CHAPTER V

MALAYSIA AND SUCCESSION TO TREATIES

Malaysia has had for her foundation the Federation of Malaya. The latter falls within the category of newly independent States which emerged after the Second World War, having been colonised by the United Kingdom. A summary of Malaysia's historical background is necessary in understanding the various aspects of her succession to the treaties of the U.K.

1. Historical Background

Although the Federation of Malaya has stood as a single political unit before the formation of Malaysia, this is not representative of her past. Before the formation of the Federation of Malaya, the different political units existing in the land were the Federated Malay States (comprising the States of Perak, Selangor, Negri Sembilan and Pahang), the Unfederated Malay States comprising the States of Perlis and Kedah, Kelantan, Trengganu and Johore) and the Straits Settlements (comprising Penang and Malacca). The control of the U.K. over these units varied in form and degree.

In 1948, by virtue of the Federation of Malaya Agreement, the three political units were united to form the Federation of Malaya and came directly under the control of the U.K. In 1957, the Federation of Malaya was granted independence by the U.K.

In 1963 the Federation of Malaya was enlarged to form the Federation of Malaysia. Article 1 of the Malaysia Agreement, 1963, provided that the colonies of North Borneo and Sarawak and the State of Singapore should be federated with the existing States of the Federation of Malaya and the Federation should thereafter be called Malaysia.

A change in the composition of Malaysia took place in 1965. In accordance with Article II of the Separation of Singapore Agreement signed between Malaysia and Singapore, the latter ceased to be a State within Malaysia. Singapore gained her independence and began to exist as a sovereign State.

2. General Considerations

Upon her independence in 1957, the Federation of Malaya, as it then was, became a party to a devolution agreement with the predecessor State, the United Kingdom, through an exchange of letters between the High Commissioner for the U.K. and the Prime Minister of Malaysia. The Agreement provided:

> "(1) All obligations and responsibilities of the Government of the United Kingdom which arise from any valid instrument are from the 31st August, 1957 assumed by the Government of the Federation of Malaya, in so far as such instruments may be held to have application to or in respect of the Federation of Malaya.

(2) The rights and benefits heretofore enjoyed by the Government of the United Kingdom in virtue of the application of any such International Instrument in respect of the Federation of Malaya are from 31st August, 1957 enjoyed by the Federation of Malaya."[1]

The devolution agreement entered into by Malaya is similar to that of Ghana, which was discussed in Chapter IV. The obvious questions which arise from a consideration of the devolution agreement of Malaya are some of those posed by O'Connell in relation to Ghana's devolution agreement. Those are: What is meant by "any valid instrument"? Within whose authority is it to decide which instruments may be "held to have application to or in respect of the Federation of Malaya"?[2]

When Malaysia was formed in 1963, no devolution agreement was entered into between the U.K. and Malaysia in relation to the new territories.[3] It would appear that the devolution agreement of 1957 was extended to the whole entity of Malaysia. This is because

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[1] Exchange of Letters Concerning Succession to Rights and Obligations Arising from International Instruments, 12th September, 1957. Cmd. 346, U.N.T.S. Vol. 279, p. 287.

[2] O'Connell, "Independence and Succession to Treaties" in B.Y.I.L., Vol. 29 (1962) p. 120.

[3] International Law Commission, Report on the Work of its 26th Session, G.A.O.R. 29th Session, Supplement 10 (A/9610/REV.1) p. 89.

Malaysia has regarded as an enlargement of the Federation of Malaya. This view was expressed by the U.N. in considering Malaysia's membership in the U.N. The Office of Legal Affairs of the U.N. stated:

> "An examination of the Agreement relating to Malaysia of 9 July, 1963 and the constitutional amendments ... confirms the conclusion that the international personality and identity of the Federation of Malaya was not affected by changes which have taken place".[4]

This was also evident in the advice given by the same Office on the question of Malaysia's succession to a Special Fund Agreement. It was expressed that the Agreement continued in force for the new State of Malaysia, "since the previous international personality of the Federation of Malaya continues and has no effect on its membership in the United Nations".[5]

The devolution agreement of 1957 only makes provision for succession to treaties which were applicable to the Federation of Malaya. No mention is made of pre-1948 or pre-Federation treaties. In practice too, it appears that no regard is given to the fact that

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[4] The U.N. Juridical Year Book, (1963) p. 163, Quoted in International Law Commission, Ibid.

[5] Ibid.

some of the treaties, when entered into by the U.K., applied only to certain parts of the Federation of Malaya. In pointing this out, the I.L.C. has stated that "neither the Federation nor depositories appear in the case of multilateral treaties to have related Malaya's participation to the particular regions of Malaya in regard to which the treaty was previously applicable."[6] In the case of bilateral treaties however, the I.L.C. has found that the practice available does not indicate "how far continuance in force of pre-independence treaties [is] related to the particular regions in regard to which they [are] applicable".[7]

The I.L.C. has proposed that in the case of a newly independent State formed from two or more territories which becomes a party to a treaty, but consent to be bound by the treaty was given only in respect of one or more but not all the territories of the newly independent State, the treaty should apply in respect of the entire territory.[8] However, exceptions should be made where it appears from the treaty or where it is otherwise established that the application of the treaty to the whole territory would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty. Exceptions should also be made where the parties otherwise agree.[9] If the proposals of the I.L.C.

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[6] Ibid.

[7] Ibid.

[8] Ibid., p. 87.

[9] Ibid.

are adopted, it would mean that where the Federation of Malaya has expressed consent to be bound by treaties, by virtue of the devolution agreement, the same treaties would apply to the new States comprising Malaysia.

In practice, the Secretary-General of the U.N., acting in his capacity as depository of multilateral treaties has acted on the same principle and Malaya's treaties apply automatically to Sabah and Sarawak and also to Singapore, while the latter was a part of Malaysia. This can be gathered from the fact that in the entries for "Malaysia" in the Multilateral Treaties in respect of which the Secretary-General performs depository functions, there is no indication that any of the treaties apply only to certain regions of Malaysia.[10] The same also applies to other multilateral treaties and the automatic application of these treaties extends to the whole of Malaysia.

However, there is one notable exception. Malaysia has notified the Director-General of G.A.T.T. that some pre-Federation agreements of Singapore, Sarawak and Sabah would continue to be considered binding in respect of those States, but would not be extended to the States of the former Federation of Malaya.[11] Malaysia also informed G.A.T.T. that some agreements in respect of the Federation of Malaya would for the time being not be extended to the three new States.

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[10] Ibid., p. 89.

[11] Ibid.

The Federal Constitution has also made provision for the succession of Malaya, and later Malaysia, to the relevant treaties concluded by the U.K. Article 169 of the Constitution provides:

> "For the purposes of Article 76(1) any treaty, agreement or convention entered into before Merdeka Day between Her Majesty or her predecessor or predecessors or the Government of the United Kingdom on behalf of the Federation or any part thereof and another country shall be deemed to be a treaty, agreement or convention between the Federation and that other country."

Article 76(1) empowers Parliament to make laws on matters enumerated on the State list for specified purposes. Thus, any treaties, conventions or agreements pertaining to matters which come within Article 76(1) which were concluded by the U.K. on behalf of the Federation or any part of the Federation are effective as treaties, conventions or agreements between the Federation and other countries.

Section 41 of the Malaysia Agreement provides for the amendment of Article 169 to include paragraph (C). As a result, Article 169 also applies to the Borneo States and to Singapore, while the latter was in the Federation. Treaties pertaining to matters within the ambit of Article 76(1) which were concluded by the U.K. on behalf of Sarawak or Sabah or Singapore before Malaysia Day would be construed as treaties between Malaysia and the other countries.

The net effect has been that the Federation of Malaya, and later Malaysia, has become a party to those treaties, agreements or conventions falling within Article 169. It is not the individual part or parts of Malaya or Malaysia on whose behalf the U.K. concluded the relevant treaties which succeed to these treaties but Malaya, and later Malaysia, which as a whole has succeeded to them.

Although Article 169 is limited by Article 76(1) to cover only those matters on the State list over which Parliament has powers to legislate, this provision is in line with the devolution agreement of 1957. It would appear that treaties pertaining to matters on the Federal list are covered by the devolution agreement itself. Article 169 of the Constitution supplements the agreement by providing for succession to treaties relating to matters on the State list. Thus the Exchange of Letters between the U.K. and Malaya, which constitutes the devolution agreement, and Article 169 of the Federal Constitution are the two essential elements upon which any case for the succession of Malaysia to the treaties of its predecessor must rest.

3. The Malaysian Position

Essentially, it is the devolution agreement which forms the crux of discussion on Malaysia's succession to treaties. The official view appears to be that Malaysia automatically succeeds to all rights and obligations arising from treaties concluded on

her behalf by the U.K. It has been expressed that succession to treaties presents no problem in Malaysia as she has agreed to honour all treaties and obligations concluded on her behalf before Independence Day in 1957.[12] This view was expressed at the Round Table Conference on International Problems in Asia, when the topic of State succession was being discussed. It was also stressed that Malaysia still adheres to her determination to honour existing treaties in spite of the views of other States.[13] Support for the official view would apparently be in the Exchange of Letters and in Article 169. The Exchange of Letters which constitutes the devolution agreement appears to be given the standing of an instrument which legally commits Malaysia to all treaties concluded by the U.K. on behalf of Malaysia or any part thereof.

While the official view appears to be legal in approach, there are others who are adherents of the view that whether or not Malaysia succeeds to the treaties of the U.K. is a political question. They are of the opinion that the devolution agreement should not be over-emphasised. Such persons have felt that at the time the Federation of Malaya entered into the devolution agreement it would not have been exactly aware of the type of treaties it was going to

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[12] Round Table Conference on International Law Problems in Asia, Edited by Vincent Shepherd, Hong Kong, Oxford University Press (1965) p. 93. This view was expressed by Mr. M.D. Ariff while he was Federal Counsel on Foreign Affairs and International Law at the Attorney-General's Chambers in Kuala Lumpur.

[13] Ibid., p. 94.

succeed to. As such the legal approach of automatic succession means that Malaysia has to succeed to treaties which might be against her own interests.

It is submitted that the question whether Malaysia should succeed to the treaties concluded on her behalf by the U.K. cannot be decided in a vacuum. Even if the question is a political question, the advantages and evils of succession must be weighed before deciding for or against succession. In view of the fact that at the time Malaya attained independence, there was still a need for continuity to ensure political stability both municipally and in the international community and in view of the economic needs of the country, succession to treaties which might not be in the interests of Malaysia may be a necessary evil.

The official view on Malaysia's position in relation to succession to treaties of the U.K. comes from the Attorney-General's Chambers. In contrast to Malaysia's stand, Indonesia expressed that Article 5 of the Transnational Agreement (which provided for Indonesia's succession to treaties concluded on her behalf by the Netherlands) did not cause by itself, the automatic application of international agreements which had been applicable to the territory of the former Netherlands Indies. For the continued application of such international agreements, "a further step [was] required on the part of the Indonesian Government, that is, the sending of a

declaration to the Government of the other contracting party or depository, as the case may be, that the Indonesian Government [wished] to be regarded as a party to the agreement concerned in place of the former Netherlands Indies".[14] It is to be noted that this statement on Indonesia's position which does not advocate automatic succession was made by the Department of Foreign Affairs of Indonesia. It is submitted that the difference in the sources making the stand (Attorney-General's Chambers for Malaysia and Ministry of Foreign Affairs for Indonesia) could account for the different positions adopted by the two countries.

Nevertheless, it is to be noted that Malaysia is one of the few countries which has adverted great significance to her devolution agreement and has generally been submissive as far as succession is concerned. In contrast, Indonesia in 1959 went to the extent of abrogating the Transitional Agreements with the Netherlands which were entered into in 1949.

In 1958, the Federation of Malaya notified the Secretary-General of the U.N. in his capacity as depository that she was assuming as from 31st August, 1957 all obligations arising from the agreements which it had listed in the notification itself.[15]

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[14] Year Book of the International Law Commission, Vol. 2, 1962, p. 110.

[15] International Law Association, The Effect of Independence on Treaties, London, Steven and Sons, (1965) p. 176.

However, the effect of the notification was that not all the agreements deposited with the Secretary-General were to be regarded as binding on Malaya. Subsequently, "[after] consulting the competent authorities of the Federation, the Secretary-General on the basis of the devolution agreement registered with the Secretariat, included the Federation among the States bound by other agreements deposited with him whose application had been extended by the U.K. to the territories constituting the Federation".[16] In consequence it would appear that the Federation impliedly consented to all the treaties affecting the territory.

Although Malaysia has generally and on the international plane, seemed to express that she automatically succeeds to all treaties affecting her by virtue of her devolution agreement, the real test lies in the actual implementation of these treaties. Malaysia has not taken the necessary steps with regard to all the treaties of the predecessor State in order to make them effective municipally. On the contrary, Malaysia appears to have adopted the attitude of "wait and see", waiting for an occasion when succession to a particular treaty or convention comes into question before she actually makes a stand.

Moreover, although Malaysia has expressed that she succeeds automatically to all the treaties concluded on her behalf by the U.K.,

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[16] Ibid., p. 177.

she has had to enter into negotiations with third States on certain treaties. For example, the Extradition Treaty of 1911 between the U.K. and Thailand was not automatically succeeded to. Negotiations were held between Thailand and Malaya and these led to the signing of a new Thai-Malay Extradition Agreement. Malaysia is still negotiating with some other countries on such agreements. These negotiations which result in the conclusion of new treaties show that in actual fact, Malaysia has not automatically succeeded to all the treaties concluded on her behalf by the U.K.

Actual practice, therefore, does not appear to coincide with the official view. Perhaps the official view of automatic succession to the treaties concluded part the U.K. is necessary for the political and economic survival of Malaysia. Be that as it may, in practice it appears that it has not always been possible to keep within the confines of this view.

Although Malaysia may find it convenient to attribute legal significance to her devolution agreement with the U.K., be it for policy reasons or for the purpose of approaching the matter from a strictly legal point of view, in practice third States are not bound to act on this stand. It has been shown in Chapter IV that devolution agreements have limited legal significance. The current position as represented in the draft proposals of the I.L.C. is that the predecessor State's obligations or rights under treaties do not become the obligations or rights of the successor State in consequence only of the fact that the predecessor and successor States have

concluded an agreement which provides for the devolution of obligations and rights upon the successor State.[17]

Moreover, as discussed in Chapter IV, the devolution agreement is concluded between the predecessor and successor States and third States are not directly envisaged in the agreement. Therefore, even if the agreement may be binding on the predecessor and successor States, third States may reject a claim to succession by the successor State on the ground that the agreement is res inter alios acta. Thailand has expressed that she is not bound by devolution agreements. As a result, the Extradition Treaty of 1911 was only provisionally extended to Malaya after her independence. As mentioned earlier, negotiations led to the conclusion of a new treaty. Hence, whatever Malaya's stand might be, Thailand as a third State did not regard herself bound to accept Malaya as a party to the treaty.

Lauterpacht has expressed in "United Kingdom Contemporary Practice in the field of International Law" that the exchange of letters between Malaya and the U.K. binds only Malaysia and the U.K. by privity and not Thailand as she is a third State.[18] Malaysia at the Round Table Conference on International Law Problems in Asia,

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[17] International Law Commission, Report on the Work of its 24th Session, G.A.O.R., 27th Session, Supplement No.10 (A/8710/REV) p. 16.

[18] Quoted in Round Table Conference on International Law Problems in Asia, op. cit., No. 12, p. 93.

expressed that she was aware of such a view but "stressed that Malaysia still adhered to her determination to honour all existing treaties in spite of the view of other States".[19]

The writer submits that despite Malaysia's determination to honour all treaties and despite her wish to succeed to them, the fact remains that at least one nation has regarded itself not bound by the devolution agreement. It is therefore not an unreality that a third State may not wish to be bound by the devolution agreement. Malaysia's determination to honour the treaties in question does not of itself bind the third States. As such, it ought to be realised that the devolution agreement is not the "be all and end all" in determining succession to treaties. The attitude of third States in relation to devolution agreements must be given consideration in view of the fact that international law is consensual law.

The importance of third States can be further seen from Thailand's attitude with regard to the Customs Agreement of 1922, entered between Thailand and the U.K., on behalf of Malaya. In 1965, Thailand expressed the view that the treaty was no longer valid because of the formation of Malaysia.[20] Thailand's attitude might well amount to the fact that the State of Malaysia does not succeed to the treaties of Malaya. Although Thailand's attitude might have been coloured by the fact that even before the formation

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[19] Ibid.

[20] Ibid.

of Malaysia she was not too happy with Agreement, it would serve well to observe that much as Malaysia would hold fast to her devolution agreement and to the view that Malaysia is an enlargement of Malaya, her effective succession to treaties concluded on her behalf by the U.K. is largely dependent on the reactionsof third States.

The International Law Association has raised a point of interest in relation to succesion and that is the question of treaty lists. A list of treaties was prepared by the U.K. at the time of independence of the Frderation of Malaya. The I.L.A. noted that the list did not necessarily reflect the attitude of the Government of Malaya as to which treaties were to be succeeded to. Referring to Malaya and Nigeria, the I.L.A. stated:

> "The value of the list as it affects these two States therefore will become apparent when they publish their own treaty lists at a future date and a comparison between the two is made."[21]

More than ten years have passed since this remark was made but Malaysia is still in the process of preparing a treaty list of its own.

However, in the course of an interview, the writer has found that it would not be correct to attach the significance that the I.L.A. wished to attach to the new list. The new list is not in any

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[21] International Law Association, op. cit., N. 15, p. 45.

way intended to indicate those treaties which Malaysia has actually succeeded to. It is only intended to be a list of treaties affecting Malaysia, arranged in an order suitable to the competent authorities.

4. Succession and the Philippines' Claim to Sabah

A significant issue arising at the time of the formation of Malaysia was the Philippines' claim to Sabah. Sabah was to constitute a component State of Malaysia. At the same time, the Philippines also laid claim to Sabah. The concept of succession in the Malaysian context can also be discussed in relation to this claim.

The Philippine claim to Sabah is to a large extent based on the interpretation of the word "padjak" which was used in the Agreement, by which the Sultan of Sulu gave the concession of the territory in question to Gustavas Baron de Overbeck and Alfred Dent in 1878. The Philippines interprets "padjak" as a lease whereas Malaysia asserts that it meant cession.

Nevertheless, succession is relevant here because Malaysia regards the Convention entered into between U.K. and the United States in 1932 as final. Article 1 of the 1932 Convention delimited in detail, the boundary between the Philippine Archipelago and the State of North Borneo which was under British protection. When Sabah became a constituent State of Malaysia, Malaysia succeeded to the treaty entered into by the U.K. Hence by virtue of the 1932 convention and by Malaysia's succession to this Convention, the position of Sabah in relation to Malaysia might be treated as settled, the Philippines thus having no valid claim to Sabah.

While Malaysia's claim to Sabah may be based on positive succession to the 1932 Convention, such a claim might also be argued by negativing succession in respect of the Philippines. For such a purpose, it is necessary to go into the history of the Philippine Archipelago. The Philippines was first colonized by Spain. In 1877, Spain attempted to extend her claims over North Borneo by hoisting her flag at various points on the islands.[23] In 1888, Spain claimed the Borneo possessions of the Sultan of Sulu which he had ceded to the Overbeck-Dent Association in 1877. As a result of the conflict between Spanish and British interests, the Madrid Protocol of 1885 was signed. Article II of the Protocol provides that "... as regards the British Government, all claims of sovereignty over the territories of the continent of Borneo which belong or which might have belonged in the past to the Sulu Sultanate and which comprise the neighbouring States of Balembangan, Banguey and Malawali as well as those comprised within a zone of three marine leagues from the coast..." Under the terms of the Protocol, Spain renounced her claim to North Borneo in favour of the U.K. and the U.K. (and Germany) recognized Spanish sovereignty over Sulu.

In 1898, Spain entered into a treaty with the United States, under which she ceded her sovereignty over the Philippine Archipelago to the United States.[24] Because Spain had renounced

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[23] M.O. Ariff, The Philippine Claim to Sabah, Kuala Lumpur, Oxford University Press, (1970) p. 31.

[24] Ibid., p. 32.

her interests in North Borneo under the Madrid Protocol, the United States, as successor to Spain could not succeed to any Spanish interests in North Borneo. Similarly, when the U.S. granted independence to the Philippines in 1946, there were no U.S. interests in North Borneo which she could succeed to. Moreover, in the Preamble to the Proclamation of Philippine Independence, there were specific references to the fact that the U.S. had acquired sovereignty over the Philippines from Spain and had agreed with the U.K. on the delimitation of the boundary between the Philippine Archipelago and the State of North Borneo.[25] These references imply that the U.S. and its successor, the Philippines, had renounced all possible claims over the territory of North Borneo.

In short, all possibilities of Philippine succession to any interests in North Borneo were negatived. If, in fact, there was any succession, the Philippines succeeded to the Madrid Protocol of 1885 which favoured North Borneo as a sphere of interest of the U.K. Succession to the 1898 treaty between Spain and the U.S. ruled out any possibility of North Borneo being considered as part of the Philippine Archipelago. Thus, although the Philippine claim to Sabah may be approached from other angles, succession to treaties may be used in support of a valid title of Malaysia to Sabah and to negative the Philippine claim to Sabah.

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[25] Ibid.

5. Succession to Treaties in Relation to Singapore

In discussing succession to treaties in respect of Malaysia, it is also essential to consider succession to treaties arising from the merger of Singapore with the other States to form Malaysia in 1963 and subsequently, the separation of Singapore from Malaysia in 1965. Although Singapore exists as a separate sovereign State today, in terms of succession to treaties, Malaysia and Singapore have much in common in view of their historical and political ties in the past.

When Singapore joined to form Malaysia, the latter, by virtue of Article 169(C) succeeded to any treaties, agreements or conventions relating to matters enumerated in the State List over which Parliament has power to legislate by virtue of Article 76(1).

It is also provided by section 76 of the Malaysia Agreement, 1963 that all rights and liabilities and all obligations relating to any matter which was the responsibility of the Singapore Government and which thereafter became the responsibility of the Federal Government should devolve upon Malaysia. Although Section 76 does not specifically refer to rights and obligations arising from treaties, the wording of the section is sufficiently wide to cover Malaysia's succession to any international rights and liabilities arising from Singapore's exercise of limited treaty-making power before it joined Malaysia.[26] Malaysia also succeeds to the treaties

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[26] S. Jayakumar, "Singapore and State Succession: International Relations and Internal Law" in I.C.L.Q., Vol. 19, (1970) p. 404.

entered into by the U.K. on behalf of Singapore.

There is little doubt that Malaysia, even after the separation of Singapore, remains bound by the treaties entered into by the Federation of Malaysia before such separation took place. This is supported by Article 34 of the draft proposals of the I.L.C. which provides:

> "When after separation of any part of the territory of a State, the predecessor State continues to exist, any treaty which at the date of the succession of States was in force in respect of the predecessor State continues in force in respect of its remaining territory unless:
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> (a) it is otherwise agreed;
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> (b) it is established that the treaty related only to the territory which has separated from the predecessor State;
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> (c) it appears from the treaty or is otherwise established that the application of the treaty would be incompatible with its object or purpose or would radically change the conditions for the operation of the treaty."[27]

It is interesting to note that upon Singapore's separation from the Federation of Malaysia, no express devolution agreement was entered into between Malaysia and Singapore. However, this aspect

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[27]International Law Commission, op. cit., N. 3, p. 99.

is covered by Section 13 of Annex B of the Separation of Singapore Agreement, 1965. Section 13 provides:

> "Any treaty, agreement or convention entered into before Singapore Day between the Yang di-Pertuan Agong or the Government of Malaysia and another country or countries including those deemed to be so by Article 169 of the Constitution of Malaysia, shall in so far as such instruments have application to Singapore be deemed to be a treaty, agreement or convention between Singapore and that country or countries".[28]

Thus this section provides for the succession of Singapore to treaties entered into by Malaysia before Singapore Day, provided "such instruments have application to Singapore. The words "including those deemed to be so by Article 169 of the Constitution of Malaysia" provide for the succession of Singapore to treaties concluded by the U.K. on her behalf prior to Malaysia Day.

Annex B of the Separation of Singapore Agreement, 1965 was later enacted by the Malaysian Government as a Statute called An Act to amend the Constitution of Malaysia and the Malaysia Act, 1965.

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[28] Jayakumar, op. cit., N. 26, p. 405.

This has led one writer to point out that it is unique that the provisions for succession should be embodied in the laws of a foreign State.[29] [Presumably, by "Foreign State" is meant Malaysia] This statement has been described as misleading in so far as it suggests that it is only the Malaysian Statute which is relevant in determining Singapore's rights and obligations under treaties.[30] While it has been admitted that it is unusual that Annex B should have been enacted as a Malaysian Statute, the defence has also been made that "Annex B is an integral part of the Separation Agreement concluded between Malaysia and Singapore".[31] Article 31 of the Vienna Convention on the Law of Treaties is cited in support of this view. This Article provides that a treaty should be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Article 31(2) indicates that the "context" comprises, inter alia, "... the text, including its preamble and annexes".[32] Thus, in international law, Annex B "will have legal significance primarily due to its being an integral part of an international agreement".[33]

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[29] L.C. Green, Malaya/Singapore/Malaysia. Comments on State Competence, Succession and Continuity, 4 Canadian Year Book of International Law, Cited in Jayakumar. Ibid., p. 403.

[30] Ibid.

[31] Ibid.

[32] Ibid.

[33] Ibid.

The interpretation of the words "in so far as such instruments may be held to have application to Singapore" in Section 13 of Annex B may also give rise to problems. Some agreements concluded by Malaysia such as the Public Officers [Singapore] Agreement, 1964 between the U.K. and Malaysia and The Treatment in Singapore Hospitals for Asian Residents of Christmas Islands, 1965 between Australia and Malaysia clearly apply to Singapore and thus fall within the scope of Section 13 of Annex B.[34] However, there are instruments which may not be so easily identified as having application to Singapore. One example of such agreements is the Nuclear Test Ban Treaty of 1963 (Treaty Banning Nuclear Weapon Tests in the Atmosphere in Outer Space and Underwater). This treaty was ratified by Malaysia in 1964 while Singapore was part of Malaysia. It may be argued that Singapore succeeds to this treaty because Malaysia is bound to apply its provisions to the entire territory of the Federation of Malaysia, which then included Singapore.[35] But if the words "has application" were to mean some specific undertaking that has to be done, then the Test Ban Treaty, it can be argued, may not have application to Singapore.[36]

The I.L.C. has proposed in Article 33(1) of its draft proposals:

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[34] Ibid., p. 405.

[35] Ibid., p. 406.

[36] Ibid.

"When a part or parts of the territory of a State separate to form one or more States whether or not the predecessor State continues to exist:

(a) any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed".[37]

However, Article 33(2) provides that the above does not apply if:

"(a) the successor States concerned otherwise agree;

(b) it appears from the treaty or is otherwise established that the application of the treaty would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty."[38]

Applying these provisions to the new Republic of Singapore, it would appear that she is in general bound to succeed to those treaties entered into by the Federation of Malaysia, while she part of that Federation, which apply to the entire territory of the said Federation.

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[37] International Law Commission, loc. cit.

[38] Ibid.

However, despite the provisions of the Separation of Singapore Agreement, 1965, Singapore has not considered herself as automatically succeeding to all treaties. Instead she has looked upon the continuance of such treaties as a matter of mutual consent.[39] This attitude is further reflected in her practice regarding Multilateral Treaties in respect of which the Secretary-General of the U.N. performs depository functions. Singapore has notified its succession to multilateral treaties as it has thought fit and has not notified succession in respect of all treaties.[40]

Of significance in the succession of States to treaties in relation to Singapore is the Agreement for Air Services entered into between Japan and the United Kingdom in 1952. This Agreement gave Japan air traffic rights into Singapore. In accordance with this Agreement, Japan Air Lines started the operation of a Singapore route in 1958.

The question of succession arose in 1963 when with the formation of Malaysia, it was necessary to consider whether Malaysia was ipso jure bound to recognize Japan's air traffic rights in Singapore which had been accorded by the Agreement. Japan maintained that its traffic rights into Singapore had been conceded in return for the rights conceded by Japan to the U.K. and that as long as the

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[39] Ibid., p. 104.

[40] Ibid.

rights conceded by Japan to the U.K. remained intact, Japan's traffic rights into Singapore should also remain intact.[41]

Malaysia informed Japan that she hoped to enter into a new agreement with Japan for the purpose of regulating air services between the two countries. Malaysia also notified Japan that "... pending the conclusion of the agreement the traffic rights to be exercised by the national airline of Japan [was to be] limited from 1st January, 1964 to 3rd and 4th. freedom routes between points in Japan and Singapore".[42] Malaysia was, in other words, trying to restrict Japan's rights under the Agreement. It is submitted that in view of these facts, it does not appear as if Malaysia regarded herself in any way automatically bound to the 1952 Agreement. However, Japan protested against the restriction of her traffic rights in Singapore, as a result of which Malaysia agreed "tentatively to withdraw the above-mentioned restriction until a new agreement could be reached".[43]

However, later, in accordance with Article 17 of the Agreement which provided for the termination of the Agreement, Malaysia notified her intention to terminate the Agreement within twelve months. It would appear from this that Malaysia considered herself as having succeeded

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[41] S. Tabata, "The Independence of Singapore and her Succession to the Agreement Between Japan and Malaysia for Air Services", in The Japanese Annual of International Law, No. 12, (1968) p. 38.

[42] Ibid., p. 39.

[43] Ibid.

to the Agreement and was now exercising her right as a party to the agreement in terminating the Agreement. Japan's rights under the Agreement would terminate on March 23, 1965.

In the meantime a new Agreement was signed on February 11, 1965 but it would not come into force before March 23, 1965. This would mean the termination of Japanese rights after March 23, until the new Agreement entered into force. To avoid this, Notes were exchanged on the Provisional Implementation of the new Agreement until the date of entry into force of the new Agreement.

The ratification and entry into force of this new Agreement only took place on November 4, 1965. Meanwhile, Singapore gained her independence on August 7, 1965. The questions which arose were: whether the Agreement had actually been entered into as to come within the ambit of Annex B of the Separation of Singapore Agreement and whether Singapore was bound to succeed to the Agreement.

Malaysia expressed that the Agreement fell "under paragraph 13 of the Constitution of Malaysia (Singapore Amendment) Act, 1965 since the Agreement was signed and ratified by both Governments before Singapore Day and an exchange of Instruments of Ratification merely constitutes a ceremonial formality".[44]

Japan was of the view that the Agreement comes into effect at the date of ratification but requested Singapore to make her stand on the matter. Singapore stated that she accepted the Agreement between Malaysia and Japan, notwithstanding the fact that the

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[44] Ibid., p. 41.

ratification had not yet taken place.[45] It would appear then that Singapore regarded herself as succeeding to the rights and obligations of the Agreement between Malaysia and Japan.

However, as one writer pointed out, it is not clear whether Singapore and Malaysia "acted under the legal conscience that they were bound to succeed to such treaties ipso jure under international law".[46] This doubt exists because of the expressions such as "... the obligations of the Malaysian Government voluntarily accepted" used in the notice of termination given by Malaysia on March 17, 1964 and "... to terminate the obligations of the Singapore Government voluntarily accepted under the terms of the said Air Services Agreement..." used in the notice given by Singapore on May 28, 1966.

The military bases in Singapore also bring into light the question of Singapore's succession to treaties. Malaya and the U.K. entered into the Agreement on External Defence and Mutual Assistance in October, 1957. This Agreement was extended to the whole of Malaysia by Article VI of the Agreement Relating to Malaysia, 1963, which provided that it should apply to all territories of Malaysia, and any reference in that Agreement to the Federation of Malaya shall be deemed to apply to Malaysia, subject to the proviso that the Government of Malaysia will afford to the Government of the United Kingdom the right to continue to maintain bases and other facilities

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[45] Ibid., p. 42.

[46] Ibid., p. 44.

at present occupied by their Service authorities within the State of Singapore...". Thus after the formation of Malaysia, Singapore came within the scope of the 1957 Agreement between the U.K. and Malaysia.

When Singapore separated from Malaysia in 1965, Section 13 of Annex B of the Separation of Singapore Agreement, 1965, was introduced to cover this matter. Section 13 provides:

> "... In particular as regards the Agreement on External Defence and mutual Assistance between the Government of the United Kingdom and the Government of the Federation of Malaya of October 12, 1957, and its annexes which were applied to all territories of Malaysia by Article VI of the Agreement Relating to Malaysia of 9th July, 1963, subject to the provision of Annex F (relating primarily to Service Lands in Singapore) the Government of Singapore will on and after Singapore Day afford to the Government of the United Kingdom the right to continue to maintain the bases and other facilities occupied by their service authorities within Singapore and will permit the Government of the United Kingdom to make use of the bases and facilities..."

Thus Section 13 not only providesfor general succession to agreements applicable to Singapore but it also makes particular provision for Singapore's succession to the Agreement on External Defence and Mutual Assistance, 1957.

Singapore, however, has opposed the wide interpretation of Section 13. Although a literal interpretation of Section 13 does not require Singapore's consent to the use of the bases by the U.K., Singapore has several times expressed that the U.K. cannot do anything without first consulting Singapore. She has also expressed that if the U.K. acted without prior consultation, she would be given notice to quit.[47]

The U.K. appears to have fallen in line with this stand. She acknowledged that she had no sovereignty over any part of Singapore and therefore agreed that she would keep her bases only as long as Singapore wanted them.[48]

Singapore herself pointed out at the Round Table Conference on International Law Problems in Asia, in the paper on State succession, that her opposition was due to many reasons, among them being the sensitivity of many Afro-Asian States to foreign troops in the neighbouring States.[49]

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[47] Jayakumar, op. cit., N. 26, p. 408.

[48] Straits Times, September 2, 1965, p. 10, Quoted in Ibid, p. 408.

[49] Round Table Conference on International Problems in Asia, op. cit., N. 12, p. 78.