State succession and treaty survival between the predecessor state and the other state party

To Dame Rosalynn Higgins

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Introduction

This article discusses 'treaty survival' in the light of the 1969 agreement between the Portuguese Republic and the Republic of South Africa governing the Cahora Bassa hydroelectric project.[1] We therefore are dealing with a treaty, relating specifically to a territory that became the territory of a newly independent state, which continued between the original parties after independence with the newly independent state having consented to the survival of the treaty.

The project comprised the effective construction of a dam on the Zambezi river in northern Mozambique; the effective installation of the power generation and conversion equipment at the dam; construction of a transmission line running through Mozambican territory to the South African border and then through South African territory to Apollo; and, finally, the construction of a conversion and distribution station at Apollo in South Africa.[2] The treaty was linked to a supply contract between Portugal, as supplier, and the South African Electricity Supply Commission (ESKOM /ESCOM) as receiver.[3]

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[1]Agreement between the Governments of Portugal and the Republic of South Africa relative to the Cabora Bassa Project, done at Lisbon on 19 September 1969 – hereafter the 'treaty' or the '1969 treaty' or the 'Agreement' or the '1969 Agreement'.

[2]Hereafter, the 'Project' or the 'Cahora Bassa Project'. Portuguese refer to the project as Cabora Bassa, while Mozambicans use Cahora Bassa. In this article the term Cahora Bassa is used.

[3]Cabora Bassa Supply Contract between the Government of the Republic of Portugal and Electricity Supply Commission, of the same date as the Agreement – hereafter the 'SC', the '1969 SC' or 'the contract'. The name of the receiver was originally ESKOM, afterwards

The treaty and contract applied specifically to the territories of Mozambique and South Africa. Mozambique is the location of the dam and of the plant and so the *locus* where the obligations stood to be performed. The transmission lines run in direct current (d/c) through Mozambique and South Africa. The conversion of the power to alternate current (a/c) and subsequent distribution stations are in South Africa. The supply is from Mozambique to South Africa.[4] At the time of signature of the agreement, Mozambique was a Portuguese colony.[5]

The Portuguese revolution of 25 April 1974 opened the way for Portugal to recognise the right of colonial peoples to self-determination and for a decolonisation process. As regards Mozambique, the 'Lusaka Agreement' between the Portuguese government and FRELIMO was signed on 7 September 1974. This agreement established a cease-fire, laid down a timeframe for Mozambican independence (25 June 1975), and organised the transitional government.[6]

During the transition period an agreement was concluded, in April 1975, between the Portuguese Republic and FRELIMO, the Protocol of Agreement relative to the Cahora Bassa Project of April 1975, with some amendments in June.[7] On 23 June, just before independence, within a framework that will be described later, Hidroeléctrica de Cahora Bassa SARL or *HCB*, a share company, was incorporated. Portugal held, directly and indirectly, the majority of HCB's shares. The concession to conclude the construction and to exploit the Cahora Bassa Project was granted to HCB, together with the assignment of the position of Portugal (rights and obligations) in the Supply Contract (and of some rights and obligations in the Agreement), as well as in the job contract with ZAMCO, referred to below.[8]

As regards the 1969 Agreement, for obvious and compelling political reasons, Mozambique refused to become party to a treaty with South Africa. Initially,

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changed to ESCOM, the latter will be used in this article.

[4]A minor part of the power would be distributed locally or to the near region through an a/c line and a substation, or come back to the south of Mozambique from Apollo (ESCOM Conversion Substation).

[5]According to then Portuguese constitutional characterisation, an 'overseas province'.

[6]A provision for Portuguese former investments seemed to refer specifically to or at least to include Cahora Bassa: 'The "Frente de Libertação de Moçambique" declares its disposal to accept the responsibilities arising from financial undertaking by the Portuguese Republic in the name of Mozambique provided that have been undertaken in the real interest of the territory'.

[7]Hereafter 'The 1975 Protocol of Agreement' or 'The 1975 Protocol'.

[8]The Portuguese delegation to the negotiations with FRELIMO was headed by the Secretary of State for Cooperation, Jorge Sampaio, himself a lawyer and having worked on the matter before being appointed to Government. Jorge Sampaio is well known because, from 1996 to 2006, he was President of the Portuguese Republic. The Portuguese delegation included, as legal advisors, besides me, José Robin de Andrade.

South Africa claimed that Mozambique had automatically succeeded Portugal in the treaty, becoming bound by it, a claim countered as contrary to the clean slate principle of treaty succession. Portugal argued that conditions existed for the treaty to continue between itself and South Africa – a claim supported by state practice from 1977. Later, the trilateral treaty of 1984 between Mozambique, Portugal and South Africa,[9] recognised that the 1969 Agreement had continued in force between Portugal and South Africa after Mozambican independence. What, however, would the legal situation be if South Africa opposed the continuation of the treaty between itself and Portugal? And how should one characterise 'treaty survival'?

Informally, by the end of 1974 – but formally in January 1975 – the Portuguese government, at the suggestion of the High Commissioner in Mozambique, appointed a team, headed by Engineer António Martins, to deal with the issues relating to the 'Plan of the Zambezi Valley' and, more specifically, Cahora Bassa.[10] Final clarification of the 1969 treaty survival issue came only in 1984. However, Cahora Bassa was, until 2007, a sensitive issue requiring discretion from those involved.

For both Mozambique and Portugal Cahora Bassa has, in some respects, been a cross. To start with, tariffs were established in 1969 without indexation and denominated for the first fifteen years in PTE (Portuguese escudos) and subsequently in Rand. The first oil shock led to a huge increase in costs, which, together with exchange fluctuation, was estimated by HCB in 1977 at around one hundred per cent. That year, just before the commencement of commercial operation, HCB and ESCOM agreed on a two-thirds tariff increase, accepted by HCB as provisional, Portugal and South Africa agreed to replace the PTE, under strong devaluation, with the Rand with retrospective effect.[11]

Shortly after the commencement of the power supply to South Africa, supply was interrupted for more than fifteen years.[12] The transmission lines were parallel and long – some 1400 kilometres, more than 900km of which were within Mozambican territory – supported by towers. The demolition of a few towers on the lines by rebel armed action was enough to interrupt power

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[9]Agreement between the Governments of the Republic of Portugal, the People's Republic of Mozambique and the Republic of South Africa relative to the Cahora Bassa Project, done in Cape Town on 2 May 1984 – hereafter, the '1984 treaty' or the '1984 Agreement' or the '1984 trilateral treaty'.

[10]Prime-Minister's order of 14 January 1975, published in the official journal (*Diário do Governo, I Série*) of 18 January.

[11]Portugal wanted a currency basket to be established, but South Africa refused.

[12]HCB and ESKOM formally declared the SC suspended, by *force majeure* (temporary impossibility of performance), as from the 6 December 1980. In spite of this, there was still some supply of power until 1983, although constantly interrupted by sabotage.

transmission. Despite the apparent thaw expressed in the controversial non-aggression and good neighbourliness Accord of Nkomati of 16 March 1984, between the People's Republic of Mozambique and the Republic of South Africa, and repeated subsequent assurances by certain South African officials that the country would assist with the protection of the transmission line, it was only after the 1992 General Peace Agreement in Mozambique and the 1994 South African democratic elections that rehabilitation of the transmission lines was possible.

Portugal had invested heavily in the construction of the dam and in equipment. The 1975 Protocol of Agreement was aimed at Portugal's recovery of this investment through HCB. However, as the supply had been interrupted, HCB had no revenue from which to pay Portugal – in fact Portugal financed the maintenance of the equipment, the servicing of the debt, and the payment of the human resources.

On the other hand, the new tariff established in the 1984 Supply Contract (the second Supply Contract, linked to the 1984 Agreement) was soon outdated. An agreement on the standards for tariff had been reached in 1988, but was not applied as no power was being supplied. Portugal wished to link the resumption of the supply to a tariff review. A short term understanding was briefly achieved at Porto Novo, Portugal, but ESCOM rejected it and its effectiveness was a matter of controversy.

An arbitration between HCB and ESCOM started on this subject, as well as on the general criteria for tariffs, but was stopped before judgment on the merits to allow a short term agreement which enabled the resumption of power supply and the opening of good faith negotiations for the long term. The matter was finally settled in 2004 with an agreement on new tariffs and criteria. The Cahora Bassa Project finally became economically viable.

In terms of the 1975 Protocol, HCB's shares would revert to Mozambique once Portugal had recovered its investment plus an amount corresponding to a calculated remuneration for capital. After so many years of interrupted supply, it was politically impossible to wait for total investment recovery before transferring the shares. Quite understandably, Mozambique insisted on Portugal delivering the shares. Portugal, however, could only do this against fair payment. The possibility of determining a fair price depended on the existence of a fair tariff for the supply to South Africa. Only after agreement on a fair tariff could negotiations between Mozambique and Portugal proceed and a fair price be established. In November 2005, a Memorandum of Understanding between the Republic of Mozambique and the Portuguese Republic was signed. By 31 October 2006 the two states entered into the 'Protocol on the Reversion of and Transfer of Control on HCB'

and the 'Agreement Relating to the Reorganisation of Own Capitals and Sale of Shares in HCB', which, when effective, replaced the 1975 Protocol of Agreement. On 27 November 2007 Portugal transferred shares in HCB to a company incorporated by the government of Mozambique resulting in an eighty-five per cent shareholding in HCB by Mozambique and fifteen per cent by Portugal – precisely the inverse of the previous positions of the parties. Adjustments have since been made to the 1984 trilateral treaty and the 1984 Supply Contract.[13]

This article examines how and why the parties involved purport or accept to keep the 1969 treaty in force between Portugal and South Africa only, and to locate and evaluate this situation within the rules and the theory of state succession in respect of treaties.

Legal framework for state succession in respect of treaties

The practice and theory of state succession has developed considerably over the past twenty years linked principally to the dismemberment of the Soviet Union and disintegration of Yugoslavia.[14] The split between the Czech Republic and Slovakia, on the one hand, and the German and Yemeni unifications[15] on the other, also played a role. These events have highlighted the distinction between state continuity and the 'replacement of one State by another in the responsibility for the international relations of territory'– that is state succession – and of the compatibility of these recent developments with the 1978 Vienna Convention on Succession of States in respect of Treaties (VC 1978), linked to the question of which Convention provisions correspond to customary law.

Here I address 'classical state succession', ie succession where the successor state is a newly independent state. Mozambique, as a former Portuguese colony, fully corresponds to the definition in terms of which 'a successor State the territory of which immediately before the succession was a dependent territory for the international relations of which the predecessor State (Portugal) was

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[13] In 2011/2012 an agreement was entered into for the sale of more 7,5% of the HCB shares to Mozambique. The agreement is outside the scope of this paper and I don't comment on it.

[14] See, in particular, Stern 'La Succession d'Etats' (1996) *Recueil des Cours* at 262, The Hague (2000) at 27; Eisemann and Koskenniemi *La succession d'etats: la codification à l'épreuve des faits, State succession: Codification tested against the facts* (2000); Crawford *The creation of states in international law* (2006) (2 ed) at 667; Craven *The decolonization of international law, state succession and the law of treaties* (2007). With regard to Soviet Union, see especially Hamant *Démembrement de l'URSS et problèmes de succession d'etats* (2007).

[15] In addition to the works referred to in n 14 above, see, too, Oeter 'German unification and state succession' (1991) 51 *ZaöRV* at 349; Papenfuss 'Les traités internationaux de la RDA dans le cadre de l'établissement de l'unité allemande. Une contribution pragmatique au problème de la succession d'Etats en matière de traités internationaux' (1995) 41 *Annuaire français de droit international* 207-244.

responsible' (art 2(f) VC 1978). It is well known that, for newly independent states, the VC 1978 adopted the *tabula rasa* approach in dealing with bilateral treaties (arts 16 and 24), while also according the right, in principle, to become a party to multilateral treaties (arts 16 and 17). There is no need to discuss here whether the clean slate rule regarding bilateral treaties has or has not been established under customary international law. For present purposes it is sufficient to note that there is no customary rule prescribing for a successor state to be bound by predecessor states' treaties –where the successor state is newly independent. Each state acquires sovereignty *ex novo*, not by transfer.[16]

A basic principle of the law of treaties is that a state is not bound by a treaty to which it has not consented.[17] For a treaty entered into by one state to bind another which was not a party to it, or for a third state to become a party without its specific consent, a customary or conventional rule determining this would be necessary. The corollary also applies.

There is no general conventional rule providing that a newly independent successor state is bound by the bilateral treaties of its predecessor. In fact, VC 1978 establishes precisely the opposite. There is also no discernible binding and consistent practice among newly independent states not allowing them to be bound by predecessor treaties.[18] In those instances where such states have been bound this has been based on the 'new' state's consent (with that of the other parties) or, at least, on a lack of opposition.

The critical problem within decolonisation related to devolution agreements,[19] and, first, is whether or not – and under what conditions – they can be construed as treaties for the benefit of third parties ('treaties providing for rights of third States' – art 36 of VC 1969);[20] further, it is whether devolution agreements could

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[16]Bedjaoui 'Second Report on Succession of States in respect of matters other than treaties' (1969) II *YBILC* at 77; Stern n 14 above at 118.

[17]Referring to state succession, see eg, Brownlie *Principles of international law* (2008) (7ed) at 661; Daillier, Forteau and Pellet *Droit international public* (2009) (8 ed) at 613.

[18]See the documents prepared by the Secretariat, within the work of the ILC related to or including bilateral treaties (A/CN 4/229 (1970) II *YBILC* at 102; A/CN 4/243 and Add 1 (1971) II *YBILC* at 111, Supplement A/CN4/263). See also, irrespective of the exact terms in which the authors construe the practice, being enough for this one not to be incompatible with to the clean slate rule, Zemanek 'State succession after decolonisation' (1965) III/116 *Recueil des Cours* at 222; Gonçalves Pereira *Da Sucessão de Estados quanto aos Tratados* (1968) especially at 75, 97, 169, 255 (French translation *La succession d'etats en matière de traités* (1969) at 54, 73, 129, 202); Bardonnet *La succession d'etats à Madagascar* (1970) at 429; Makonnen 'State succesion in Africa' (1986) 200 *Recueil des Cours* at 117.

[19]Especially, O'Connel *State succession in municipal law and international law* vol II (1967) at 113 and 358.

[20]For justifying the exclusion, in principle, of such kind of construction and, therefore, the provision of art 8 of 1976 Vienna Convention, see the ILC's commentary on the article in (1974)

be contrary to the right of self-determination or to permanent sovereignty of peoples over their natural resources, understood as *jus cogens* principles.[21] However, these issues are not directly relevant for present purposes as there was no devolution agreement between Portugal and Mozambique.

The freedom of a newly independent state is today only limited by the provisions of articles 11 and 12 of VC 1978 dealing respectively with boundaries and territorial regimes. It is widely accepted in case law that both the *uti possidetis* rule[22] and the rule regarding other territorial regimes correspond to customary law.[23]

Now, let us conceive a treaty relating specifically to the territory of a newly independent state, ie, *grosso modo*, a treaty that has to be performed in such territory. Suppose that the newly independent state does not become bound by it. What happens to the treaty?

A general framework may be found, initially, in the principle of 'moving treaty boundaries'. Akehurst's characterised this as follows:

> When a state loses territory, it loses its rights and obligations under treaties, in so far as those treaties used to apply to the lost territory. … When an existing state acquires territory, it does not succeed to the predecessor state's treaties; but

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II/1 *YBILC* at 182.

[21] Such is, in summary, the position developed, in particular, by President Mohammed Bedjaoui 'Problèmes récents de la succession d'etats dans les etats nouveaux' (1970) II/130 *Recueil des Cours* at 485.

[22] *Case concerning the Frontier Dispute* (Burkina Faso/Republic of Mali) Judgment of 22 December 1986 ICJ Rep par 24 at 556; *Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras; Nicaragua intervening) Judgment of 11 September 1992 ICJ Rep 1992 pars 40-42 at 386-387; *Affaire de la Délimitation de la Frontière Maritime* (Guinée/Guinée-Bissau) sentence arbitrale du 14 février 1985 par 40. In the *Affaire pour la Détermination de la Frontière Maritime* (Guinée-Bissau/Sénégal), the Arbitral Award of 31 July 1989 applied the *uti possidetis* rule to maritime boundaries, even beyond the territorial sea (pars 63-66), with a very strong dissenting opinion, including this point, by Arbitrator Bedjaoui (pars 21-52). On its side, the ICJ refused to extend *uti possidetis* to maritime boundaries, at least beyond the territorial sea – *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (Honduras/Nicaragua) Judgment of 8 October 2007 ICJ Rep 2007 pars 289-236. The Guinea-Bissau/Senegal judgment, including Arbitrator Bedjaoui's dissenting opinion, may be seen as an attachment to Guiné-Bissau's application in the case of the *Arbitral Award of 31 July 1989* (Guinea-Bissau) – http://www.icj-cij.org/.

[23] The idea that art 12 of VC 1978 expresses customary law was confirmed by the ICJ in the *Gabčíkovo-Nagymaros* case. The court considered that the 1977 treaty between Czechoslovakia and Hungary fell under art 12 of the VC because, by establishing 'the navigational régime for an important sector of an international water way, in particular the relocation of the main international shipping lane to the bypass canal', it 'created rights and obligations "attaching to" the parts of the Danube to which it relates' – *Gabčíkovo-Nagymaros* case, Judgment of 25 September 1997 ICJ Rep 1997 par 123 at 71-72 (by re-conducting the situation to art 12, the court could avoid discussing whether or not art 34 corresponds to customary law).

> its own treaties normally become applicable to that territory. … This rule is codified by Article 15 of the 1978 Vienna Convention.
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> The above rules are reflected in the so-called principle of 'moving treaty boundaries' which is thought to apply in the case when an existing state transfers sovereignty over a party of its territory to another state (as distinct from the cases of the confederation of independent states or the unification into one state of two previously independent states). It means that the treaties concluded by the predecessor state are no longer applicable to that territory, while the treaties of the successor state automatically apply to it.[24]

The rule operates in two dimensions: as an expansion and as a reduction of the 'territorial scope' of treaties, or, as the ILC has stated, the principle

> has two aspects, one positive and the other negative. The positive aspect is that the treaties of the successor State begin automatically to apply in respect of the territory in question as from the date of the succession. The negative aspect is that the treaties of the predecessor State, in turn, cease automatically to apply in respect of such territory as from that date. … Shortly stated, the moving treaty-frontiers rule means that, on a territory's undergoing a change of sovereignty, it passes automatically out of the treaty régime of the predecessor sovereign into the treaty régime of the successor sovereign.[25]

The negative aspect – where reduction occurs – is characterised by the ILC as

> … [i]t seems clear that, from the date of independence, the treaty obligations of the predecessor State cease automatically to be binding upon itself in respect of the territory now independent. This follows from the principle of moving treaty-frontiers which is as much applicable to a predecessor State in the case of independence as in the case of the mere transfer of territory to another existing State dealt with in article 14, because the territory of the newly independent State has ceased to be part of the entire territory of the predecessor State.[26]

The 'moving treaty-frontiers' principle presents a recognised connection with the 'territorial scope' of treaties or the 'application of treaties to territory'. The issue is dealt with in article 29 of the Vienna Convention on the Law of Treaties (VC 1969), which, under the heading 'Territorial scope of treaties', provides that, '[u]nless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory'.

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[24]Malanczuk *Modern introduction to international law* (1997) (7rev ed) at 163-164. It should be noted that this description of the principle is incomplete in the sense that no specific mention is made of newly independent states. See, too, O'Connell n 19 above at 25 and 374.

[25]Commentary to article 14 of the ILC's final draft of what became the 1978 Vienna Convention (art 15 in the approved text) (1974) II/1 *YBILC* 208.

[26]Commentary (7) to article 8 of the ILC's final draft (art 9 in the approved text) *id* at 184.

This provision's origin is found in Sir Humphrey Waldock's third report.[27] Waldock stated:

> Sometimes the provisions of a treaty expressly relate to a particular territory or area, eg, the Antarctic Treaty; and in that event the territory or area in question is undoubtedly the object to which the treaty applies. But this is not what the territorial application of a treaty really signifies, nor in such a case is the application of the treaty confined to the particular territory or area. The 'territorial application' of a treaty signifies the territories which the parties have purported to bind by the treaty and which, therefore, are the territories affected by the rights and obligations set up by the treaty.[28]

Subsequently, he considered that '[t]he territorial application of a treaty is essentially a question of the intention of the parties. Some treaties contain clauses dealing specifically with their territorial scope.'[29]

There was some discussion of the colonial clause,[30] and the ILC's final draft differs somewhat not only from Waldock's first proposal, but also from what became the 1966 Convention text. The final draft, under the 'Application of treaties to territory', provides 'Unless a different intention appears from the treaty or is otherwise established, the application of a treaty extends to the entire territory of each party'. Comparing the approved text with the final draft, not only the heading has been changed to 'Territorial scope of treaties' but 'application of the treaty to' is replaced by 'treaty [being] binding in respect of'.[31] The change came from Ukrainian proposal, based on the premise that application of a treaty in a territory depends on that state's municipal order, which may vary from state to state.[32] But the reasons that can be invoked for the final version are wider than those referred to by the Ukraine.

The VC 1978 contains no direct provision on the consequences of a newly independent state not being bound by a predecessor's treaty. There are,

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[27] A/CN 4/167 and Add 1-3 (1964) II *YBILC* 12. The proposed article read:

> Article 58 – Application of a treaty to the territories of a contracting State
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> A treaty applies with respect to all the territory or territories for which the parties are internationally responsible unless a contrary intention
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> (a) is expressed in the treaty;
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> (b) appears from the circumstances of its conclusion or the statement of the parties;
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> (c) is contained in a reservation effective under the provisions of articles 18 to 20 of these articles.

[28] *Ibid*.

[29] *Ibid*.

[30] (1964) I *YBILC* 47.

[31] In English, the title changed from 'application of treaties to territory' to 'territorial scope of treaties'. But the French version continues to refer to 'application' ('*Application territoriale des traités*'). The Spanish version is similar to the English one ('*Ámbito territorial de los tratados*').

[32] 'United Nations Conference on the Law of Treaties, 1st session, Vienna, 26 March-24 May 1968, Official records, Summary records of the plenary meetings and of the Committee of the Whole' 30th and 31st meetings, 162-163 and 166, and 32nd meeting 428-429.

however, clauses referring to other cases from which some inferences may be drawn. In terms of article 15, when part of a territory of one state becomes part of a territory of another state, 'treaties of the predecessor State cease to be in force in respect of the territory to which the succession of States relates from the date of the succession of States'. So, too, article 34 relating to 'Succession of States in cases of separation of parts of a State', provides:

> 1 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:
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> (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;
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> (b) any treaty in force at the date of the succession of States in respect only of that part of the territory of the predecessor State which has become a successor State continues in force in respect of that successor State alone … .

The general trend from both provisions is that a treaty ceases to be 'in force in respect to the territory' to which succession applies. The situation closer to the creation of a newly independent state is that of secession, provided for in article 34. The terminology, however, shifts from the treaty continuing in force 'in respect of' to being 'binding in respect of' used in article 29 of the VC 1969.

Waldock's observation, coupled with the terms of articles 34 and 35 of VC 1978, call for closer consideration of the relationship between a treaty and state territory, of which there are several variants.

In some cases, the treaty's object and the resultant rights and duties of state parties have nothing to do with state territory: this is the case, for example, with treaties that refer to areas outside of state sovereignty or jurisdiction[33] – not only the Antarctic Treaty, but also the Geneva Convention on the High Seas, and the Geneva Convention on Fishing and on the Conservation of Living Resources in the High Seas (1958), and, more recently, the UN Convention on the Law of the Sea where it addresses the High Seas (Part VII), the Area (Part XI), and the Agreement relating to the Implementation of the Convention (Part XIV); or the Treaty Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies, serve as examples. The same type of de-linking from state territory may appear in treaties constituting international organisations or parts of those treaties.

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[33] I understand jurisdiction to include the continental shelf and ZEE, as well as protectorates, mandates, trusteeship and powers of colonial states after a certain development of international law.

Secondly, conventions may prohibit acts wherever they are performed – eg, the Genocide Convention. A third kind of treaty imposes legal regimes to be applied in the municipal order. The establishment of these regimes may require state action – in particular legislative action – if the domestic system does not provide for automatic application of international law, or if the international regimes are not self-executing. And, after that, enforcement may be needed. In any event, the essential point is that state territory operates as the legal space where the internationally determined regimes should apply. A fourth scenario arises where the territory of the parties to the treaty or of some of them, is the place where treaty obligations are to be performed or rights to be exercised. It may happen that not all acts have to take place in a certain territory or territories; but the category applies if acts indispensable for the performance of the treaty must be performed in the territory.[34] Finally, we have treaty regimes linked to territory. Clearly, there may be various permutations of these scenarios.

If one goes back to the distinction between 'territorial scope' and 'object' of the treaty and to what has been said above, it is clear that the treaty is sometimes to be performed or applied in the state party's territory (the third, fourth and fifth scenarios above), sometimes not (as in the first scenarion), or not necessarily (as in the second). This implies a distinction between the territorial scope of the treaty (which merely means the territory 'bound' by the treaty, ie, the territorial basis of the state party to the treaty) and the territory of application of the treaty, ie, the territory where the third, fourth and fifth scenarios must take place. I advisedly do not refer to 'territory of performance' as there may be other cases of application in the territory of the third kind detailed above. But it is as 'territory of performance' that the territory is of interest for present purposes. Later we shall see why as a result of moving boundaries, treaties may, or may not terminate, and why the concept of 'moving boundaries' is inadequate.

The Cahora Bassa Project and the relationship between Mozambique, Portugal and South Africa

The Cahora Bassa hydroelectric power station has been both a remarkable engineering project and an exuberant expression of Portuguese colonial policy, linked to a tactical alliance between this policy and apartheid South Africa. The project was conceived from research initiated by Portuguese Minister for Overseas Territories into the Mozambican section of the Zambezi river on learning of the then Rhodesia's intention to build the Kariba dam upstream on the Zambezi.

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[34] One may, in normal cases at least, refer to the place of 'characteristic performance', within the meaning of the 1980 Convention on Contractual Obligations, now EU Regulation Rome I, referring, instead of contract to treaty: 'characteristic performance of the treaty'.

Engineer Alberto Abecassis Manzanares[35] was charged with the research and as early as 1956 he identified the Cahora Bassa rapids as particularly suitable for a dam and power station. From studies it soon emerged that the Cahora Bassa production capacity vastly exceeded Mozambican demand (actually, Cahora Bassa has close to 2000 MW capacity).[36] The feasibility of the project depended on a supply agreement with an economically developed neighbouring country: Rhodesia already had Kariba; Hobson's choice dictated South Africa. Talks commenced between Portugal and South Africa. While the dam would secure savings in South Africa's coal resources and politically would reinforce common interests and mutual dependence for both Portugal and South Africa, there were misgivings on both sides. In South Africa these centred around foreign dependency,[37] in Portugal, political considerations aside, such an enormous investment set alarm bells ringing.[38] All this aside, FRELIMO which had embarked on its armed liberation struggle in 1963, came out against the project.

Companies were interested. There was a lot of work, including civil construction, to be done. But the interest from electric equipment companies was very specific. Power transmitted in alternate current (a/c) suffers a loss. A scientific and technical conception was formulated in terms of which such loss could be reduced by converting a/c to direct current (d/c) at the point of origin, transmitting it as d/c, and reconverting it to a/c on arrival (HVDC lines). However, the cost of conversion, compared with the benefit in power savings would be justified only if the distance were sufficient for the power loss to cost more than conversion.[39] Cahora Bassa offered the first transmission line long enough to make the adoption of a conversion system economically viable and, in the Portuguese and South African establishments, those who favoured building the dam prevailed.

Portugal and South Africa agreed that the work would be undertaken by a single consortium, ZAMCO, acting on the basis of separate contracts.[40] The

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[35]Manzanares taught at the *Instituto Superior Técnico*, the highly renowned Engineering School of the Technical University of Lisbon. On Manzanares's work regarding Mozambique and Cahora Bassa, see Castro Fontes, Coutinho and Casanova 'Plano Geral do Zambeze', and Quintela, da Cruz and Moliço 'Aproveitamento de Cahora Bassa' in Quintela and Portela (eds) *Alberto Manzanares e a Engenharia Hidráulica em Portugal* (2004) at 99 and 115.

[36]In terms of the 1969 SC, the contractual maximum demand was, with one generator out, 1470 MW, less the capacity reserved for Mozambique, which, according to the contract, should not exceed 100 MW.

[37]Middlemas *Cabora Bassa, engineering and politics in Southern Africa* (1975) at 29.

[38]Nunes *Memórias Soltas* (2009) 57-61, and preface by Lopes at 11-12. Both Nunes and Lopes were subsequently Governors of the Bank of Portugal and Ministers of Finance.

[39]Middlemas n 37 above at 43.

[40]On the choice of the winning consortium, see Middlemas n 37 above at 41, and Olivier *Damit* (1975) at 123. ZAMCO was comprised of AEG – Telefunken, Brown Boverie and Cie, CGEE

legal relationship between Portugal and South Africa was based on two instruments: an international agreement, and a supply contract (SC). The SC was concluded between Portugal – as the Supply Authority (SAuth) – and ESCOM. The contract envisaged (without being prescriptive) that the Portuguese government would create a SAuth or company to establish and operate the Cahora Bassa Project, granting to it all the 'necessary powers, authorisations, rights and concessions'. The Portuguese government was empowered 'to transfer its rights and obligations under [the] contract to such Authority or Company'.

The SAuth undertook to construct and establish the project in Mozambique, and to start work timeously and then operate the project; ESCOM undertook to construct the lines and the Apollo Station on South African territory. Furthermore, the SAuth undertook to supply power to ESCOM, in terms detailed in the contract, and ESCOM undertook to receive the power under a regime of 'take or pay'. A (small) part of the power produced by Cahora Bassa was reserved to Mozambique. The SC established the tariffs and the currency of account.

The treaty first referred to Portugal's obligation to – directly or through a SAuth or company – construct, establish, operate and maintain the Cahora Bassa Project. It added Portugal's right to create an SAuth or company, which would

> have all the powers, authorisations, rights and concessions it may require to enable it to carry out such part of the rights and obligations of the Government of Portugal as may be assigned to it as well as the terms and conditions of the supply contract as fully and effectively as the Government of Portugal itself could have done [...] the Government of Portugal shall have the right to transfer such part of its rights and obligations under this Agreement as are capable of being assigned and as it may desire to assign, to such special authority or company.

The governments of Portugal and South Africa undertook to carry out the obligations assumed in the terms of the agreement and the SC, or to cause them to be carried out.

There is also a discrete reference to the obligation to respect the financial terms agreed upon with the construction consortium, and both Portugal and South Africa undertook not to amend the contract with the construction consortium or rescind it without prior agreement between their two governments. Articles 4 and 5 referred to advances of money and repayment,

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– Cogelex, Fougerolle, Hochtief, JM Voith, LTA, Siemens, Shaft Sinkers, Sorefame, Società Anonima Elettrificazione, Alsthom, Compagnie de Constructions Internationales, Société des Grands Travaux de Marseille, Société Générale d'Entreprises, Société Française d'Entreprises de Dragages et de Travaux Publics, and Compagnie Industrielle de Travaux et Entreprises Campenon-Bernard.

article 6 prohibited supply from Cahora Bassa to an area outside Mozambique under conditions more favourable than those applicable to ESCOM, and article 7 prohibited the tapping of the lines. Article 8 referred to currency, method of payment, and rates of exchange. It addressed, in particular, the calculation of the amounts in the event that the governments requested to be paid in a currency other than the one in which debts were denominated (PTE or Rand).

An important clause was included in article 8(5):

> In the event of substantial changes in revenues or costs associated with changes in rates of exchange, the parties will consult and examine any request for modification of the terms of this Agreement: provided that in the consideration of any request for payment by Escom of a higher price for electricity, the profitability of the Cabora Bassa project shall be one of the factors to be taken into account.

Article 10(3) provided:

> If as a result of circumstances beyond the control of either party the revenue or costs pertaining to the establishment or operation of the Cahora Bassa project show a fundamental change, the parties will consult and examine any request for modification of the rates of charge referred to in paragraph 5) of article 4.

Article 11 contemplated an advisory board on technical matters, constituted by representatives of the two states and termed the Permanent Joint Technical Committee. Both the agreement and the SC contained arbitration clauses.

The SC was capable of functioning independently. Nevertheless, there was an intended linkage between SC and agreement. At the date of the signature of the agreement,

> each Government shall receive from the other Government written confirmation that:
> (a) The supply contract between the supply authority and Escom has been signed;
> (b) The two contracts between the selected consortium and the Portuguese Government and Escom respectively, shall have been signed.

On its side, the SC would only become binding when the 'Main Agreement between Governments is signed and of full force and effect' (clause 2(1)).

The Cahora Bassa Project was structured in three stages.[41] According to the Portuguese contract with ZAMCO, the first stage was to be ready for

[41] First stage, three generators and four converters; second stage, four generators and six converters; third stage, five generators and eight converters. The record of documents on the engineering aspects of the Cahora Bassa implementation may be seen in Costa (coord) *Inventário de Cahora Bassa* (2004).

commercial operation in March 1975; the second stage in January 1977; and the third stage in January 1979. The reservoir should start to be filled by June 1974. It is estimated that on independence approximately twenty-five per cent of the contract was still to be completed.

There are two reasons which may be seen to have persuaded FRELIMO not to push for a Mozambican takeover of Cahora Bassa. First, was the need for an *écran* between Mozambique and South Africa; the second was that work had not been completed. A takeover at that stage would have resulted in legal chaos.[42]

This emerges from the 1975 Protocol of Agreement, the basic concept in which was to ensure the incorporation of a company (HCB), with Portuguese majority shareholding, to which the concession for finalising and exploiting the Project was granted in consideration of the undertaking to repay Portugal's investment in the Project.[43] As HCB was a *concessionaire,* the ultimate ownership of the dam and equipment would vest in Mozambique after independence. HCB would enjoy only a right of use – albeit a very wide right.

The scheme required that Portugal's rights and obligations under the SC be assigned to HCB. This was done on the basis of article 3 of the agreement and clause 2 of the SC before the independence of Mozambique – to ensure the assignment would be immune to any issue regarding state succession in respect of treaties.

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[42] Assuming that Mozambique would not replace Portugal in the contract with ZAMCO (because of not wishing to do so or of lack of consent by the Contractor, determined by financial reasons), Portugal would, for sure, invoke impossibility of performance of such contract and, very probably, rescind it on such basis. Portugal would have a big problem with German, French and South African export credits. But it would also be very hard for Mozambique to get financial assistance for completion of the works and to have them completed.

[43] The initial shareholders of HCB were the Portuguese government, the Portuguese banks who financed the construction, the Bank of Mozambique which resulted from the incorporation of a branch of Banco Nacional Ultramarino, also a lender, and the government of Mozambique, with 10% in consideration of the concession. All the Portuguese banks that financed Cahora Bassa, except one, were state owned and the one that was not had been nationalised in March 1975, so that 85% were under the control of the Portuguese government. Later, the Portuguese government acquired the Portuguese banks' shareholding. In consideration of the concession, HCB undertook to pay the investment directly made by the Portuguese government and the loans granted by the banks. The credits over HCB, corresponding to such obligation, were converted into shares and it was established that, according to revenues received by the shareholders, the shares would be transferred to the government of Mozambique until it got the majority of HCB and, soon afterwards, all of the shares. For the reasons mentioned in the Introduction (above), this situation never materialised and an alternative way had to be found. In any event, HCB replaced Portugal as debtor to the banks and the rights of Portugal and of the banks arising from their investment and, indirectly, from their financing were recognised, although with limited recourse.

For the SC, HCB constituted the necessary *écran* in the relationship with South Africa. However, the critical point was the 1969 agreement. From the first, Mozambique declared, with irrefutable reasons, that it could not and would not become a party to the treaty. The situation was legally complicated and could become dangerous. The 1975 Protocol of Agreement tried to put the first stone in a path where it provided:

> FRELIMO accepts that the power produced by the Cahora Bassa project be supplied to the Republic of South Africa, as regards the existence, the validity and the contents of the power supply contract to Escom which the future concessionaire company of the project would have to perform, the same being applicable to all agreements that Portugal entered into with States or any other entities regarding the project, its construction and financing (…).

The idea seemed already to be that the 1969 treaty would stay with Portugal.

To make things clear, article 35 established, in paragraph 1, that

> [t]he State of Mozambique undertakes to maintain the legal regimes regarding the implementation of the Cahora Bassa project in everything that corresponds to contractual provisions accepted by the Portuguese State in the contracts referred to below and not to practice acts which may jeopardize the fulfilment of the obligations undertaken by the Portuguese State by such agreements;

paragraph (2) mentioned, among the instruments to which paragraph (1) referred, the 'Agreement between the Governments of Portugal and of the Republic of South Africa relative to the Cahora Bassa Project, signed in Lisbon the 19th September 1969 …' (no 15).

As early as the end of February 1975, a meeting between the Portuguese and the South African delegations was held at which Portugal suggested a review of the agreement and of the SC as regards tariffs, because of the enormous increase in agreed costs. Some months after the independence of Mozambique, on 17 and 18 November 1975, a meeting was held at Songo between representatives of the governments of Portugal, Mozambique and South Africa.[44] The minutes of the meeting record no intervention by Mozambique, which is fully justified by the framework described below.

The meeting opened with South Africa requesting

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[44]The South African delegation, chaired by the Ambassador Brand Fourie, General Secretary of the Ministry of Foreign Affairs, comprised ten members. The Portuguese delegation, chaired by Engineer António Martins, and including Jorge Sampaio, Robin de Andrade and myself, had eight members. Mozambique had only one representative, the Engineer António Alves, who was also the member of HCB's board appointed by Mozambique.

> clarification of the new situation arising from the changed circumstances resulting from the constitutional changes which have taken place and the establishment of the HCB. The Portuguese representatives gave an assurance that the responsibilities undertaken and guarantees given by the Portuguese Government remain intact. A legal sub-committee was appointed to spell out the consequences of the new arrangements.

According to the legal sub-committee report:

> The South African representatives posed certain legal questions arising from the independence of Moçambique. Explanations regarding these questions were given by the Portuguese delegation to indicate that the Agreement between the Governments of Portugal and South Africa relating to the Cahora Bassa project and the Supply Contract between the Government of Portugal and ESCOM remain in force.
>
> The Portuguese delegation stated that Portugal was authorized by means of a Protocol with Moçambique to fulfil all the obligations arising from the above mentioned Agreement and Contract. It was agreed that the explanations offered by the Portuguese delegation would be affirmed in a Diplomatic Note by Portugal to the South African Government.

The Portuguese Diplomatic Note, after mentioning the Protocol of Agreement with Mozambique, HCB and the concession granted to it, and noting that Mozambique had not 'declared the intention to succeed in the above mentioned Agreement', stated:

> As a consequence, and in consonance with such commitment by Moçambique, Portugal is in condition to declare that the responsibilities undertaken and the guarantees given by the Portuguese Government on the Agreement between the Governments of Portugal and the Republic of South Africa relative to the Cabora Bassa Project, dated 19th September, 1969, as well as the Contract for Power Supply between the Government of Portugal, and the Electricity Supply Commission of the Republic of South Africa, signed on the same date, remain intact.
>
> Therefore, Portugal considers that such Treaty remains in force between the signing parties, such being also the case with the Contract for Power Supply to ESCOM in which the position of the Portuguese State has been, in the meantime, assumed by Hidroelectrica de Cabora Bassa, in accordance with the terms contractually foreseen.

The next meeting between the governments was held in Lisbon in May 1976. Mozambique again, did not intervene:

> The South Africa representatives having acknowledged receipt by their Government of the Diplomatic Note issued by Portuguese Government requested some clarifications on the legal framework in which the Cahora Bassa undertaking is to operate, considering the independence of Moçambique (…). (…) the Portuguese representatives, having outlined again the whole legal framework mentioned above, repeated its assurance, already given at Songo, that

> the responsibilities undertaken [and] given by the Portuguese Government remain intact, that the Agreement dated 19 September 1969 between the Government of South Africa and the Government of Portugal and all rights and obligations arising thereof remain in full force for the period mentioned in Article 9 of the Agreement.

The South Africa delegation stated that the Moçambique government had in fact succeeded to the main Agreement between South Africa and Portugal and stressed the desirability and the importance to South Africa for purposes of determining the respective rights and obligations of the parties to the Agreement, that the Moçambique government confirm that the Agreement would be permitted to remain valid for the full period of the supply contract with ESCOM.

The Portuguese delegation argued that treaty succession depends on the will of the eventual successor newly independent state and that Moçambique had not indicated its intention to be bound by the Agreement. Moçambique had, however, given Portugal its assurances, in a Protocol of Agreement, that Portugal would be able to fulfil its undertakings to South Africa in the 1969 Agreement. This Portugal had confirmed in a Diplomatic Note to the South African government.

South Africa's claim to 'automatic succession' would appear to have been based on an understanding that a successor state is generally bound by its predecessor's treaties. It is interesting to note that the South African delegation appeared to have shifted from a firm position that Mozambique automatically became a party to the agreement to a request addressed to the Mozambican government, that it 'confirm … that the Agreement will be permitted to remain valid for the full period of the supply contract with ESCOM', without mentioning between whom.

It is uncertain whether or not Mozambique gave South Africa assurances. Nevertheless, in a meeting held in March 1997 shortly before the start of commercial operation, HCB and ESCOM agreed, not only on the commencement date, but also on a tariff increase, without reference to the treaty issues.

One critical point in the agreement, not yet considered, is that article 11 provided for an Advisory Permanent Joint Technical Committee (PJTC), the members being appointed by Portugal and South Africa. The first meeting of the PJTC was held on 14 and 15 June 1977 in Johannesburg, with members appointed by such states. The meeting implied the recognition of the continuing force of the treaty between Portugal and South Africa. The PJTC subsequently met on an annual basis. On 24 April 1979 a meeting of

governments' delegations was formally held between Portugal and South Africa only, the representatives of Mozambique being present as observers. As from 1977, South Africa had thus tacitly recognised the continuing force of the 1969 treaty.

One may ask why Portugal argued for the continuing force of the 1969 Agreement between the Portuguese Republic and the Republic of South Africa: it was certainly not a mere academic exercise. Three things were known: Portugal had made a huge investment; the only possibility of recovering it was by having HCB sell power to ESCOM; Mozambique did not consent, and would not at that time consent, to become a party to the treaty.

Therefore, Portugal had an interest in maintaining the supply relationship. However, as we have seen, the SC and treaty were related. This is a kind of relationship that, if contracts alone were involved, one would term a 'union or group of contracts' (*Verträgeverbindungen* in German, *união de contratos*, in Portuguese, *collegamento di contratti* in Italian, *groupe de contrats* in French). As we here have a treaty and a contract we can talk of union or group of conventions, attributing to the term convention a very wide meaning. Whatever the concepts and the terms used to characterise the situation, if the treaty were extinguished because of Mozambique's refusal to be bound by it, there would be a concomitant risk of the termination of the SC.

Exactly what the South African's establishment was thinking is unclear. However, with hindsight, a position favourable to Cahora Bassa prevailed until 1980, but changed going into the nineties.[45] If South Africa were to break up the supply relationship, it would close the door to any possibility of Mozambique not becoming bound by the treaty. If Mozambique continued to refuse to be bound, South Africa would declare the treaty terminated and argue that the SC had also terminated because of its link to the treaty. Portugal needed defences for such an eventuality. As referred to above, both the treaty and the SC contained arbitration clauses.

There were two possible lines of defence for Portugal: that the Agreement was not terminated; and that, even if it was, the SC could and did continue. The treaty survival was the defence of choice regarding the first issue. In addition, under the prevailing economic circumstances with enormous cost increases

[45]The destruction of the line towers started only in 1980, after white rule was abolished in Zimbabwe, and would have been impossible without some support from the 'other side' of the boundary. On the other hand, South Africa started to build nuclear plants, avoiding, for some time, the need for Cahora Bassa power. The recent enormous increase in the demand for power, linked with the profound political, social and economic change in the country, made Cahora Bassa power extremely important for South Africa.

and a deep devaluation of the escudo, articles 8(5) and 10(3) of the Agreement, together with the arbitration clause included in it, could prove very important. Portugal was taking a risk: if Mozambique adopted any measure preventing Portugal from fulfilling the treaty, Portugal could not invoke *force majeure vis-à-vis* South Africa. It would only have recourse against Mozambique. It was an accepted risk.

It is not disputed that there were ways of maintaining the supply relationship without the treaty: to declare that the SC would continue as it was, with no Agreement, or perhaps amended. But this would require an arbitral award or the consent of the parties involved and it was something that Portugal could consider, if proposed by South Africa, but not that it would itself raise without jeopardising its first line of defence. South Africa did not propose such an alternative.

The acceptance by Mozambique of the 'treaty survival' was guaranteed in the 1975 Protocol of Agreement. This was the consequence of Mozambique refusing to become a party to the treaty as Portugal's successor. On the South African side, things would certainly be more complicated and could give rise to litigation. I am convinced that South Africa realised that Mozambique would not become a party to the treaty and convinced itself of the advantage of keeping Portugal on board. Although Portuguese policy had radically changed in comparison with the period before revolution and decolonisation, Portugal had a lot to lose and could be some kind of a bridge. I believe that South Africa convinced itself that 'treaty survival' was the best way to overcome the difficulties. This was recognised as from 1977, and litigation was avoided.

It has been mentioned that by 1984 there was a perceptible thaw in the relationship between Mozambique and South Africa. After the signature of the Nkomati Accord there was no longer any obstacle to Mozambique being a party to a treaty with South Africa. However, instead of Mozambique replacing Portugal in the 1969 treaty, the governments agreed to replace the treaty with a trilateral treaty signed on 2 May 1984.[46] The 1984 treaty formally acknowledges that the 1969 Agreement had been in force until then and would continue to be in force between South Africa and Portugal only to the 'date of operation' of the 1984 treaty.

Article 1 of the 1984 treaty, on definitions, declares that '"[p]revious agreement" means the agreement entered into on 19 September 1969 between the governments of the Republics of Portugal and South Africa relative to the Cahora Bassa project'. Article 2(1) states:

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[46]Neither Robin de Andrade nor I (nor Jorge Sampaio) intervened in the 1984 negotiations or in their preparation.

> As between the Government of the Republic of Portugal and the Government of the Republic of South Africa, the provisions of this Agreement shall from the date of its operation terminate and replace the provisions of the previous agreement, subject however to the provisions of article 4 of this Agreement.

Treaty survival was, thus, confirmed retrospectively,

The 1969 Treaty survival

Two main issues have now to be addressed. The first is whether Portugal's argument that the 1969 treaty continued in force after the independence of Mozambique, even without the agreement of South Africa or in the face of its opposition, was sound – or until what point it was sound. South Africa had accepted that, as a matter of fact, the treaty continued between itself and Portugal. A second question is how to construe the situation conceptually. This must be addressed against the underlying question of the location of the issues. Therefore, when dealing with a bilateral treaty where the territory of application becomes the territory of a new state, why does new state's refusal to become a party to the treaty raise a question of treaty termination?[47]

Before analysing these issues, a preliminary point must be established: whether the 1969 Agreement was a territorial treaty falling under what is now article 12 of the VC 1978 which the International Court of Justice (ICJ) has adjudged as corresponding to customary law.[48]

South Africa does not appear to have argued that the Cahora Bassa Agreement was a territorial treaty. Rather it based its argument on the general continuity of treaties, without exception for newly independent states. In any event, the 1969 Agreement cannot be classified as a territorial treaty within the meaning of current article 12. The application of paragraph 2 of article 12 is impossible as there was no group of states whose interests were to be protected. As regards paragraph 1, the 1969 Agreement and the SC established only rights *in personam* and correlative obligations, which do not refer to the use of territory. The only similarity between the Cahora Bassa and the Gabčíkovo-Nagymaros Projects is the issue of the project's integration. Article 1 of the Agreement includes in the Project the transmission line in South Africa and the Apollo distribution station. But in contradistinction to Gabčíkovo-

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[47]In the text I am simplifying by assuming that the entire 'territory of application' becomes the territory of a new state, or that the treaty cannot be applied at all without including such territory. However, it may happen that only a part of the 'territory of application' separates, and that the treaty continues to be applicable and applied in the remaining territory, with its contents reduced (see art 35 of VC 1978). What will be said regarding the termination of a treaty is applicable, *mutatis mutandis*, to its reduction.

[48]See above.

Nagymaros, there is no question of joint ownership: each state is the full owner of what is built and installed in its territory. Nor is there anything similar in the regimes regarding an international river.

The situation is more closely aligned to an agreement on the construction of railways or pipelines in contiguous states for supply from one state to the other. Certainly, there is mutual dependency, but the same kind of mutual dependency could exist, for example, in the case of two satellites. The rights and obligations deriving from the Agreement are not attached to the territory.

Let us now consider the location of the above issues. This returns us to the connection between the territory and the so-called 'treaty-moving boundaries rule'. The mere fact that the 'territorial binding scope' of a treaty is reduced regarding a state, does not mean, in itself, that a treaty is terminated if the new state does not become bound by it. If there is no specific relationship between the treaty content and a particular territory under the jurisdiction of a state, there is no consequence of, for example, the 'loss' of that part of the territory other than the territorial basis of the juristic personality of the state having changed. For the treaty to be terminated, it is necessary that the territory at stake be 'territory of application' of the treaty. This is because without sovereignty or jurisdiction over the territory, the treaty performance by the predecessor state becomes impossible[49]. The ground for termination is impossibility of performance. Later, we shall see whether the loss of sovereignty (or of jurisdiction) necessarily and always implies such impossibility.

Article 61(1) of the Vienna Convention on the Law of Treaties indeed states that

> [a] party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty … .

However, it is also true that, notwithstanding some problems caused by the wording of article 61(1),[50] by limiting the relevant impossibility to the

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[49]Other than the ILC, the Harvard Draft on the 'Law of Treaties' was aware of this. It provided in art 26: 'A change in the territorial domain of State, whether by addition or loss of territory, does not, in general, deprive the State of rights or relieve it of obligations under a treaty, unless the execution of the treaty becomes impossible as a result of the change'. Grant and Barker (comp) *Harvard research in international law*, *original materials* (2008) II at 1066, and commentary at 1066 to 1077. Report by Gardner. See too Doehring 'The scope of the territorial application of treaties: Comments on Art 25 of the ILC's 1966 Draft Articles on the Law of Treaties' (1967) 27 *ZaöRV* at 483.

[50]The perplexity may be seen in Capotorti 'L'extinction et la suspension des traités' (1971) III/134 *Recueil des Cours* 528-531 and in Bodeau-Livinec 'Commentaire à l'article 61-1969'

disappearance or destruction of an object indispensable for the execution of the treaty,[51] the ICJ admitted, in the *Gabčíkovo-Nagymaros* case, that the provision would correspond to customary international law.[52]

The ICJ's position must, however, be weighed. Hungary argued that it could not be 'obliged to fulfill a practically impossible task, namely to construct a barrage system on its own territory that would cause irreparable environmental damage'.[53] Very simply, in the court's view, there was no impossibility at all. The court stated that even if ecological requirements were seen to correspond to obligations *erga omnes,* 'the treaty made available to the parties the necessary means to proceed at any time, by negotiation, to the required readjustments between economic imperatives and ecological imperatives'. That is why it was unnecessary for the court to 'determine whether the term "object" in Article 61 can also be understood to embrace a legal régime …'.[54]

The court referred in general to articles 60 to 62 of the Vienna Convention as embodying, in many respects, a codification of existing customary law. For such purpose, it mentions the *Advisory Opinion regarding Namibia* and the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, as well as the *Fisheries Jurisdiction* cases.[55] However, in the Namibia opinion what was at stake was termination of a treaty as a consequence of its breach and, therefore, article 60.[56] On their side, the *Fisheries Jurisdiction* cases relate to change of circumstances and, therefore, to article 62.[57] The *Opinion on the Agreement between WHO and Egypt* refers to article 56, especially paragraph 2, on prior notice of termination, and to the parallel provisions of the, at the time, 'Draft Articles on Treaties between States and International Organizations or between International Organizations'.[58] None

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(2006) III *Les Conventions de Vienne sur le Droit des Traités cit* at 2198. Sir Gerald Fitzmaurice separated the extinction or disappearance of the object from the impossibility of performance in general ('Second Report' (1957) II *YBILC* at 29 and 48-49).

[51] The ILC gives as examples *'*the submergence of an island, the drying up of a river or the destruction of a dam or hydroelectric installation indispensable for the execution of a treaty*'* Commentary (2) to Draft Article 59 of the 1966 Vienna Convention (1966) II *YBILC* 256.

[52] 1997 ICJ Rep par 46 at 38, par 99 at 62, par 102 at 63-64.

[53] Paragraph 94 at 59.

[54] Paragraph 103 at 63-64.

[55] 1997 ICJ Rep par 46 at 38.

[56] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970), Advisory Opinion 1971 ICJ Rep par 94 at 46-47.

[57] *Fisheries Jurisdiction (United Kingdom v Iceland), Jurisdiction of the Court*, Judgment 1973 ICJ Rep par 36 at 18; *Fisheries Jurisdiction (Federal Republic of Germany v Iceland), Jurisdiction of the Court,* Judgment 1973 ICJ Rep par 36 at 63.

[58] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion* 1980 ICJ Rep pars 48-49 at 95-96.

of the cases deals with impossibility of performance and their only connection is that all relate to treaty termination.

Pierre Bodeau-Livinec, in his commentary on article 61 of the VC, underlines the lack of practice on the matter. He, however, remarks that *' l'évanescence de la pratique se trouve, en quelque sorte, aisément compensée par la certitude de l'* opinio juris*, que véhicule l'adage* ad impossibilia nemo tenetur'.[59] The question is not so much that the treaty obligation extinguishes itself or may be extinguished in the event of impossibility; the doubt surrounds the limitation on impossibility imposed by article 61(1), to events resulting from the 'disappearance or destruction of an object indispensable for the execution of the treaty'.

The court recalls that, during the diplomatic conference which adopted the Convention, a proposal was made (by Mexico)

> to extend the scope of the article by including in it cases such as the impossibility to make certain payments because of serious financial difficulties …. Although it was recognized that such situations could lead to a preclusion of the wrongfulness of non-performance by a party of its treaty obligations, the participating States were not prepared to consider such situations to be a ground for terminating or suspending a treaty, and preferred to limit themselves to a narrower concept.

The commentary to article 23 (regarding *force majeure*) of Draft Articles on Responsibility of States, asserts that

> [i]n drafting what became article 61 of the 1969 Vienna Convention, the ILC took the view that *force majeure* was a circumstance precluding wrongfulness in relation to treaty performance, just as supervening impossibility of performance was a ground for termination of a treaty. The same view was taken at the United Nations Conference on the Law of Treaties. But in the interests of the stability of treaties, the Conference insisted on a narrow formulation of article 61 so far as treaty termination is concerned.[60]

The court's statement calls for three observations. The first is that generally, even in municipal law, financial difficulty is not dealt with as a case of impossibility of performance. The second is that article 61(1), interpreted in strict conformity with its wording, is unreasonable. The provision refers, as the only relevant cause for impossibility of performance that allows terminating (or withdrawing from) a treaty, the 'permanent disappearance or destruction of an object indispensable for the execution of the treaty'. As referred to

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[59] *Les Conventions de Vienne sur le Droit des Traités, Commentaire cit* vol III (2006) at 2188-2189.
[60] (2001) II/2 *YBILC* 77.

above, the ILC's Commentaries note that 'the type of cases envisaged by this Article is the submergence of an island, the drying up of a river or the destruction of a dam or hydroelectric installation indispensable for the execution of the treaty'.[61] Imagine a treaty referring to the construction and use of a port on an island. The island does not submerge but decreases in such terms that the port can no longer be constructed; alternately in a treaty relating to navigation on a river, the river does not dry up, but the volume of water decreases to a level where navigation of the kind envisaged in the treaty becomes impossible. What is the relevant difference, for the purposes of article 61(1), between the submerging of the island or the drying up of the river? One could try to extend the meaning of article 61(1) by arguing that what is important is not the disappearance of the object as such, but the disappearance of the prerequisites required for the performance of the treaty – in other words, we are not dealing with the disappearance of the object, but rather with the disappearance of the properties necessary for performance of the treaty. This, however, means that all the aspects of an object indispensable for the performance of a treaty are relevant. This, in turn, implies a shift in the criterion: if the absence of an element in the object indispensable for the performance of treaty is a case of impossibility, why, then, limit the relevant prerequisites by reference to an 'object'?

A third note concerns the argument that the restrictive mode of article 61(1) does virtually no damage to the party to whom the performance is impossible because it may invoke *force majeure* as a circumstance excluding wrongfulness. The point is that, if the party whose performance became impossible has a justified interest in the termination of the treaty, there is an additional reason for the possibility of such termination. According to this second ground, termination of a treaty (as well as termination of a contract) on the basis of impossibility of performance does protect the interests of the other party (I consider only bilateral treaties with reciprocal obligations). If the reciprocal obligation of the other party is to be wholly or partially performed after the fulfilment of the obligation whose performance has become impossible, this other party may, under article 60, invoke material breach of the treaty to terminate (or suspend) it. If the reciprocal obligations are to be performed simultaneously, the issue starts to be whether the *exceptio non adimpleti contractus* applies in the field of treaties.[62] If the other party's obligation is to be performed, in the whole or in part, after the execution of the one whose performance has become impossible, impossibility of performance as a ground for termination (or suspension) of the treaty is the only way to protect the legitimate interest of that party in not having to perform its own reciprocal obligation.

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[61] Commentary (2) to draft article 58 (1966) II *YBILC* 256.

[62] See Nisot 'L'exception "non adimpleti contractus" en droit international' (1970) XXXIV *Révue Générale de Droit International Public* at 668-673.

Would an analysis of municipal legal systems and of common rules regarding the effects of impossibility of performance in the so-called 'sinalagmatic' contracts or contracts with reciprocal obligations, show some trend that could be useful in dealing with the subject in international law.

It is curious that in mentioning only disappearance or destruction of the object, the formulation of article 61 of the VC 1968 corresponds to the French *Code Civil* of 1804 where article 1302 refers to the obligation being extinguished by loss of the object not attributable to the obligor. However, case law and doctrine in France have long considered that if *force majeure* permanently prevents one party to a contract with reciprocal obligations from fulfilling its obligation, the contract is terminated.[63] The Spanish Civil Code of 1889 refers to extinction of the obligations of *dare* by disappearance of the object, and of the obligations of *facere* by physical or legal impossibility of performance (articles 1182 and 1183). It is understood that impossibility of performance determines the possibility of termination of the contract.[64] In a different and better formulation, article 1148 of the Portuguese Civil Code of 1867 (Seabra Code), as in *Code Civil*, excluded responsibility for non-performance in the event of *force majeure* and in article 709, established that a party could consider itself liberated from its own obligation if the performance by the other party was physically or legally impossible. The German BGB (1896-1900) not only determined exclusion of responsibility for non-performance arising from supervening impossibility of performance non attributable to the obligor (§ 323), but also excluded the right of the obligor to consideration in sinalagmatic contracts. In the BGB's 2001 revision the second provision has been moved from § 323 to § 326(1). The Swiss *Code des Obligations* (1911) determines the relationship between impossibility of performance and the position of the other party to the contract in article 119(1) which provides that '[t]he obligation extinguishes when its performance becomes impossible following circumstances non attributable to the obligor'. In terms of paragraph 2, '[i]n bilateral contracts, the obligor liberated that way has to restitute, pursuant to the rules of unjust enrichment, what he has already received and cannot claim what be owed to him'. Similar provisions are found in articles 1256 and 1463 of the Italian *Codice Civile* (1943), and in articles 790 and 795(1) of the Portuguese *Código Civil* of 1966.[65] Note that all the above provisions refer to the impossibility not attributable to the obligor, leaving aside the consequences of impossibility attributable to him.

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[63] See art 1722 of the French *Code Civil* regarding impossibility of performance in rent contracts, which expressly provides for this solution. See also Benabént *Droit civil – Les obligations* (2007) (11ed) at 259 and Terré, Simle and Lequette *Droit civil - Les obligations* (2005) (9ed) at 1417. For cases providing for restitution of what has been paid, see, eg, *Arrêts du Cour de Cassation – Chambres Civiles* of 13 March and 4 June 1907 DP 1907.1.281 et 1907.1.321.

[64] For example, Díez-Picazo *Fundamentos del Derecho Civil Patrimonial II – Las Relaciones Obligatorias* (2008) (6 ed) at 688-690, 694-695.

[65] See the remarkable work by Pereira *Conceito da Prestação e Destino da Contraprestação* (2001).

In English law the matters are dealt through the doctrine of frustration (impossibility of performance that leads to the termination of contract by frustration) and through the doctrine of breach of contract, linked with anticipatory breach, breach being understood in terms that include cases where excuses or circumstances excluding wrongfulness are verified.[66] Breach by impossibility of performance is a breach which may allow withholding of performance by the other party or termination of the contract.[67] Anticipatory breach also allows the party not to perform, even if it had to perform first.

As for international instruments, still in Europe the 'Principles of European Contract Law' (PECL) define non-performance as 'any failure to perform an obligation under the contract, whether or not excused…' (art 1:301(4)) and excuses include circumstances precluding wrongfulness (art 8:108). Article 8:101(2) allows, in cases including impossibility of performance by the other party, withholding performance (art 9:201), and terminating the contract, if the non-performance is fundamental (arts 9:301 and 9:304).

Article 7.1.1 of the 'Unidroit Principles on Commercial Contracts' (2004) defines non-performance in a wide sense, including cases where excuses for non-performance exist (see *Comment* to art 7.1.1). Excuse is also used in a wide sense, including circumstances precluding both wrongfulness and excuses *stricto sensu*, as is clear from article 7.1.7 which deals with *force majeure* as an excuse. Articles 7.1.7(4), 7.1.3 and 7.3.3 give the party whose performance is not impossible, not only the right to withhold performance if its performance should be the latter, or if the performances are to be simultaneous, but also the right to terminate the contract – provided non-performance is fundamental – even if the party should perform before the other party, because impossibility of performance here means anticipatory non-performance.

Finally, the 'Vienna Convention on Contracts for the International Sale of Goods' (CISG), which anticipates the failure to perform 'due to an impediment beyond the party's control' essentially as a cause of exemption of liability (art 79(1)), also admits the possibility of the other party declaring the contract avoided, as long as the non-fulfilment is fundamental (arts 45(1)(a), 49, 61(1)(a) and 64 *ex vi* article 79(5)).[68]

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[66] Chitty and Beale (eds) *Chitty on contracts: Volume I - general principles* (1999) (28 ed) at 1167, 1238-1240.

[67] See s 1 of Law Reform (Frustrated Contracts) Act 1943 and s 7 of Sale of Goods Act 1979 (specifically on the extinction of goods before sale but after agreement to sell).

[68] See Schlechtriem and Schwenzer *Commentary on the UN Convention on the International Sale of Goods (CISG)* 2005) (2ed) 832.

It is obvious that, whatever the arguments on minor points and distinctions that are and have to be made, the termination on the basis of supervening impossibility of performance also intended to protect the other party, requires a much wider basis than the 'disappearance or destruction of an object indispensable for the execution of the treaty'. Furthermore, article 61(1) of the VC 1966, where it provides that 'impossibility of performing a treaty' may be invoked 'if the impossibility results from the disappearance or destruction of an object indispensable for the execution of the Treaty', presupposes that there is impossibility of performance resulting from other causes.

A thorough analysis of municipal laws could perhaps even reveal a basis for invoking article 38(1)(c) of the ICJ Statute by referring to general principles recognised in the *foro domestico* of the states. Neither the ICJ nor its predecessor, however, has formally applied article 38(1)(c).[69] In any event, the simple survey above shows the lack of reasonableness of the restrictive formulation of article 61 of the VC.1966 And, whatever the conception relating to interpretative paths and ways of filling gaps in international law, reasonableness is an essential criterion for deciding, and even for 'construing' customs.

Apart from the cases involving an object to which the content of the treaty refers, the causes of impossibility of performance are basically those related to hostilities and to 'legal change'. Legal change can involve, first, the emergence of a *jus cogens* norm (addressed in art 64), and secondly, the succession of states. The point is that both the hypothesis of hostilities and of succession of states are excluded from the scope of the Vienna Convention on the Law of Treaties and, therefore, from article 61(1). In terms of article 73 '[t]he provisions of the present Convention shall not prejudge any questions that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States'.

Regarding hostilities, the International Law Commission has been engaged in an analysis of the effects of armed conflicts on treaties with the late Professor Ian Brownlie as Special Rapporteur. Draft article 13 proposed by Brownlie declared, under the heading 'Cases of termination or suspension', that 'the present draft articles are without prejudice to the termination or suspension of treaties as a consequence of: ... (c) Supervening impossibility of performance; ...'.

As noted in the commentary, this draft article states the obvious.[70] The question is whether the impossibility of performance is here considered within

[69] See Pellet 'Comment to article 38 of the Statute' in Zimmermann, Thomuschat and Oellers-Frahm (eds) *The Statute of the International Court of Justice, a commentary* (2006) 764.
[70] A/CN 4/555 41-42.

the limited wording of article 61(1) of the VC. However, after draft article 3 having determined that

> The outbreak of an armed conflict does not necessarily terminate or suspend the operation of treaties as:
> (a) between the States parties to the armed conflict;
> (b) between a State party to the armed conflict and a third State;

Article 4, in the draft adopted by the working group, provides:

> In order to ascertain whether a treaty is susceptible to termination, withdrawal or suspension in the event of an armed conflict, resort shall be had to:
> (a) articles 31 and 32 of the Vienna Convention on the Law of Treaties; and
> (b) the nature and the extent of the armed conflict, the effect of the armed conflict on the treaty, the subject-matter of the treaty and the number of parties to the treaty.[71]

The criteria referred to in (b) may clearly serve to establish whether the performance of the treaty has become impossible in a wide sense.

Sir Gerald Fitzmaurice has suggested regarding the extinction of a state as a cause for termination of treaty, although subject to rules governing state succession.[72] The Commission preferred to reserve all matters relating to succession.[73] And the reservation was formulated in entirely general terms.[74]

Regarding the relationship between succession of states, termination or 'reduction' of treaties, and impossibility of performance, a relevant practice has been established. The United Kingdom had a tradition linked to devolution. After devolution by Act of parliament regarding, in particular, India and Pakistan, the practice developed of agreements between the United Kingdom and the newly independent states for whose international relations the UK was responsible, determining which treaties would be continued by the new state. This was the case with, besides Iraq and Transjordan (former mandates), Burma, Ceylon, Cyprus, Jamaica, Trinidad and Tobago, Western Samoa and, in Africa, Ghana, Nigeria and Sierra Leone.[75] Tanganyika refused to enter into a devolution agreement with the United Kingdom and made a general declaration in terms of which

> [a]s regards bilateral treaties validity concluded by the United Kingdom on behalf of the territory of Tanganyika or validity applied or extended by the former to the territory of the latter, the Government of Tanganyika is willing to

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[71] A/CN 4/L 727/Rev 1 6 June 2008.
[72] 'Second Report on the Law of Treaties' A/CN 4/107 (1957) II *YBILC* 49.
[73] Commentary (6) to draft art 58 'Draft articles on the law of treaties with commentaries' (1966) II *YBILC* 256.
[74] Commentary (3) to draft art 69 *id* at 268.
[75] O'Connell n 19 above at 358-360.

> continue to apply within its territory, on a basis of reciprocity, the terms of all such treaties for a period of two years from the date of independence (ie, until 8 December 1963) unless abrogated or modified earlier by mutual consent. At the expiry of that period, the Government of Tanganyika will regard such of these treaties which could not by application of the rules of customary law be regarded as otherwise surviving as having terminated.[76]

The declaration was based on the Nyerere doctrine, pursuant to which the newly independent state has the right to chose whether or not to be bound by the treaties entered into by the predecessor state.[77] Tanganika's position was followed, with nuances, by, for example, Tonga, Tanzania, Uganda, Swaziland, Zambia, Botswana, Lesotho, Mauritius and Nauru.[78]

In all these cases, the United Kingdom sent a note for circulation in the United Nations stating:

> Her Majesty's Government in the United Kingdom hereby declare that, upon … becoming an independent sovereign State …, *they ceased to have the obligations or rights, which they formerly had,* as the [Government/Authority] responsible for the [international relations/administration] of …, as a result of the application of such international instruments to ….[79]

There is no notice of any reaction against the United Kingdom disclaimer, including the Tanganyika case, or of any allegation that the United Kingdom continued to be bound (and entitled) by the treaty in relation to the territory in question.[80] This lack of reaction against the United Kingdom disclaimer practice cannot but express *opinio juris* that the United Kingdom was exercising a right.

Zemanek argues that the United Kingdom statements would only have a declaratory effect, as they merely apply the customary rule of 'moving treaty boundaries'.[81] According to Brigitte Stern, this rule belongs to customary international law insofar as it would be a consequence of the principle of the territorial application of treaties, linked with the competence of states' distribution.[82] It has been seen, however, that the moving treaty boundaries

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[76] 'ILC draft articles on succession of states in respect of treaties with commentaries, article 9' (1974) II *YBILC* 188.
[77] Makonnen 'State succession in Africa: Selected problems' (1986) V/200 *Recueil des Cours* 121.
[78] *Id* at 188.
[79] See 'Materials on succession of states' ST/LEG/SER.B 14 at 177-178 Supplement to 'Materials on succession of states' A/CN 4/263 45, and 'Draft articles on succession of states with commentaries' (1974) II/1 *YBILC* 187.
[80] See, in particular, Makonnen n 18 above at 141.
[81] *Id* at 215.
[82] *Id* at 169.

rule alone is of no consequence in the application of performance or a treaty to a territory. It works when the territory is the territory of application of the treaty if combined with impossibility of performance. And this has been understood by Tanganyika. Regarding bilateral commercial treaties concluded on behalf of Tanganyika or extended to it, where no further relationships were desired, the Tanganyikan government noted that, 'were Tanganyika to be substituted for the United Kingdom as one of the parties, large portions of the Treaty would become deprived of meaning and impossible of fulfilment'.[83]

In this matter, there is a customary rule, built in part by the United Kingdom disclaimer practice. The rule is that bilateral treaties may be terminated (or reduced) in the event of territorial change, when the state acquiring sovereignty does not become bound and the performance of the treaty by the predecessor state regarding such territory becomes impossible.

In terms of article 61 of the VC, termination of a treaty by impossibility of performance is not automatic, but depends upon an act by either of the parties. In Commentary (5) to draft article 59 (which became article 61), the ILC stated that considerations of certainty convinced the Commission to 'formulate the article in terms of a right to invoke the impossibility of performance as a ground for terminating the treaty and made this right subject to the procedural requirements of Article 62'[84] (article 65 in the approved text of the Convention). However, British practice as regards state succession, seems to acknowledge that 'invoking' termination is necessary. Although there have been cases of termination or reduction of (bilateral) treaties without disclaimer, these may be explained on the basis that, as there was no dispute the states had tacitly admitted termination or reduction.

There is a further argument for not considering the termination of a treaty as automatic. The Vienna Convention talks, and we have talked until now of impossibility of performance 'of the treaty', but this assertion is not entirely accurate. The impossibility of performance refers directly to an obligation, not to the treaty itself. For the purposes of the theory of termination, the treaty involves a set of obligations and rights. If one were to assume that the termination of the obligation whose performance has become impossible was automatic, it does not follow that the termination of all the obligations and rights, that is, of the treaty, should be automatic.

We have, until now, left open the issue of whether the loss of sovereignty (or of jurisdiction) over a territory of application of a treaty necessarily involves

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[83] 'Succession of States in respect of bilateral treaties – second and third studies prepared by the Secretariat' A/CN 4/243 and Add 1 (1971) II/2 *YBILC* 158.
[84] (1966) II *YBILC* 256.

the termination (or reduction) of that treaty. Switching from our specific case to theory, let us now ask whether or not it was impossible for Portugal to perform its obligations under the 1969 treaty?

As referred to above, Portugal's main obligation was to construct, establish, operate and maintain the Cahora Bassa Project. This obligation could be fulfilled directly or indirectly through a special authority or a company. Before the independence of Mozambique, a company (HCB) was incorporated. In conformity with the burden and the right referred to in article 3 of the Agreement, Portugal transferred its position as regards construction, supply, operation and maintenance to HCB, assigning to it both the rights and obligations in the construction contract with ZAMCO and in the SC with ESCOM. Therefore, the Portuguese government chose HCB to fulfill its obligations and could fulfill them through HCB. The circumstance of the treaty allowing indirect performance from the Portuguese side made it possible for Portugal , before the independence of Mozambique, but with FRELIMO's consent, to 'build' an instrument for the performance of the treaty.

In addition, Portugal held, at least in the beginning and probably for a considerable period, the majority of HCB shares, which gave it the control over the company. This allowed it, for example, not to consent to changes in the contract with ZAMCO without South Africa's agreement (art 3, I, (iv)).

Other obligations, eg, not to supply power from Cahora Bassa outside Mozambique at a better price than that applicable to ESCOM, or not to allow tapping of the line, are incorporated in the SC (clause 2(1)) and could be fulfilled within it. Financial rights and obligations, linked to or resulting from advances of moneys to Portugal, could be exercised and performed without difficulty; and changes in tariffs or in currency determined by governments (or by arbitration) would automatically bind the parties in the SC.

The critical moment would be when, having been paid, Portugal would lose the majority and subsequently all its shareholding in HCB. If things went well, with continuous supply and fair tariffs, this could happen before the SC expired.

The 1975 Protocol (art 3) and the Concession Contract (art 6) provide that the government of Mozambique may terminate the concession granted to HCB not earlier than three years after full recovery by Portugal and the Portuguese banks of the amount of their investment or financing. Considering, however, the commitment to fulfilment of the Agreement and of the SC in the 1975 Protocol, the provision could only apply once the treaty and contract expired, or with South Africa's agreement.

Even in the event of Portugal losing control of HCB, the indirect performance of the treaty remained viable. Because the rights and duties arising from the treaty and from the SC vested in HCB, Mozambique could never legally free HCB from its duties without South Africa's and ESCOM's consent. Likewise, HCB could not assign its obligations to anyone without South Africa's and ESCOM's consent, and could also not stop fulfilling them.

Article 3 I(ii) of the Agreement stated that 'the Government of Portugal hereby agrees and holds itself bound to carry out the obligations assumed by it in terms of this Agreement or to cause them to be carried out'. Article 3(2) determined that the 'Government of South Africa undertakes to ensure that ESCOM will carry out the terms of the Supply Contract and it will provide such assistance as may be necessary to enable ESCOM to do so'.

The question would be whether, in the event of indirect performance, Portugal was required itself to be in a position to cause the obligations to be carried out. As long as Portugal was the majority shareholder in HCB, it had the means to compel HCB to carry out the obligations it had assumed. The issue would arise only if Portugal lost its majority shareholding before the expiry of the SC and the Agreement.[85] This would depend on HCB's profitability and was, therefore, uncertain.

Even assuming that to effect the performance of its obligations by HCB required control over HCB, the performance was not actually and currently impossible, and it was not certain whether loss of control would happen during the agreement's life. It would depend on HCB's financial results. If it happened, the performance would become impossible only at that point, and only then could South Africa terminate the treaty on the basis of impossibility of performance.

Had Portugal not incorporated HCB before independence, granted it the concession and assigned it rights and obligations, the performance of the treaty, as such, by Portugal would have become impossible, because it would lose authority and would be deprived of instruments for performance. By organising a means of performance before independence, with Mozambique's prior consent through FRELIMO, Portugal made its performance of the treaty possible.

The theoretical inference is that impossibility of performance arising from the loss of sovereignty or of jurisdiction over a territory exists only when it is certain that such sovereignty or such jurisdiction will be necessary in the future for the performance of the treaty. Could Mozambique break its

[85]The Agreement and the SC, save for suspension, would expire 35 years from the date of commercial operation of stage I (art 9 and cl 16 (1)).

understanding with Portugal and disturb or interrupt the performance by Portugal? Certainly, there was a risk for both Portugal and South Africa. The latter could see supply halted and Portugal would be responsible. But this was a risk, not impossibility of performance, which must be actual or certain.

Could one revert, then, to the doctrine of change of circumstances? It is known that the ICJ, in its decisions on jurisdiction in the *Fisheries* case, stated that '[i]nternational law admits that a fundamental change in the circumstances which determined the parties to accept a treaty, if it has resulted in a radical transformation of the extent of the obligations imposed by it, may, under certain conditions, afford the party affected a ground for invoking the termination or suspension of the treaty'. And it considered that article 62 of the Vienna Convention on the Law of Treaties 'may in many respects be considered as a codification of existing customary law on the subject of the termination of a treaty relationship on account of change of circumstances'.[86]

It could be argued that paragraph 1 of article 62 of the VC 1969 is inaccurate insofar as it refers only to change of the existing circumstances and does not consider the fulfilment of the circumstances foreseen by the parties for the future (*error in futurum*). Nevertheless, the relevance of *error in futurum*,[87] to be admitted, requires a certain kind of excusability, for its invocation not to be contrary to good faith. To what could an error of this kind refer? To the international regime of state succession regarding newly independent states? Belief that the successor (newly independent) state would automatically and necessarily be bound by the (bilateral) treaties of the predecessor state? It would be an unjustified belief. The ILC had just started its work specifically on the succession of states in respect of treaties, but its 1968 Report already referred to the questions of whether particular solutions should be adopted for newly independent states.[88] In 1968 the International Law Association's Committee on the Succession of New Independent States to the Treaties and Certain Other Obligations of their Predecessors proposed a scheme in which the new state was allowed to choose whether or not to be bound by the predecessor's treaties.[89] But,

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[86]See n 57 above. Remember that art 62 of VC 1966 determines, under the heading 'Fundamental change of circumstances', in par (1):

> 1 A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:
>
> (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
>
> (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

[87]See, for 'error' referring to present circumstances, art 48 par 2 of the Vienna Convention on the Law of Treaties.

[88](1968) II *YBILC* at 218-220.

[89]International Law Association, 53rd Conference, Buenos Aires, 1968, 'Interim Report'.

above all, the Nyerere doctrine had been formulated in 1961, and several states followed it in practice even before 1969,[90] As for the possibility of ensuring the performance through a company, it was the treaty itself that provided for this.

Finally, the extent of the parties' obligations was not at stake, as would be required by paragraph 1(b) of article 62 of the VC 1966.

So, Portugal and HCB had good cases. But the situation was dangerous and the existence of effective means against a *fait accomplit* was highly doubtful. The choice of the arbitrators involved risks.[91] In addition, if South Africa refused to receive power, enforcement of an arbitral award could be difficult. That is why the tacit agreement consolidated as from 1977 has been the best way to overcome difficulties.

As referred to above, since 1977 South Africa accepted the Portuguese claim that the 1969 treaty survived and continued in force between South Africa and Portugal. An agreement has therefore been reached on the continued force of the 1969 treaty. It was a tacit agreement, but an agreement nevertheless. The last point to be addressed relates to the conceptual location of such agreement and to the relationship between the latter and the 1975 Protocol.

There are many kinds of relationship between agreements. The parties being the same, it may happen that a treaty terminates, amends or novates another treaty. Treaty novation is not a current concept, but is conceivable. Anyway, the case of the Cahora Bassa Agreement is not one of novation. Nothing suggests that the parties wished to give a new foundation to their relationship. On the contrary: before the independence of Mozambique, Portugal, exercising rights grounded in the treaty, created an instrument which made performance of that treaty possible without sovereignty.

Another category involves treaties on treaties, ie, treaties the content of which refers to other treaties between the parties. The category presents several modalities. Without pretending to be exhaustive, we may distinguish treaties the contents of which refer to the contents of other treaties, and treaties the contents of which refer to the legal effectiveness (including, according to civil law conceptualisation, validity and force) of other treaties. Treaties of the first kind may be amending treaties (change, addition, deletion) or interpretive treaties. In both cases, the contents of the two treaties together regulate the situations which

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[90] See above. Tanganyika acceded to independence in 1961, as well as Tanzania, Uganda in 1962, Swaziland in 1963, Lesotho and Botswana in 1966, Mauritius in 1968.

[91] Both arbitral tribunals would be comprised of five arbitrators, each party appointing two. If the appointed arbitrators or the parties did not reach agreement on the fifth arbitrator, he or she should be chosen by allotment between four names, two submitted by each party.

form their subject-matter. Agreements regarding effectiveness of other agreements may be termination or suspension agreements (although, in such cases, elements of the first category may also be present) and declaratory agreements – that is, agreements that determine whether another agreement, between the parties, is or is not legally effective. Declaratory agreements may or may not be linked to a settlement. If they are positive, they imply the waiver of the right to invoke (at least) past causes of invalidity or of legal ineffectiveness.

The tacit agreement between Portugal and South Africa was a positive declaratory agreement governing the continued force of the 1969 treaty between the parties. It was autonomous, not being part of any settlement, and implied a waiver by the parties of any possible past hypothetical grounds of non-effectiveness, be it impossibility of performance, change of circumstances, or whatever.

The 1969 treaty together with the declaratory agreement determined the relationship between South Africa and Portugal. The 1975 Protocol of Agreement governed Portugal's relationship, first with FRELIMO and afterwards with Mozambique. It was the Protocol that organised the means for the performance of the treaty by Portugal and that established Mozambique's duty not to raise any obstacle to the performance of the treaty (and the SC). The whole scheme was based on two bilateral relationships with Portugal at the centre as the party who had a relationship with the other two. Only in 1984 did the two bilateral relationships change into a trilateral one.

Conclusion

Termination of a bilateral treaty between the predecessor state and the other state party when the successor state does not become bound is not an automatic consequence of the moving treaty boundary rule. First, such rule is relevant for the purpose only insofar as the moving boundaries affect the territory of application of the treaty, either because it is in such territory that the regimes established by the treaty will have to be in force, or because it is the territory where the treaty is to be performed (both being able to combine). In the second case, termination requires that, because of the loss of sovereignty or jurisdiction by the predecessor state, the performance becomes (actually or certainly) impossible, although in a sense wider than the one referred to in article 61 of the Vienna Convention on the Law of Treaties.

In the Cahora Bassa case, Portugal, when it still had jurisdiction over the territory of Mozambique, created, on the basis of such jurisdiction and in conformity with the 1969 treaty, an instrument (HCB, to which contracts, rights and obligations were assigned) that made performance of the treaty possible. The tacit agreement by which Portugal and South Africa accepted the continuing force of the 1969 treaty is a positive declaratory agreement.