse than the latter, and this also reflects on the analysis and selection.

Finally, it should be realised that when a "large contributor" has had many dealings regarding a specific case of State succession, this will also have effects on the amount of available material about, and thus influence the attention given to, that case of State succession as well as that contributing State.

A second remark concerns the fact that the terminology used by the authors in their description and analysis of specific situations and events is without prejudice to the positions taken by individual States with regard to the interpretation of these situations and events. Thus, for example, the use in the paragraphs on Germany of the terms "uniting" and "unification" (cf. *Einigung*, *Vereintes Deutschland*, etc.) is without prejudice to the issue whether this actually concerns a "re-uniting" and thus a "re-unification".

CHAPTER 2: STATE SUCCESSION AND THE RECOGNITION OF STATES AND GOVERNMENTS

Olivier Ribbelink²³

2.1 Introduction

State succession involves a change of sovereignty over territory, or "the replacement of one State by another in the responsibility for the international relations of territory".²⁴ In order to be able to deal with the consequences (e.g. in respect of treaties, property, archives, debts, or nationality) it is necessary for other States, as well as for international organisations, to identify the States involved.

Thus, other States and international organisations will look into the claims forwarded by the States involved and determine how they will act upon that claim, that is, decide on their position in respect of the consequences of the events.

This includes determining whether only existing States are involved or new States as well. As a rule, there can be no State succession when the "successor"- State is the same international legal person as the "predecessor"State. In that case, that is, when there is continuity and identity between these States, they must be considered the same State.

Succession involving two existing States (e.g. the transfer of -part(s) of- territory) will, generally speaking, not require any act of recognition of either States or Governments, but at the most recognition of the legitimacy of the act or process leading to this specific outcome. Nevertheless, State succession of this type may have consequences for the application of treaties, in particular localised treaties, such as boundary treaties.

In cases of uniting (or "merger") of States, the legitimacy of the process is generally assumed. In fact, the rather few cases of uniting of States have mostly been the result of a voluntary undertaking of the States involved, and any other way is likely to be assumed contrary to, that is not in conformity with, international law. Nevertheless, in some instances the question may come up whether the united State is to be considered a new State or the enlargement of one existing State.

However, in cases of separation of States, that is "when a part or more parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist"²⁵, the situation is different. Historically, separation of States has often been the outcome of sometimes long-lasting struggle, though not always violent, in which the central State authority is challenged by, for example, regional, national, ethnic or religious groups, claiming either some degree of autonomy or independence.

Other subjects of international law will have to determine whether the predecessor State continues to exist, as a "rump-State", with one or more new States having separated from it. In that case relations with the "old" State will, or at least can, continue albeit under different circumstances and conditions, and therefore adapted to the new situation. At the same time a decision will have to be taken as to the position one will have to take towards the new State(s) and their government(s).

However, when it is decided that the predecessor State has ceased to exist ("dissolution" or "dismemberment") there can only be new States and similar decisions will have to be taken. A complicating factor in the determination of the process and its outcome may be the position taken by the States involved in the State succession.

²³*Idem* 1.

²⁴Art. 2.1(b) Vienna Convention on State Succession in Respect of Treaties, 1978

²⁵Art.34, 1978 Vienna Convention

A distinction must be made between recognition of States and recognition of governments. Recognition of a State only becomes an issue with the appearance of a "new" State. When there is no new State the issue does not arise. Recognition of a State means that, according to the recognising State, that specific State fulfils the criteria for statehood. However, as indicated in Chapter 1, two different approaches to the recognition of States, based on two different theories, can be distinguished.

The "constitutive theory" sees recognition of a State as a necessary condition for its existence on the international sphere as well as for having rights and duties under international law. This approach has historical origins in that in the 19th century a small number of powerful (European) States more or less determined which other States could join the community of States.

This approach has in the latter half of the 20th century been less frequently applied than previously. In recent decades preferences appeared to have shifted to the "declaratory theory", which holds that recognition is, or at least should be, the acknowledgement of a factual situation: when the generally accepted criteria for the existence of a State are fulfilled, the State exists.

These criteria, although not always identically formulated, and with varying emphasis on the different criteria, are essentially the following: a State must have a defined territory, a permanent population, and effective control over territory and population. An often-mentioned fourth criterion is that the State has the capacity to enter into relations with other States.²⁶ The latter is sometimes interpreted as meaning "independence in international relations".²⁷ However, in practice, as the United Kingdom Foreign and Commonwealth Office (FCO), stated on 5 February 1992: "These criteria are always subject to interpretation in the light of circumstances on the ground".²⁸

Not surprisingly, several documents refer to these criteria²⁹. For example, the Austrian Minister for Foreign Affairs not only refers (re. recognition of Croatia and Slovenia) to "the usual principles of international law: the criteria of territory, sovereignty and a populace would affect the relevant decision"³⁰, but he also states that: "[t]he formal recognition could be decided only when the internationally legal requirements were met."³¹

However, sometimes individual States do add their own criteria or conditions.³² For example,

²⁶These criteria can e.g. be found in Art.1 of the 1933 Montevideo Convention on Rights and Duties of States, see e.g. Doc. D/2. Note that the criterion of defined territory does not preclude recognition of States "whose borders are not fully agreed with their neighbours", cf. Doc. UK/59. The criterion of effective government is, of course, directly linked to independence and State sovereignty. Nevertheless, virtually all States maintained their recognition of Kuwait, although it no longer exercised effective control over its territory after it had been occupied by Irak. Cf. Doc. NL/14: "A State does not immediately cease to exist when its territory is occupied by a hostile power." In fact, international law prohibits annexation by the occupying power and thus recognition by other States; cf. *idem*, and Doc. D/16.

²⁷Cf. Doc. UK/1. And Doc. UK/3 in which it is stated that for the UK the "normal criteria ... [to] apply for recognition as a State are that it should have, and seem likely to continue to have a clearly defined territory with a population, a Government who are able of themselves to exercise effective control of that territory, and independence in their external relations." Also see e.g. Doc. UK/22 (re the non-recognition of Bophuthatswana), and Doc. UK/24 (re. the Baltic States).

²⁸Doc. UK/108

²⁹Cf. e.g. Docs. S/3, S/36, S/37, A/1

³⁰Doc. A/1 (Statement of 17 June 1991)

³¹*Ibidem* (Statement of 25 June 1991)

³²But see Doc. S/37: "In general, ..., Sweden has avoided adding political conditions or prerequisites to the three legal criteria."

Switzerland which stated that another, and as it was called, exclusively political and extremely important criterion is that Switzerland wishes to be able to control ("maitriser") the effects of its act of recognition, which is taken to mean that it is essential to recognise a State only when its security is by and large assured and guaranteed ("assurée et garantie").³³

Recognition of a government means that according to the recognising State the recognised government exercises effective control over the territory of the State. The recognition of a government, however, also involves rather different issues. A change of government can, in principle, occur in any given State at any given moment. The question whether this new government should be recognised (or not) is of a predominantly political nature. It involves not only the recognition of effective control over the territory in question, but at the same time, at least for some States, it may also involve approval of the new government, which is often closely related to the way that government has come to power.

Therefore, States sometimes make a distinction between *de facto* and *de iure* recognition. The former is seen as mere acceptance of the factual situation while simultaneously indicating disapproval of, for example, the regime or the way in which control has been acquired over the territory involved, while the latter is taken also to imply approval of the situation. Thus, several States have recognised *de facto* control of the USSR over the Baltic States while they have withheld *de iure* recognition.³⁴

However, in modern practice, most States just recognise States without specification of the type of recognition.³⁵ Another feature has become that they state their position as to (non-) recognition explicitly. That way speculative interpretations as to whether they recognise certain States that could be implied from their behaviour can be avoided. Notwithstanding, States sometimes go to great lengths to make certain that specific actions, declarations, or voting records shall not be interpreted as implied recognition.³⁶

Several States have adopted the policy that they only recognise States, and not Governments, e.g. Switzerland³⁷, the United Kingdom³⁸, Germany³⁹, and the Netherlands⁴⁰.

Not all of these States have always adhered to this policy. The Netherlands government changed its policy in July 1990 when it stated that there is no duty to recognise a new government and no right to recognition of a new government. As the practice of almost all the other States partners in European Political Co-operation (EPC) has become that they recognise States, not governments, and since it is desirable to follow the policy of all the other EPC partners, the Netherlands had come to the conclusion that it would no longer recognise governments, but only States.⁴¹

³³Cf. Doc. CH/24 re the recognition of the three Baltic States. The same document also States that: "... il ne s'agit pas d'être le premier mais de mesurer tout les poids de sa decision."

³⁴Cf. infra para. 2.3.1

³⁵Interestingly, Doc.B/2 and B/3 refer to *de facto* recognition of States through their admittance to membership of the United Nations. This, judging from the extract, mainly has to do with the fact that diplomatic relations will not yet follow.

³⁶See e.g. Docs. D/7, D/9. Also Doc. D/37 re the South African "homelands". But see infra para. 2.4.4 on "The Former Yugoslav Republic of Macedonia"

³⁷Cf. Docs. CH/27 and CH/28.

³⁸Cf. a.o. Docs. UK/4, UK/5, UK/6, UK/8. Also see Docs. UK/32 (re. Panama), UK/56 (re. Estonia), and UK/123, UK/124 (re. the (non-)recognition of governmental entities in Somalia).

³⁹Cf. Doc. D/4: "It is a constant practice, in terms of public international law, of the Federal Republic of Germany, not to make statements concerning the recognition of governments"

⁴⁰Cf. Doc. NL/13

⁴¹Cf. Doc. NL/13. Also cf. Doc. UK/8 in which it is recalled that the UK changed its policy in this regard in 1980.

To this the Netherlands later added that as a matter of principle this doctrine has the advantage that the appearance of interference in the internal affairs of other States would be avoided.⁴²

Four years later, during a debate in Parliament about the situation in Rwanda, the Netherlands Minister of Foreign Affairs declared, in rather cryptic terms, that "[f]ormally the Netherlands only recognises States. *De facto* the Ruandese government is recognised. Possibly other countries do formally recognise governments." To which he added: "In as far as it is important for those countries to know whether the Netherlands recognises that government, the Netherlands government will disseminate this."⁴³

Recognition has political as well as legal aspects, both before and after the factual recognition. Often the decision whether to recognise or not is perceived as highly political, and is thus taken at the political level⁴⁴, notwithstanding the fact that any act of recognition has also, as a matter of course, legal consequences. Nevertheless, the effects of recognition may differ between States, given the differences between national legal systems⁴⁵, as well as procedures.⁴⁶

One of the potential, and in the documentation frequently recurring, consequences of recognition, is the establishment of diplomatic relations, which in the classification scheme of the Pilot Project is dealt with as an effect of recognition.

Thus, while the recognition of a government implies the recognition of that State, the recognition of a State does not automatically imply the recognition of that State's government. Similarly, the establishment of diplomatic relations between two States implies their mutual recognition, although usually formal recognition precedes, and sometimes coincides with, the establishment of diplomatic relations.⁴⁷

Two of the four selected cases (Germany⁴⁸ and the CSFR⁴⁹) have taken place with agreement between the States involved, and did not create problems regarding recognition of States and governments. The two other cases (USSR⁵⁰ and SFRY⁵¹) did pose specific problems with respect to recognition, due to differences of opinion regarding the status of the States involved, not only among themselves but between third States as well. This was also expressed through action of the European Community, which adopted the "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union"⁵² of 16 December 1991, and within the United Nations with respect to membership of specific States, for example, of the FRY and "the Former Yugoslav Republic of Macedonia".

States (including non-member States of the European Community) have made their recognition

⁴²Cf. Doc. NL/14

⁴³Doc. NL/49

⁴⁴Cf. Doc. S/37, in which the Swedish Minister for Foreign Affairs speaking in Parliament said: "There is no obligation to recognise new States in international law and, in some cases, Sweden has for political reasons postponed recognition."

⁴⁵ For example, on the effects of the laws of a non-recognised State in United Kingdom law, cf. Docs. UK/83, UK/85 and UK/86

⁴⁶Cf. Doc. UK/114 re the recognition by the EC of Bosnia-Herzegovina: "the measures implementing this decision will be taken nationally in accordance with international practice."

⁴⁷Of course, with the disappearance of a State through State succession, the diplomatic relations with that State will cease to exist, cf. Docs. D/18 and D/22.

⁴⁸See *infra* para. 2.2

⁴⁹See *infra* para. 2.5

⁵⁰See *infra* para. 2.3

⁵¹See *infra* para. 2.4

⁵²*Idem* 2.

conditional to specific requirements, particularly through the application of the Guidelines, mostly in the field of respect for democratic principles, rule of law and for human rights, in particular the rights of ethnic and national groups and minorities.⁵³ This was sometimes expressed in the statement of recognition, e.g. by Austria⁵⁴.

Or, recognition in general was declared to be dependent on the democratic "level" of the State, that is to say, the quality of self-determination of the people. A good example of this can be found in a Declaration by the European Community and its member States in reaction to the outcome of the referendum in Eritrea. Since there have been no great problems, and since the result mirrors clearly the decision of the majority of the people, "the Community and its member States greet the coming into existence of the independent State Eritrea, and they will subsequently take steps on the national levels".⁵⁵

An interesting feature is that the member States of the European Community in several cases decided to co-ordinate their decisions regarding recognition of (new) States among themselves, and not only that, the Community and its member States also agreed "to co-ordinate their approaches to completing the process of recognising those Yugoslav republics that seek independence" with the United States.⁵⁶

Interestingly, the European Community demands also included a declaration of adherence to the Nuclear Non-Proliferation Treaty as non-nuclear weapon States.⁵⁷

What this amounts to is in fact that even States who for some time did base their recognition of States on facts, that is, on the judgement whether the criteria for the existence of a State are fulfilled, and some of whom have publicly declared that they recognise States and not governments, have introduced additional criteria upon which they have made their recognition conditional.⁵⁸ Thus, in essence, the European Community and its member States, as well as the other States which have followed European Community practice, have returned to the constitutive theory, in the sense that they (collectively) determine which new States will be admitted into the community of States, and on what conditions.

2.2 Germany

The establishment of German unity through the incorporation of the GDR into the FRG, in which process the GDR ceased to exist, did not bring forward any question of recognition of States and governments.

Neither a new State nor a new government came into existence, and since the unification was mutually agreed upon and effectuated in conformity with international law, the question whether the process itself had to be recognised or approved, was irrelevant.

The issues that had to be solved in this case related primarily to succession in respect of treaties, including membership of international organisations (see Chapter 3) and in respect of

⁵³The Declaration refers to the UN Charter and the CSCE process, that is, the Helsinki Final Act, and the Charter of Paris, especially with respect to the rule of law, democracy and human rights, to guarantees for ethnic and national groups and minorities, inviolability of frontiers, commitments to disarmament and peaceful settlement of disputes. Cf. e.g. Doc. D/60.

⁵⁴Cf. Docs. A/2, A/3, and A/4.

⁵⁵D/103, d.d. 29 April 1993

⁵⁶Doc. UK/110.

⁵⁷Cf. Doc. UK/70

⁵⁸Cf. e.g. the EPC Declaration on Yugoslavia, of 16 December 1991, amongst others in Doc. D/61

State Property, Archives, Debts, and Nationality (see Chapter 4).

In fact, the German unification did rather induce States to convey their congratulations to the German people and their government.⁵⁹

Nevertheless, it is worth mentioning that Finland, already before 3 October 1990, stated that the reference to Germany as a possible aggressor in the 1947 Peace Treaty between Finland and the Soviet Union, had become "obsolete" now that "[t]he unification of Germany ... creates a situation where the stipulations of the Peace Treaty concerning Germany lose their meaning"⁶⁰. The more so since the so-called "2 + 4" Treaty of 12 September 1990 "resolves the central problem of East-West confrontation"⁶¹.

2.3 Union of Soviet Socialist Republics (USSR)

There is hardly any mention of the USSR in the documents on recognition, except when the status of the Russian Federation is mentioned, or when reference is made to the annexation of the Baltic States by the USSR. There are only a few documents in which, in relation to the recognition of new republics, it is explicitly stated that the USSR has ceased to exist⁶², or in which the conferences at Minsk and Alma Ata are mentioned, thus indirectly recalling the same fact.⁶³

2.3.1 Baltic States

Many States have never *de iure* recognised the incorporation of the Baltic Republics by the USSR, to which several States refer. For example, Norway: "Predicating the non-recognition of the illegal incorporation of Lithuania into the former Soviet Union"⁶⁴, and the United Kingdom which: "... never recognised *de iure* the forcible incorporation of the former Baltic States in the Soviet Union".⁶⁵ However, the United Kingdom did acknowledge that the Baltic States were in fact no longer independent States.⁶⁶

Neither had Switzerland formally recognised the *de iure* sovereignty of the USSR over the Baltic States ("territoires"), although, for practical reasons, consular affairs were dealt with from the Swiss mission in Moscow.⁶⁷ Nevertheless, it was stated by a Swiss official that this did not imply that Switzerland would immediately recognise the independence of Lithuania as of the moment that the Lithuanian Parliament declared independence. Thus, Switzerland would wait for the outcome of consultations between Lithuania and the USSR.⁶⁸

⁵⁹Cf. e.g. Docs. CH/23 and S/6

⁶⁰Doc. FIN/4

⁶¹Doc. FIN/3

⁶²Cf. e.g. Docs. CH/27 and S/32

⁶³Cf. e.g. Docs. B/46 and B/47

⁶⁴Doc. N/6 (on 200494); Doc.N/5 (021194) uses exactly the same phrase with regard to Latvia.

⁶⁵Docs. UK/21, UK/35, UK/37, UK/39, UK/42

⁶⁶Cf. Doc. UK/26 (9 May 1990): "It is perfectly clear at present that there is no independent State of Lithuania to recognise." Also Doc. UK/37: "... we have never recognised the annexation of Lithuania by the Soviet Union as legal, although it was recognised in fact in the Helsinki accords." And Doc. UK/39: "The Helsinki accord recognised the boundaries in fact but not in law." Also, see Docs. UK/55 and UK/56 re Estonia.

⁶⁷Cf. Doc. CH/22

⁶⁸Cf. Doc. CH/22. A similar position was taken by the Netherlands, cf. e.g. Docs. NL/16 and NL/17. But cf. Doc. NL/47 in which it is stated that the Netherlands, while transferring sovereignty to Indonesia in 1949, had already in March 1947 recognised the Indonesian Republic *de facto* as from the declaration of independence, that is, on 17 August

The actual recognition and the establishment of diplomatic relations was announced by Switzerland on 28 August 1991, since after the success of the reform movements "nothing else opposed the independence of the three republics" ("plus rien ne s'oppose à l'indépendance des trois Républiques").⁶⁹ This happened one day after an Extraordinary Meeting of the Foreign Ministers of the European Community member States had issued a declaration in which they warmly welcomed the restoration of sovereignty and independence of the Baltic States which they had lost in 1940.⁷⁰

Some States have made more ambivalent statements. For example, the German Federal Government, in answer to a question in Parliament, just declared that it "has never recognised the annexation".⁷¹ And Italy issued joint declarations together with each of the Baltic States on "the re-establishment of diplomatic relations which were interrupted in 1940, following the annexation of [name of Baltic State] by the Soviet Union, which Italy has never recognised."⁷² These declarations, however, do not explicitly mention the recognition by Italy of the independence of the Baltic States.

Other States do not refer to the annexation in their recognition, but they do refer to the "re-establishment" of diplomatic relations.⁷³ For example, Turkey refers to the statements made by the Baltic States "regarding the re-establishment of status of independence" (without any further qualification) and the decision to re-establish diplomatic relations.⁷⁴ And Belgium, which had never recognised "the illegal Soviet annexation"⁷⁵, acknowledged "the restoration of the full independence" and re-established diplomatic relations.⁷⁶

Some States had indeed recognised the annexation by the USSR, and this, of course, has had its effects on their position with respect to the Baltic States in 1991.

The Netherlands, which had recognised the Baltic States in 1921 and maintained diplomatic relations until 1940, had only recognised the USSR in 1942, and had done so without any reservations with respect to the Baltic States, thus implicitly recognising the incorporation. However, the EPC decision that the member States of the European Community would enter into diplomatic relations with the Baltic States, did mean for the Netherlands an explicit recognition that independence had been restored.⁷⁷ Remarkably enough, six months later in a letter to Parliament the Netherlands Minister of Foreign Affairs remarks that the Baltic States have been recognised as newly independent States⁷⁸, a category which in the law of State succession, as formulated in the two Vienna Conventions, has a very specific meaning. Nevertheless, this must be taken to indicate support for the explicitly expressed position that the Baltic States will not be seen as successor States to the former USSR.⁷⁹

1945.

⁶⁹Doc. CH/24 (Press communiqué). At the press conference a spokesperson for the Swiss government made reference to the fact that Switzerland had re-established diplomatic relations with the Baltic States within their actual borders.

⁷⁰Cf. Doc. D/49.

⁷¹Doc. D/28

⁷²Cf. Docs. I/1, I/2, and I/3 (all 30 August 1991)

⁷³E.g.: "Wiederaufnahme", cf Docs. A/2 and D/51.

⁷⁴Cf. Docs TR/6, TR/7, TR8

⁷⁵Docs. B/4, B/5, B/6

⁷⁶Ibidem

⁷⁷Cf. Doc. NL/18

⁷⁸Cf. Doc. NL/25

⁷⁹Cf. Doc. NL/29

Finland, which for several reasons holds a special position in the region, had not only recognised the independence of the Baltic countries after the First World War, but also their incorporation into the Soviet Union two decades later.⁸⁰

In January 1991, Finland reaffirmed that the Baltic countries and peoples have the right to national self-determination and that problems should be solved by political means through negotiations.⁸¹ Simultaneously, the importance of the Conference for Security and Co-operation in Europe (CSCE) process and the Paris Charter was emphasised.

Half-a-year later it was announced that "[t]he progress of the Baltic countries toward independence has clearly been speeded up..." and that Finland was "prepared to start negotiations about the establishment of diplomatic relations".⁸² Thus, Finland implicitly stated its willingness to recognise the Baltic States as independent States. Interestingly, the next document is dated only four days later and concerns "the exchange of letters through which we restored the diplomatic relations" with the Baltic States.

Sweden had in 1940 and 1941 recognised the incorporation of the Baltic States in the Soviet Union.⁸³ Interestingly, Sweden, before it formally recognised the Baltic States⁸⁴ and restored diplomatic relations⁸⁵, had already recognised the Baltic nations, through recognition of the Baltic Parliaments as "legitimate representatives of their peoples".⁸⁶

Then again, only few documents make reference to conditions which will determine the decision whether to recognise or not. Thus, the United Kingdom declared itself "to be ready" to recognise when the Baltic States had "established a degree of effective independence which justifies their being recognised."⁸⁷ And Austria stated that it expects ("Österreich geht davon aus") that the Baltic States will abide by principles of democracy, rule of law, and respect for human rights including the rights of all "groups of people" ("Volksgruppen"), this being a condition for their inclusion in the circle of democratic-pluralistic States in Europe.⁸⁸

2.3.2 Russian Federation

Several States have explicitly stated that they consider the Russian Federation to be the continuing State of the USSR.

For example, Norway: "Sovjetunionens etterfølgerstat"⁸⁹, and France speaks of the fact that the Russian Federation is the continuing State of the USSR⁹⁰. The United Kingdom Government, in January 1992, stated that it "accepts" the Russian Federation as the continuing State of the Soviet Union".⁹¹ One year later, a background note from an official of the FCO, *inter alia*, sets out: "A "successor State" is a State which succeeds to rights and obligations originally undertaken by another State. The Russian Federation continues the legal personality of the

⁸⁰Cf. Doc. FIN/6

⁸¹Cf. Doc. FIN/7

⁸²Doc. FIN/8

⁸³Cf. Doc. S/1

⁸⁴Cf. Doc. S/14

⁸⁵Cf. Docs. S/15, S/16, S/17

⁸⁶Doc. S/12

⁸⁷Doc. UK/62. The UK did recognise after the European Community and its member States had decided to establish diplomatic relations, cf. Docs. UK/63, UK/64, and UK/65.

⁸⁸Cf. Doc A/2

⁸⁹Doc. N/2

⁹⁰Doc. FR/4

⁹¹Doc. UK/107

former Soviet Union, and is thus not a successor State in the sense just mentioned. The other former Soviet Republics are successor States".⁹²

A similar statement was made by Switzerland, which in several documents stated that the Russian Federation is the continuing State of the USSR and that the other member States of the CIS are successor States, ("la Russie est-elle l'État continuateur de l'ex-USSR, les autres États membres de la CEI étant des États successeurs").⁹³

The German Government, in the *Bundesgesetzblatt*, reproduced declarations by the Russian Federation that it would continue to exercise the rights and obligations under treaties concluded by the USSR, without however adding the German position as to what this does imply for the relation between the international legal personalities of the USSR and the Russian Federation.⁹⁴

Belgium was very specific in this respect when it was stated that given the fact that Russia is the continuing State of the USSR, Russia will not be recognised as a sovereign and independent State.⁹⁵ Likewise, the Netherlands has recognised all CIS republics, with the exception of the Russian Federation, because the Netherlands was of the opinion that this was not required due to the special position of the Russian Federation.⁹⁶ And Finland "accepted on 30 December 1991 [the] status of Russia as continuation of [the] former USSR and concurrently recognised ten former Soviet republics as independent States".⁹⁷

Sweden, on the contrary, not only specifically recognised the Russian Federation as an independent State⁹⁸, it also stated that "Russia is taking the place of the Soviet Union".⁹⁹ While Austria "acknowledged [the Russian Federation] as independent and sovereign member of the community of States"¹⁰⁰, similar wording is used with regard to the Ukraine and Belarus¹⁰¹. However, there is no mention of recognition as such, contrary to the letters Austria sent to seven other former republics of the USSR.¹⁰²

The European Community member States generally stated their "willingness to continue relations on the basis of its changed constitutional status".¹⁰³

2.3.3 Other former republics of the USSR

The member States of the European Community, in conformity with the Guidelines of 16 December 1991, have co-ordinated their policies, and they have waited for a common decision

⁹²Cited in the Court of Session in Scotland, see Doc. UK/162

⁹³Doc. CH/8. Also, Doc. CH/12, which reproduces part of a judgment of a federal court in which the Russian Federation is stated to be the "État continuateur" of the USSR. And see Doc. CH/19 of 2 September 1990 in which the chef of the Swiss federal department of foreign relations in a letter to Kozyrev, the Minister of Foreign Affairs of the Russian Federation, agrees with a letter by Kozyrev of that same day, which is quoted in full, in which, a.o. was written that during previous consultations between the Russian Federation and Switzerland, parties have established that the Russian Federation, "en sa qualité d'État continuateur" of the USSR will assume rights and obligations under treaties entered into by the USSR.

⁹⁴Cf. Doc. D/82

⁹⁵Cf. Doc. B/7

⁹⁶Cf. Doc. NL/25

⁹⁷Doc. FIN/23

⁹⁸Cf. Docs. S/26 and S/32

⁹⁹Doc. S/28

¹⁰⁰Cf. Doc. A/3. In the original text Austria "greet" (begrüsst) the Russian Federation.

¹⁰¹Cf. Doc. A/4

¹⁰²See *infra* para.2.3.3

¹⁰³Cf. Doc. D/65

as to the recognition of these republics.

The European Community and its member States indicated on 23 December 1991 their willingness to create diplomatic relations on the condition that the criteria for the recognition of new States, as mentioned in the Guidelines, were fulfilled.¹⁰⁴ Eight former Soviet republics were then recognised on 31 December 1991, and it was announced that two others would be recognised as soon as they declared acceptance of the Guidelines.¹⁰⁵

Thus, the Netherlands decided on recognition of all former republics (except Georgia, due to the chaotic internal situation), following the decision by the European Community to recognise those States who had responded positively to the European Community Guidelines of 16 December 1991.¹⁰⁶

The Italian documents are very clear in this respect, in that, consistent with the European Community Guidelines, in all texts (Protocols) relating to the decision to establish diplomatic relations with former republics of the USSR, Italy makes reference to the UN Charter, the Helsinki Final Act, and the Paris Charter.¹⁰⁷

On 15 January 1992 the European Community Presidency issued a Statement regarding the willingness by Kyrgyzstan and Tajikistan to fulfil the requirements of the Guidelines and the readiness of the European Community and its member States to proceed with recognition. In this Statement it is noted "with satisfaction" that "all members of the CIS have now committed themselves to the Guidelines".¹⁰⁸

Several other States, not (yet) member States of the European Community, also refer to the fulfilment of similar criteria. Austria specifically mentions in identical *notes verbales* to Ukraine and Belarus¹⁰⁹, to eight other former Soviet Republics¹¹⁰, and to Georgia¹¹¹, the expectation ("Österreich geht davon aus") that the other State will abide by principles of democracy, the rule of law (Rechtsstaatlichkeit), and respect for human rights, including the rights of all "groups of people" ("Volksgruppen"). Interestingly, Austria specifically mentions that it "recognises" these republics as sovereign and independent members of the international community, contrary to the Austrian "welcoming" of the Russian Federation, Ukraine and Belarus as such.¹¹² And Switzerland specifically stated that the recognition of the Ukraine had, *inter alia*, been made dependent on the commitment of the Ukraine to respect for human rights, in particular the rights of minorities.¹¹³ The factual recognition by Switzerland of the Ukraine took place simultaneously with the recognition of eleven other former Soviet Republics. This decision had been largely motivated by the fact that the USSR no longer existed, and with a view to avoid a legal vacuum. Also, each of these republics fulfilled the criteria for recognition of States: a population, a specified territory and a government to ascertain the maintenance of order.¹¹⁴

¹⁰⁴Cf. e.g. Doc. D/65

¹⁰⁵Cf. e.g. Docs. D/66, B/8, B/17, B/22

¹⁰⁶Cf. Doc. NL/26

¹⁰⁷Cf. Docs. I/4 (Ukraine), I/5 (Moldova) I/6 (Georgia), I/7 (Turkmenistan), I/8 (Tajikistan), I/9 (Armenia), I/10 (Uzbekistan), and I/15 (Kyrgyzstan)

¹⁰⁸Cf. Docs. UK/101 and D/67. Note that the United Kingdom Minister of State, FCO, in answers to Parliament explicitly stated that the UK does not recognise the CIS as an independent State, cf. Doc. UK/105.

¹⁰⁹Cf. Doc. A/4

¹¹⁰Cf. Doc. A/5

¹¹¹Cf. Doc. A/7

¹¹²Cf. Doc. A/5

¹¹³Cf. Doc. CH/26

¹¹⁴Cf. Doc. CH/27: "Dans la mesure où il y a dans chacune de ces républiques un peuple, un territoire délimité et un

All Swedish documents relating to the establishment of diplomatic relations specifically refer to purposes and principles of the Charter of the UN and the principles of the Final Act of the CSCE.¹¹⁵

The recognition of these republics by Turkey should be mentioned specifically here since in all relevant letters the statement that Turkey has decided to recognise that State's decision concerning its independence is followed by the statement that Turkey has the honour of being the first State to recognise the independence of that specific State.¹¹⁶ Within a few days of a decision by the Turkish Council of Ministers, Turkey recognised several Central Asian Republics and began establishing consular relations, which may be transformed into diplomatic relations.¹¹⁷

As already mentioned, the recognition of Georgia took a while longer, due to the confused and chaotic internal situation. Thus, Georgia was, for example, recognised by Belgium and the United Kingdom on 23 March 1992, that is on the same day the European Community noted the assurance of Georgia "to fulfil the requirements" of the Guidelines.¹¹⁸

Georgia was recognised by Finland on 27 March 1992, after "Georgia was adopted as a participating State of the CSCE on 24 March 1992, and its independence as a State has already been recognised by several European Community countries".¹¹⁹

2.4 Socialist Federal Republic of Yugoslavia (SFRY)

Similarly to the case of the USSR, there are hardly any documents which specifically mention the SFRY in relation to recognition. In fact, the SFRY is only mentioned in the context of the republics originating from the SFRY, and this is sometimes limited to reference to the internal borders of the SFRY. For example, Austria, in its statements of recognition, and in addition to the reference to the Guidelines criteria it always includes, specifically mentions that Austria recognises the new republics within their existing borders.¹²⁰

2.4.1 Federal Republic of Yugoslavia (Serbia and Montenegro) (FRY)

Relatively few documents deal specifically with recognition of the FRY. Member States of the European Community tend to refer to European Community decisions in this matter. See, for example, a statement from the Netherlands Ministry of Foreign Affairs that the European Community will decide on this matter.¹²¹

Two European Community member States, Germany and France, even issued a joint declaration in which they confirm that the re-integration of Yugoslavia (Serbia/Montenegro) will depend on compliance with the stated conditions.¹²²

gouvernement pour assurer le maintien de l'ordre, elles réunissent les conditions préalables a une reconnaissance conforme aux critères définis par le droit international public."

¹¹⁵Cf. Docs. S/40 (Kyrgyzstan), S/44 (Kazakhstan), S/45 (Uzbekistan), S/46 (Turkmenistan), S/48 (Azerbaijan), S/51 (Moldova), S/52 (Armenia), S/54 (Georgia), S/57 (Tajikistan)

¹¹⁶Cf. Docs. TR/10, TR/11, TR/12, TR/13

¹¹⁷Cf. Doc. TR/21 (16 December 1991)

¹¹⁸Cf. Docs. UK/112 and UK/113. Also Docs. B/17, B/47, B/18, B/26, B/45

¹¹⁹Cf. Doc. FIN/27; also cf. Swedish Doc. S/41 (2 April 1992)

¹²⁰"in ihren bestehenden Grenzen", cf. Docs. A/10, A/11, A14

¹²¹Cf. Doc. NL/30

¹²²Cf. Doc. D/89

Then again, States frequently refer to what happens within the United Nations. Thus, the United Kingdom speaks of Serbia and Montenegro as "the new State" and announces that the United Kingdom will "await recognition in the United Nations after application to the General Assembly".¹²³

The European Community did not accept the automatic continuity of the FRY in international organisations, including the United Nations.

This, of course, concerned the question whether the FRY was to be considered identical to the SFRY. As the representative of the United Kingdom to the UN General Assembly stated on behalf of the European Community, "the automatic continuity of the [FRY] in international organisations" was not accepted.¹²⁴ Curiously enough, both this statement and an EPC statement of 20 July 1992¹²⁵, to which the former refers, specifically state that the FRY "cannot be accepted as the sole successor to the former [SFRY]". One cannot help but wonder why this phrasing has been chosen, since the FRY claimed to be the continuation of, that is, identical with, the SFRY, implying that all other former Yugoslav republics (Croatia, Slovenia, Bosnia and Herzegovina, and "The Former Yugoslav Republic of Macedonia") are new States. As explained before, a successor State is a new State as opposed to a State which is identical with the predecessor State, and therefore the same State and same international legal person. Thus, the issue should indeed deal with and be confined to "automatic continuity".¹²⁶

Finland¹²⁷ and Sweden¹²⁸ both refer to a meeting of the Nordic Foreign Ministers in which it was decided that the question of recognition of the FRY should be solved in the same manner as with regard to the other republics, that is, on the basis of the principles of the Brussels conference, and within the framework of the Peace Conference, by "all States on the territory of disintegrated Yugoslavia".

There is one more statement by Finland that it supports the Security Council decision that the FRY should apply for membership of the United Nations.¹²⁹

2.4.2 Bosnia and Herzegovina

The European Community and its member States decided on 6 April 1992 to recognise Bosnia and Herzegovina on the following day, as an independent State and by referring to the Guidelines on Recognition.¹³⁰

However, as the United Kingdom stated, "[t]he measures implementing this decision will be taken nationally in accordance with international practice."¹³¹

Again, Austria followed the European Community, and that same day declared recognition as

¹²³Doc. UK/132. And Doc. UK/116: "We reserve our position on the status of the recently self-proclaimed Federal Republic of Yugoslavia".

¹²⁴Doc. UK/139

¹²⁵Cf. Docs. UK/138 and D/80

¹²⁶It should be noted that already on 4 July 1992 the Badinter Commission had issued Opinions 8, 9 and 10 which stated that the dissolution of the SFRJ had been completed. Text a.o. in 31 International Legal Materials (1992), at 1521. Also see e.g. Doc. UK/162 of 19 March 1993, in which the Court of Session in Scotland cites a background note from the Foreign and Commonwealth Office, which *inter alia* sets out: "A 'successor State' is a State which succeeds to the rights and obligations originally undertaken by another State."

¹²⁷Cf. Doc. FIN/29 (press release, 050592). This document also mentions that the Yugoslav People's Army "has clearly and flagrantly breached against the principles of CSCE and international law".

¹²⁸Cf. Doc. S/47

¹²⁹Cf. Doc. FIN/32 (21 September 1992)

¹³⁰Cf. Docs. UK/118 and D/72

¹³¹Doc. UK/114

an independent and sovereign State within the existing borders ("in ihren bestehenden Grenzen") and using the familiar Austrian guidelines formula.¹³²

Similarly, Belgium recognises Bosnia and Herzegovina as the successor State of Yugoslavia at the international level in so far as it is concerned and within the limits of its territories ("comme état successeur de la Yougoslavie sur le plan international en ce qui la concerne et dans les limites de son territoire").¹³³

Sweden announced that it had supported a unanimous United Nations General Assembly Resolution to elect Croatia, Bosnia and Herzegovina and Slovenia as members of the UN. To this was added that "[i]n accordance with Swedish practice this means that Sweden has also recognised the Republic of Bosnia and Herzegovina."¹³⁴ Such implicit recognition is remarkable, since both Croatia and Slovenia had been (explicitly) recognised by Sweden four months earlier.¹³⁵ One year later Sweden chose the same approach with regard to the implicit recognition of "The Former Yugoslav Republic of Macedonia".¹³⁶

2.4.3 Croatia and Slovenia

Most States have simultaneously recognised Croatia and Slovenia, and most have done so after the European Community gave the green light on 15 January 1992, following advice from the Arbitration Commission.¹³⁷ In almost all documents reference is made, either directly or indirectly, through their wording, to the conditions specified in the Guidelines.

Thus, Italy issued Joint Declarations with both States on 17 January 1992 on the establishment of diplomatic relations. In these declarations the recognition by Italy of the full independence, sovereignty and international personality of Slovenia and Croatia respectively, are explicitly mentioned, as well as the Community criteria.¹³⁸

The Netherlands also recognised Slovenia and Croatia following the European Community decision, while indicating with regard to Croatia that the establishment of diplomatic relations will depend on efforts by the Croatian government to adapt certain legislative shortcomings.¹³⁹

The United Kingdom, on 15 January 1992, refers to the European Community Declaration of 16 December 1991.¹⁴⁰ That same day the FCO held a press conference on the recognition of the two States. It was noted that although the Arbitration Commission "had identified some deficiencies in Croatia's law on minorities", Croatia had promised "swift action" and therefore the United Kingdom declared itself willing to recognise.¹⁴¹

Germany, on the other hand, made it clear on 5 December 1991, that is one-and-a-half months before the European Community decision, that if not all members of the European Community followed the common position taken in early October of that year, Germany would pronounce recognition "together with as many European Community partners as possible and together

¹³²Cf. Doc. A/14 (7 April 1992). Switzerland recognised the next day, cf. Doc. CH/29. Finland recognised following recognition by the EC-countries and the US, cf. Doc. FIN/28

¹³³Doc. B/44

¹³⁴Doc. S/50 (22 May 1992)

¹³⁵Cf. Doc. S/33

¹³⁶See below, para. 2.4.4

¹³⁷E.g. Austria, Belgium, Finland, Germany, Italy, the Netherlands, Sweden, United Kingdom.

¹³⁸Cf. Docs. I/13 (Slovenia) and I/14 (Croatia)

¹³⁹Cf. Doc. NL/27

¹⁴⁰Cf. Doc. UK/102 (15 January 1992)

¹⁴¹Doc. UK/103

with other States."¹⁴² On 16 December 1991 the European Community and its member States issued the Guidelines and three days later Germany announced that it recognised all republics who would declare by 23 December that they wanted recognition and that they would adhere to all conditions stated in the European Community Declaration of 16 December. The actual recognition of Croatia and Slovenia by Germany indeed took place on 23 December.

Even States which at the time were not yet member States of the European Community, e.g. Austria and Finland, refer to the European Community and the European Community Guidelines when they recognise Croatia and Slovenia.

The recognition by Austria also took place on 15 January 1992 and uses the Guidelines-formula.¹⁴³

The Foreign Minister of Finland expressly stated that although "Slovenia as such does fulfil the criteria for independent statehood", recognition will depend on the attainment of a political settlement of the crisis in former Yugoslavia.¹⁴⁴ Finland left the question of the recognition to the deliberations of the European Community and its Member States and made it clear that Finland "shall in this matter first and foremost follow the Community's position".¹⁴⁵

Finland eventually recognised both States after the European Community did. Finland, stating that this decision "parallels" the European Community decision, stressed that the situation in Slovenia was stable and that Croatia had advanced to independence through democratic decisions and after guaranteeing the rights of ethnic and national groups.¹⁴⁶

The non-member State Switzerland emphasised that it will not act on its own in recognising Croatia and Slovenia but in concordance with the other western States, since consensus will be needed on the ensuing practical measures that will have to be taken.¹⁴⁷ Later this position in repeated with the addition that Switzerland is ready to join a significant group of States in a joint act of recognition.¹⁴⁸ In that same statement it is made clear that to the traditional criteria, with respect to the new States in Europe, have been added the obligations resulting from the agreements of Helsinki and Paris.

The actual recognition of Croatia and Slovenia by Switzerland was announced on the same day as the recognition of these two republics by the European Community. The Federal Council states that in taking this decision it has taken into consideration the Badinter Report on the human rights situation and the protection of national minorities.¹⁴⁹

2.4.4 "The Former Yugoslav Republic of Macedonia"

"The Former Yugoslav Republic of Macedonia" was the last of all former SFRY republics to obtain recognition. This was largely due to the fact that although the large majority of the member States of the European Community were willing, they could not agree on recognition. In fact, although most European Community member States wanted to recognise as soon as possible, "the strongly held concerns of a member State had to be taken account of".¹⁵⁰ To

¹⁴²Doc. D/59

¹⁴³Cf. Docs. A/10 and A/11.

¹⁴⁴Cf. Doc. FIN/10

¹⁴⁵Docs. FIN/12 and FIN/15

¹⁴⁶Cf. Doc. FIN/18

¹⁴⁷Cf. Doc. CH/25, containing a statement by the Swiss Minister of Foreign Affairs (23 September 1991)

¹⁴⁸Cf. Doc. CH/26

¹⁴⁹"Pour autant que des Républiques yougoslaves expriment une volonté démocratique de souveraineté et d'indépendance, le Conseil fédéral ne refusera pas de les reconnaître", Doc.CH/28

¹⁵⁰Doc. UK/122

satisfy these "Greek concerns about Macedonia"¹⁵¹ the European Community Guidelines "required the adoption of constitutional and political guarantees ensuring that "The Former Yugoslav Republic of Macedonia" has no territorial claims towards a neighbouring Community State and that it will conduct no hostile propaganda activities versus a neighbouring Community State, including the use of a denomination which implies territorial claims."¹⁵²

On several occasions the Twelve issued statements to the effect that they were prepared to recognise within the existing boundaries and under a name which would be acceptable for all parties concerned.¹⁵³ As a United Kingdom Government spokeswoman stated: "We shall continue to act as honest broker in order to obtain recognition of that State under any name except Macedonia."¹⁵⁴

An interesting feature with regard to the recognition of "The Former Yugoslav Republic of Macedonia" is that several States only explicitly stated that they recognised "The Former Yugoslav Republic of Macedonia" as an independent State after "The Former Yugoslav Republic of Macedonia" had been admitted to the UN, through the acceptance by the General Assembly of a Resolution submitted by member States of the European Community, e.g. the Netherlands¹⁵⁵, and other States, e.g. Sweden¹⁵⁶ and Switzerland¹⁵⁷

Some States specified that their vote in favour of admission to the UN must be taken to mean recognition as an independent State (the United Kingdom¹⁵⁸), or that support for admission to the UN "would be equivalent of express formal recognition" (Sweden¹⁵⁹).

Finland and Belgium even added that they considered (a vote in favour of) admission to the UN as *de facto* recognition, which they later followed up with formal recognition.¹⁶⁰

Italy, which as a matter of fact also recognised "The Former Yugoslav Republic of Macedonia" after it had been admitted to the UN, is the only State to refer explicitly, in an exchange of letters, not only to recognition of the full independence, sovereignty and international personality of "The Former Yugoslav Republic of Macedonia", but also to the UN Charter, the

¹⁵¹Doc. UK/120

¹⁵²*Ibidem.*

¹⁵³Cf. Doc. D/76, informal EPC-meeting (27 June 1992). In that same document reference is made to an earlier Declaration of the Twelve (2 May 1992), re. recognition under a name which does not contain the denomination "Macedonia". And cf. Doc. UK/118, referring to an EC-memorandum (22 September 1992): The European Council declared itself ready to recognise "as an independent State within its existing borders" ..., "under a name which does not include the name Macedonia".

¹⁵⁴Doc. UK/135

¹⁵⁵Cf. Doc. NL/32. And cf. Doc. NL/53: the Netherlands will delay recognition of "The Former Yugoslav Republic of Macedonia" until the FRY and "The Former Yugoslav Republic of Macedonia" have recognised each other.

¹⁵⁶Cf. Doc. S/68

¹⁵⁷Cf. Doc. CH/32 (13 May 1993): Switzerland recognised "The Former Yugoslav Republic of Macedonia", since it had been admitted to the UN as well as being recognised by the majority of European States under that name. To this was added that Switzerland already maintained informal relations with "The Former Yugoslav Republic of Macedonia".

¹⁵⁸Cf. Doc. UK/153 containing an extract from a letter by the Minister of State, FCO, to "The Times" newspaper, in which it is said that "[t]he British Government, in fact, did [recognise] by voting in favour...". Earlier, in reply to questions in Parliament, it was written that "[t]he United Kingdom's support for an application for United Nations membership means that the United Kingdom recognises the applicant as a State.", Doc. UK/146.

¹⁵⁹Doc. S/63 (16 February 1993). Also cf. Doc. S/67 (8 April 1993). But cf. Doc. S/68 (17 April 1993) with an explicit statement by the Ministry of Foreign Affairs of the Swedish decision to recognise "The Former Yugoslav Republic of Macedonia". Also cf. Doc. S/79 in which it is said that recognition does not mean a decision regarding the points of dispute with Greece.

¹⁶⁰Cf. Docs. FIN/36 (formal recognition), and B/32 and B/42 (formal recognition)

Helsinki Final Act, and the Paris Charter, that is to say, the conditions stated in the European Community Guidelines.¹⁶¹

2.5 Czech and Slovak Federal Republic (CSFR)

The circumstances in which the CSFR separated into two new States, meaning its dissolution and the creation of two successor States: the Czech and the Slovak Republics, induced several States to recognise both successor States explicitly on the day of independence, that is on 1 January 1993.¹⁶²

Other States, however, do not specifically mention the date. Thus, two German documents contain two almost similar letters, reproduced in the Information Bulletin of the German Government of 8 January 1993, stating that Germany does recognise the two respective new States as independent States, but without specifically mentioning a date.¹⁶³ In these documents, Germany leaves open whether Germany recognises both States as of the moment of writing or retroactively, that is, as of the moment of dissolution of the CSFR. And the United Kingdom, in letters to both States stating recognition, does not give a date either; however, the documents are all dated 1 January 1993.¹⁶⁴

2.6 Conclusion

With the reservation that the above paragraphs are based on a double selection, that is, through the limited number of States which have participated in the Pilot Project, and because of the differences between the individual contributions, some concluding remarks can be made.

First of all, it can be concluded that all documents deal with the recognition of States, not of governments. Obviously, the participating States have all adopted the policy that they recognise States, not governments.

It is also very clear that the traditional criteria for the existence of a State¹⁶⁵ still form the basis of all decisions concerning the recognition of a new State, notwithstanding the differences in the wording used.

What is new, at least in comparison with the post Second World War practice in Europe, is first of all the revival of collective decision-making, and second, the rehabilitation of the constitutive approach. And in both the European Community plays a vital role.

Through the application of the "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union" of 16 December 1991, all States which have participated in the Pilot Project, to a larger or smaller extent, have made their recognition of new States conditional on

¹⁶¹Cf. Doc. I/17

¹⁶²Cf. Norway: Docs. N/3 and N/4; Sweden: Doc. S/60; Austria: Docs. A/15 and A/16 with the same wording for Czech Republic and Slovakia, and with the usual Austrian reference to the CSCE principles; Turkey: Doc. TR/5; Switzerland: Doc. CH/30; Belgium: B/27, B/35, B/50 (Slovakia), B/51 (Czech Republic). In the latter two Belgian documents it is stated that Belgium has taken good notice of the fact that both States consider themselves to be successor States. Finland even declared recognition two days before the day of separation, as well as its acceptance of the proposal by both Czech and Slovak authorities to establish diplomatic relations as from 1 January 1993: Doc. FIN/35. Also, cf. Docs. UK/165 and UK/166 (Czech Republic), and UK/167 and UK/168 (Slovakia).

¹⁶³Cf. Docs. D/99 and D/100

¹⁶⁴Cf. Docs. UK/165 and UK/166 (Czech Republic); UK/167 and UK/168 (Slovakia).

¹⁶⁵ See above para. 2.1.

the fulfilment of specific requirements, which are added to the traditional criteria for the existence of a State.

These requirements include, next to adherence to the principles of the United Nations Charter, respect for the rule of law, democracy and human rights, guarantees for ethnic and national groups and minorities, inviolability of frontiers, commitments to (nuclear) disarmament, and peaceful settlement of disputes.

The latter are also to be found in the Helsinki Final Act and the Paris Charter, that is to say, documents agreed upon in the CSCE process. And this, of course, is a process in which not only all European Community member States, but also States which are not (yet) member States participate, as well as all predecessor States involved in the cases which have been studied.

However, the Guidelines' criteria have in fact played an important role only in relation to the new States which have been created on the territories of the former USSR and the SFRY. Neither the uniting of the FRG and the GDR into Germany, nor the separation of the CSFR into the Czech Republic and the Slovak Republic caused any complications in this respect.

Not only has recognition in several cases been withheld for a prolonged period of time from States which, in the collective eyes of the European Community, did not (yet) abide by the requirements (e.g. "The Former Yugoslav Republic of Macedonia" and Georgia), but the factual decision that a given State will be recognised was always taken collectively by the European Community and its member States. The latter is not surprising since the EC member States will all have to go through the nationally required formalities. What is more remarkable is that it has worked. The only time an EC member State did decide to deviate from this procedure and to proceed without a collective decision (Germany with respect to Croatia and Slovenia) the others quickly closed ranks. Also remarkable is the extent to which States which are either not member States of the European Community (Switzerland) or which have become member States during the period included in the documents (Austria, Finland and Sweden), have adapted to and followed the collective decision-making process.

The constitutive element is illustrated by the fact that the above-mentioned criteria were clearly meant, and used, as additional criteria. The statehood of the new States as such was hardly ever in doubt. What it was about was that it had been decided that the new States had to be forced to accept norms and standards which were considered to be vital for the international community of (European) States.

Thus, before formal recognition, before diplomatic relations could be established, or even before a new State could be admitted to membership of the United Nations, that is, before it could be a State on equal footing with all other States (sovereign equality), a declaration of acceptance of and adherence to the Guidelines was required.

One cannot help but wonder whether this practice, however necessary at the time in the collective opinion of (all) other States, does not open the gate to arbitrariness and thus to lack of clarity. It had been for reasons of clarity that so many States had shifted their practice from the constitutive to the declaratory approach.

Also noteworthy is that some documents illustrate the fact that for some States the distinction between *de facto* and *de iure* recognition is still relevant today, as well as the notion of implied recognition. See, for example, the statements by Finland and Belgium that they consider a vote in favour of admission to membership of the United Nations as *de facto* recognition, and the Swedish statement that such a vote equals formal recognition.

A final remark concerns the notable differences in the language used by States in their notifications of recognition of new States, even among European Community member States.

Most States just report that they recognise, sometimes but not always with the addition that they act following a European Community decision, and with or without reference to the Guidelines. It is remarkable that Austria, even before it became a member State of the EC, has been most consistent in including detailed reference to the Guidelines criteria.

CHAPTER 3: STATE SUCCESSION IN RESPECT OF TREATIES

Andreas Zimmermann¹⁶⁶

3.1 Introduction

The international law of State succession in respect of treaties was codified and further developed by the 1978 *Vienna Convention on Succession in Respect of Treaties*¹⁶⁷ which entered into force in December 1996 after the required 15th State had become a party. However, among the Member States of the Council of Europe only Croatia, Estonia, Slovenia, Slovakia and Ukraine are now contracting parties¹⁶⁸. Notwithstanding this relatively low number of ratifications or notifications of succession in relation to the Convention, international judicial bodies such as the International Court of Justice¹⁶⁹ and the Arbitration Commission established under the auspices of the Peace Conference for the Former Yugoslavia¹⁷⁰, as well as States, have to some extent referred to the Convention as a guiding instrument as far as succession in regard of treaties is concerned.

The Convention itself distinguishes between different categories of succession. Apart from the specific category of *newly independent States*, which was supposed to cover the legal rules governing former dependent territories, it deals with the transfer of territory (Art. 15), the separation of a State or its complete dissolution (Art. 34 and 35)¹⁷¹ and finally with a uniting of two or more States (Art. 31). As to the transfer of territory, the Convention contains the moving-boundary-rule, i.e. it prescribes that treaties of the predecessor previously in force in the territory which forms the object of the succession cease to apply while the treaties in force for the successor State automatically extend to the very same territory. As to a separation of a State or the complete dissolution of a State, Art. 34, at least as a matter of principle, applies the rule of automatic succession to all treaties of the predecessor State regardless of whether the predecessor State continues to exist or not. Finally, as to the unification of States, Art. 31 of the Convention provides that all treaties of both predecessor States are supposed to remain in force.

Moreover, the Convention in Art. 11 and 12 also contains particular rules as to boundaries determined by a treaty and other forms of localised treaties, both of which are considered not to be put into question by the occurrence of an incidence of State succession.

Taking into consideration this attempt of codification and progressive development of international law, it will have to be seen to what extent - if ever - States concerned have followed the different categories of State succession just outlined, what rules they have applied in recent instances of State succession and to what extent State practice has either followed or deviated from the rules contained in the Convention which however includes a relatively high number of States most concerned by the subject matter of the Convention, i.e. successor

¹⁶⁶ *Idem* 1.

¹⁶⁷ Text to be found *inter alia* in ILM 1978, p. 1488 et seq.

¹⁶⁸ It is worth noting that the Dutch Government had in 1989 submitted the Vienna Convention on Succession of States in Respect of Treaties for consent by the Dutch Parliament but later withdraw the proposal because the provisions on newly independent States had become obsolete and because State practice did not follow the rules contained in the Convention (cf. Doc. NL/10 and NL/48).

¹⁶⁹ For details cf. below 3.5.

¹⁷⁰ For details cf. below 3.4.

¹⁷¹ Cf. as to this distinction Doc. CH/8 and Doc. D/85.

States.

3.2 Germany

The unification of Germany is one of the most important examples of a unification of two States in recent times. As far as matters of treaty succession are concerned, one has to distinguish between, on the one side,

- the possible extension of treaties previously entered into by the Federal Republic of Germany (FRG) to the territory of the former German Democratic Republic (GDR)¹⁷², and, on the other side,
- the possible succession by the FRG as to treaties which, prior to German unification, had been concluded by the GDR¹⁷³.

3.2.1 Federal Republic of Germany (FRG)

Art. 11 of the Unification Treaty¹⁷⁴, concluded between the FRG and the GDR, provided that as a matter of principle, all treaties to which the FRG had been a contracting party would remain in force and that their geographical scope of application would automatically extend to the territory of the former GDR¹⁷⁵. However this treaty could by virtue of the *pacta-tertiis*-rule not as such bind third parties. Notwithstanding, almost all of the treaty partners of the FRG accepted the approach contained in Art. 11 of the Unification Treaty¹⁷⁶, the content of which had also been notified to all Member States of the United Nations¹⁷⁷ as well as to the respective depositaries of multilateral treaties¹⁷⁸.

An opposite position was however taken by the government of the Netherlands which argued that the extension of the geographical scope of application of treaties concluded with the FRG to the territory of the former GDR required the approval of the respective third party, i.e. the Netherlands¹⁷⁹. This divergence of approaches is reflected in the Dutch-German exchange of notes regulating the extension of those treaties to the territory of the former GDR¹⁸⁰.

Generally speaking, this general extension of treaties previously entered into by the FRG to the

¹⁷² Cf. below 3.2.1.

¹⁷³ Cf. below 3.2.2.

¹⁷⁴ *Bundesgesetzblatt* 1991 II, p. 889; a partial English translation can be found in 30 ILM 1990, p. 471. For a summary of its contents cf. Doc. D/19.

¹⁷⁵ Art. 11 of the Unification Treaty stipulated:

"The Contracting Parties proceed on the understanding that international treaties and agreements to which the Federal Republic of Germany is a contracting Party, including treaties establishing membership in international Organisations or Institutions, shall retain their validity and that the rights and obligations arising therefrom, with the exception of the treaties named in Annex I, shall also relate to the territory specified in Article 3 of this treaty [i.e. the territory of the former GDR, the author]. Where adjustments become necessary in individual cases, the All-German Government shall consult with the respective Contracting Parties."

¹⁷⁶ Cf. as to the position of Belgium Doc. B/36.

¹⁷⁷ For the text cf. G. Schuster, *Völkerrechtliche Praxis der Bundesrepublik Deutschland im Jahre 1990*, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1992, p. 828 et seq. (1039).

¹⁷⁸ Cf. in that regard e.g. Multilateral Treaties deposited with the Secretary General 1994, p. 9, note 13.

¹⁷⁹ Cf. Doc. NL/43 and NL/45; as to further details cf. A. Bos, *Statenopvolging in het bijzonder met betrekking tot verdragen*, in: A. Bos/O. Ribbelink/L. van Sandick, *Statenopvolging*, (Preadvies Nederlandse Vereniging voor Internationaal Recht 1995) p. 1 et seq. (50).

¹⁸⁰ *Tractatenblad* 1994, No. 81, p. 1 et seq.

territory of the former GDR not only took place with regard to bilateral treaties but also with regard to multilateral conventions¹⁸¹ including treaties establishing the membership of the FRG in international organisations¹⁸². *Inter alia*, Germany remained a Member of NATO with the guaranty provided for in its Art. 6 being extended to the territory of the former GDR¹⁸³. In accordance with Art. 5 of the Treaty on the Final Settlement with respect to Germany¹⁸⁴, no foreign troops or nuclear weapons are however to be stationed in that part of Germany¹⁸⁵. Accordingly, certain treaties concluded between the FRG and the three Western Allied powers before 1990, which related to the status of the respective forces, were not extended to the territory of the former GDR¹⁸⁶. Similarly, the relevant agreement of 8 December 1987 concluded between the FRG and the USSR regarding inspections on the territory of the FRG provided for in the US-USSR treaty on the elimination of their intermediate-range and short-range missiles¹⁸⁷ was not extended to the territory of the former GDR neither since it was considered to be localised on the territory of the FRG as it existed before 3 October 1990¹⁸⁸.

The analysis just undertaken demonstrates that as a matter of principle - although not without exceptions - almost all of the bilateral and multilateral treaties to which the FRG was a party have been extended to the territory of the former GDR. Thus one might realise that the general rule contained in Art. 31, para. 2 of the 1978 Vienna Convention on Succession in Respect of Treaties according to which in a case of unification, the treaties of both predecessor States remain in force within the territorial limitations which applied beforehand, was not abided by. To the contrary, at least as a matter of principle, the moving-boundary-principle seems to have been applied.

3.2.2 German Democratic Republic (GDR)

As to treaties of the GDR, Art. 12 para. 1 of the Unification Treaty provided that those treaties should be discussed with the respective contracting parties with a view to regulating or confirming their continued application, adjustment or expiry, taking into account legitimate trust, the interests of the States concerned, the treaty obligations of the FRG as well as the principles of a free, democratic basic order governed by the rule of law, and respecting the jurisdiction of the European Community. Besides, Art. 12 para. 2 stipulated that the united Germany would establish its position in respect of the possible devolution of international treaties of the GDR subsequent to consultations with the respective parties to the treaty, and in those cases in which the competencies of the European Community were concerned, after consultations with the EC.

As to bilateral treaties of the GDR, already by the end of 1996, those consultations just mentioned had been held with more than 135 countries. In the vast majority of cases the parties concerned, i.e. Germany and the respective third party, agreed that almost all, if not all, of these

¹⁸¹ As to the applicability of the treaties founding the European Communities to the territory of the former GDR cf. Doc. D/12 and Doc. NL/3. As to the GATT cf. Doc. D/26.

¹⁸² Cf. as to the German membership in the United Nations Doc. D/25. As to the German membership in the Council of Europe cf. the Council of Europe Doc. JJ 2446 C.

¹⁸³ Cf. in that regard document D/ 23.

¹⁸⁴ Text to be found *inter alia* in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1991, p. 494 et seq. (495-496).

¹⁸⁵ As to the temporary stationing of Soviet troops on the territory of the former GDR cf. Doc. D/27.

¹⁸⁶ Cf. in that regard Annex I, Chapter I, Part 1, o. 1 and 2. of the Unification Treaty as well as Doc. D/21.

¹⁸⁷ Similarly the parallel agreement concluded by the GDR with the United States was not considered to have lapsed *ipso facto* as of 3 October 1990 but instead continued to be in force, cf. Doc. D/40.

¹⁸⁸ Cf. in this regard Annex I, Chapter 1, Part 1, No. 9 and 10 of the Unification Treaty.

treaties had lapsed at the time of unification, i.e. on 3 October 1990¹⁸⁹. In some instances, however, treaties of the GDR continued to be in force beyond that day at least for some limited period of time¹⁹⁰. This is true *inter alia* for most of the treaties in the field of social security¹⁹¹ and maybe most importantly for lump sum-agreements concluded by the GDR with Denmark¹⁹², Finland¹⁹³, Austria¹⁹⁴ and Sweden¹⁹⁵.

As to multilateral treaties to which the GDR had been a party, it seems that they, too - with some exceptions - were considered to have ceased to be in force by that date by virtue of the absorption of the GDR into the FRG¹⁹⁶. Indeed, it seems that Germany only became a contracting party to a very limited number of multilateral treaties to which the GDR alone had previously been a party¹⁹⁷, *inter alia* the treaty founding the international organisation INTERSPUTNIK.

More difficult issues arose, however, with regard to boundary treaties and other forms of localised treaties. As to the question of the eastern border of Germany, it should be noted that its legal status was closely intertwined with the legal status of Germany as a whole as it existed after 1945 and was also related to the powers and responsibilities of the Four Allied Powers in that respect. Notwithstanding, both the GDR in 1950 and the FRG in 1972, by signing the so-called Treaty of Görlitz, respectively the Treaty of Warsaw, had confirmed that the boundary between the GDR and Poland constituted the border between Germany and Poland¹⁹⁸. It was against this background that both German parliaments in June 1990 acknowledged that these two treaties would constitute the basis for any future final confirmation of the German Polish border to be enshrined in a border treaty to be concluded by reunified German with Poland¹⁹⁹. Indeed, the German-Polish Treaty of 1991 on the Confirmation of their Common Border²⁰⁰ contains references to these two treaties. Furthermore, the list of bilateral treaties concluded between the GDR and Poland which were agreed to have lapsed as of 3 October 1990 does not make reference to the Treaty of Görlitz. Thus, it might be said that this treaty has survived the German unification and along with the Treaty of Warsaw continued to be binding upon

¹⁸⁹ As to a model protocol dealing with the fate of the treaties of the former GDR, cf. Doc. D/24. In some cases, it was expressly stated that this lapse of the treaties of the GDR occurred in accordance with international law, cf. e.g. in regard of treaties concluded between the GDR and the United States Doc. D/40. Cf. as to specific countries Docs. B/16, DK/99; FIN/5 and FIN/20, N/7 and S/21.

***Cf. also as to a specific treaty concluded between the GDR and Poland Doc. D/104 and as to the combined effects of both German and Yemenite unification on German-Yemenite treaty relations Doc D/104. Cf. finally as to agreements the GDR had concluded with the PLO Doc. D/56.

¹⁹⁰ See e.g. Doc. S/90 as to bilateral treaties concluded between the GDR and Sweden which continued to apply beyond 3 October 1990.

¹⁹¹ Cf. Doc. D/92.

¹⁹² Cf. Doc. DK/99

¹⁹³ Cf. Doc. FIN/20.

¹⁹⁴ The continuance in force of that agreement was confirmed by a decision of the Austrian Constitutional Court of 25 June 1992, cf. Doc D/36.

¹⁹⁵ Doc. S/90, p. 3; cf. in regard to that agreement also the decision of the *German Bundesgerichtshof*, VIZ 1997, p. 155 et seq. (157).

¹⁹⁶ See *inter alia* Doc. D/38.

¹⁹⁷ As to the question whether the United Nations Convention on the Limitation Period in the International Sale of Goods, which had been ratified by the GDR but not by the FRG, remained in force on the territory of the former GDR, cf. Doc. D/75.

***¹⁹⁸ As to the text of the so-called Treaty of Warsaw, respectively the Treaty of Görlitz, cf. *Bundesgesetzblatt* 1972 II, p. 362 and *Gesetzblatt* DDR 1950 II, p. 1205.

¹⁹⁹ Cf. Doc. D/14.

²⁰⁰ Doc. D/29.

Germany.

Similar considerations apply with regard to the border between Germany and the CSFR, respectively the Czech Republic. It seems appropriate to note first that a recent German-Czech Treaty on the Delimitation of their Common Border²⁰¹ makes reference *inter alia* to two German-Czechoslovakian treaties of 1935 and 1937, thereby indicating that the Czech Republic remained bound by these treaties after the dissolution of the CSFR. Besides, it is similarly important to observe that this very same German-Czech delimitation agreement also provides that the delimitation of that component of the border which on the German side forms part of the State of Saxony, is determined by a treaty concluded between the GDR and the CSSR in 1980²⁰². Finally, Art. 7 para. 3 of the Czech-German Treaty on Border Crossings of 1996²⁰³ provides that with its entry into force a treaty previously concluded between the GDR and the Czech and Slovak Socialist Republic (CSSR) in 1971 relating to border crossings at their common border would no longer be in force *ex nunc*, thereby indicating *e contrario* that this treaty had until that point in time still been in force.

With regard to other localised treaties, one may mention the fact that two treaties concluded between the GDR and Poland which regulated the use of certain rivers were only terminated by virtue of Art. 21 par. 4 of the German-Polish Treaty on Inland Waterway Traffic of 1991²⁰⁴.

Germany and Czechoslovakia agreed already in December 1990 that two treaties concluded by the GDR should - some exceptions notwithstanding²⁰⁵ - continue to govern the administration of their joint border crossings. Finally it was only Art. 15 para. 6 of the German-Czech Treaty on Co-operation in Regard of Boundary Waters of December 1995 which terminated a similar treaty concluded between the GDR and the CSSR in February 1974²⁰⁶.

Sweden and Germany agreed that a number of agreements concluded by the GDR should have ceased to apply as of 3 October 1990²⁰⁷. It was also agreed that some agreements could remain in force. Among those were the Agreement concerning the Co-operation in regard of the Fight against Pollution of the Baltic Sea, the Agreement on the Delimitation of the Continental Shelf and an Agreement of the Settlement of Property Rights²⁰⁸.

Finally, it should be noted that two bilateral agreements concluded by the GDR with the United States and the USSR respectively, which had granted these two States certain property rights in the GDR, were not considered to have automatically lapsed as of 3 October 1990²⁰⁹.

²⁰¹ *Bundesgesetzblatt* 1997 II, p. 567 et seq. (567-568).

²⁰² *Bundesgesetzblatt* 1997 II, p. 567. Furthermore, similar to the situation with regard to Poland, the border treaty mentioned of 1980 concluded between the GDR and the CSSR is not to be found in the official list of those treaties of the GDR which have lapsed as of 3 October 1990.

²⁰³ *Bundesgesetzblatt* 1997 II, p. 1385.

²⁰⁴ *Bundesgesetzblatt* 1993 II, p. 779 et seq. (785-786).

²⁰⁵ These exceptions concerned Art. 9 para. 3 and Art. 10 para. 2 of the Treaty on Co-operation in the Field of Traffic, Border, Customs and other Controls as well as Art. 8 of the 1973 Treaty on Joint Controls of Transboundary Traffic.

²⁰⁶ Cf. Bundestags-Drucksache 13/5720, p. 1 et seq. (12)

²⁰⁷ Cf. in that regard *Bundesgesetzblatt* 1994 II, p. 728.

²⁰⁸ Cf. Doc. S/90.

²⁰⁹ Cf. in regard of the Arrangements with respect to property in Berlin concluded between the United States and the German Democratic Republic late in 1987 Doc. D/73 and in regard of the Agreement between the GDR and the Soviet Union on the Soviet-German Joint Stock Company WISMUT, Art. 7 of the German-Soviet Treaty on the termination of the activities of said company, Doc. D/42.

3.3 Union of Soviet Socialist Republics (USSR)

With regard to the USSR, one has to distinguish between three categories of countries. This is due to the fact that the State practice of the respective States concerned, as well as the practice of third States is not uniform. Instead, the relevant practice shows rather far-reaching differences between these three different categories of States. The State practice analysed demonstrates that one has to distinguish between:

- the Baltic States²¹⁰ which do not consider themselves to be successor States of the Soviet Union;
- the Russian Federation²¹¹ as the continuing State of the USSR and, finally,
- the other former Republics of the USSR²¹² with the exception of the Baltic States.

Beforehand, one should however briefly refer to the common practice of at least some of the member States of the CIS. Art. 12 of the Agreement founding the CIS, agreed upon by the Russian Federation, Belorussia and Ukraine²¹³ on 8 December 1991 stipulated that "[t]he High Contracting Parties undertake to discharge the international obligations incumbent on them under treaties and agreements entered into by the former Union of Soviet Socialist Republics". The Alma Ata Declaration of 21 December 1991, adopted by all States which at that time were members of the CIS used a slightly modified formula by stating that "[t]he States participating in the Commonwealth guarantee in accordance with their constitutional procedure the discharge of the international obligations deriving from treaties and agreements concluded by the former Union of Soviet Socialist Republics"²¹⁴. Finally, the joint Memorandum of Understanding of 6 July 1992 of the Member States of the CIS provided that:

- questions of succession with regard to multilateral treaties should be decided in accordance with relevant rules of international law by each individual country,
- the fate of certain bilateral treaties which only concerned one or more of them shall be determined by them in negotiations with the respective third parties and
- other bilateral treaties, in particular border treaties, shall remain in force for those member States of the CIS which have a common border with a third State²¹⁵.

Concerning the question of membership in the United Nations and other international organisations, the States represented at the meeting in Alma Ata on 21 December 1991 decided that "[t]he States of the Commonwealth support Russia's continuance of the membership of the Union of Soviet Socialist Republics in the United Nations, including permanent membership of the Security Council, and other international organisations" and that furthermore "[t]he Republic of Belarus, the RSFSR and Ukraine will extend their support to the other States of the Commonwealth in resolving issues of their full membership in the United Nations and other international organisations."²¹⁶

3.3.1 Baltic States

²¹⁰ Cf. below 3.3.1.

²¹¹ Cf. below 3.3.2.

²¹² Cf. below 3.3.3.

²¹³ ILM 1992, p. 142.

²¹⁴ ILM 1992, p. 148-149 (149).

²¹⁵ A French translation of the memorandum can be found in RBDI 1993, p. 627-628.

²¹⁶ ILM 1992, p. 151.

The three Baltic States have, since 1991, claimed to be identical to the three States that had existed on their territory until 1940. Indeed they all three made declarations stating that, given their legal status, they are not successor States to the USSR²¹⁷. Accordingly, none of those three States has ever made a declaration of succession in respect of any multilateral treaties previously concluded by the Soviet Union.

In line with this approach that the Baltic States are not to be considered successor States to the USSR, a certain number of countries have considered that bilateral treaties they had concluded with one or more of the Baltic States between 1919 and 1940 were still in force²¹⁸, and in some cases these treaties were accordingly terminated *ex nunc* after 1991. On the other hand, at least a certain number of countries took the position that the regular rules of State succession should also apply in respect of the Baltic States²¹⁹.

De facto, a certain number of bilateral treaties concluded between third States and the Soviet Union between 1940 and 1990 continued to be applied with regard to the territory of one or more of the Baltic States²²⁰. Finally, as far as the delimitation of certain maritime areas is concerned, treaties concluded by the Soviet Union were taken as a basis for the delimitation of these zones with one or more of the Baltic States²²¹.

3.3.2 Russian Federation

The Russian Federation has right from the beginning of its existence claimed to be the continuing State (*gosudarstvo-prodolzatel*)²²² of the USSR which is supposed to be distinguished from the notion of successor State²²³. This concept has been expressly confirmed by a significant number of Member States of the Council of Europe which have either concluded agreements with the Russian Federation reiterating this concept (e.g. Finland²²⁴, France²²⁵, Greece²²⁶, Norway²²⁷, Switzerland²²⁸ or the United Kingdom²²⁹) or have unilaterally

²¹⁷ Cf. in this regard the relevant declarations in Multilateral treaties deposited with the Secretary General (Status as of 31 Dec. 1994), p. 9 and Multilateral treaties deposited with the Secretary General (Status as of 31 Dec. 1995), p. 9.

²¹⁸ Cf. e.g. as to Finland Doc. FIN/25, as to France, *Liste des Traités et Accords de la France* (Status as of October 1992), vol. II, p. 681, 741 und 744 and, as to Norway, the exchanges of notes with Latvia respectively Lithuania of 2 November respectively 20 April 1994 (Doc. N/5 Annex 5 and Doc. N/6 Annex 6).

²¹⁹ Cf. e.g. Doc. NL/25.

²²⁰ Cf. e.g. the Finnish-Estonian exchange of notes according to which 16 such treaties continued to be applied, Doc. FIN/24. Cf. also Doc. FIN/39 concerning the extension in time of the agreement mentioned.

²²¹ Cf. Doc. S/66, according to which Sweden maintained that according to principles of public international law the agreement on territorial delimitation concluded between Sweden and the Soviet Union remained in force between Sweden and the Baltic States. Cf. also Docs. S/64, S/66, S/71 and S/78 referring to fisheries agreements concluded between Sweden and the three Baltic States according to which as from the respective entry into force of such agreement all other previously concluded agreements shall no longer be in force.

Similar considerations apply as to the relationship between Estonia and Finland. While the two States had first provisionally applied certain agreements entered into by the USSR and Finland (cf. Doc. FIN/24) they later seem to have reached agreement to continue to make use of that delimitation (cf. in that regard the Agreement between the Republic of Finland and the Republic of Estonia on the Boundary of the Maritime Zones in the Gulf of Finland and the Northern Baltic Sea, text to be found in Int. J. Marine Coastal Law 1997, p. 375

et seq.).

²²² Cf. e.g. the note of President Yeltsin to the Secretary General of the United Nations of January 1992, Doc D/82.

²²³ Cf. in this regard the Statement of the Russian representative in the CAHDI, Doc. CAHDI (92) 2 rev., App. 1.

²²⁴ Doc. FIN/30.

²²⁵ Cf. in this regard the answer of the French Government submitted to the French Senate of 13 November 1992, Doc. FR/4.

²²⁶ Greek-Russian Protocol on their Bilateral Treaty Relations of 13 December 1995, Doc. GR/19, quoted by C. Economides, *Actes et positions de la Grèce concernant des questions de droit international* (1995), Rev. Hell. Dt. Int. 1996, p. 255 et seq. [279].

stated that they consider the Russian Federation to be the continuing State of the USSR (e.g. Belgium²³⁰, Italy²³¹, Germany²³² and Sweden²³³).

It is against this background that the Russian Federation informed other States and the depositaries of multilateral treaties that it continues to exercise the rights, and to fulfil the obligations, of the USSR with regard to all bilateral and multilateral treaties previously entered into by the Soviet Union²³⁴. The Committee of Ministers of the Council of Europe took note of this position and stated at its 472nd meeting that the Russian Federation is accordingly a party to all conventions concluded under the auspices of the Council of Europe to which the Soviet Union had become a party²³⁵. Furthermore the Russian Federation continued to exercise the rights and obligations of the USSR within the United Nations and other international organisations, including permanent membership in the Security Council.

Given that the Russian Federation is the continuing State of the USSR, third parties have formally accepted as a matter of principle that all bilateral agreements they had previously concluded with the USSR would continue to be in force with regard to the Russian Federation²³⁶, unless they had otherwise become obsolete due to a change of circumstances.

Generally speaking, one might therefore conclude that it appears to have been widely accepted that the Russian Federation as a matter of principle automatically continued the treaty obligations of the former Soviet Union, a result which is in line with the solution proposed by Art. 35 of the Vienna Convention on Succession of States in Respect of Treaties.

3.3.3 Other former Republics of the USSR

The successor States to the Soviet Union have since their independence either acceded to multilateral treaties which had previously been entered into by the Soviet Union or have made declarations of succession, without however a clearly discernible pattern of behaviour. Similar considerations apply to bilateral agreements. While some countries considered that as a matter of principle all bilateral treaties they had previously concluded with the Soviet Union would automatically devolve upon the respective successor States²³⁷, others took the position that

²²⁷ Cf. the Norwegian-Russian Protocol of 22 April 1992 on the Continuation of the Soviet-Norwegian Treaties, Doc. N/2 with Annex 2, which instead of using the term '*sukcessorstat*' (successor State) uses the term '*etterfølgerstat*' (continuing State).

²²⁸ Cf. Doc. CH/6 and Doc. CH/19.

²²⁹ Cf. Doc. UK/162.

²³⁰ Doc. B/7.

²³¹ *Situazione delle Convenzioni Internazionali Vigenti per l'Italia al 31 Dicembre 1993*, t. I: Convenzioni Bilaterali, p. 126.

²³² Cf. *inter alia* Doc. D/65 and D/78.

²³³ Cf. Doc. S/28.

²³⁴ Cf. Doc. D/82.

²³⁵ Note of the Secretary General of the Council of Europe to all Member States of 6 April 1992, Doc. No. JJ 2748 C; cf. also the Note concernant la pratique du Conseil de l'Europe relative à la succession d'Etats en matière de traités, CAHDI (94) 3, p. 3, which speaks of a "(...) régime de la succession qu'il est proposé d'appliquer aux Républiques de l'ancienne Union Soviétique *autres que la Fédération de Russie* (...)" [emphasis added].

²³⁶ This is *inter alia* true for Belgium (cf. Doc. B/7), Germany (cf. Doc. D/78), Finland (Doc. FIN/30; cf. also Doc. FIN/33 as to the termination *ex nunc* of eight Finnish-Soviet treaties *vis-à-vis* the Russian Federation), France (Doc. FR/4), Norway (cf. Doc. N/2 with Annex 2; it remains however open whether those treaties not listed in Annex 1 and 2 were considered to have become extinct *ex nunc* or *ex tunc*), Sweden [cf. Doc S/28 as well as the three Swedish-Russian exchanges of notes contained in Docs. S/55, Doc. S/77 and S/86), Switzerland (Doc. CH/6 and CH/19) and the United Kingdom [cf. already above note 229]. Cf. also as to the position of Austria Doc A/18.

²³⁷ Cf. e.g. as to

there is at least a presumption in favour of a succession in regard of multilateral treaties²³⁸, or left the question undecided, or finally, took the position, at least initially, that the clean-slate rule would apply²³⁹.

Regardless of this lack of uniformity, it might be said that there seems to be at least a certain tendency to uphold existing treaty relations with the respective successor State even in a case - like the one considered - where one of the parts of the predecessor State, i.e. the Russian Federation, is considered to be the continuing State. One might doubt, however, whether the rule contained in Art. 34 of the Vienna Convention on Succession of States in Respect of Treaties, has by now, and for those cases, been accepted as already constituting an accepted part of existing customary international law²⁴⁰.

3.4 Socialist Federal Republic of Yugoslavia (SFRY)

Both the Arbitration Commission set up under the auspices of the Peace Conference for Yugoslavia, the so-called Badinter Commission, and other international organs, including the Security Council of the United Nations, have considered that the SFRY has ceased to exist²⁴¹

- Belgium: the exchanges of notes with Georgia (Doc. B/12), Kyrgyzstan (Doc. B/11), Moldavia (Doc. B/14) and Tajikistan (Doc. B/13).

- Germany: the exchange of notes with Armenia (Doc. D/87), the joint declaration with Azerbaijan of 22 December 1995 (Bundesgesetzblatt 1996 II, p. 2471, I.), No. 17 of the joint declaration with Belarus of 25 August 1994 (Bundesgesetzblatt 1994 II, p. 2533), the exchange of notes with Georgia (Doc. D/74), No. 17 of the joint declaration with Kyrgyzstan (Doc. D/79), No. 17 of the joint declaration with Ukraine (Doc. D/105) and finally the one with Uzbekistan (Doc. D/106). Cf. also No. 15 of the joint declaration with Kazakhstan (Doc. D/84), which provided however, that the treaties in question would continue to be applied "in accordance with international law". The same is true as to Moldavia (cf. No. 15 of the joint declaration of 11 October 1995, Bundesgesetzblatt 1996 II, p. 768).

- Finland: Doc. FIN/14, p. 45: "Finland (...) assumes that all the Republics, which formerly constituted the Soviet Union, will fully comply with the international commitments undertaken by the Soviet Union." But cf. also Doc. FIN/17 according to which it was the Finnish position that the Finnish-Soviet Treaty on Friendship, Co-Operation and Mutual Assistance had, in accordance with general principles of international law, this had not devolved upon the successor States of the former USSR. As to the succession of Ukraine to Soviet treaties previously concluded by Finland cf. Doc. FIN/38.

- the Netherlands: the decisions by Dutch courts reproduced in Docs. NL/58, p.26; NL/38, NL/39 and NL/69, p.70.

²³⁸ Cf. Doc. CH/4 and Doc. CH/6. The Swiss courts seem to have taken the position, that lacking a confirmation to the contrary, treaties of the predecessor State are considered to have lapsed, cf. in particular Doc. CH/9.

²³⁹ This is in particular true as far as the practice of Austria is concerned, cf. e.g. the Statement in Austrian Foreign Policy Yearbook, Report of the Austrian Federal Ministry for Foreign Affairs for the Year 1992, p. 67 where the official Austrian position was described that "[a]s regards bilateral treaties, the so-called 'clean-slate' principle applies. (...) According to this principle, a newly-emerging State is not as a rule automatically bound by treaties entered into by its territorial predecessor. The only exceptions are treaties applying to specific geographical areas ('localized treaties') (...) which would automatically be taken over by the successor State(s) on the same territory."

***Austria has however later moved away from the clean-slate rule towards the principle of continuity, cf. in that regard in particular the exchange of notes with Ukraine of 2 June 1996, ÖBGBl. 1996, No. 291, p. 2347-2348. Beforehand the Austrian-Soviet treaties continued to be applied *vis-à-vis* Ukraine in a pragmatic manner, cf. Doc. A/9 Annex I.

²⁴⁰ As to the question whether a specific succession régime has developed concerning human rights treaties cf. M. Kamminga, State Succession in Respect of Human Rights Treaties, EJIL 1996, p. 469 et seq. But cf. also the decision of the Swiss Federal Court (Doc. CH/11) which provides that even in regard of the UN Covenants and the UN Convention against Torture, Kazakhstan as one of the successor States of the USSR is free to decide upon its succession in regard of such treaties. Similarly, the Swiss Government in its function as depositary does not make any distinction between multilateral treaties in general and the four Geneva Conventions of 1949, cf. Doc. CH/10.

²⁴¹ Cf. as to the practice of the Security Council *inter alia* Resolutions 777 and 821 of 19 September 1992 respectively 28 April 1993 as well as Resolution 1074 of 1 October 1996. As to the relevant practice of the Badinter-Commission cf. its opinions No. 9 (ILM 1992, p. 1521) and 10 (ILM 1992, p. 1525).

and that therefore none of the States nowadays existing on the territory of the former Yugoslavia can claim to be identical with the former Yugoslavia²⁴². This finding is further confirmed by relevant State practice²⁴³. Therefore, the case of Yugoslavia seems to have been considered as a case of complete dismemberment of a State rather than as a case of separation. Against this background, the question arises whether the successor States as well as third States took Art. 34 of the Vienna Convention on State Succession in Respect of Treaties as a starting point when resolving issues of State succession in regard to treaties. That is, when they considered whether the respective successor States remained bound by the treaties previously concluded by the SFRY or not.

3.4.1 Federal Republic of Yugoslavia (Serbia/Montenegro) (FRY)

As to the Federal Republic of Yugoslavia (Serbia/Montenegro), the situation is complicated by the fact that it has, starting from 1992, considered itself as being the continuation, although in a limited geographical sense, of the former Socialist Federal Republic of Yugoslavia²⁴⁴. Therefore, most of the State practice which deals with the question which treaties previously concluded by the SFRY continue to be in force *vis-à-vis* the FRY, is somewhat ambivalent since, in most cases, it does not address the issue of whether one deals with a matter of State succession in the proper sense or one of legal identity²⁴⁵.

Similarly, the decision of the International Court of Justice in the Genocide Case neither formally addresses the issue whether the FRY succeeded to the Genocide Convention, nor whether the convention remained applicable taking into account the claimed identity of the FRY with the SFRY²⁴⁶.

3.4.2 Bosnia and Herzegovina, Croatia, Slovenia and “the Former Yugoslav Republic of Macedonia”

Unlike the FRY, all other States now existing on the territory of the former Yugoslavia have accepted the fact that they are successor States to the SFRY. It remains open, however, whether and to what extent those successor States have succeeded to the treaties previously concluded by the SFRY.

The International Court of Justice has left the question open of whether the principle of

²⁴² The attempt by the Secretary-General of the United Nations to characterise the Federal Republic of Yugoslavia (Serbia/Montenegro) as being identical to the Socialist Federal Republic of Yugoslavia (cf. Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties 1994, Doc. ST/LEG/8, p. 89, para. 297) led to protests by several States which forced the Secretariat to issue an *erratum*, cf. UN Doc. A/50/910; Doc. A/51/95, Doc. A/50/930 und Doc. A/50/928.

²⁴³ Cf. e.g. as to Belgium cf. Doc. B/20 and Doc. B/30 which speaks of “*cinq Etats successeurs issus de la dissolution de l’ancienne Yougoslavie*”; as to Finland cf. Doc. FIN/29 which refers to the fact that all States existing on the territory of the former Yugoslavia should be treated as equal successor States; as to the Member States of the European Union *inter alia* the declaration of the European Council of 27 June 1992 (Doc. D/76) according to which the Federal Republic of Yugoslavia (Serbia/Montenegro) is to be considered a new legal entity.

***Cf. also the decision of the Committee of Ministers of the Council of Europe adopted at its 480th session, which determined that the Socialist Federal Republic of Yugoslavia had ceased to exist for the purposes of the conventions and agreements of the Council of Europe to which it had been a party, cf. in that regard the letter of the Secretariat of the Council of Europe RB/hms JJ 2853 C of 6 October 1992.

²⁴⁴ Cf. in particular the ‘Declaration on a New Yugoslavia of 27 April 1992, Text to be found *inter alia* in S. Trifunovska, Yugoslavia Through Documents: from its creation to its dissolution (1994), p. 532 et seq.

²⁴⁵ Cf. e.g. as to Switzerland Doc. CH/16.

²⁴⁶ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Request for the Indication of Provisional Measures) (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Order of 8 April 1993, ICJ Rep. 1993, p. 3 et seq. (14-16).

automatic succession was applicable either with regard to all multilateral treaties of the former Yugoslavia or at least with regard to certain types of international treaties. On the contrary, the Badinter Commission considered that the Vienna Convention on Succession of States in Respect of Treaties should at least serve as a guiding instrument when deciding issues of succession with regard to treaties²⁴⁷. Similarly, all successor States to the Socialist Federal Republic of Yugoslavia, with the notable exception of the Federal Republic of Yugoslavia (Serbia/Montenegro), seem to have also accepted that approach. In particular Bosnia and Herzegovina, Croatia²⁴⁸, the Former Yugoslav Republic of Macedonia, as well as Slovenia, have either enacted national legislation or made declarations which indicate that they are willing to abide by the rules of customary law which in their view seem to be largely enshrined in the Vienna Convention on Succession of States in Respect of Treaties and in particular its Art. 34.

This view appears to have been confirmed by a number of member States of the Council of Europe, which have either acknowledged that their bilateral treaties continue to be in force *vis-à-vis* the respective successor States, or have terminated such treaties in relation to one or more of the successor States of the former Yugoslavia *ex nunc*, thereby also indicating that they share that view²⁴⁹. However, for some States, including *inter alia* Finland²⁵⁰, France²⁵¹, Sweden²⁵², the United Kingdom²⁵³, Switzerland²⁵⁴, and Turkey²⁵⁵, no clear position can be

²⁴⁷ Cf. Opinion No. 1 of 20 November 1991 which stated that “[u]n tel phénomène est régi par des principes de droit international dont s’inspirent les Conventions de Vienne du 23 août 1978 et du 8 avril 1983” and opinion No. 9 (ILM 1992, p. 1523) according to which “(...) the succession of States is governed by the principles of international law embodied in the Vienna Convention of 23 August 1978 and 8 April 1983, which all Republics have agreed should be the foundation for discussions between them on the succession of States at the Conference for Peace in Yugoslavia.”

²⁴⁸ Cf. Doc. NL/55.

²⁴⁹ Cf. e.g. as to the position of

- Belgium the exchange of notes with Slovenia (Doc. B/10);

- Germany cf. e.g. the text of the exchanges of notes confirming the continued applicability of treaties respectively terminating them *ex nunc* cf. in regard of Bosnia-Herzegovina Doc. D/86, in regard of Croatia Doc. D/81, and in regard of the Former Yugoslav Republic of Macedonia Doc. D/108.

- Greece cf. the respective exchange of notes with Slovenia (Doc. GR/18, text to be found in Rev. Hell. Dt. Int. 1995, p. 416-417, Croatia (Doc. GR/17, text to be found in Rev. Hell. Dt. Int. 1996, p. 255 et seq.(276-277)). In contrast thereto, the Agreement between Greece and the Former Yugoslav Republic of Macedonia of 1995 (Doc. GR/21, text to be found in Rev. Hell. Dt. Int. 1996, p. 269 et seq. (274)) only provides that three Greek-Yugoslavian treaties should remain in force as between these two States.

- the Netherlands: Docs. NL/55 (Croatia) and NL/54 (Slovenia) where the Dutch Government states that it “subscribes to the continued application of all treaties, unless it appears from the relevant treaty or is otherwise established that the application of a treaty would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.”

²⁵⁰ Cf. as to Slovenia Doc. FIN/31. It is unclear whether the exchange of notes is to be considered as a pure confirmation of a succession which had already taken place *ex lege* or whether it was supposed to have a constitutive effect.

²⁵¹ Cf. as to the treaty relations with Slovenia Doc. FR/2.

²⁵² Cf. Docs. S/73 and S/88.

²⁵³ Similar to its practice relating to the successor States of the USSR, the British Prime Minister stated that as *appropriate*, the United Kingdom regards Treaties and Agreements in force to which the United Kingdom and the Socialist Federal Republic of Yugoslavia were parties as remaining in force between the United Kingdom and Croatia respectively Slovenia, cf. Docs. UK/99 and UK/100. As to the slightly modified wording concerning the Former Yugoslav Republic of Macedonia cf. Doc. UK/164.

²⁵⁴ Cf. Docs. CH/4 and CH/6. But cf. also Doc CH/12, which refers to the fact that the Swiss-Slovenian exchange of notes *confirms* the fact that the listed bilateral treaties remain in force. As to the treaty relations of Switzerland with Croatia cf. Doc. CH/13 and as to the Former Yugoslav Republic of Macedonia cf. Doc. CH/14. Doc. CH/15 provides that, pending further clarification, Swiss-Yugoslav treaties would continue to be applied *vis-à-vis* Bosnia-Herzegovina.

²⁵⁵ As to the continuation of certain Turkish-Yugoslavian treaties *vis-à-vis* the Former Yugoslav Republic of Macedonia and Bosnia-Herzegovina cf. Docs. TR/22 and TR/23.

identified with sufficient certainty. Finally, it is noteworthy that Austria - similar to the position it had taken with regard to the dissolution of the USSR²⁵⁶ - initially took the position that the clean-slate-rule should be applied by the successor States²⁵⁷. However, very recently Austria changed its legal position and concluded two exchanges of notes with Croatia and "The Former Yugoslav Republic of Macedonia" which were largely based on the principle of continuity of treaty relations as codified in Art. 34 of the Vienna Convention on Succession of States in Respect of Treaties.

Notwithstanding the lack of uniformity in regard to general questions of treaty succession, it must be pointed out, that it appears that the States concerned took the position that localised treaties²⁵⁸ and boundary treaties²⁵⁹ have survived dissolution of the Socialist Federal Republic of Yugoslavia²⁶⁰.

3.5 Czech and Slovak Federal Republic (CSFR)²⁶¹

Both successor States of the CSFR, which ceased to exist on January 1, 1993, have accepted the principle of automatic succession in regard of all treaties to which the CSFR had beforehand been a party including both reservations entered into by the CSSR/CSFR and objections made by Czechoslovakia against reservations formulated by other parties²⁶². Besides, both successor States have taken the position that they also succeeded to those treaties, which had only been signed by their Predecessor State, i.e., that they have accordingly acquired the status of a signatory State in relation to these treaties²⁶³. Also, it has to be noted that the Slovak Republic, after having acceded to the Vienna Convention on Succession of States in Respect of Treaties, which had only been signed by the CSFR, made a declaration in accordance with its Art. 7 para. 2 and 3. The declaration provided that it will apply the provisions of the Convention in respect of its own succession, which had occurred before the

²⁵⁶ Cf. above 3.3.

²⁵⁷ Cf. in particular the two exchanges of notes with Slovenia (Doc. A/17) which provided that certain Austrian-Yugoslavian treaties are to be 'put into force' (*in Kraft setzen*) in relation to Slovenia while certain localized treaties 'remained in force' (*in Kraft bleiben*); But cf. also Docs. A/10 and A/11 where Austria had favoured a continuity of treaty relations to the greatest extent possible.

²⁵⁸ Cf. in particular the original approach taken by Austria concerning its treaty relations with Slovenia which distinguished between regular treaties which were *reinstated* while localized treaties (*radizierte Verträge*) were supposed to have remained in force, cf. Doc. A/17.

***Art. 12 para. 1 lit. c) of the Interim Accord between Greece and the Former Yugoslav Republic of Macedonia of 13 September 1995 (Doc. GR/21, text to be found in ILM 1995, p. 1461 et seq. [1470]) provided that the Greek-Yugoslavian Agreement on hydro-economic questions should remain in force as between the two parties.

²⁵⁹ A boundary agreement concluded by Yugoslavia with Austria is considered to have remained in force *vis-à-vis* Slovenia, cf. Doc. A/17.

²⁶⁰ Cf. for the similar position of Switzerland Doc. CH/4.

²⁶¹ Cf. generally the survey contained in the contributions by the Czech Republic and the one of the Slovak Republic, *passim*, in particular p. 3 et seq. respectively p. 3 et seq. As to the treaty relations between Austria and Slovakia cf. Doc. A/19; as to Denmark cf. Docs. DK/86 and DK/87; as to Finland cf. Doc/37; as to Germany cf. Doc. D/96, as to the Netherlands Docs. NL/59 and NL/60 and finally as to Sweden S/87 and S/89. Cf. also as to the continuation of a specific treaty concluded by Turkey with the CSFR Doc. TR/22.

***As to the position of the UK Government which was analogous to its position taken in relation to the question of treaty succession in the cases of Yugoslavia and the USSR cf. Docs. UK/166 and UK/168.

***Cf. also the two exchanges of notes concluded by Switzerland with the Czech Republic and the Slovak Republic respectively, which both refer to the fact that both successor States had declared to be bound by way of succession by all the treaties previously entered into by the CSFR.

²⁶² For the wording of the relevant declarations made by both successor States cf. the contribution by the Czech Republic, p. 1 and 3 and the one by the Slovak Republic, p. 1 and 3.

²⁶³ Wording to be found in the contribution of the Czech Republic, p. 5 and in that of the Slovak Republic, p. 3.

entry into force of the Convention, provided, however, that the other party involved accepts that declaration. Accordingly both successor States have regularly notified their succession to multilateral treaties to which the CSFR had been a party.

A relatively large number of those member States of the Council of Europe that have participated in the Pilot Project, appear to have accepted the position taken by the two successor States, and have therefore in one way or another confirmed that, at least as a matter of principle, bilateral treaties to which the CSFR had *ex ante* been a party either remained in force or were abrogated with an effect *ex nunc*²⁶⁴. Even Austria, which in respect of the dissolution of the CSFR had first supported the applicability of the clean-slate rule, later agreed to an exchange of notes with the Czech Republic which is based on the principle contained in Art. 34 of the Vienna Convention on Succession of States in Respect of Treaties²⁶⁵.

As regards localised treaties, one must first mention the fact that the Czech Republic in its general declarations of succession took the position that it would not take over those treaty rights and obligations "relating to the territory which was under [Czechoslovakia's] sovereignty but is not under sovereignty of the Czech Republic."²⁶⁶ Besides, one should also particularly mention the decision of the International Court of Justice in the *Gabcikovo-Nagymaros case* which *expressis verbis* stated that "Article 12 [of the Vienna Convention on Succession of States in Respect of Treaties] reflects a rule of customary international law" and that, therefore, the 1977 treaty on the Gabcikovo-Nagymaros project was also binding in the relation between Hungary and the Slovak Republic²⁶⁷. Similarly, the respective boundary regimes were also succeeded to by the respective successor State²⁶⁸.

3.6. Conclusions

With all necessary caution, one might summarise the results of the analysis of the State practice just described as follows.

As regards the German unification, it seems to be appropriate to conclude that the case of Germany demonstrates that the rules of State succession in regard of treaties, which are contained in Art. 31 of the Vienna Convention on Succession of States in Respect of Treaties have not been followed. On the contrary, the bulk of the treaties of the incorporated State, i.e. treaties concluded by the former GDR, were considered to have lapsed *ipso facto* as of 3 October 1990. Similarly, almost all of the treaties of the incorporating State, i.e. treaties concluded by the FRG, were generally considered to have become applicable to the whole of the territory of the united State in accordance with the moving boundary rule.

²⁶⁴ For a detailed survey of this approach cf. the contribution by the Czech Republic, p. 25 et seq. and the one by the Slovak Republic, p. 16 et seq.

²⁶⁵ Austria terminated an Austrian-Czechoslovakian Treaty with effect from 1 January 1995, thereby implying its devolution upon the Czech Republic, cf. Czech Contribution, p. 38. Cf. also the fact that the agreement concluded between the Member States of EFTA (including Austria) and Czechoslovakia continued to be in force vis-à-vis the Czech Republic and the Slovak Republic after January 1, 1993, cf. Docs. S/69 and S/70.

²⁶⁶ Cf. the report of the Czech Republic, p. 3.

²⁶⁷ At the same time, the Court did not consider it necessary to decide whether or not Article 34 of the 1978 Convention reflects the current status of customary international law, cf. in that regard para. 123 of the judgment.

²⁶⁸ As far as boundary treaties with Germany are concerned cf. already above 3.2.2. As to the border of Austria with the CSFR cf. the Austrian-Slovakian exchange of notes (Doc. A/19), which confirms the continued validity of three boundary agreements of March 1921, December 1928 and December 1973. This is even more important since Austria, at the time of signing of the exchange of notes with the Slovak Republic, did still support the applicability of the clean-slate-rule.

It is worth noting, however, that different rules have been applied in the case of boundary and related treaties as well as in respect of other forms of localised treaties.

In that context it is also appropriate to mention that in the case of the uniting of Yemen, which took place in April 1990, i.e. only some months before the uniting of Germany, Yemen followed a significantly different approach. Indeed, the practice of Yemen appears to have largely followed the model contained in Art. 31 of the Vienna Convention on Succession of States in Respect of Treaties²⁶⁹. One might attempt to explain this quite different approach by the fact that the case of Yemen is not one of incorporation by one State into another but instead a case of a merger which - unlike the case of Germany where the legal identity of the Federal Republic of Germany as a subject of international law remained unhampered - resulted in the creation of a new State.

In the case of the dissolution of the USSR, the Russian Federation is now generally considered the 'continuing State' of the Soviet Union, and as such remains bound by the treaties of the USSR. As to the other former Republics of the USSR (with the exception of the Baltic States) no clear pattern can be found. Indeed, while some countries which have participated in the Pilot Project clearly follow the model of automatic succession, some others seem to have been more reluctant in that respect.

As to the Socialist Federal Republic of Yugoslavia, it has first to be noted that the claim of the Federal Republic of Yugoslavia (Serbia/Montenegro) to be the continuation of the former Yugoslavia has not been generally accepted by the international community. As far as treaty succession is concerned, it appears that the successor States of the former Yugoslavia have tended to succeed to the treaties of their predecessor State. Recent third States' practice has also revealed a certain tendency to strive for a continued application of pre-existing treaties. However, given the present uncertainties of the law on State succession and taking into account that certain treaties might not devolve upon the respective successor State(s) given their object and purpose, or in case such a succession would change the circumstances of its application, frequently the existing legal situation is acknowledged by way of an exchange of notes or through similar instruments. Such instruments are also used to make it clear that certain treaties have become obsolete. In any event, it seems that even those States which favoured, or still favour, the applicability of the clean-slate-rule, have acknowledged that localised treaties as well as boundary treaties automatically devolve upon the respective successor State.

Finally, as regards the dissolution of the Czech and Slovak Federal Republic, where the two successor States have clearly favoured the applicability of the rule contained in Art. 34 of the Vienna Convention on Succession of States in Respect of Treaties, i.e. automatic succession in regard of both bilateral and multilateral treaties of their predecessor State, it appears that a relatively large number of States have by and large accepted that approach. This seems to be true even for some third parties that had originally favoured applying the clean-slate rule. And again it has been accepted and confirmed that localised treaties have devolved upon the respective successor States.

On the whole, there does indeed seem to be a certain tendency in State practice towards the application of the model of automatic succession in cases of separation of a State, which seems to be particularly strong and coherent in cases of a complete dissolution of a State²⁷⁰. But, against the background of the practice analysed, it does still appear too ambitious to state

²⁶⁹ Cf. the notification made by Yemen to the Secretary-General of the United Nations, Multilateral Treaties deposited with the Secretary-General 1994, p. 10, note 28.

²⁷⁰ As to this distinction cf. *supra* note 6.

that this approach has as yet turned into a firm rule of customary international law. Therefore, both notifications of succession by the respective successor State and bilateral exchanges of notes serve a double purpose: they first confirm the extent to which treaties have indeed devolved upon a given successor State, but also clarify which treaties are not subject to the principle of automatic succession.

CHAPTER 4: SUCCESSION IN RESPECT OF STATE PROPERTY, ARCHIVES AND DEBTS, AND NATIONALITY

Martti Koskenniemi & Jan Klabbers²⁷¹

4.1 Introduction

Going through the stacks of paper gathered by the CAHDI for the purpose of the present Pilot Project, one cannot help but be impressed by two things. First, the response to the call for instances of State practice has been overwhelming. All materials together take up a box of rather generous proportions. Second, however, it is striking that practically all materials relate to either recognition of States or governments, or relate to matters of State succession in respect of treaties. The practice compiled on State succession in respect of State property, archives and debts, and nationality, does not require a box of generous proportions; it easily fits into a medium-sized envelope.

Notably, also, on the specific topics of archives and nationality, hardly any practice at all was submitted. When it comes to archives, this is perhaps understandable: given today's reproduction facilities, legal questions pertaining to ownership of archives may readily be solved by simply reproducing the archives concerned. It is only on rare occasions, usually related to concerns of secrecy, that issues concerning archives assume prominence.²⁷²

More surprising perhaps is the absence of any materials relating to State succession in respect of nationality. It is well known that in some areas of Europe the recent cases of succession have given rise to some tension and problems relating to issues of nationality; indeed, it is not too far-fetched to suppose that the conclusion, in November 1997, of the European Convention on Nationality has been incited, at least in part, precisely by those problems.²⁷³

Succession in respect of State property, debts and archives has found regulation in the 1983 Vienna Convention which provides, in a nutshell, that in cases of separation and dissolution of States, as well as where there is a transfer of part of a territory, the fate of property and debts is to be decided by agreement. If there is no agreement, then property will either follow the territory to which it is connected, or be divided equitably, as will debts. When two States unite, all property and debts pass to the successor State, while newly independent States will generally succeed to property, but not automatically to debts.

4.2 Germany

Practically all materials submitted on the German situation and its consequences with regard to State property and debts have been submitted by Germany itself; the one possible exception being a letter written by the Dutch Agriculture Minister to the Second Chamber of the Dutch Parliament on the restructuring of East German agriculture in the light of the addition of the

²⁷¹*Idem* 1.

²⁷²Or, in the alternative, they come up in a more general way. Compare e.g. Document D/22, dealing with property, debts, funds, and archives. This Circular from the German Foreign Ministry held that as of 3 October 1990, the diplomatic and consular missions of the former GDR would fall to the FRG.

²⁷³The Convention is reproduced in 37 *International Legal Materials* (1998), 44-55. Articles 18 to 20 deal with nationality and succession. The materials submitted within the framework of the Pilot Project occasionally deal with recognition of passports, see e.g. Doc. TR/9.

German Democratic Republic (GDR) to the European Community.²⁷⁴ The main parameters for German unification were, of course, already set by the 1990 Unification Treaty, and more in particular by chapter VI thereof, dealing with public assets and debts.²⁷⁵

The Unification Treaty poses few specific problems with regard to State succession in respect of property and debts. In general, the Federal Republic of Germany (FRG) assumes all assets of the GDR; as far as the debts are concerned, a Special Fund created under the Unification Treaty took over all debts of the GDR's central budget.

Nonetheless, at the fringes some legal questions remained, or turned up rather unexpectedly. Thus, the issue arose in the German Parliament of whether Nicaragua's debt to the GDR could possibly be qualified as development aid. Invoking criteria developed by the Development Assistance Committee of the Organisation for Economic Co-operation and Development, the German government replied that such was not the case, but that an equitable solution would be sought.²⁷⁶ Later, the government confirmed that for the time being no remission of debts owed by developing countries to the former GDR was envisaged.²⁷⁷

As early as December 1990, the German government entered into correspondence with the United Nations concerning the contribution of the former GDR to the UN. In response to being scheduled to overtake the GDR's contribution for the whole of 1990, Ambassador Vergau suggested that no automatic succession was to take place²⁷⁸, although both parties agreed that Germany's share be raised as of 1 January 1991.

In Germany's view the GDR has ceased to exist, while the FRG continues to exist "as an identical subject of international law and, as such, continues its membership in the UN." And since, as a subject, the FRG of after 3 October 1990 is identical to the FRG of before 3 October 1990, no passing over of debts is to take place. The GDR simply disappeared on 3 October 1990.

Ambassador Vergau's position hinges, or so it seems, on two propositions. First, German unification does not entail the creation of a new entity with a distinct personality, and second, contribution owed to international organisations is not to be considered as 'debt' in the meaning of the law of State succession. Both strands of thought were dispelled by the UN's Office of Legal Affairs. The Office calls on the 1983 Vienna Convention in support, holding that "[w]hile not yet in force, the provisions of that Convention represent the general *opinio juris* of the international community on the question."²⁷⁹

Moreover, the Office of Legal Affairs was able to point to a certain inconsistency in Germany's position: Germany, the Office recalls, had filled the GDR's seat on the Special Committee on Peace-Keeping Operations. The Office of Legal Affairs added that it be understood "that the title to the former GDR Mission to the United Nations has passed to Germany."²⁸⁰ In sum, as reflected in the 1983 Convention, debts and assets are but two sides of the same coin. According to the "underlying legal philosophy" of the pertinent provisions, "to the extent that property rights and interests of a predecessor State pass to a successor, so too pass the State debts of that predecessor."²⁸¹

²⁷⁴Document NL/12. The letter is a description of the things that are expected to happen on the topic, without dealing with issues of succession specifically.

²⁷⁵Document D/19 contains a brief outline of the Unification Treaty.

²⁷⁶Document D/39.

²⁷⁷Document D/44.

²⁷⁸Document D/62.

²⁷⁹*Ibid.*, para. 11

²⁸⁰*Ibid.*, para. 10

²⁸¹*Ibid.*, para. 15.

Almost two years later, the German government made an announcement that while "it does not recognise any legal obligation to pay the debts of the former German Democratic Republic, ..., it will make a voluntary contribution of an appropriate amount in due course."²⁸² As the original German text of the document makes clear, Germany's offer contains an element of decisiveness: the UN is to reproduce clearly the legal position that Germany deems correct, or run the risk of losing all outstanding GDR contributions.²⁸³

Apart from the above, some matters were arranged through negotiations with the States concerned. Thus, the termination of activities of a Soviet-German joint company was effected by means of a bilateral agreement concluded with (at the time still) the USSR.²⁸⁴ With the US, an agreement was reached on American property claims arising from expropriation and related activities by the GDR.²⁸⁵ In both these cases, then, issues of succession were solved by negotiation.

4.3 Union of Soviet Socialist Republics (USSR)

Following the dissolution of the former Soviet Union, two types of successor States emerged: the Russian Federation and the three Baltic States are generally regarded as continuing pre-existing States (with the Russian Federation continuing the former USSR); and the remaining former republics are generally regarded as successor States.²⁸⁶

4.3.1. Baltic States

The legal position of the Baltic States has not been without practical consequences. Thus, in Switzerland, a problem arose with respect to premises used by Latvia as its diplomatic mission during the *inter-bellum*. After being annexed by the USSR in 1940 (*de facto* if not *de iure* recognised by Switzerland), use of the building fell upon the USSR, which meant that a solution had to be sought after Latvia had regained its independence. The result was a negotiated settlement between Switzerland and the Russian Federation.²⁸⁷

The embassy of Estonia in Germany had, after the end of the Second World War, been put under legal guardianship. After Estonia's independence, a Berlin court ordered that the guardianship be lifted and property be restored to Estonia.²⁸⁸ The court's order appears to indicate that guardianship had been instituted due to the beneficiary being unknown. After regaining independence, followed by recognition, Estonia was no longer unknown within the meaning of the pertinent provision of the Civil Code, which justified the lifting of guardianship. The provision concerned was § 1910 of the German Civil Code (it is no longer in force), which dealt with guardianship of adults who are incapable of representing themselves for physical reasons. The provision mentions in particular deafness, dumbness and blindness.

²⁸²Document D/83.

²⁸³"Sollten die VN dem nicht entsprechen, muss damit gerechnet werden, dass der Bundesminister der Finanzen seine Zustimmung zur Leistung - freiwilliger Zahlung zum Abbau von Zahlungsverpflichtungen der ehemaligen DDR widerruft. [sic]" In unauthorized translation, this reads "If the UN were not to agree thereto, then account must be taken of the possibility that the Federal Finance Minister withdraw his permission to the voluntary decimation of the former GDR's payment obligations."

²⁸⁴Document D/42.

²⁸⁵Document D/73.

²⁸⁶See generally Martti Koskenniemi & Marja Lehto, "La succession d'Etats dans l'ex-URSS, en ce qui concerne particulièrement les relations avec la Finlande", 38 *Annuaire Français de Droit International* (1992), 179-219.

²⁸⁷Document CH/21.

²⁸⁸Document D/52.

Guardianship requires the consent of the individual concerned, unless an agreement were not possible.²⁸⁹

Celebrating the first anniversary of Estonia's independence, Sweden promised to make restitution for Estonian gold once deposited in the Bank of Sweden but handed over to the USSR after 1940.²⁹⁰

What is interesting is that neither of the three documents discussed relates to succession as such. Sweden, clearly, no longer possesses Estonia's gold, but instead promises to compensate. The situations concerning the Estonian embassy in Berlin and the Latvian embassy in Geneva indicate the search for pragmatic answers when confronted with difficult and unexpected situations, in 1946 as well as after 1991. The very concept of State succession, then, does not even enter the picture, which in an intricate way affirms the claims of the Baltic States that no succession, strictly speaking, took place.

The same position was upheld by the Helsinki District Court in *Skopbank v. Republic of Estonia*. The Court denied that Estonia had succeeded to loans entered into by the USSR, considering that the USSR had been an occupying power; present-day Estonia must legally be regarded as the successor to the Estonia that was established in 1922, instead of the Estonian Soviet Socialist Republic or the USSR.²⁹¹

More ambiguous are the various stages of court proceedings in the Netherlands regarding ownership of ships and succession to the *1969 Agreement on Shipping between the Netherlands and the USSR*. This Agreement provides, amongst other things, that both contracting parties shall take steps to enforce claims based on a judgement rendered by each other's courts, and that the parties shall not, under certain circumstances, seize each others ships in civil action.²⁹² In a string of cases, the Netherlands courts have been confronted with the question as to whether the various republics of the former USSR were to be regarded as having succeeded the USSR to this Agreement, and with the question as to whether shipping companies formerly owned by the USSR had through succession become the property of the new republics.

One of the earlier decisions in this string, *Sevrybkholodflot v. Granoil International BV*, concerned Latvia; in April 1992 the President of the District Court of Dordrecht held that it was unclear whether the Agreement was still in force, and whether it would be applicable to Latvia.²⁹³ In a later stage, the Court of Appeal of The Hague presumed that ownership had come to rest with the Russian Federation, not Latvia, and was willing to assume that Russia had succeeded to the Agreement. This did not guarantee, however, that a judgment against the

²⁸⁹In its 1989 version, § 1910 read:

***"(1) Ein Volljähriger, der nicht unter Vormundschaft steht, kann einen Pfleger für seine Person und sein Vermögen erhalten, wenn er infolge körperlicher Gebrechen, insbesondere weil er taub, blind oder stumm ist, seine Angelegenheiten nicht zu besorgen vermag.

***"(2) Vermag ein Volljähriger, der nicht unter Vormundschaft steht, infolge geistiger oder körperlicher Gebrechen einzelne seiner Angelegenheiten oder einen bestimmten Kreis seiner Angelegenheiten, insbesondere seine Vermögensangelegenheiten, nicht zu besorgen, so kann er für diese Angelegenheiten einen Pfleger erhalten.

***"(3) Die Pflegschaft darf nur mit Einwilligung des Gebrechlichen angeordnet werden, es sei denn, dass eine Verständigung mit ihm nicht möglich ist."

²⁹⁰Document S/38.

²⁹¹Decision of 21 January 1998, as yet unpublished.

²⁹²Article 16 of the Agreement. These and similar cases are extensively discussed in Leonard H.W. van Sandick, "Statenopvolging: enkele IPR aspecten", in A. Bos/O. Ribbelink/L. van Sandick., *Statenopvolging* (Preadvies Nederlandse Vereniging voor Internationaal Recht 1995), 115-168, esp. 134-145.

²⁹³Document NL/4.

shipping company will or shall be adhered to by the Russian Federation.²⁹⁴

If *Sevrybkhodflot* already illustrates some of the uncertainties arising from a succession of States, even more illustrative is *Latvian Shipping Company v. AKP Sovcomflot*, decided by the President of the District Court of Middelburg in October 1992.²⁹⁵ Faced with the question as to whether seizure was allowed due to an unforeseen change of circumstances, the District Court's President noted that under Dutch law, he could change the initial contract between the parties and perhaps allow the seizure, but that *in casu* foreign law apparently had to be applied.²⁹⁶ It remained unclear, however, which foreign law was to be applied: the President of the Court mentioned the possibilities of applying the law of Latvia, and/or of the CIS, and/or of the Russian Federation. In the end, the President settled for what appeared to him to be an equitable compromise, happily disregarding questions of applicable law.

4.3.2. Russian Federation

Surprisingly, only few materials have been submitted regarding the Russian Federation.²⁹⁷ One of the bigger problems, as is well known, has been the settlement of the Soviet debt.²⁹⁸ In respect of this matter, in January 1992 an *Agreement on the Deferral of Debt of the USSR and its Successors to Foreign Official Creditors* had been signed in Paris.²⁹⁹ The government of Denmark submitted two instances of practice in execution of the Paris Agreement. In April 1992, Denmark and the Vnesheconombank (as representative of the former USSR) concluded an agreement on deferral of the debt³⁰⁰, to be followed in December 1993 by an agreement between the same parties on consolidation of the debt.³⁰¹

A German-Russian Joint Declaration, issued on 16 December 1992, also addressed the question of the debts of the former Soviet Union. Chancellor Kohl and President Yeltsin agreed on the necessity of converting the Soviet debt, and outlined some principles to guide the process of conversion, the most important of which was perhaps the legally binding recognition by the Russian Federation of the debts of the former USSR.³⁰² In the same Joint Declaration, the parties recorded their agreement to extend the term of repayment concerning the "transferrubelsaldo" with a period of 8 years.³⁰³

As has already become apparent from the discussion of the situation of the Baltic States above, on various occasions the Russian Federation has been involved in legal proceedings in the

²⁹⁴Document NL/7. The pertinent paragraph of the judgement reads: "Zo wil het hof ... wel aannemen dat de Russische Federatie (verder RF) de Overeenkomst na de omwenteling in de USSR heeft voortgezet; daarmee is echter niet gegarandeerd dat een vonnis, gewezen tegen de rederij, door de RF moet of zal worden nagekomen."

²⁹⁵Document NL/8.

²⁹⁶According to their contract concluded in 1990, Latvian leased ships from Sovcomflot, and was supposed to pay in US dollars, based on calculations in fictitious so-called hard currency rubles. Latvian argued that it was willing to pay, but not in US dollars and not on the basis of the fictional currency values of yesteryear.

²⁹⁷We do not feel Document DK/73 relates to our topic, as it records Danish recognition of succession or accession of several States to a treaty.

²⁹⁸There are fleeting references in some documents of a very general nature to issues such as the ownership of the Black Sea fleet, but those references are too fleeting to take into account. So, e.g., in Document NL/28, a memorandum presented by the Dutch defence Minister to the Second Chamber of Dutch Parliament on the size and capabilities of the armed forces in the CIS.

²⁹⁹The debt issue is described and analyzed in detail in August Reinisch & Gerhard Hafner, *Staatensukzession und Schuldenübernahme beim "Zerfall" der Sowjetunion* (Vienna 1995).

³⁰⁰Document DK/13.

³⁰¹Document DK/65.

³⁰²Document D/90.

³⁰³Submitted as Document D/91, but identical to Document D/90.

Netherlands concerning shipping. In addition to the cases mentioned above, an interesting sequence of events is demonstrated by the various stages of *Russian Federation v. Pied-Rich BV*. At issue was a request for conservatory seizure by Pied-Rich of a ship apparently belonging to the Russian Federation, the "Kapitan Kanevskiy".

In the early stages of proceedings, the Rotterdam District Court appeared to work on a variety of assumptions. It assumed that ownership of the ship had indeed, through succession, come to rest with the Russian Federation; and it also assumed that Russia had succeeded to guarantees made earlier by the Russian³⁰⁴ shipping company and the responsible ministry.³⁰⁵ The Court of Appeal elaborated further, stating that Russia had to be regarded as successor to the USSR and that Russia did not dispute this.³⁰⁶ The Dutch Supreme Court, while only addressing (and rejecting) Russia's plea for immunity³⁰⁷, did not contest the various assumptions concerning succession.

When Russia once more tried to get the seizure lifted, arguing amongst other things that the "Kapitan Kanevskiy" is not her property to begin with, the President of the District Court of Rotterdam observed that as Russia had earlier not disputed the fact of its ownership, it could not argue the opposite in later summary procedures.³⁰⁸

An important consideration in all these cases was the applicability of the 1969 Soviet-Dutch Agreement on Shipping, which prohibits seizure in certain circumstances. Whereas the general point to be distilled from the aforementioned cases appears to be that succession by Russia to this agreement was simply assumed, the President of the District Court of Middelburg, in *Baltic Shipping Company & Russian Federation v. Intercontinental Equipment (Gibraltar) Ltd*, in December 1994, substantiates the assumption by pointing out that the Netherlands government has taken the position that the point of departure is continuity of treaty relations between the Netherlands and the former USSR republics.³⁰⁹

The assumption that debts or guarantees are also succeeded to is never spelled out in the Dutch cases that have been submitted. The Paris Court of Appeal, however, does spell it out in a case before it, dealing with ownership of an arbitral award. In *Société française GLO v. Stankoimport*, the Court of Appeal bases its reasoning on what has been dubbed a 'double succession': there is the State succession as such, but also the succession of legal persons. *In casu*, a newly founded company Stankoimport had succeeded an earlier existing Stankoimport, and thus inherited an arbitral award made in favour of the former Stankoimport.³¹⁰

4.3.3. Other former republics of the USSR

The only materials relating to the remaining former Soviet Union republics in matters of succession to debts and property were submitted by the Netherlands, and consisted of a few Court decisions relating to, once more, ownership of ships and succession to the 1969 Soviet-Dutch Agreement on Shipping. These cases, moreover, related solely to Ukraine.

³⁰⁴As the Court here deals with agreements concluded before the revolutionary changes occurred, we may safely presume that what it meant here was the USSR shipping authorities, not those of the Russian Federation which, after all, did not yet exist at that time. In colloquial Dutch, as in other languages, USSR and Russia were often used as synonyms.

³⁰⁵Document NL/5.

³⁰⁶Document NL/6. The Appeal Court's decision is also reproduced in Document NL/5.

³⁰⁷Incidentally, immunity was rejected since the USSR had participated in a commercial transaction. What was decisive, so the Supreme Court held, was the nature of the transaction, not its purpose. Document NL/9.

³⁰⁸Documents NL/34 and NL/35. NL/34 contains the more extensive reproduction.

³⁰⁹Document NL/68.

³¹⁰Document FR/6.

In *Black Sea Shipping Co. v. Transamerica Leasing Inc.*, the Middelburg District Court worked on the assumption that the ship "Indira Gandhi", formerly owned by the USSR, had through succession come under ownership of Ukraine. While the respondent argued that ownership had been privatised, the Court found that too little evidence thereof had been produced.³¹¹ In a later phase of the same case, the Court of Appeal of The Hague ordered a special session on the question of ownership.³¹²

In *Black Sea Shipping Co. & Ukraine v. Transamerica Leasing Co.*, a similar situation arose concerning another ship, the "Ernesto Che Guevara". For purposes of the proceedings, the President of the Middelburg District Court clearly stated the assumption that the ship was the property of Ukraine (no issues of succession of ownership were mentioned), and that Ukraine had succeeded to the 1969 Agreement on Shipping. Consequently, the President ordered that the seizing of the "Ernesto Che Guevara" be lifted.³¹³

4.4 Socialist Federal Republic of Yugoslavia (SFRY)

Less than a handful of submitted documents deals with issues of succession to debts and property arising out of the conflict in the former Yugoslavia; at the time of writing, negotiations between the former SFRY republics continue within the Working Group on Succession (the so-called Watts group).³¹⁴

The legal department of the Swiss Federal Ministry of Foreign Affairs produced an internal note that set out the legal position of Slovenia and Croatia in respect of assets of the former SFRY on foreign territory. Having highlighted the general usefulness of the 1983 Convention, the legal department noted that property located abroad is not dealt with in circumstances of partial succession. It is, however, regulated when it comes to a total dissolution, in which case the 1983 Convention prescribes that a division in equitable proportions be sought.³¹⁵ Either way, the conclusion is drawn that Slovenia and Croatia be best advised to open negotiations with Yugoslavia.³¹⁶

The only other pertinent example of State practice submitted is a decision by the Civil Court of Kassel, rendered in April 1992. Confronted with the question as to whether an arbitration clause in a private contract had survived the onset of the civil war in Yugoslavia, the Court found that the change of circumstances brought about by the existence of what was practically a state of war was enough to neglect an onerous arbitration clause. After all, the Court argued, the point of arbitration clauses is to facilitate dispute settlement rather than to insist on executing the inexecutable.³¹⁷

³¹¹Document NL/38. Unfortunately, the documentation is not quite complete. It turns out (see Document NL/69) that respondent argued privatization in order to prevent applicability of the prohibition of seizure as envisaged in article 16 of the 1969 Soviet-Dutch Agreement.

³¹²Document NL/69.

³¹³Document NL/67.

³¹⁴In its decision of 17 December 1996 in *Republic of Croatia & others v. Girocredit Bank A.G. der Sparkassen*, the Austrian Supreme Court has held that property formerly owned by the SFRY abroad now constitutes a *communio incidens*: it is jointly owned by all successor States until such time as a division has been secured. See 36 *International Legal Materials* (1997), 1520-1530.

³¹⁵Document CH/20.

³¹⁶Note that, at the time of the note (26 March 1992), the legal nature of the Yugoslav situation was still far from settled. The Badinter Commission had opined on 29 November 1991 (Opinion No. 1) that the SFRY was in a process of dissolution, and found on 4 July 1992 (Opinion No. 9) that the process of dissolution had been completed and that as a consequence, the old SFRY had completely ceased to exist.

³¹⁷Document D/71. Purists may have a hard time finding the actual *ratio decidendi* of the case. The decision suggests

4.5. Czech and Slovak Republic (CSFR)

No State practice in respect of property and debts, much less archives or nationality, was submitted concerning the 'velvet' dissolution of Czechoslovakia. In part, this may find its cause in the circumstance that the two new republics agreed on the modalities of State succession in respect of State property and debt, favouring a solution in rough proportion (2:1) to the size of their populations.³¹⁸

4.6. Conclusions

The practice as discussed above raises at least three questions. First, what exactly do the materials tell us about State succession in respect of property, debts, archives, and nationality? Second, we may wonder why there is such a scarcity of materials submitted on the topics of succession to debts, property, archives, and nationality. Third, such materials as have been submitted show an infinite variety as to their origins, thus indicating that even on fundamental concepts such as what constitutes State practice, there is remarkably little agreement.

As regards the first question, the law of State succession, one of the goals of the present project was to find out whether the practice of States would show, upon analysis, some regularities of behaviour which might be taken to provide some normative guidance for States and other actors. When it comes to State succession in respect of archives or nationality, the answer is simply that we do not know on the basis of the materials submitted whether any regularities of behaviour exist. Where no materials are submitted, no conclusions can be drawn. Similarly, the practice submitted concerning property and debts, while larger in number, does not provide much guidance either. Nonetheless, with due care perhaps two generalities may be noted. The first is that usually an agreed solution appears to have the preference of the parties involved. There are few references, e.g. to the norms entailed in the 1983 Vienna Convention, and where such references do occur³¹⁹, they point to the desirability of mutual agreement.³²⁰

The reason for this state of affairs may well be, as Stefan Oeter has suggested in a thoughtful article a few years ago, the existence of "various levels of legal dispute".³²¹ On one level, there may be a dispute between the various entities involved in the succession itself, if only on how their situation must be classified. On another level, there may be disputes between the entities involved in the succession, and other States. And on yet another level, relevant in particular when debts and property are at issue, foreign creditors may enter the picture with demands of their own. Clearly, in such a situation a negotiated solution may be the most workable solution and, as Oeter points out, the 1983 Convention actually prescribes a negotiated solution, at least in cases of separation and dismemberment.³²² His conclusion that the 1983 Convention offers

that imperative considerations are the object and purpose of arbitration clauses, a fundamental change of circumstances, the outbreak of war, and something akin to force majeure. The submitted summary, moreover, speaks simply of equity.

³¹⁸For a general overview, see Mahulena Hoskova, "Die Selbstauflösung der CSFR: ausgewählte rechtliche Aspekte", 53 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1993), 689-735.

³¹⁹For example, in Document CH/20.

³²⁰An exception appears to be the correspondence between Germany and the UN (Documents D/62 and D/83) concerning payment of East-Germany's contribution for 1990, with the UN relying on the 1983 Convention as representing *opinio juris*, and Germany not even referring to it.

³²¹Stefan Oeter, "State succession and the struggle over equity", 38 *German Yearbook of International Law* (1995), 73-102, at 84.

³²²Articles 40 and 41.

"a convincing solution to some extremely complex problems"³²³ appears a mite optimistic, however, in the light of its open-ended wording. Second, the practice submitted demonstrates that practical cases of State succession are more complex than any clear-cut legal rule can handle. In particular the string of decisions by the Dutch courts illustrates, if nothing else, to what extent succession in respect of debts and property is interwoven with succession in respect of treaties. What is required, often, is the finding of a double succession: not merely to treaties, but also to debts or property. But that entails, in turn, that the pertinent legal rules allow States and private parties alike to adopt a consistent position³²⁴, something which appears at present most likely within the context of a negotiated settlement.

As regards the second question, the scarcity of the materials submitted on debts, property, archives, and nationality pales in comparison to the wealth of materials submitted on both recognition and succession to treaties. The intriguing question is then why so little was submitted on debts and property, never mind archives and nationality.

Strange though it may seem, the answer resides perhaps in the "directness", or "concreteness", of issues relating to debts and property. Issues of recognition, or succession in respect of treaties, remain rather abstract. Thus, for example, whether State A will recognise State B is an important matter, from which all kinds of practical consequences may follow, but the distance between the act of recognition itself and those consequences is relatively remote. No immediate consequences follow necessarily.

In both cases there is a comfortable distance between engaging in a somewhat abstract practice and the concrete practical consequences thereof. With issues of succession to debts or property, however, this comfortable distance is absent. One cannot divide property or debts in the abstract, at least not in the same way as one can succeed to a treaty in the abstract. Any division of debts or property will have immediate winners and losers, and this inevitable urgency contributes not just to the preference for a negotiated settlement, but may also impress upon States that what they are engaged in is not so much practice of a law-making kind, but rather practice of the problem-solving kind. Inasmuch as law is often deemed to involve the creation of abstract standards, it should perhaps not come as much of a surprise that the law-making character of negotiated settlements is intuitively denied.³²⁵ Here, then, international law's often-honoured pragmatism ironically turns against itself: the pragmatics of problem-solving end up denying anything that can possibly be reported.

Finally, as regards the third question, the concept of State practice, even a mere perusal of the submitted documents would reveal that there is a wide variety of ideas as to what constitutes State practice. Some States have submitted large piles of documents, including replies to questions asked in their parliaments, decisions rendered by even their lower courts, and internal memoranda emanating from various governmental branches. Others, on the other hand, have been more succinct, and have largely limited themselves to formal government promulgations and agreements.

This suggests the existence of an awkward problem at the heart of international law: uncertainty as to the meaning of such a central concept as 'State practice'. Debates on the existence of alleged rules of customary international law are always sensitive to the question of the sort of practice invoked as the sociological foundation of the rules in question; most notorious perhaps have been the discussions as to whether the making of statements at

³²³Oeter, *op. cit.* (note 321), at 90.

³²⁴Compare the comments of the UN's Office of Legal Affairs in response to Germany's position regarding the GDR's outstanding payments to the UN, in Document D/62.

³²⁵Richard Lillich once pointed to a similar phenomenon concerning lump-sum agreements concluding expropriation disputes. See his "The obligation to register treaties and international agreements with the United Nations", 65 *American Journal of International Law* (1971), 771-773.

international meetings may by itself qualify as State practice. The obvious consequence is that where conceptions of what constitutes State practice differ to a great extent, any rule based on State practice is likely to be controversial. As it is, this chapter is bound to conclude with the finding that the materials do not permit any conclusion at all, save perhaps for the conclusion that negotiated settlements appear to be most workable.

To conclude that practice appears to support negotiated settlements is not to say a whole lot; it leaves unsaid on what basis negotiations are to proceed, let alone what sort of result is to be strived for. But then again, it is not meaningless either. Practice in respect of succession has the habit (and the present materials, if anything, confirm as much) of being a practice of bits and pieces. As one of us has written elsewhere, the most appropriate metaphor is that of diplomatic *bricolage*: practice builds on the collecting of bits and pieces from normative materials "however open-ended or otherwise obscure, lying around in treaties, doctrinal writings and diplomatic discourse and constructing from them whatever it takes to get from one day to the next."³²⁶ And as long as problem-solving rather than law-making is the main task, surely such *bricolage* is entirely honourable. The often-noted problem that the diversity of cases of succession renders it difficult to extract customary rules from past practices, finds its origin perhaps not so much in the diversity of practice but rather in the assumption that practice would, should, or could somehow give rise to legal rules.

³²⁶ Martti Koskenniemi, "State succession: codification tested against the facts", in Pierre-Michel Eisemann & Martti Koskenniemi, *La succession d'états: la codification à l'épreuve des faits* (The Hague 1997), 89-168, esp. at 167-168.

CONCLUSIONS

Martti Koskenniemi, Jan Klabbers, Olivier Ribbelink & Andreas Zimmermann³²⁷

The law on recognition of States and the law regarding State succession have often been regarded as indeterminate in their contents. While two general conventions on State succession have been drafted, one of which has entered into force, most commentators agree that very few rules regarding State succession (if any) are easily recognisable and applicable. In the opinion of some authors, the normative guidance provided by the 1978 and 1983 Vienna Conventions has proved to be rather limited, that is, although the conventions provide for a common vocabulary, they hardly amount to a stable set of clear-cut rules to be applied in cases of State succession³²⁸. Consequently, resort is often had to other factors in order to determine the proper solution to problems arising out of a succession of States. With recognition, many textbooks suggest, matters are even worse: the topic is felt to be politicised to such an extent as to discourage legal analysis.

The documents submitted in the framework of the CAHDI's Pilot Project and analysed in the preceding chapters confirm this picture along two broad lines. First, the documents seem to indicate that indeed few rules are clear cut: the practice of States when it comes to State succession in respect of treaties, and especially in respect of debts and property, indicates a variety of solutions chosen by parties, and a number of distinct approaches adopted. Practice is varied to such an extent that hard and fast rules are difficult to discern.

Second, the documents lend support to the thesis that issues of State succession appear to be most often dealt with by resorting to various considerations, some perhaps more determinate than others. Once more, especially in the context of State succession in respect of property and debts, problems are often solved in an *ad hoc* manner, by seeking to find an equitable outcome. Clearly, as pointed out by some scholars, an agreed settlement on the basis of equitable considerations is also prescribed by the 1983 Vienna Convention. Yet, equally clearly, the injunction to reach an equitable solution may not be helpful inasmuch as it is precisely what is equitable in the particular case that is subject to disagreement.

The Pilot Project therefore lends some support to the traditional views about the complexities involved in determining the fate of treaties, property, and debts upon succession of States. However, at least within western Europe, some broad patterns seem to emerge in the ways in which states respond to cases of succession. Thus, as Chapter Three carefully concludes, the response to German unification appears to have strengthened the traditional moving-frontiers rule, at least for those cases where a disappearing State joins another one.

Moreover, and arguably more important, Chapter Three confirms that States increasingly strive for clarity, and to that end engage in notifications or negotiations about the fate of their treaty obligations. One is tempted to draw the conclusion that the state of the law on this point is so uncertain as to stimulate States to make sure for themselves: reliance on either *ipso jure* continuity or the clean slate doctrine might prove, in the end, too rigid, or costly, to form an even presumptively applicable general rule.

As Chapter Three also indicates, although there may be indications of a certain tendency, the

³²⁷ *Idem* 1.

³²⁸ See especially the extensive reports of Pierre Michel Eisemann and Martti Koskenniemi written for the Centre for Studies and Research in International Law and International Relations of the Hague Academy of International Law, under the titles *La succession d'Etats: la codification à l'épreuve des faits* and *State succession: codification tested against the facts* (The Hague 1997).

practice analysed does not as yet warrant the conclusion that a rule of customary international law has formed.

Likewise, when it comes to State succession in respect of property and debts, the preference for agreed settlements outlined in Chapter Four suggests that States (as well as other interested parties) wish to avoid, wherever possible or feasible, having to rely on an alleged rule of uncertain status. Instead, agreed settlements are deemed more equitable for all parties concerned. An agreed settlement allows States to adopt a realistic and comprehensive approach to the distribution of the relevant assets and liabilities.

These are important conclusions to draw, even though they have to be drawn with caution in the light of the fact that what is analysed above is, after all, the practice of only 16 States from western Europe. Nonetheless, given these caveats, it appears that there is a preference for dealing with issues of succession on a case-by-case basis. It may appear a slight comfort that despite its appearance of *ad hoc*, almost non-legal problem-solving, some leading philosophers feel that case-by-case analysis is the strength *par excellence* of the legal mind.³²⁹

But perhaps the most noteworthy developments are taking place in respect of recognition. One such development is clearly discernible: as Chapter Two abundantly demonstrates, recognition by western European states is becoming more and more a collective process, something which is in itself not unsurprising given the foreign policy aspirations of the European Union.

Arguably of more importance however, both as a matter of practice and as a matter of theory, is the circumstance that recognition is also increasingly made conditional upon certain guarantees. And as Chapter Two suggests, there may be but a fine line between insisting that certain desiderata are generally lived up to (most of all perhaps respect for human rights), and using those desiderata as an excuse to postpone recognition.

Chapter Two also confirms the extent to which the decision to recognise or not to recognise (or when to recognise) is relatively independent of considerations of law. While guidelines such as those issued by the European Community may provide a reason to postpone recognition for a while, it is unlikely that they will be strictly adhered to if other circumstances demand that recognition take place. And that, in turn, suggests that perhaps lawyerly debates regarding recognition have always been cast in terms which are less than fully adequate.

Both the constitutive theory of recognition and its counterpart, the declarative theory, are based on the thought that recognition is best regarded in terms of gate-keeping. The constitutive theory declares as much without further ado, while the declarative theory implicitly assumes the same. Recognition either determines or confirms that an entity is admitted into the community of States.

Yet, both theories have always faced empirical problems. The declarative theory cannot, in the end, explain instances where entities aspiring to statehood meet the traditional requirements without being recognised; nor can it explain why it is that, if the requirements of statehood are clear enough to be applied by States, nonetheless some entities are recognised by some but not by others. The constitutive theory, on the other hand, assumes an air of artificiality in the light of the circumstance that, in some cases, official relations between States take place unimpeded by concerns of recognition or non-recognition.

Both theories then, aside from stimulating resort to such notions as *de facto* or *de jure* recognition, implied recognition, or recognition of governments instead of States, end up referring the matter back to politics, leaving the act of recognition as little more than symbolic while remaining unclear about what exactly it is that this act is supposed to symbolise.

Clearly, the seriousness with which States contemplate and discuss recognition, as confirmed

³²⁹Stephen Toulmin, *Cosmopolis: the hidden agenda of modernity* (Chicago 1990).

by Chapter Two, implies that recognition is of more than unclear symbolic value, and this in turn suggests that neither the constitutive theory nor the declaratory theory has sufficient explanatory force.

This finding appears to be confirmed by the present Pilot Project as a whole. Thinking about recognition and statehood in gate-keeping terms, there would seem to be a clear conceptual link between recognition and state succession. In gate-keeping terms, issues of succession will only come to be debated after recognition of new entities has taken place. Yet, the present Pilot Project demonstrates, precisely by allowing for the study of recognition and succession not in isolation but in conjunction, that the intuitive conceptual nexus is practically absent: issues of succession are debated, discussed, analysed, and decided, with a benign neglect of issues of recognition. And where recognition is mentioned at all, as in some of the municipal judicial decisions analysed in Chapter Four, it does not appear to be a controlling factor.³³⁰

This may suggest that the gate-keeping framework is not very suitable. Once it is accepted that recognition of States is not always of equal relevance for their existence or functioning in law, as practice appears to indicate, then perhaps a different framework is called for. One such alternative has been offered recently by Frost, who argues that recognition should be analysed not so much in black and white gate-keeping terms, but rather in the grey that accompanies notions of initiation. Recognition, in this view, entails a mutual commitment toward initiation into the practices and rituals of statehood.³³¹

Such an approach to recognition may well circumvent the pitfalls associated with both the constitutive and the declaratory theories, and may go some way toward explaining why it is that when it comes to issues of State succession, there is such a remarkable preference for agreed settlements. For, what are agreed settlements, in the context of succession, but introductions of new entities to the daily business of States? It is too early to draw any firm conclusions in this respect. Suffice it to say that the study of the actual practice of states remains an essential element in both the determination of international rules and the formation of international legal theory. In the light thereof, the practice gathered by the CAHDI is, quite literally, invaluable.

³³⁰ The materials do not allow any conclusion on whether non-recognition would constitute a controlling factor in judicially deciding issues of succession.

³³¹ Mervyn Frost, *Ethics in international relations: a constitutive theory* (Cambridge 1996), esp. 153-155.

DOCUMENTARY APPENDICES

(selected texts from the Pilot Project)

**Selected documents from the Pilot Project of the Council of Europe on State practice
regarding State succession and issues of recognition**

AUSTRIA	A/1, A/2, A/3, A/5, A/9, A/17, A/18, A/19
BELGIUM	B/4, B/7, B/10, B/16, B/44, B/46
DENMARK	DK/13, DK/65
FINLAND	FIN/12, FIN/17, FIN/23, FIN/24, FIN/29, FIN/30
FRANCE	FR/4, FR/6
GERMANY	D/23, D/25, D/28, D/29, D/36, D/38, D/39, D/40, D/42, D/52, D/59, D/62, D/65, D/73, D/74, D/78, D/83, D/89, D/90, D/92
ITALY	I/1, I/4, I/13, I/16
NETHERLANDS	NL/5, NL/6, NL/13, NL/18, NL/54, NL/60
NORWAY	N/3, N/6
SWEDEN	S/1, S/3, S/12, S/14, S/28, S/32, S/33, S/37, S/38, S/50, S/66, S/73
SWITZERLAND	CH/4, CH/6, CH/8, CH/12, CH/15, CH/19, CH/20, CH/22, CH/24, CH/27
TURKEY	TR/6, TR/8, TR/10, TR/21, TR/22, TR/23
UNITED KINGDOM	UK/3, UK/8, UK/26, UK/39, UK/42, UK/56, UK/68, UK/69, UK/101, UK/103, UK/110, UK/139, UK/153, UK/162, UK/166, UK/168
National report on the Czech Republic	
National report on the Slovak Republic	