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# Secession and International Law - Some Economic Problems in Relation to State Succession

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Article abstract

Le 15 novembre 1976, le Parti Québécois prenait le pouvoir au Québec. Puisque l'objectif majeur du gouvernement Lévesque est de conduire la province de Québec vers les chemins de l'indépendance, il convient d'ores et déjà de s'interroger sérieusement sur l'agenda d'éventuelles négociations entre, d'une part, un gouvernement mandaté pour faire la sécession et, d'autre part, une équipe de négociateurs représentant le reste du Canada. Sans doute, l'un des points cruciaux d'un tel agenda serait la question du partage de l'actif et du passif de la Couronne aux droits du Canada. L'étude qui suit n'a pas d'autre objectif que d'analyser les données pertinentes du droit international sous ce rapport.

Dans un premier chapitre, l'auteur examine le sort théorique que pourrait connaître la propriété publique fédérale sise dans les limites géographiques du Québec. L'enquête démontre deux choses. Premièrement, l'actif passe automatiquement à l'État nouveau et point n'est besoin, à cet égard, de la conclusion d'un accord spécial. Deuxièmement, l'actif passe automatiquement à l'État nouveau, sans compensation aucune, à moins, bien entendu, que les parties ne se mettent d'accord sur le principe d'une compensation quelconque.

Dans un second chapitre, l'auteur s'intéresse à la question de savoir si l'État nouveau serait obligé, en vertu du droit international, à assumer une part quelconque de la dette publique canadienne. L'analyse démontre que la pratique des États, dans son ensemble, ne reconnaît pas l'existence d'une telle obligation, bien qu'elle ait sanctionné le principe d'une répartition à diverses occasions. Toutefois, des considérations de justice et d'équité ont conduit la plupart des publicistes à reconnaître l'existence d'une obligation morale à la charge de l'État nouveau.

En droit strict, il semblerait donc que le Québec n'aurait rien à débourser pour l'actif qu'il recevrait automatiquement et n'aurait rien à débourser, également, au chapitre de la dette publique fédérale. Toutefois, l'examen minutieux du fondement de ces curieuses solutions traditionnelles, selon lesquelles l'État sécessionniste succéderait à l'actif et non pas au passif de l'État prédécesseur, amène l'auteur à plaider pour une solution plus logique et plus juste aussi. Le problème réel, à ce niveau, consiste cependant à élaborer des critères de répartition qui seraient justes et équitables pour les deux parties en présence; à cet égard, la pratique internationale n'offre pas de solution magique et tout laisse croire que la méthode la plus sûre est encore celle qui tiendrait compte d'indicateurs économiques.

# Secession and International Law—Some Economic Problems in Relation to State Succession*

J.-Maurice ARBOUR**

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* Cette étude a été originalement soumise comme thèse de maîtrise à la Harvard Law School. L'auteur tient à exprimer sa plus vive gratitude à l'endroit des professeurs Richard Baxter et Ronald Sheen ainsi qu'à Dean Weiner, Aviva Weiner, André Delisle et Monique Lessard qui, à des titres divers, ont collaboré à la préparation du manuscrit.

** Professeur à la Faculté de droit de l'Université Laval.

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**Abréviations utilisées par l'auteur**

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| A.F.D.I. | Annuaire français de droit international |
| A.J.I.L. | American Journal of International Law |
| B.Y.I.L. | British Yearbook of International Law |
| I.C.J. | International Court of Justice Reports |
| I.L.C. | International Law Commission |
| ISRAEL | F.L. Israël, *Major Peace Treaties of Modern History (1648-1867)*, New York, Ed. by F.L. Israël, 1967. |
| J.O.R.F. | Journal officiel de la République française |
| PARRY | C. Parry, *The Consolidated Treaty Series*, New York, Oceana Publications, 1969 |
| P.C.I.J. | Permanent Court of International Justice |
| R.C.A.D.I. | Recueil des cours de l'Académie de droit international (La Haye) |
| R.G.D.I.P. | Revue générale de droit international public |
| U.N.T.S. | United Nations Treaty Series |
| YEARBOOK. . . | Yearbook of the International Law Commission |

## Introduction

*The problems and distinctions to be considered with regard to State succession.*

On November 15, 1976, the *Parti Québécois*, which advocates independence for the Province of Quebec and its French-speaking majority, won control of the provincial government. The main commitment of the *Parti Québécois* is to lead the province out of the Canadian Federation, establishing Quebec as an independent nation and breaking up Canada as it now exists. For the time being, the Province of Quebec will be kept within Canada until such time as the population of Quebec can decide, by referendum, whether or not it wants independence. The importance of that referendum for Canada's future cannot be underestimated: there is a strong possibility, now, that an entirely new State will come into being through separation from Canada. In fact, there are very uncertain times ahead for Canada before the outcome is resolved.

It goes without saying that the legal scholar has the task, here and now, of studying the various problems which would accompany the acquisition of national sovereignty by Quebec. Let us suppose it does happen, and Quebec peacefully chooses to go out of the Canadian Federation. What are then the effects of this political event upon the various legal situations stemming from the very fact that Quebec was a member of the Canadian Federation? For example, is the new State legally required to respect the 1954 agreement between Canada and the United States concerning the St. Lawrence Seaway[1]? Is the new State legally required to take over a proportional part of the Canadian public debt? What is the effect of a change of sovereignty on federal public property which is located within the new State? Is the new State obliged to respect the terms of a contract concluded before "Independence Day" between a private contractor and the Canadian Administration? Does international law have precise answers to these questions?

In reality, it is under the label "State Succession"[2] that international law deals with those problems, and it must be admitted not very success-

1. *United States Treaties and other International Agreements*, 1954, Vol. 5, p. 1784.
2. The International Law Commission provisionally adopted the following definition of this term; it means " (. . .) the replacement of one State by another in the responsibility for the international relations of the territory." Draft Articles on Succession of States in respect of Treaties" Doc. A/8710/Rev.1, in: Yearbook of the International Law Commission (hereafter Yearbook. . .) (1972) vol. 11, p. 230. The same definition is used in respect of matters other than treaties; see: Yearbook. . . (1974) vol. 11,

fully. Indeed, there is probably no topic of international law more theoretically confusing than that of State succession. Such a situation can have various explanations.

First of all, international custom, as "evidence of a general practice accepted as law"[3], is not easy to circumscribe because the practice of States is neither general nor uniform. Very often, solutions to a particular problem are the result of pure political or economic considerations. For example, a peaceful change of territorial sovereignty can engender a favourable attitude, in the new nation, to voluntarily agreeing to the devolution of rights and liabilities; on the contrary, an involuntary loss of a territory, in such a case as the secession of a province against the predecessor[4] State's will, can have profound significance upon the terms of an agreement, if there is an agreement at all[5]. Economic factors may also dictate, to a great extent, the terms of negotiations; indeed, it is a truism to say that the successor[6] State's capacity to pay, with respect to financial matters, is an important fact which cannot be underestimated[7].

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Part I, p. 94, Doc. A/CN.4/282. We must remark that this term is used as referring to "the fact of replacement of one State by another, leaving aside any connotation of inheritance of rights or obligations on the occurrence of that event" (Doc. A/8710/Rev.1, *ibid.*, p. 231). In municipal law, the term succession tends to carry the meaning of a legal institution which brings about by itself the transfer of legal rights and obligations; this is not necessarily the case in international law. On this particular question, see generally: Sir Humphrey WALDOCK, "First Report on Succession of States and Government in Respect of Treaties", *Yearbook*. . . (1968) Vol. II, p. 87, Doc. A/CN.4/202.

3. See: Article 38, *International Court of Justice Statute*.
4. "Predecessor State" means "the State which has been replaced by another on the occurrence of a succession of State" ("Draft Articles on Succession of States in Respect of Treaties", *Yearbook*. . . (1972) Vol. II, p. 230, Doc. A/8710/Rev.1).
5. Keith is one of the first writers, in modern literature, who emphased that distinction when he wrote: "(. . .) it is better to accept as the fundamental division that between (1) cases of cession and (2) cases of conquest, thus distinguishing the instances not on the basis of the extent to which the state is affected by the change, but on the basis of the mode in which the change comes about, by agreement or by force." A.B. KEITH, *The Theory of State Succession with Special Reference to English and Colonial Law*, London, Waterloo and Sons Ltd, 1907, p. 1. See also: S. ROSENNE, "Effect of Change of Sovereignty Upon Municipal Law", (1950) *B.Y.I.L.* 272: "The manner in which the emancipation is achieved is of considerable legal importance, for it alone will determine whether or not the change involved a break in the chain of legal continuity."
6. "Successor State" means the State which has replaced another State on the occurrence of a Succession of States": *supra*, note 4.
7. See: D.P. O'CONNEL, *State Succession in Municipal Law and International Law*, Cambridge, Cambridge University Press, 1967, Vol. 1, p. 369: "Economic considerations, it must be admitted, have obstruded to such an extent on the topic as to obscure whatever fundamental principles exist."

In other words, factual considerations, peculiar to each case, may produce different results. The solution which is reached in one bilateral treaty does not necessarily illustrate the feeling on the part of the two States that in acting as they did, they were fulfilling a legal obligation. As the International Court of Justice held in the *North Sea Continental Shelf Case*:

> Not only must the acts concerned amount to a settled practice but they must also be such, or be carried out in such a way as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*.

Moreover, even if it is assumed that the same solution to a particular problem may be present in a certain number of bilateral treaties, it should be constantly borne in mind that similar provisions in bilateral treaties between a predecessor State and a successor State do not establish, *ipso facto*, the existence of a rule of customary international law[9].

Nor is this an end to the difficulties. It should not be forgotten that State Succession—as a special field of inquiry—covers a broad variety of situations; there are, indeed, various types[10] of State succession: creation of a new State, separation from an established State, partial cession of territory, extinction of a State, union of States, accession to independence as a result of decolonization, and so on. From the standpoint of legal theory, it cannot be lightly assumed that the same rules of law necessarily apply to all these different situations. The dangers of generalization are always present and I believe that the circumstances of different cases, which are rarely identical, must be taken into consideration. In this respect, it is significant that the International Law Commission decided to treat separately the special case of separation of part of a State (secession) in connection with its draft articles on succession of States in respect of treaties[11]. Of primary concern to the object of this paper is the question of whether or not the case of the emergence of new States as a result of decolonization after the Second World War is relevant to our discussion.

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8. *North Sea Continental Shelf Cases*, [1969] *I.C.J.* 44.
9. See: R. BAXTER, "Treaties and Customs", (1970) 1 *R.C.A.D.I.* 24.
10. For a brief presentation of the various classifications, see: A/CN.4/267, p. 65 and *seq.*
11. Indeed, the International Law Commission uses the expression "newley independant State" which applies to any case of emergence to independence of a former dependent territory but which excludes cases concerning the emergence of a new State as a result of a separation of part of an existing State. "Draft Articles on Succession of States in Respect of Treaties", *Yearbook*. . . (1972) Vol. II, p. 230-231, Doc. A/8710/Rev.1. Mr Bedjaoui, Special Rapporteur on Succession of States in matters other than treaties, decided to adopt the same approach: A/CN.4/267, p. 72.

To the extent that the independence of colonial territories is "a process constitutionally and sociologically distinguishable from the traditionnal forms of secession"[12], it must be considered that the precedents afforded by these instances are completely irrelevant. On the other hand, to the extent that one is prepared to admit that Quebec's independence is the mere assertion of the right of its population to self-determination[13], the differences between these two types of State succession can be minimized. As a matter of fact, there is only one reason why one can rely on precedents emanating from the emergence of new States as a result of decolonization: recent practice—as evidence of the *opinio juris* of today—is extremely rich in matters relating to new States emerging from a dependent territory but the same cannot be said for cases of secession. On the whole, and from a legal point of view, Quebec's secession is similar to the separation of the Congo from Belgium in 1960[14]. This case may be correctly analysed as the one where a portion of the Belgian national territory, called Belgian Congo, seceded from the Belgian State in order to become a new State within the international community. In both cases, the basic elements which gave rise to questions of succession are identical, though political and economic factors may be different.

However, I will respect the traditional and fundamental distinction which exists between partial and universal succession[15]. As it was pointed out by Hershey, the main difference between these two categories "(. . .) is that in case of partial succession there is a continuity of state life or personality on the part of the State which has lost a portion of its territory."[16] Therefore, cases of annexation or fusion with another State shall be excluded from our investigation.

This is the background against which some legal consequences of an eventual secession on the part of the Province of Quebec must be assessed. The purpose of this paper is not to deal with all the various aspects of

12. International Law Association, *Committee on State Succession to Treaties and Other Governmental Obligations*, London, 1965, p. 2.
13. See: The independent opinion of Dr. Zourek, *supra*, note 12, p. XIV.
14. This case is one example among many others since 1945.
15. Succession is said to be partial "(. . .) when an existing State takes over (. . .) the sovereignty of a portion of territory formerly belonging to another State or again when a new State is formed by breaking off from a larger State (. . .) or when a State previously a member of a federal State or of a Confederation (. . .) obtains its complete independence." C. FENWICK, *International Law*, 3d Ed., London, Appleton-Century-Crofts Inc., 1948, p. 152. On the other hand, succession is said to be universal when the whole territory of a State is acquired by one or several other States.
16. A.S. HERSHEY, "The Succession of States", (1911) *A.J.I.L.* 289.

State succession[17]; its scope is more modest for it is strictly limited to questions relating to public property and debt. Within this framework, the objective is not so much a discussion about the precise content of the existing rules of law—a task which would be very ambitious, if not impossible[18]—as a search for general principles which could be applied in eventual negotiations on these issues. For this purpose careful attention will be paid both to theory and States' practice.

In keeping with what has just been said, the present will take the following form: the first chapter will cover problems relating to the federal public property which is located within the territory of the new State, and the second will be concerned with the problematical question of the successor State's obligation to take over a part of the Canadian public debt.

## 1. Succession to public property

Since State succession consists of the replacement of one sovereignty over a territory by another, it is important to consider the fate of federal public property which is located within the Province of Quebec. Among international law authorities[19], the prevailing view seems to be

17. State succession, as a particular field of investigation, deals generally with such problems as succession in respect of treaties, problems of nationality, acquired rights, public debt and public property, international responsability and so forth.

18. It is to be remembered that the International Law Commission decided, in 1967, to begin its study of Succession of States, by appointing Sir Humphry Waldock Special Rapporteur for Succession in respect of treaties and Mr. Mohammed Bedjaoui Special Rapporteur for succession in respect of matters other than treaties. From 1968 to 1974, Mr. Bedjaoui submitted eight reports relating to Succession of States in economic and financial matters, more particularly on succession to public property. See: A/CN.4/204, A/CN.4/216/Rev.1, A/CN.4/226, A/CN.4/247, A/CN.4/259/Add.1, A/CN.4/267, A/CN.4/282, A/CN.4/292. Sir Waldock submitted, from 1968 to 1972, five reports: *Yearbook*. . . (1972) Vol. II, p. 224, Doc. A/8710/Rev.1.

19. *Inter alia*: D.P. O'CONNEL, *International Law*, 2d Ed., London, Stevens and Sons, 1970, Vol. 1, p. 387; J.G. STARKE, *An Introduction to International Law*, 6th Ed., London, Butterworths, 1967, p. 287; L. DELBEZ, *Les principes généraux du droit international public*, 3d Ed., Paris, Librairie générale du droit et de jurisprudence, 1964, p. 277; A. BONDE, *Traité élémentaire de droit international public*, Paris, Dalloz, 1926, p. 120; L. CAVARÉ, *Le droit international public positif*, 3d Ed., by J.P. QUENEUDEC, Paris, Pedone, 1967, p. 378; PRADIER-FODERE, *Traité de droit international public*, Paris, Pedone-Lauriel, 1885, Tome 1, p. 276; C. ROUSSEAU, *Droit international public*, 7th Ed., Paris, Dalloz, 1973, p. 176; M. SIBERT, *Traité de droit international public*, Paris, Dalloz, 1951, Tome 1, p. 213; A.B. KEITH, *op. cit., supra*, note 5 p. 49; CASTREN, "La succession d'états", (1951) *R.C.A.D.I.* 455; P. GUG GENHEIM, *Traité de droit international public*, Genève, Librairie de l'Université, 1953, Tome 1, p. 466; BRIERLY, *The Law of Nations*, 6th Ed. by Sir Humphrey Waldock, Oxford, 1963, p. 156.

that the successor State becomes possessor of the public property of the predecessor State which relates to the seceding territory. The most common argument put forward in support of this rule appears to be that this right is an integral part of the exercise of sovereignty. Indeed, it is generally said that it would be inconceivable that the predecessor State might maintain property rights in assets which are necessary to the new State in order to carry out its general activity. Things like public harbors, customs houses, post offices, prisons and military buildings would consequently pass to the successor State. However, it is true that opinions vary as to the exact extent and the precise conditions under which such a succession takes place. For instance, does it mean that the successor State is entitled to receive all public property, of whatever type or class, used or possessed by the predecessor State? Does it mean that such property must pass automatically, without compensation, to the successor State? In order to clarify the situation, it may be useful to consider (see Part 1.1.) if there exists a general principle, recognized by the practice of States, which requires complete devolution of State property to the successor State. If such a rule does exist, it will then be necessary to determine to what extent and under which conditions such a rule operates. Part 1.2. will analyse special problems which arise in the application of the rule, while Part 1.3 will deal with the question of compensation.

### 1.1. The existence of the rule of succession

One of the most difficult and practically important questions that must be resolved in the following section is whether or not such a general rule as the automatic passing of State property from the predecessor State to the successor State exists in the realm of international law. In order to answer that question in the most accurate method, I shall follow Brierly's sound counsel when he says: "Evidence that a custom in this sense exists in the international sphere can be found only by examining the practice of States."[20] I will proceed by examining the practice of States in this respect, however tedious such an exercise can be.

The practice that public property passes to the successor State takes its roots in the early history of international law. Indeed, treaties signed as early as the eighteenth century give proof of that fact. For example, by Article 4 of the *Treaty of Peace of February 1763* between France, Great Britain and Spain, France "(. . .) cedes and guaranties to his said Britannic Majesty, in full rights, Canada with all its dependencies (. . .) and in

20. BRIERLY, *supra*, note 19, p. 59.

general, everything that depends on the said country" [21] Twenty years later, the same practice was embodied in the first Article of the *Treaty of Peace between Great Britain and the United States*: for himself, his heirs and successors, His Britannic Majesty "(. . .) relinquishes all claims to the government, property and territorial rights (. . .)"[22] of the newly independent State. These two cases of forced cessions of territory, though they have an historical importance, reflect more a solution imposed by armed force than the mere application of a general principle of law. On this point, the formation of the Kingdom of Belgium, in 1830, offers a case where such a reservation may not be entertained; indeed, when Belgium separated from Holland, it was finally agreed that:

> Les ouvrages d'utilité publique ou particulière tels que canaux, routes ou autres de semblable nature, construits en tout ou en partie aux frais du Royaume des Pays-Bas, appartiendront, avec les avantages et les charges qui y sont attachées, au pays où ils sont situés.[23]

The same principle was applied by the *Treaty of Peace between the U.S.S.R. and Finland*, in 1920:

> Les biens appartenant à l'Etat russe et aux institutions gouvernementales russes et se trouvant en Finlande passent sans indemnité en toute propriété à l'Etat finlandais.[24]

When the United States of America recognized the independence of the Republic of the Philippine Islands, in 1946, a similar provision was introduced into the Treaty of general relations between the two parties. Article 1 provided:

> The United States of America agrees to withdraw and surrender and does hereby withdraw and surrender, all rights of possession, supervision, jurisdiction, control or sovereignty existing and exercised by the United States of America in and over the territory and the people of the Philippine Islands.[25]

Perhaps the most interesting case is the Indian one in 1947. Firstly, as India gained independence, the problem of British public property located

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21. *Defenitive treaty of peace between France, Great Britain and Spain* (signed at Paris, February 10, 1763), *in*: PARRY, Vol. 42, p. 320.
22. *Definitive treaty of peace between Great Britain and The United States*, (signed at Paris, September 3, 1783), in: *Idem*, Vol. 48, p. 487.
23. Article 15, *Traité du 19 avril 1839 entre la Belgique et la Hollande, relatif à la séparation de leurs territoires respectifs*, *in*: G. MARTENS, *Nouveau recueil de traités*, T. XVI, p. 773.
24. Article 22, *Traité de la Paix entre la République de Finlande et la République Socialiste Fédérative des soviets de Russie*, League of Nations Treaty Series, 1921, Vol. 3, p. 5.
25. *Treaty of general relations between the Republic of the Philippine and the United States of America*, in: *Treaties and other International Agreements of the United States of America*, vol. II, p. 3.

in former British India was significant. It was solved in the following manner: all property which, immediately before Independence Day, had been vested in His Majesty for the purposes of the exercice of the functions of the Crown in its relationship with the Indian States was vested, without compensation, "in His Majesty for the purposes of the Governor-General-in-Council"[26]. Secondly, with the division of India into two independent States, both India and Pakistan became successor States in relation to the former undivided India. According to Article 9 of the *Indian Independence Act*, the general principle of division of powers, rights and property of the Governor-General-in-Council was fully consecrated between these two Dominions[27]. This rule was subsequently recognized by a comprehensive financial settlement between the two parties[28], and also embodied in an Order made under the authority of the *Indian Independence Act*[29].

The Indonesian and Singapore cases are two other examples where the rule of succession to public property was recognized. In the first case, it was agreed that (. . .)"all rights and obligations of Indonesia, under private and public law, are "ipso jure" transferred to the republic of the United States of Indonesia, unless otherwise provided for."[30] In the second case, when the Government of Malaysia relinquished its sovereignty in respect of Singapore, it was enacted that "all property, movable and immovable", which belonged to the government of Singapore before its union with Malaysia, was to become once again the property of Singapore[31].

French practice, in relation to its former dependent colonies also gives evidence of the same rule. For example, by virtue of article 33 of the Agreement of June 19, 1961, the Republic of Mauritania "(. . .) exerce

26. *The Crown Representative (Transfer of Property and Liabilities) Order, 1947*, G.G.O. no 10.
27. *Indian Independence Act, 1947*, 10-11 Geo. 6, C. 30, Art. 9: "The Governor-General shall by order make such provision as appears to him to be necessary or expedient (. . .)—(b) for dividing between the new Dominions (. . .). The powers, rights, property, duties and liabilities of the Governor-General-in Council (. . .)"
28. At the best of our knowledge, this agreement was never published. However, extensive details of that accord are reported in: *Keesing's Contemporary Archives*, Vol. 6, Part. 2, p. 3611.
29. *The Indian Independance (Rights, Property and Liabilities) Order, 1947*, G.G.O. no 18, Art. 4 and 6: "All land, goods, coins, bank notes and currency must be attributed either to India or Pakistan according to their actual locality."
30. Article 4, *Agreement on Transitional Measures, November 2, 1949, in* U.N.T.S. Vol. 69, p. 267.
31. Article 9, *Malaysia Law No 53 of 1965*, reproduced *in* (1965) 4 *I.L.M.* 938.

sur le domaine public et privé en Mauritanie tous les droits de toute nature exercés antérieurement par la République française qui y renonce expressément."[32] The agreement between the French Republic and Senegal concerning State property, article 1, embodies this same idea: "(. . .) est transférée au Sénégal la propriété des dépendances domaniales immatriculées sur son territoire au nom de la République française."[33]

In view of the evidence, it must be admitted that common practice with regard to the transfer of public property to the successor State is largely sanctioned. The examples cited above represent only a few cases among numerous examples[34]. It is not surprising, therefore, that the Permanent Court of International Justice, in the *Pazmany University Case*[35]

32. *Journal Officiel de la République Française, in*: J.O.R.F., February 6, 1972, p. 1330.
33. *Convention relative au règlement domanial entre le Gouvernement de la République Française et le Gouvernement de la République du Sénégal, in*: J.O.R.F., March 21, 1963, p. 2720.
34. Ethiopia: Article 34, *Italian Peace Treaty*: "Italy formally renounces in favour of Ethiopia all property (apart from normal diplomatic or consular promises) rights, interests and advantages of all kinds acquired at any time in Ethiopia by the Italian State", in: Israel, Vol. IV, p. 2436. Trieste: Annex X, *Italian Peace Treaty*: "The free territory of Trieste shall receive without payment, Italian State and para-statal property within the free territory", in: *Idem*, p. 2502. Lybia: Resolution 388 (V) of December 15, 1950 of the General Assembly of the United Nations (Official Records, Fifth Session, Supp. no 20. (A/1775)): Article 1: Lybia shall receive, without payment, the movable and immovable property located in Libya owned by the Italian State either in its own name or in the name of the Italian administration of Libya. Federation of Malaysia: *Constitution of the Federation of Malaysia*, Article 166: "Subject to the provisions of this Article, all property and assets immediately, before Merdeka Day, were vested in Her Majesty (. . .) vest in the Federation", *in*: ST/Leg. Sec. B/14, p. 84. Western Samoa: *Constitution of the Independent State of Western Samoa*, Article 123: "All property which immediately before Independence Day is vested in Her Majesty the Queen (. . .) shall (. . .) vest in Western Samoa", *in*: St/Leg. Sec. B/14, p. 117, Cyprus: *Treaty concerning the Establishment of the Republic of Cyprus*, Annex E, Section 1: "All property of the Government of the Colony of Cyprus shall on the date of entry into force of this treaty, become (. . .) the property of the Republic of Cyprus", *in*: *U.N.T.S.*, Vol. 382, p. 130. Algeria. *Declaration of Principles concerning Economic and Financial Cooperation*, Article 19: "Public real estate in Algeria will be transferred to the Algerian State, excepting, with the agreement of the Algerian authorities, the premises deemed necessary for the normal functionning of temporary or permanent services", *in*: (1963) 57 A.J.I.L. Mali Federation: Accord de coopération en matière économique, monétaire et financière, Article 36: "La propriété de toutes les dépendances domaniales immatriculées au nom de la République Française sera transférée à la République gabonaise", *in*: *J.O.R.F.*, November 24, 1960, p. 10486.
35. Appeal from a judgment of the Hungaro-Czechoslovak mixed arbitral tribunal (*The Peter Pazmany University v. The State of Czechoslovakia*) *Hungary v. Czechoslovakia, P.C.I.J.*, Series A/B, no 61.

found that the first paragraph of Article 191 of the *Treaty of Trianon*[36] was applying the "generally accepted law of State succession". Similarly, the United Nations Tribunal for Libya, in its decision of February 31, 1953[37], was of the opinion that the principles set forth in the following excerpts from the French writer Fauchille constituted a generally accepted rule of international law. Indeed, Fauchille wrote that:

> When a dismenbered State cedes a portion of its territory, property which constitutes public property, namely property which by its nature is used for a public service existing on the annexed territory passes with its inherent characteristics and legal status to the annexing State.[38]

Thus, there seems to be little doubt among international law writers that the new sovereign succeeeds to the public property. Moreover, practice of States is to the same effect and international jurisprudence gives the doctrine ample recognition. Considering the evidence, it must be admitted that the International Law Commission did not start a legal revolution when it provisionally approved this substantive rule in Article 8 of the draft Articles on succession of States in respect to matters other than treaties[39]. On the whole, then, I am firmly convinced that if there was only one custom in this extremely and confusing question of State succession, this custom would be that the successor State inherits the public property of the predecessor State. In the words of the International Law Commission, a succession of States "(. . .) entails the extinction of the rights of the predecessor State and the arising of the rights of the successor State."[40]

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36. Article 191(1): "States to which territory of the former Austro-Hungarian Monarchy is transferred and States arising from dismemberment of that Monarchy shall acquire all property and possessions situated within their territories belonging to the former or existing Hungarian Government."
37. *Report of International Arbitral Awards*, United Nations, Vol. XII., p. 362.
38. Translation of the excerpt in: Doc. A/CN.4/232, Supplement prepared by the Secretariat, to the "Digest of the decisions of international tribunals relating to State succession", see: *Yearbook*. . ., 1970, Vol. II, p. 173.
39. See: "Seventh Report on Succession of States in Respect of Matters other than Treaties", by Mr. M. BEDJAOUI, Special Rapporteur, Doc. A/CN.4/282; *Yearbook*. . ., 1974, Vol. II, Part 1, p. 91.
40. Doc. A/CN.4/282, *supra*, note 39, Article 6. See also Foreign Affairs French Minister's Declaration in: [1974] *A.F.D.I.* 1072: "L'existence même d'un nouvel Etat implique, suivant la règle du droit international public de la succession d'Etats, que la quasi-totalité du domaine public de l'Etat prédécesseur devienne partie intégrante de l'Etat successeur."

### 1.2. The scope and content of the rule of succession

The complete harmony between practice of States and doctrine about the existence of the rule of automatic devolution of the public property of the predecessor State to the successor State must not, however, hide the real difficulties in trying to apply such a rule. The international legal problems traditionally associated with it are those of the distinction between private and public domain of State and the proper definition that should be given to the expression "public domain".

#### 1.2.1. The traditional distinction between public and private domain

It would seem that the traditional distinction between public and private domain is closely linked to the legal question of compensation[41]. Indeed, it is often said, that the public domain of the predecessor State passes to the successor State, without compensation, while the private domain does not[42]. For instance, a representative of this view states his opinion as follows:

> As regards private State property, i.e. property which the State possesses in the same manner as a private person, in order to derive income from it, it must be noted that failing any special provision it does not become part of the property of the annexing State.[43]

The same writer exposes the reasons for this rule in the following manner:

> In spite of the loss the dismembered State has suffered, it remains the same person as before and does not, any more than a private person, cease to be the owner of the things it possesses in the annexed territory and there is no principle preventing it from having the ownership of immovable property in that territory.[44]

The consequences of this distinction are very clear: the successor State has no right to appropriate for itself property which, under the law of the predecessor State, was considered private property of that State. If it

41. We shall discuss this question in Part 1.3.
42. R. SELOSSE, *Traité de l'annexion au territoire français et son démembrement*, Paris, L. Larose, 1880, p. 180 and *seq.*; A. CAVAGLIERI, *Effets juridiques des changements de souveraineté territoriale*, Rapport à l'Institut de Droit International, Session de Cambridge, Bruxelles, 1931, p. 24-25; L. CAVARÉ, *supra*, note 19, p. 278; C. ROUSSEAU, *supra*, note 19, p. 175; A. BONDE, *supra*, note 19, p. 120; P. GUGGENHEIM, *supra*, note 19, p. 468; L. DELBEZ, *supra*, note 19, p. 276; H. WHEATON, *Elements of International Law*, 6th Ed., Boston, by W.B. LAWRENCE, 1855, Vol. 1, p. 67.
43. P. FAUCHILLE, *Traité de droit international public*, 8th Ed., Paris, Rousseau & Cie, 1925, Vol. 1, p. 361; translation from: *Yearbook. . .*, 1970, Vol. II, p. 173, Doc. A/CN.4/232.
44. *Ibid.*

does appropriate such property, it does so as an act of sovereignty and is required, as in any other State appropriation of property, to pay a just compensation to the owner. In other words, the assets of the predecessor State which relate to its private domain do not pass to the successor State.

It is true that such a distinction was applied in the practice of States, particularly in relation to the French practice[45], and was qualified by an international tribunal as a distinction which was recognized by general international law[46]. However, the passing over of all the private domain of the predecessor State was sanctionned by various treaties, such as the *Treaty of Versailles* of June 1919[47], the *Treaty of Trianon*[48] and many agreements between France and African countries[49]. In view of this contradictory evidence, it would seem that this distinction is not universally accepted. Moreover, strong reasons stand against it, the first one having a close connection with the distinction between public acts and private acts in the law of State immunity: it is a concept of French administrative law. Indeed, in the administrative law of France, the property of the State is divided into two categories: the public domain, which is owned by the State in its public capacity (navigable waters, public roads, territorial sea) and the private domain, which is exploited by the State for a commercial

45. Senegal: See J.G. GAUTRON, "Sur quelques aspects de la succession d'Etat au Sénégal, [1962] *A.F.D.I.* p. 836; Madagascar: See D. BARDONNET, "La succession d'Etats à Madagascar", Paris, Librairie générale de droit et de jurisprudence, 1970, p. 567; Algeria: See G. FOUILLOUX, "La succession aux biens publics français dans les Etats nouveaux d'Afrique", [1965] *A.F.D.I.* 890 and *seq.*: LEBANON: See the agreement of March 1949, between France and Lebanon concerning monetary and financial relations between the two countries in: *U.N.T.S.*, Vol. 173, p. 101, Article 8: "The French Government shall transfer and the Lebanese Government shall accept the promises listed in Annex 1, in their present stage, the total value of which shall be fixed at the lump sum of 18 million Lebane pounds, which shall be credited to France and debited to Lebanon." See also, generally: D.P. O'CONNELL, "States Succession in Relation to New States", (1970) 2 *R.C.A.D.I.* 169. It should be borne in mind, also that Israel did not succeed to the "private" domain of Great Britain: Article 2(a) of the agreement between the United Kingdom and Israel for the settlement of financial matters outstanding as a result of the termination of the mandate for Palestine; see *U.K. Treaty Series* no 26 (1950), C.M.D. 7941.

46. *United Nations Tribunal in Libya, Report of International Arbitral Awards*, Vol. XII, p. 362.

47. Article 257, see ISRAEL, *supra*, note 34, Vol. 2, p. 1424.

48. *Idem*, Vol. III, p. 1863.

49. Mauritania: *Agreement between the French Republic and Mauritania concerning State property*, Article 1, "La république française confirme le transfert à titre définitif à la république islamique de Mauritanie de ses droits sur tous les immeubles ayant constitué le domaine public ou le domaine privé de l'Etat français". (Text of this agreement in: [1964] *R.G.D.I.P.* 304.

or industrial purpose. The effect of this situation is that legal questions concerning the private domain are governed by rules of private law. It must be admitted that such a distinction is unknown in British law and consequently, in Canadian law and Quebec law also. In fact, it would be very difficult, if not impossible, in the event of a State succession in Canada, to apply this terminology because there is only one category of State property, i.e. public property which is the property of Her Majesty[50]. The second reason which indicates that this distinction must not be supported is the fact that it is not always easy to distinguish whether or not a particular property should be classified as private domain or public domain. This problem may explain, to a certain extent, why even France did not completely follow this pattern in its negotiations with various African States[51]. For all these reasons, it is my opinion that the Special Rapporteur to the International Law Commission is right when he does not formulate rules based on that distinction[52]. In any event, the political inconvenience of having a foreign power as the owner of a private domain within the territory of another State could seem a sufficient reason for disregarding such a distinction.

However, this traditional distinction between private and public domain should not be underestimated. From a political viewpoint, it means that some States are not completely ready to transfer their property rights without fair compensation. This distinction demonstrates various important economic interests which can be involved; it is my submission that this very fact may explain, to a certain extent, why so many writers, particularly French writers, consider the distinction a sound one. The magniture of this problem is clearly illustrated by the special case of public establishments or public (governmental) corporations.

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50. See: R. DUSSAULT, *Traité de droit administratif canadien et québécois*, Québec, P.U.L., 1974, Tome 1, p. 514.

51. See: D. BARDONNET, *La succession d'Etats à Madagascar*, Paris, L.G.D.J., 1970, p. 567 and *seq*.

52. *Third Report on Succession in Respect of Matters other than Treaties, Yearbook. . .*, 1970, Vol. II, p. 131, Doc. A/CN.4/226. As Mr. Bedjaoui expressed himself: "The distinction between public domain and private domain is unsatisfactory not only because it does not exist in all legal systems but also because it does not cover public property in a uniform and identical manner from country to country", *in: Sixth Report* (. . .), *Yearbook. . .*, 1973, Vol. 2, p. 22, Doc. A/CN.4/267. And again: "Bearing in mind that neither the writers nor judicial decisions have exhausted discussion on the question whether property in the private domain of the State is transferable *ipso jure* on the same grounds as property in its public domain, the Special Rapporteur sought to avoid this distinction", *in*: *Fifth Report* (. . .),*Yearbook. . .*, 1972, Vol. II, p. 62; Doc. A/CN.4/259.

### 1.2.2. Property owned or possessed by public corporations

A difficult question arises when it is a question of whether the successor State may take over property, rights and interests owned or possessed by public corporations. In his Sixth Report, Mr. Bedjaoui made the following proposition regarding this:

> The successor State shall be automatically and fully subrogated to the patrimonial rights which the predecessor State possesses in public establishments situated in the transferred territory.[53]

However, the Special Rapporteur recognized that such a rule, although clear and logical, does not represent a firm rule of customary international law. As a matter of fact, the practice of States is less than uniform because it shows cases of automatic and complete succession along with cases of succession on condition of purchase. For example, although the *Italian Peace Treaty* made it quite clear that successor States must receive, without compensation, para-statal property located within the acquired territory, i.e. movable and immovable property of public institutions and public owned companies[54], the same solution was not applied in relation to Lebanon and Algeria. Lebanon had to pay 80,000 pounds for the transfer of the Lebanese telephone system and 150,000 pounds for Beirut radio broadcasting station[55]. Payment was also provided for Air Algeria[56].

It is true that international law does not offer autonomous criteria for determining what constitutes public property[57], and that due recourse to municipal law is necessary in order to answer this problem. However, from a logical standpoint, there is no valid reason why one may be authorized to make an exception to the general principle of succession solely on the basis that such a property belongs to a public corporation. In reality, to the extent that such property belongs to the State and is used for the general interest of all population, it is difficult to understand why it should not follow the legal destiny of public domain. I think it is fair to say that public establishments were often viewed as properties pertaining to the private domain of the State, and were therefore excluded from the

53. A/CN.4/267, p. 62.
54. ISRAEL, *supra*, note 34, Vol. VI, Annex X, p. 2502.
55. *Agreement between France and Lebanon concerning monetary and financial relations between the two countries, U.N.T.S.*, Vol. 173, p. 101.
56. *Protocole relatif à la coopération technique entre l'Etat français et l'Etat algérien dans le domaine des travaux publics, des transports et du tourisme, J.O.R.J.*, October 6, 1962, p. 9660.
57. FRANCO-ITALIAN CONCILIATION COMMISSION, "Dispute regarding property belonging to the order of St. Maurice and St. Lazarus", [1965] *A.F.D.I.* 319.

general transfer. In any case, if the particular framework of Canadian administrative law is kept in mind, difficulties quickly vanish. Indeed, many Canadian statutes expressly provide that property actually possessed by various public corporations is vested in Her Majesty in right of Canada. Such provisions are usually present when public establishments are governmental agencies. Examples of this general tendency are given by the *St. Lawrence Seaway Authority Act*[58], *The National Harbors Boards Act*[59] and the *Broadcasting Act*[60]. Under this last statute, Radio Canada is an agent of Her Majesty, and property acquired by the Corporation is the property of Her Majesty. Sometimes, statutes do not expressly state that a particular public corporation is an agent of Her Majesty but do make an express provision for the legal status of public property. For example, article 57 of the *Government Railways Act*[61] states that all government railways and works connected therewith are "public works of Canada"; there is no reason, therefore, to classify these properties into a special category since they are Crown properties and, as such, subject to the general rule reserved to State property. It follows from this that all properties used or possessed by Crown Corporations[62] would pass automatically to the successor State. These properties include, *inter alia*, property owned by Air Canada, Radio Canada and by the National Capital Commission, the National Battlefield Commission, the National Harbors Board, Canadian National, Polymer Corporation and by the St. Lawrence Seaway Authority.

### 1.2.3. The link with the territory

If the rule is that State property passes from the predecessor State to the successor State without regard to the distinction between private and public domain, we still have to incorporate in this rule certain qualifications. On the one hand, that does not mean that everything which is found within the seceding territory becomes, *ipso facto*, property of the new State. On the other hand, it does not follow that only tangible assets are subject to that rule. According to O'Connell, the most that could be said is that:

58. R.S.C. 1970, C.S-1.
59. R.S.C. 1970, C. N-8.
60. R.S.C. 1970, C. B-11.
61. R.S.C. 1970, C. G-11.
62. "Crown Corporation" means a corporation that is ultimately accountable, through a Minister, to Parliament of the conduct of its affairs. A list of these corporations is provided by the *Financial Administration Act*, R.C.S. 1970, Shedules B, C and D.

> only such property as certains to sovereignty and only such part of it as is identified with ceded or annexed or seceding territory can be claimed by a successor State *ipso jure*.[63]

This statement contains two major qualifications; the first one is that only property appertaining to sovereignty over the territory should devolve automatically to the successor State. It is to be remembered that Mr. Bedjaoui proposed the same qualification in his Third and Sixth Report[64], but discussions within the International Law Commission put it aside[65]. It was found, indeed, that this qualification was a vestige of the old distinction between private and public domain of the State and, furthermore, that the term "sovereignty" had too relative a meaning to be a standard measure[66].

The second qualification suggested by O'Connell tends to establish a close link between the territory and the property which is transferred to the new State. There is no doubt that properties such as canals, lands, public harbors, light houses and piers, bridges, dams, aerodromes, railways, custom houses, post offices and all other public buildings are closely related to the territory. But difficulties arise when the fate of movable property is considered; for example it may happen that property of the predecessor State is accidentally located within the seceding territory at the date of the succession of States. In that case, the practice of States or international jurisprudence is not of much help in answering the problem. However, a fair solution can be reached if we resort to analogy. Both in civil law and common law, legal theory usually distinguishes between *res mobiles* and *res immobiles*; both systems also say that in certain circumstances a chattel becomes affixed to the freehold so as to

63. O'CONNEL, *supra*, note 7, Vol. 1, p. 199.
64. A/CN.4/226: "Property appertaining to sovereignty shall devolve, automatically and without compensation, to the successor State" (Art. 2) and A/CN.4/267, Article 5: "Public property means all property (. . .) which are necessary for the exercice of sovereignty by the successor State in the said territory." Later, Mr. Bedjaoui will submit a new proposal on the basis of which the I.L.C. discusses: "State property necessary for the exercice of sovereignty over the territory to which the Succession of States relates shall pass the predecessor State to the successor State" new Article 9—*Yearbook*. . ., 1975, Vol. I, p. 74.
65. See: 1318th, 1319th and 1320th meetings, *Yearbook*. . ., 1975, Vol. I, p. 73 and *seq*.
66. The version finally proposed by the Drafting Committee is a s follows: "Subject to the articles of the present part and unless otherwise agreed or decided, State property which, on the date of the Succession of States, is situated in the territory to which the Succession of States relates, shall pass to the successor State." See: 1329th meeting, *Yearbook*. . ., 1975, Vol. I, p. 126. The Commission then approved this new formula.

become part of the freehold[67], The essential idea is that moveables may become immoveables by their destination on the ground that what is annexed in permanence to the land becomes part of the land. It is my opinion that the same basic distinction may be used effectively in this case: federal property which is temporarily allocated to the seceding area, such as military vehicles or vessels while in transit across the territory, should not be subject to the rule of transfer.

A second series of problems, in relation to the definition and determination of State property, concerns more specifically public funds and incorporeal rights.

### 1.2.4. Public Funds

It may be recalled the *Pakistan (Monetary System and Reserve Bank) Order,* in working out the transitional provisions for the monetary system of Pakistan, prescribed succession to public funds as follows:

> The Government of India shall pay to the Government of Pakistan an amount which bears to the Government's bank profits the same proportion as the total value of Pakistan notes in circulation in Pakistan (. . .)[68]

The question can then be asked whether the successor State may be entitled to claim a part of the predecessor State's public funds. As it was pointed out by Mr. Bedjaoui,

> The part of the territory transferred may be fairly substantial and there is no reason why the remaining territory alone should retain the public funds and the treasury in their entirety.[69]

However, this position raises serious difficulties. On the one hand, there is no doubt that the successor State, by virtue of its territorial jurisdiction, may appropriate for itself funds emanating from former federal activities over the territory. It is my submission that it is a valid exercise of its territorial jurisdiction because there is no longer a legal link between the predecessor State and its former activities upon that territory. Consequently, revenues emanating from federal activities such as custom revenues, post office revenues and funds specially allocated to the seceding territory such as currency and monetary tokens of all kinds should pass, from the date of the succession of States, to the new State. One may even say that such funds pass to the successor State pursuant to

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67. *Quebec Civil Code*, Article 375 and *seq.*; ANGER and HONSBERGER, *Canadian Law of Real Property*, Toronto, Canada Law Book Co., 1959, p. 453 and *seq.*
68. G.G.O. no 21, August 14, 1947, Part. IV, par. 1.
69. A/CN.4/267, p. 57.

the general rule that public property located within the seceding area is automatically transferred to the new State. On the other hand, it is not necessarily true that the predecessor State might be willing to make an apportionment of central funds which remain under its territorial jurisdiction. If, as it is suggested by O'Connell, "(. . .) it is perhaps just that a successor State should acquire such proportion of these funds as is represented by the contributions of the absorbed territory (. . .)"[70], the question remains highly political and the solution may depend on whether or not the secession takes place with the consent of the predecessor State. It is true that Mr. Bedjaoui, in his Sixth Report, recommended that the State fortune, i.e. its public funds and treasury assets, should be apportioned between the predecessor State and the secessionist State[71]. However, it would seem that he came to a more realistic position on this point when he proposed a new article based directly on the practice relating to newly independent States: the assets and holdings of the territory which have been allocated by the predecessor State to the secessionist State should pass now to the successor State[72]. For the purpose of this paper, this means for example, that paper money which is normally in circulation in the Province of Quebec, on Independence Day, would now be vested to the new State. But it is wrong to assert, as Mr. Bedjaoui did, that the currency left in circulation in the territory by the predecessor State and retained temporarily by the successor State "(. . .) justifies the latter in claiming the gold and foreign exchange security or backing for that currency."[73] Indeed, I do not understand the Special Rapporteur when he writes that "(. . .) currency has value only through the existence of its gold backing (. . .)"[74]; such an assertion was true before World War I, under the Gold Exchange Standard, but is not true under the world monetary system as it exists today[75].

On the whole, it is my opinion that apportionment of public funds is closely related to the more fundamental problem of succession of one monetary system to another. There is no doubt at all that international

70. O'CONNEL, *supra*, note 63, Vol. 1, p. 205.
71. A/CN.4/267, p. 57.
72. *Yearbook. . .*, 1974, Vol. II, Part 1, p. 114, Doc. A/CN.4/282.
73. *Ibid.*, p. 104.
74. *Ibid.*
75. See: YEAGER, *International Monetary Relations: Theory, History and Policy*, Harder and Row, New York. From April 1929 to April 1933, at least 35 countries left the gold standard: *ibid.*, p. 344. Under the Bretton Woods System, gold became a reserve asset, as foreign currencies. In 1976, gold is a precious metal like many other precious metals.

sovereignty confers on the new State the right to introduce its own currency and to establish its own bank of issues. But until the successor State is able to issue its own money, the old currency will necessarily be in circulation and will be legal tender. In the Indian case, for example, the *Pakistan (Monetary System and Reserve Bank) Order* provided that the Reserve Bank of India was permitted to continue managing the currency of Pakistan and carrying on the banking business there until an agreed-upon-date[76]. By this same order, the Indian rupee was considered as the standard monetary unit of Pakistan until the Pakistan Legislature provided its own currency. This particular aspect of a State's succession may present great technical difficulties which can be properly solved only by an appropriate financial agreement which provides for the conduct to be adopted during the transitional period.

### 1.2.5. Incorporeal rights

When it is said that the successor State succeeds to the public property of the predecessor State, that does not mean that it will take over tangible property only. It would seem that this principle of succession extends to public rights of a pecuniary character, such as debt-claims which constitute the public resources of the State. Indeed, the International Law Commission provisionally adopted the following definition of State property which passes to the successor State:

> (. . .) State property means property, rights and interests which, on the date of the succession of States, were according to the internal law of the predecessor State, owned by that State.[77]

It should be noted that this extension of the concept of public property is not a new discovery. This definition was already present in the *Treaty of peace between Great Britain and the United States*[78], as well as in the *Treaty of Versailles*[79], the *Italian Peace Treaty*[80] and in the *Indian Independence (Rights, Property and Liabilities) Order*[81]. Nevertheless, this

76. G.G.O. no 21, published in: POPLAI, *Select Documents*, India 1947-1950, Vol. 1, p. 49.
77. See *Yearbook*. . ., 1973, Vol. II, p. 202 and *seq*.
78. *Supra*, note 23. See also the *Treaty of Paris, February 10, 1763*: "Moreover, his most Christian Majesty cedes and guaranties to his said Britannik Majesty, in full right, Canada, (. . .) with the sovereignty, property, possessions and all rights acquired by treaty or otherwise."
79. ISRAEL, *supra*, note 34, p. 1449.
80. *Supra*, note 34.
81. *Supra*, note 29. See also: *The Federation of Malaya Order 1* (Independence Order in Council), S.I. (1957) no. 1533; *Treaty between the Government of the United Kingdom*

definition gives rise to interesting problems. For example, does this mean that all taxes and payments which had not been paid to the predecessor State before the day of independence have to be paid to the successor State? Does this mean that the predecessor State loses its rights over the matter or does this mean that fiscal debts are paid off? As a matter of fact, it is true that Israel received all taxes which had not been paid to the Government of Palestine[82], but this case is not sufficient to prove the existence of a general practice in that sense. And it is a legitimate question to ask on which base the Special Rapporteur relied upon in suggesting that the successor State shall "(. . .) become the beneficiary of the public debts of all kinds receivable by the predecessor State."[83] This proposal is rather amazing if one takes into account that it is not substantiated by a sound theory or not demonstrated by clear evidence of State practice[84].

Professor O'Connell's thesis seems more interesting when he points out that the successor State is entitled to these unpaid taxes because the debt relationship between the predecessor State and the debtor expires with the change of nationality of the debtor and the loss of sovereign authority over him[86]. Nevertheless, this case is not completely convincing; while it is true that the predecessor State loses jurisdiction to enforce its laws within the new foreign State as well as jurisdiction to prescribe new laws on the basis of nationality of the individual, who is now a foreign citizen[86], this legal situation does not necessarily mean that the new State should be completely free *vis-à-vis* the predecessor State. From the point of view of strict logic, there is no apparent reason why unpaid taxes should not be assigned according to the date of independence. A strong case can be made, indeed, that there is a legal obligation to pay an unpaid tax to the right person entitled to receive that payment and that there is a public duty to pay full amount of the money required by the predecessor State in order to achieve its general purposes.

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*of Great Britain and the Provisional Government of Burma Regarding the Recognition of Burmese Independence and Related Matters, U.N.T.S.* Vol. 70, p. 184; BAXTER and SOHN, "Draft convention on the International Responsability of States for Injuries to Aliens", (1961) 54 *A.J.I.L.* 548, Article 10; *Case concerning the Barcelona Traction, Light and Power Co. Ltd*, (1970) I.C.J. Rep. 3, par. 53.

82. See: *Materials on Succession of States*, ST/LEG./Ser.B14/P. 50.
83. *Yearbook. . .*, 1973, Vol. II, p. 28, Doc. A/CN.4/267.
84. In fact, Mr. Bedjaoui's proposal relies upon the notion of sovereignty of the new State. This concept is very interesting but it does not tell us why we should "sacrify" sovereignty of the predecessor State without further discussion!
85. O'CONNELL *Op. cit, supra*, note 7, p. 190.
86. State succession present difficult problems in relation to nationality. As we do not deal with those problems in this paper, we shall assume that change of nationality is automatic.

However, political realities can dictate another solution: citizens of the new State and the new State itself have a real interest in keeping that money within their territory. Few tax payers enjoy paying more taxes than necessary and few tax payers would enjoy paying taxes to a State from which they had just seceded. A fair compromise might be reached if one takes into consideration the time factor in that issue. Taxes which were owed to the predecessor State before one year preceding Independence Day should be paid to that State: practically, this suggestion means that amounts which could be recovered after suits before federal tribunals should be returned to the predecessor State. Enforcement problems could be easily settled by administrative arrangements between the two parties. On the contrary, all assessments made during the year which precedes Independence Day should be paid to the successor State, subject, however, to the following exception: taxes already paid to the predecessor State during the year preceding Independence Day would not be subject to a legal claim by the successor State. This suggestion could be applied in relation to other aspects of public debt-claims.

### 1.3. Considerations concerning compensation

#### 1.3.1. The practice of States

If the rule, then, is that the successor State succeeds to the property of the predecessor State without regard to this dichotomy between its private or public domain, there is still the question of whether or not the successor State receives it without compensation. On this point, States practice, as might be expected, reveals neither consensus among States nor a pattern of conformity between terms of settlement. In the Indian case for example, the Government of India agreed to pay 100 million rupees in respect of all defence stores and fixed assets which were the property of the United Kingdom and which were taken over by the Government of India[87]. The same can be said about the Israel case: the Government of the United Kingdom transferred its rights and interests in assets but Israel agreed to pay the sum of 5,882,000 pounds in payment of other commercial debts and for the assets to be transferred[88]. Perhaps it

87. Exchange of letters between the United Kingdom and India extending the financial agreement of August 14, 1947, and making certain financial provisions in respect of defense stores and installations taken over from the Government of United Kingdom, London, July 9, 1948, in (1948) 1 *State Papers* 811.

88. Agreement between the United Kingdom and Israel for the settlement of financial matters outstanding as a result of the termination of the mandate for Palestine, *supra*,

was considered, in these two cases, that these properties belonged to the private domain of the United Kingdom; such a consideration, however, would be very surprising if it was because Her Majesty does not enjoy a private domain as it is understood by French law[89].

Again, under the peace treaties of 1919, the general practice—with one exception—has been that public property was to be paid for by the acquiring State. Article 142 of the *Treaty of Neuilly* and Article 191 of the *Treaty of Trianon* provide that any power to which territory was ceded should acquire all property and possessions situated within such territory. The value of such property and possessions so acquired shall be fixed by the Reparation Commission and placed by it to the credit of the predecessor State[90].

It would appear, however, that the cases cited above are exceptional instances, the rule being that the successor State acquires public property without compensation. Indeed, there are a tremendous number of cases where the succession took place *ipso jure*, without payment. A few examples of these cases follow.

The *Treaty of Lausanne* of July 1923 presents the following rule in its Art. 60:

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note 45 Article 2. According to Paenson, Israel paid about 1,700,000 pounds for these assets (PAENSON, *Les conséquences financières de la succession des Etats*, Paris, Domat-Mont Chrestien, 1954, p. 64).

89. British practice, in relation to the various colonies which acceeded to independence since 1960, is completely mysterious on this question. If we take a look at the various legal instruments in connection with these events, we shall find nothing; see, for example: *Malawi Independence Act*, 1964, C. 46; *Malawi Independence Order*, S.I. 1964; *Bahamas Independence Order*, 1973, S.I. Part II; *Fiji Independence Act*, 1970, C. 50; *The Fiji Independence Order*, 1970, S.I. Part III; *Mauritius Independence Act*, 1968, C. 8; *The Mauritius Independence Order*, 1968, C. 14; *Guyana Republic Act*, 1970, C. 18; *The Guyana Independence Order*, S.I. 1966; *Lesotho Independence Act*, 1966, C. 24; *The Lesotho Independence Order*, S.I. 1966-67; *Barbados Independence Order*, S.I. 1966, and so on. The only explanation we found is the one given by professor O'Connell when he says: "When a dependent British territory becomes independent and retains the monarchy there is no necessity to make provisions for the assignment to it of public property, because this remains crown property. Property of the United Kingdom government is unaffected by the change; property of the territorial government is henceforth held by the crown in right of the newly independent country." O'CONNEL, *op. cit.*, *supra*, note 63, Vol. 1, p. 210. It is Mr. Bedjaoui's opinion that in the absence of special reference to that question in British legal instruments, it cannot be assumed that the successor State has any obligation in this respect. *Yearbook. . .*, 1970, Vol. II, p. 149, Doc. A/CN.4/226.

90. *Treaty of Neuilly*, *in*: ISRAEL, *supra*, note 34, Vol. III, p. 1781; *Treaty of Trianon*, *in*: *Idem*, Vol. III, p. 1960. As a matter of fact, the scheme provided for in these articles did not work.

> The States in favour of which territory was or is detached from the Ottoman Empire after the Balkan wars or by the present treaty shall acquire, without payment, all the property and possessions of the Ottoman Empire situated therein.[91]

Similar provisions were made by the *Italian Peace Treaty*, in 1947, in regard to Trieste[92] and other States. The Resolution 388(v), adopted by the General-Assembly of the United-Nations in 1950, approved the following Article relating to Libya:

> Libya shall receive, without payment removable and immovable property located in Libya owned by the Italian State.[93]

If one now considers the French practice, it should be kept in mind that a French writer already characterized this practice in the following manner:

> Le caractère gratuit du tranfert est l'aspect le plus frappant de la succession des nouveaux Etats d'Afrique aux biens français. Dans la mesure où le transfert a donné lieu à des règlements domaniaux, il n'en est pas un qui ne le consacre.[94]

This opinion, of course, relates chiefly to the French public domain. For example, Article 6 of the agreement between France and Mauritania concerning public property states expressly that the transfer will not give rise to any indemnity[95]. The same solution governed the relations between France and Senegal[96] and it is legitimate to consider that this general principle governed the relations between the United Kingdom and her former dependent territories.

### 1.3.2. Theoretical aspects

In the doctrine of international law, there is a widespread and unanimous tendency to consider that public property passes to the successor State without compensation[97]. However, I must deplore the fact that this

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91. *Peace treaty between the allied powers and Turkey, in*: ISRAEL, *supra*, note 34, Vol. IV, p. 2301 and p. 2329. The same is true in regard to the *Treaty of Sevres*, Article 240, in: *Idem*, Vol. III, p. 2139.
92. Annex 10, par. 1: "The free territory of Trieste shall receive, without payment Italian State and para-statal property within the free territory", in: *Idem*, Vol. IV, p. 2502.
93. Annex XIV, Par. 1: "The successor State shall receive without payment Italian State and para-statal property within territory ceded to it under the present treaty, as well as relevant archives and documents of an administrative character or historical value concerning the territory in question, or relating to property transferred under this paragraph", in: *Idem*, Vol. IV, p. 2515.
94. FOUILLOUX, "La succession aux biens publics français dans les Etats nouveaux d'Afrique", [1965] *A.F.D.I.* 914.
95. *Supra*, note 32.
96. *Supra*, note 33.
97. *Supra*, note 19.

same doctrine is so silent about the philosophical or legal foundations behind the asserted rule. As far as I am aware, nobody has tried to investigate why it is that the successor State may inherit public property without, at the same time, being required to pay fair compensation. A possible answer to that question is, perhaps, that the doctrine takes for granted a rule which is in need of greater elucidation.

When the matter was discussed by the International Law Commission[98], there was unanimous agreement on the general principle to the effect that the passing of State property from the predecessor State to the successor State must take place without compensation. Such a conclusion was reached upon the basis of the evidence provided for in Mr. Bedjaoui's Third Report; however, it must be admitted that that Report is very deceptive and less than convincing on this particular point[100]. This failure was, indeed, diplomatically pointed out by Mr. Tammes[100] and it would seem that the Commission was in effect working out a rule for the progressive development of international law[101]. In this respect, it is very interesting to cite Mr. Tammes' opinion where he is reported to have said:

> As to the absence of compensation, he was not quite sure that the new rule would be the just rule in all cases of succession. It might be so in typical cases of decolonization, but perhaps it might not be so in the more numerous cases of secession which might occur in the future.[102]

It is easier to understand, therefore, the reasons why the International Law Commission chose to add the following words: "unless otherwise agreed or decided" to the original draft proposed by Mr. Bedjaoui[103]. This new formulation suggests that the "without payment rule" is not so

98. See: 1240th meeting, *Yearbook*. . ., 1973, Vol. I, p. 198.
99. *Yearbook*. . ., 1970, Vol. II, p. 149, Doc. A/CN.4/226. It is to be noted that Mr. Bedjaoui abstained generally from any purely theorectical study of problems which arise from State succession to public property. This is a serious lacuna which weakens the weight of his reports.
100. 1232th meeting, June 22, 1973, *Yearbook*. . ., 1973, Vol. I, p. 153.
101. *Ibid.*, by Mr. Tammes.
102. *Ibid.* See also Mr. Uskakov's opinion at: 1240th meeting, July 4, 1973, *ibid.*, 195.
103. See more especially the 1240th meeting, July 4, 1973, *ibid.*, Article 8, provisionally adopted, reads as follows: "Without prejudice to the rights for third parties, the passing of State property from the predecessor State to the successor State in accordance with the provisions of the present articles shall take place without compensation unless otherwise agreed or decided"; *Yearbook*. . ., 1974, Vol. II, Part 1, p. 91. Mr Bedjaoui's original draft reads as follows: "Property necessary for the exercice of sovereignty over the territory affected by the Succession of States shall devolve, automatically and without compensation, to the Successor State", *Yearbook*. . ., 1973, Vol. II, p. 10, Doc. A/CN.4/267 Art. 9.

imperative and automatic as doctrine asserts it to be. It would follow that Mr. Bedjaoui's substantive provision on the matter is not so much a statement of the international law in force *lex lata* as a practical directive *de lege ferenda*.

The above considerations lead one to the heart of the problem: why is it that a successor State could succeed to the property of the predecessor State without compensation? In reality, a right answer to this question may be derived only from a right answer to a more basic issue: how does State property pass from one State to another? In spite of the fact that this fundamental problem is of the utmost importance for the general theory of State succession, it does not appear to have received much attention by the majority of writers. Professor O'Connell appears to be the only one who presents the right questions about this issue but without any satisfying solution[104]; indeed, when O'Connell says that:

> (. . .) as a matter of juristic logic it might be argued that the successor State is entitled to the public property which appertains to the territory, wherever it is located. . .[106]

I do not think that he is resolving a great deal. If the notion of territorial jurisdiction must appear as the key concept in order to understand what is going on, there is nothing more to add to the matter of State succession: the new State, by virtue of its territorial sovereignty may do anything it wishes! I think that any attempt to give a proper answer to this problem is putting it within an adequate historical perspective.

In cases of conquests, which were rather common in the earlier centuries, it is legally comprehensive that the new conqueror did not have to pay for the public property of the new country which was brought into subjection. Above all, the conquest was the conquest of a territory and this same territory was essentially the beginning and the end of what is now called public property; at best, the conqueror could find some barracks, forts, structures, and so on. Secondly, it should be borne in mind that, at that time, the legal conception of State territory was not distinct from that of State ownership; territory was both the subject-matter of a right of sovereignty (or *imperium*) and of a right of ownership (or *dominium*). For example, it is a fair statement to say that under feudal law, the whole of England was both the territory and the property of the Crown[106]. In this particular context, it is also fair to say that the successor

104. "State Succession in Relation to New State", (1970) 2 *R.C.A.D.I.* 166-169.
105. *Ibid.*, p. 167.
106. See: BRIERLY, *supra*, note 19, p. 162.

State inherited the territory by virtue of its own conquest, like succession in private law.

As may be expected, legal theory developed as well as economic reality. If territory is generally considered now as a basic element necessary to the existence of a State, a clear distinction is drawn, nevertheless, between the two concepts of *imperium* and *dominium*[107]. Territory appears rather as the "physical sphere within which the competence of the State is manifested"[108] while State ownership, far from being limited to lands, is present everywhere in the life of the nation. Indeed, it is a truism to say that State property is directly connected to the social, economic and political life of the nation in most countries of the world.

Of course, these considerations do not suggest that the successor State should have to pay a fair compensation for the territory over which it now extends its sovereignty; territorial jurisdiction has no market value and any effort to try to determine one would be useless. On the contrary, the foregoing does suggest that traditional doctrine, in order to make the rule of no compensation legitimate has extended the concept of territory to such a point that it can include everything, from lands to airplanes. There is something fictitious in establishing at all costs a link with the territory when, in fact, this link is often purely accidental. While one can easily agree that public buildings and works, arsenals, lighthouses, libraries, bridges roads, waterways, etc. . . are of the nature of territory, it is more difficult to see this same quality in the activity of a national and public corporation which, although it is located within the seceding territory, contributes to the economy of an entire country. My firm opinion,

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107. "As against other states, a State has in international law the right of property or domain in the territory and fixtures within its limits. This right of property is not the right in the old feudal sense, for in modern public law ownership may vest in the State only in a limited sense, except for territory to which none of its subjects have titles." (G. WILSON, *International Law*, 9th Ed., New-York, Silver-Burdett and Co., 1935, p. 79). Wheaton writes: "(. . .) the conception of a State as possessing property in its territory was naturally and inevitably borrowed by the early jurists from Roman Law. Doubtless the analogy is incomplete, and there is a real distinction between the ideas of property (dominium) and territorial supremacy (imperium). H. WHEATON, *Elements of International Law*, 6th Ed., by W.B. Lawrence, 1857, Vol. 1, p. 334. L.F.L. OPPENHEIM, *International Law*, 3d Ed., London, by R.F. ROXBURG, 1920, Vol. 1, p. 306: "The territory of a State is not the property of the monarch, or of the government."

108. O'CONNEL, *op. cit. supra*, note 19, Vol. 1, p. 404. See also L.F.L. OPPENHEIM, International Law, *supra*, note 107, Vol. 1, p. 307: "The importance of State territory lies in the fact that it is the space within which the State exercices its supreme authority."

therefore, does not give to the rule of no compensation the automatic character which it often receives.

### 2. Succession to public debt

If the Province of Quebec becomes an independent State, the question arises whether or not the new State has an obligation to take over a proportional part of the debts of the State of which it once formed a part. On a theoretical level, there is no uniformity as to the right solution which one must arrive at on this issue. According to Hackworth,

> There appears to be no legal obligation on the part of a seceding province to assume some share of the national debt when the identity of the parent state is maintained.[109]

But the opposite view is often held. Sack's thesis, which is followed by many commentators, can be described as follows:

> Au cas de démembrement du territoire de l'Etat débiteur, le gouvernement de chaque partie du territoire démembré doit assumer une part de l'ancienne dette, proportionnelle à la force contributive de cette partie du territoire.[110]

As a matter of fact, there have indeed, been, a considerable number of historical instances supporting both theories, and international practice is by no means uniform. To sum up, it would seem that both practice and doctrine reveal great divergencies on the question of whether the new State is obliged to assume a part of the public financial obligations of its predecessor. In reality, some of the difficulties in dealing with this topic arise chiefly from the very nature of the problem, which varies with the circumstances of each case and from the number of distinctions that may be employed in discussing it. In order to clarify the situation, it may be useful to consider the two important theories which have been presented concerning succession to public debts. First to be examined will be that theory which considers that the successor State assumes no part of the old State's debts (see Part 2.1.). Second, that theory which considers that the seceding territory should assume an equitable share of the general debt (see Part 2.2). The enquiry will be completed by a study of the question of repartition (see Part 2.3.).

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109. *Digest of International Law*, Washington, U.S. Govt Print. Off, 1940, Vol. 1, p. 540.
110. A.N.Sack, *La Succession aux dettes publiques d'Etat*, Paris, Hachette, 1929, p. 161.

## 2.1. The negative theory

### 2.1.1. Legal foundations

According to a considerable weight of authority among international law writers[111], the new State is not required to take over a certain portion of the national debt[112]. Generally, authors justify this theory on the major ground that the international personality of the predecessor State still exists, as well as its fiscal competence. One of the most learned authorities on this subject expresses this point of view as follows:

> (. . .) Where only part of the debtor State is aborded, both its international personality and its fiscal competence remain undisturbed, although its paying capacity may be diminished. The debtor State is still the debtor and if the debt is unsecured the legal relationship between it and the creditor is intact.[113]

However, such a view pays no attention to an important preliminary matter: is it true that the predecessor State retains its international personality? This question is surely not illogical if one takes into account two famous precedents on this issue. The first case relates to the separation of Belgium from the Netherlands, in 1830. Pradier—Fodere and Fauchille categorically assert that the dismemberment of the Kingdom of the Netherlands resulted in the supression of the ancient State and conse-

111. H.W. HALLECK, *International Law*, London, C.K. Paul & Co., 1878, Vol. 1, p. 76; HACKWORTH, *supra*, note 109; P. GUGGENHEIM, *Traité de droit international public*, Genève, 1953-54, p. 275; H.A. WILKINSON, *The American Doctrine of State Succession*, Baltimore, The John Hopkins Press, 1934, p. 95; A.S. HERSHEY, *The Succession of States*, [1911] *A.J.I.L.* 285. T. BATY, "Division of States: Its Effects or Obligations", *in: Transactions of the Grotius Society*, 1923, Vol. 9, p. 122; OPPENHEIM, *International Law a Treatise*, 7th Ed., London by H. Lauterpacht, Longmans, Green and Co., 1948, Vol. 1, p. 160; E.H. FEILCHENFELD, *Public Debts and State Succession*, New York, The MacMillan Co., 1931, p. 667; KEITH, *supra*, note 5, p. 62; O'CONNELL, *supra*, note 7, Vol. 1, p. 395.

112. By national debt, it must be understood that debt "(. . .) shown in the general revenues accounts of the central government"; see 54 International Law Association, *Conference Report* (1970) p. 108. The public debt of Canada consists of those liabilities which appear on the government's statement of assets and liabilities; in addition, the Federal Government has certain indirect obligations such as the guarantee of securities of the Canadian National Railways, which in a Crown corporation. This public debt consists chiefly of treasury bills, treasury notes, bonds and debentures. It is very important to keep in mind, here, that we deal with the so-called "unsecured debt", that is to say, a debt for which liquidation is not provided from predetermined assets or revenues (for this distinction, see D.P. O'CONNELL, *Secured and Unsecured Debts in the Law of State Seccession*, B.Y.I.L., 1951, Vol. XXXVIII, p. 210.

113. O'CONNELL, *supra*, note 111, Vol. 1, p. 395.

quently that the legal personality of the old State ceased to exist[114]. Nevertheless, a contrary view was held by the Secretary General of the United Nations Organization in his declaration on the position of the Dominions of India and Pakistan *vis-à-vis* the United Nations Organization; indeed, he made no differentiation between the Belgian case and the Indian case: India, though much reduced in territory, was considered the same international entity as before, the situation being analogous to the separation of Belgium from the Netherlands[115]

These two cases show that territorial transformations of States can lead to diverse consequences in international law. Above all, they stress the importance of territory as a basic element in the existence of the State. Therefore, it is only by examining the circumstances of each particular case that one can find out whether a loss of territory is important enough to alter the legal personality of a State. If this test is applied to the Canadian Federation, a strong case can be made to the effect that the loss of the Province of Quebec would not alter Canada's international status. Such an opinion relies principally on the history of the territorial formation of that country: when the Dominion was established in 1867, it was formed by the union of four provinces only, namely Ontario, Nova Scotia, New Brunswick and Quebec[116]. Canada was Canada without Manitoba, Saskatchewan, Alberta, British Columbia, Prince Edward Island and Newfoundland, provinces which joined the union later[117]. *A contrario*, one may

114. PRADIER-FODERE, *op. cit.*, *supra*, note 19, p. 251.

115. This legal opinion reads as follows: "From the view of the international law, the situation is one of which part of an existing State break off and becomes a new State. On this analysis there is no change in the international status of India: it continues as a State with all rights and obligations of membership in the United Nations. The territory which break off—Pakistan—will be a new State. It will not have the treaty rights and obligations of the old State and will not of course have membership in the United Nations. In international law, the situation is analogous to the separation of the Irish Free State from Britain and of Belgium from the Netherlands. In these cases the portion which separated was considered a new State and the remaining portion continued as an existing State will all rights and duties which it had before." *General Assembly, Official Records*, 17th Session, Suppl. 9, par. 72, U.N., Doc. A/5209. See also the *Indian Independence* (International Arrangements) Order 1947, G.G.O. no. 17 *in*: *Government of Pakistan, Constitutional Documents*, Vol. IV-B, Karachi, 1964, p. 944.

116. See: *British North America Act*, 1867, 30-31 Vict. C. 3 (U.K.).

117. These provinces became respectively a part of the Dominion of Canada in 1870 (*Manitoba Act*, 1870, 33 Vict., C. 3); 1873 (*Order of Her Majesty in Council admitting Prince Edward Island into the Union, in*: R.C.S. 1970, App. II, p. 291); 1871 (*Order of Her Majesty in Council admitting British Columbia into the Union, in*: R.C.S. 1970, App. II, p. 279); 1905 (*Alberta Act*, 4-5 Ed. VII, C.3 and *Saskatchewan Act*, 4-5 Ed.

then conclude that the loss of one province, even though it is the largest province, would not change anything in the international status of the Canadian Federation. For these reasons, it is submitted that Quebec's secession would have no effect on the identity in the predecessor State. There are, indeed, numerous instances where loss of territory was not considered to destroy the identity of a State, even when such a loss was of a substantial character[118].

### 2.1.2. Critical outlook

This preliminary point clarified, there seems to be no reason for the general underpinning of this theory which denies any obligation on the part of the new State to pay a fair proportion of the central debt. Indeed, it is one thing to say that there can be no legal rule imposed on the successor State with respect to the creditors—as O'Connell writes[119]—and another thing to draw the conclusion that there can, therefore, be no obligation imposed on the successor State *vis-à-vis* the predecessor State! While it is right to conclude that the contractual relationship between the creditor and the debtor State is not destroyed by the loss of a portion of territory, that does not necessarily mean that international law has nothing to say about the relationship between these two States. Moreover, if legal reasoning forces one to admit that international personality and fiscal

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VII, C. 42) and 1949 (*Act to confirm and give effect to terms of Union agreed between Canada and Newfoundland*, 12-13 Geo. VI, C. 22 (U.K.)).

118. Great Britain remains the same international person after the loss of an empire! The same can be said for Columbia, after Panama secession, from Belgium after Congo secession, and from France after the loss of Algeria and many other African territories. For a full discussion of this problem, see: C. MAREK, *Identity and Continuity of States in Public International Law*, Genève, E. Droz, 1968.

119. O'CONNELL, *op. cit. supra*, note 7, at p. 394-395. See also M.A. CAVAGLIERI, "Effets juridiques des changements de souveraineté territoriale", *in*: (1934) 15 *Revue de droit international et de législation comparée* 243: "Quel est le sort des obligations patrimoniales, des dettes de l'Etat démembré ? Il ne faut pas oublier qu'il continue d'exister et garde son individualité. Il doit donc rester tenu envers ses créanciers. Il a contracté personnellement la dette et la variation de ses ressources ne peut pas modifier en principe la portée de ses obligations. Ses créanciers gardent leur action et leurs droits envers lui comme auparavant. Ils n'ont qu'un seul débiteur, l'Etat qui a émis l'emprunt ou contracté la dette. Leur droit de poursuite reste ce qu'il était avant le démembrement." FEILCHENFELD, *op. cit. supra*, note 111, p. 675: "If only a part of the territory of the public debtor has come under a new sovereignty the old sovereign remain able to interfere with the existence of the debt. The new sovereign, on the other hand, cannot destroy the jural relation existing in a foreign system of law. Consequently, only the old sovereign can be responsible for destruction of the debt, and no such responsibility can lie with cessionnary."

competence of the old State remain undisturbed, nevertheless it is not illogical to think that its paying capacity in the matter of debt amortization can be highly impaired by secession[120]. Where, then, is the principle which might protect creditor' rights if secession really involves a territorial loss sufficiently heavy to destroy the paying capacity of the predecessor State? Obviously, there is something unsatisfactory in this theory, and it is interesting to note that even professor O'Connell's opinion seems to be evolving on this particular issue. Indeed, this learned publicist wrote, in 1970, that it would be "inequitable to preserve the formal debt relationship"[121] in all cases; now he is ready to admit that "(. . .) both the predecessor State and the national States of the creditors have rights under international law to call upon the successor State to undertake a fair proportion of the amortization"[122] if the predecessor State becomes economically disabled in debt servicing. Clearly, if creditor' interests are the starting point of the negative theory, these same interests must also be the finishing line. But it is precisely in this matter that the negative theory confronts its own dilenma. As it was described by O'Connell in 1970, "(. . .) it aggravates rather than mitigates the legal crisis occasioned by change of sovereignty and is inherently anarchic".[123]

### 2.1.3. An important exception to the negative theory: the benefit theory

Furthermore, it is not without significance that the negative theory lays down its own exceptions. It is generally recognized that the successor State, while it is not required to take over a part of the general debt, is, nevertheless, expected to assume payment of debts raised for the benefit of the seceding territory. In this respect Hackworth says:

> In the case of a debt raised for the purposes of the ceded territory or charged upon its local revenues, it is held by the majority of writers, who cite numerous treaties in support, that the obligation passes with the land to its new owners.[124]

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120. However, this is not necessarily true in practice. One may imagine the case when a "poor territory" secedes, thereby decreasing the burdens of the population of the predecessor State. On the general effects of territorial changes upon the financial interests of State and their creditors, see FEILCHENFELD, *op. cit. supra*, note 111, p. 5.
121. D.P. O'CONNELL, International Law, 2d Ed., Londres, Stevens and Sons, 1970, Vol. 1, p. 384.
122. *Ibid.*
123. *Ibid.*, p. 367.
124. HACKWORTH, *supra*, note 109, p. 540. Seel also P. FIORE, *Droit international public*, Paris, Pedone-Lauriel, 1885, T. 1, p. 813; W.E. HALL, *A Treatise of International Law*, Oxford, A.P. Higgins, The Clarendon Press, 1917, p. 94; GUGGENHEIM, *op. cit.*

It can be seen that debts raised by the central government for the purpose of expenditures on particular projects in the particular seceding territory[125] are assimilated to local debts and must, therefore, be paid by the new State. The rationale of this doctrinal construction is very clear: it would be unjust to permit the successor State to enjoy the benefits accruing to its territory as the result of financial commitments assumed by the predecessor State, without at the same time bearing the burden of the debt. *Res transit cum suo onere*. Basically, this general exception to the negative theory is a sound one but it gives rise to serious difficulties.

### 2.1.4. Critical outlook

In the first place, one can ask which party will assume the burden of proof. When the visible benefits of the debt are directly connected with the seceding territory, for instance, if the proceeds of the loan have been devolved to the erection of permanent improvements on the territory, common sense and good faith may afford adequate answers. On the contrary, more cryptic situations can give rise to endless discussions. For example, how would it be possible to measure the value of these benefits when improvements indirectly favor the predecessor State? It would always be possible for the predecessor State to argue that all debts have benefited the seceding territory, directly or indirectly, while it might always be argued, on the contrary, that the central debt (although connected with the territory) was not used in fact for the benefit of the territory, i.e. for its economic, social or cultural development. On the one hand, the predecessor State might be tempted to extend the concept of benefit while, on the other hand, the successor might be tempted to operate a distinction between productive and unproductive debts. For all these reasons, I do not think that Hyde correctly answers these questions when he formulates his own test on the matter, saying:

> While there may be question as to which party should assume the burden of proof, it is believed that in the formulation of a rule of law designed to promote justice and, therefore, to command general approval, it should be laid down first, that the duty of the new sovereign to bear a portion of the debt of the old should be dependent upon the benefits accruing to the territory transferred; and secondly, that such benefits should not necessarily be deemed to be non-existent when the debt is general rather than local.[126]

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*supra*, note 111, p. 472; OPPENHEIM, *op. cit. supra*, note 111, Vol. 1, p. 159; CAVARÉ, *op. cit. supra*, note 20 p. 382; M. SIBERT, *Traité de droit international public*, Paris, Dalloz, 1951, T. 1, p. 210.

125. This kind of debts is called "localised debt" or "*dette hypothéquée sur le sol*".

126. HYDE *International Law. Chiefly as Interpreted and Applied by the United States*, 2d Ed., Boston, Little, Brown and Co., 1947, Vol. 1, p. 403.

With due respect, one must say that Hyde's statement completely begs the question. But it must be admitted that no publicist ever tried to resolve the problem. Obviously, the fact that a central debt was more or less connected with the territory does not provide a sufficient basis for considering it as local and therefore transmissible to the successor State. Hyde, himself confessed that the distinction between the general and localised debts has not always been useful in practice[127]

In addition, the benefit theory comes up against a second serious difficulty. Borrowing is essentially an alternative means of raising revenues to cover expenditures, next to taxation which can be considered as the normal way in which a government secures the revenues that it needs to finance public services. When the rate of spending exceeds the rate of tax collections the national government deficit is ordinarily financed by what is called "debt issue". Therefore, it would be a delicate task if one should be required to operate a real distinction between amounts which came from tax revenues and amounts which came from the sale of debt instruments. In fact, the amounts which are assigned to the seceding territory come from the Consolidated Revenue Fund[128] and it is impossible to draw a clear distinction based on the origin of these funds. Unless notice is officially given that a particular debt issue will be raised in order to cover some extraordinary expenditures connected with the territory—such as long term highway construction, irrigation projects, river valley developments or urban renewal programs—the advantages or benefits of the expenditures cannot be linked with certainty to any special issue.

Finally, supporters of the negative theory, while denying any legal obligation on the part of the new State to assume some proportion of the central debt, often recognize at the same time some moral obligation to that effect. For example, Hershey writes:

> Many of the authorities maintain that the partial successor must also take over a proportional part of the general public debt of the ceding or dismembered State;

127. *Certains Effects of Change of Sovereignty*, Washington, Government Print Off, 1919, at p. 17: "The distinction frequently laid down between the general and local debt of a contracting State has not always served a useful purpose for it has tended in the case of the former, to encourage an assumption unduly favorable to the new sovereign and in that of the latter to suggest the imposition of an injust or excessive burden. In neither case it refected closely the practice of States".

128. Article 102 of the *British North America Act*, 1867, 30-31 Vict. C.3 (U.K.) provides for the creation of this Fund; this Fund is appropriated by the Parliament of Canada for the public service of Canada. As a matter of fact, the net proceeds from the sale of notes and bonds are ordinarily added to the Counsolidated Fund and are applied to general expenses of the Dominion.

> but, however equitable and just such an arrangement may be, it cannot be maintained that this is a positive rule of the law of nations.[129]

*Prima facie*, such an admission is rather surprising. But it is precisely at this point that the ambiguities of the negative theory become really apparent and that the fundamental differences of opinion that exist concerning the nature of law itself appear so clearly. Indeed, it can be asked whether considerations of justice are relevant here. It will be seen that these considerations have received large application in State practice and that it is not necessary to overemphasize the differences between the true content of the rules and the formalities of the law-making process. It is my submission that the negative theory simply forgot to collect evidence of a nascent contrary practice.

### 2.1.5. The practice of States

Despite the fact of its manifest weakness, one must admit that the negative theory was largely sanctioned in practice. A classical illustration of this theory is the fact that the United States of America did not take over any debt of Great Britain in 1783[130]. According to Feilchenfeld, this is not an isolated case for during the entire period from 1648 to about 1815 it does not appear that general debts were ever taken over by the successor State in cases of cession or secession[131]. In 1925, in an arbitral decision made in relation to the Ottoman Public Debt, Mr. Borel said;

> On ne peut considérer comme acquis en droit international positif le principe qu'un Etat acquérant partie du territoire d'un autre doit en même temps se charger d'une fraction correspondante de la dette publique de ce dernier. Pareille obligation ne peut découler que du traité ou l'assume l'Etat en cause et elle n'existe que dans les conditions et les limites où elle s'y trouve stipulée.[132]

In that case, it will be recalled that Turkey's claim was that the *Treaty of Lausanne*[133], in providing for the distribution of the Ottoman public debt

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129. A.S. HERSCHEY, *The Essentials of International Public Law*, New York, The Mac Millan Co., 1912, p. 135; see also OPPENHEIM, *op. cit. supra*, note 111, p. 160: "It would be only just if the successor had to take over a corresponding part of the debt of its predecessor, but no rule of international law concerning this point can be said to exist (. . .)".
130. *Supra*, note 22.
131. FEILCHENFELD, *op. cit. supra*, note 111, p. 71.
132. *Affaire de la dette publique ottomane*, Sentence of April 18, 1925, *United Nations Report of Arbitral Awards*, Vol. 1, p. 571. Mr. Borel said also, at p. 573: "De l'avis de l'arbitre, il n'est pas possible, malgré les précédents déjà existants, de dire que la puissance cessionnaire d'un territoire est, de plein droit, tenue d'une part correspondante de la dette de l'Etat dont il faisait partie jusqu'alors."
133. Israel, Vol. IV, p. 2301.

between Turkey and the States in favour of which territory had been detached from the Ottoman Empire after the Balkan Wars of 1912-13, applied a rule of customary international law. This contention was rejected by Mr. Borel. As a matter of fact, the negative theory has successfully passed the test of time until the present, even though it has often been disputed by a contrary practice[134]. As a general rule, one can say that the negative theory has been revitalized since 1960, in the aftermath of decolonization; indeed, no instance has been found in which a new State succeeded to part of the general and unsecured debt of the predecessor State[135]. However, it should be kept in mind that most decolonization cases were carried out with full political consent and financial aid from the parent State. In these circumstances, it would have been strange behavior for the metropolis to require apportionment of its own central debt; new States were already well enough burdened with their own local debts. Indeed, most of the new States assumed liability for their own internal debts[136] according to the usual practice in this matter.

As has been seen in this part, the old rule states that liability for debt arising upon personal obligation of the predecessor State does not pass with the seceding territory unless stipulated in a particular agreement. As a man cannot be bound by a stranger's promise, so the new State has nothing to do with debts of a foreign country. Without any doubt, such a rule is completely in harmony with the doctrine of sovereignty and the positivist view of international law: a State has absolute freedom of action except in so far as it has agreed to rules restricting that freedom. However, it shall be recalled that the liability of a successor State to assume a proportional part of the general debt of the predecessor State was often sanctioned in the practice of States and it may be asked whether the principle of repartition is now part of international law.

134. See *infra*, part 2.2.

135. "According to the International Law Association, the Indonesian case is the only instance where a dependant territory agreed to a repartition of the National Debt." THE INTERNATIONAL LAW ASSOCIATION, Report of the fifty fourth Conference held at the Hague, August 23 to August 29, 1970, (London, 1971).

136. "Indonesian assumed liability for all internal debts of Indonesia at the date of transfer of sovereignty", *Round Table Conference Agreement between the Netherlands and Indonesia*, *U.N.T.S.*, Vol. 69, p. 200. Generally, see the *Official Declaration of French Minister for Finances*, *in*: *J.O.R.F.*, March 10, 1962: "Les Etats africains d'expression française et la République malgache s'acquittant régulièrement des échéances des emprunts contractés par les territoires d'outre-mer auxquels ils ont succédé."

### 2.2. Considerations concerning the rule of repartition

In 1970, professor O'Connell wrote that "(. . .) there has never been any question about the justice of a repartition"[137]. He also said:

> (. . .) there is, as a matter of fact, a long history of debt repartition, almost every treaty relating to the transfer of territory in the past two centuries having endeavoured to mitigate the economic consequences of the transfer by assigning portion of the debt to the successor State.[138]

It is the purpose of this section to demonstrate that that statement is right and that the theory on which it relies is basically in harmony with the present State of international economic cooperation. As a matter of fact, there is considerable treaty evidence in favour of apportionment and most jurists generally support that practice.

#### 2.2.1. The practice of states

As a matter of history, it appears that one of the first instances where the rule of apportionment was applied is in the Belgian case, a case of partial succession[139]. By virtue of article 13 of the *Treaty of London*, the part of the central debt to be assumed by Belgium was fixed at five million Dutch florins[140]. It must be pointed out that the separation of Belgium took away from Holland more than fifty per cent of her domestic revenues and that this financial settlement was based, first of all, on considerations

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137. O'CONNELL, *op. cit. supra*, note 121, p. 384.
138. *Ibid.*
139. Contrary to an opinion agreed by many writers, that case was not the setting upon of two new States but the loss of her Belgian provinces by Holland. See: BATY, "Division of States: Its Effects on Obligations", *in*: *Transactions of the Grotius Society*, 1923, Vol. 9, p. 123; FEILCHENFELD, *op. cit. supra*, note 111, p. 207: "As the Holy Alliance was opposed to recognition of either conquest or revolution, it was a convenient political expedient, once Belgian independence had become inevitable, to treat the separation as the dissolution of a temporary union (. . .) once the principle was recognized that the separation was to be treated as the dissolution on a union, it was not unnatural to provide for settlements which normally take place in case of dismemberment; namely for a general liquidation, a distribution of both the assets and liabilities of the old State".
140. *Traité fait et signé à Londres, le 19 avril 1839, entre la Belgique et la Hollande, relatif à la séparation de leurs territoires respectifs, in*: MARTENS, *Nouveau recueil de traités*, 1830-1839, T. XVI, p. 773. Art. 13, reads as follows: "A partir du 1er janvier 1839, la Belgique, du chef du partage des dettes publiques du Royaume des Pays-Bas, restera chargée d'une somme de cinq millions de florins des Pays-Bas, de rente annuelle dont les capitaux seront transférés au débit du grand-livre d'Amsterdam et au débit du trésor général du Royaume des Pays-Bas, sur le débit du grand-livre de la Belgique".

of justice and equity[141]. It is true that the initial use of this practice was given by the *Peace Treaty of Kiel* of 1814, where Sweden assumed a part of the Danish debt upon the cession of Norway by Denmark in 1814[142], and was followed in many other instances during the nineteenth century. In 1859, for example, by the *Treaty of Zurich*, Sardinia took over a large part of the debt of the Lombardo-Venitian Kingdom[143]. Similarly, Italy assumed, in 1866, payments on a part of papal debts after her annexation of provinces which had formed part of the papal State[144]. Also, in 1866, the *Peace Treaty of Vienna,* signed by Austria and Russia on the one side, and Denmark on the other, provided for the apportionment of the Danish debt after the loss of Schleswig and Holstein duchies by Denmark[145]. The *Treaty of Berlin* of 1878 also stipulated that Bulgaria Montenegro and Serbia should take over part of the Turkish debt[146].

At the beginning of this century, when Panama proclaimed its independence after its secession from Columbia, the new Republic offered to pay a part of Columbia's exterior debt as soon as its independence was recognized by the Republic of Columbia. However, it would seem that

141. FEILCHENFELD, *op. cit. supra*, note 111, p. 196.

142. According to Feilchenfeld, the importance of this treaty lies in the fact that "(. . .) it is the first great international treaty of cession which provided for a general distribution of debts, and not merely for the transfer of *dettes hypothéquées* and other locally connected debts", *op. cit. supra*, note 111, p. 142. See *Treaty of Peace and Alliance between Denmark and Sweden*, signed at Kiel, January 14, 1814, *in*: PARRY, Vol. 63, p. 46: "Le montant entier des dettes de la monarchie danoise, étant affecté au Royaume de Norvège, qu'aux autres parties de l'Etat, Sa Majesté le Roi de Suède, en sa qualité du Royaume de Norvège, s'impose l'obligation d'en prendre à sa charge une partie, proportionnée à la population et aux ressources de la Norvège, relativement à la population et aux ressources du Danemark". (art. VI).

143. *Treaty of Peace Between Austria and France*, signed at Zurich, November 10, 1859, Art. VII, *in*: PARRY, vol. 121, p. 146: "Le nouveau gouvernement de la Lombardie prendra à sa charge les trois cinquième de la dette du Monte-Lombardo-Venete. Il supportera également une portion de l'emprunt national de 1854 fixé entre les Hautes Parties contractantes à 40,000,000 de florins." See also the *Treaty of Peace between Austria-Hungary and Italy*, signed at Vienna, October 3, 1866, Art. VI, *in*: PARRY, Vol. 133, p. 209. "Le gouvernement italien prendra à sa charge les dettes ajoutées au Monte-Lombardo-Veneto depuis le 4 juin 1859 (. . .)."

144. *Convention between France and Italy for the Regulation of the Pontifical Debt*, signed at Compiegne, December 7, 1866, *in*: PARRY, vol. 133, p. 317.

145. MARTENS, Nouveau recueil général des traités, vol. 17, p. 470.

146. *Treaty between Great Britain, Austria-Hungary, France, Germany, Italy, Russia and Turkey for the settlement of the affairs of the East*, Art. IX, *in*: Vol. II, p. 975: "The amount of the annual tribute which the Principality of Bulgaria shall pay to the Suzerain Court (. . .) shall be fixed by an agreement between the Powers Signatory of the present treaty (. . .) this tribute shall be calculated on the mean revenue of the territory of the principality." See also Art. 33 and 42.

Panama was motivated by its desire of showing good faith toward Columbia rather than by the sentiment that by right she owed any part of the Columbian debt[147]. In virtue of the *Irish Peace Treaty* of Dec. 1921[148], the Irish Free State assumed liability for the service of the public debt of the United Kingdom in such proportion as "(. . .) may be fair and equitable, having regard to any just claims on the part of Ireland by way of set off or counterclaim"[149].

Precursor of the peace treaties which put an end to World War I, the *Treaty of Lausanne* of 1912 also provided for an apportionment of general debts. As Tripoli and Cyrenaica were ceded to Italy at the end of the War between Italy and Turkey, Article 10 provided the obligation for Italy to pay to the Ottoman Public Debt Administration a sum equivalent to the average amount of the Tripoli revenues affected to the service of the Ottoman debt during the past three years[150]. Indeed, this practice that part of the public debt of a dismembered State would be distributed among the detached territories was largely applied by the great peace treaties of Versailles, St. Germain, Trianon, Neuilly and Lausanne. The *Treaty of Versailles expressly* stipulated that the powers to which German territory was ceded should undertake to pay a portion of the debt of the German Empire as it stood on August 1, 1914, calculated on the basis of the ratio between the average for the three financial years 1911, 1912, and 1913, of the revenues of the ceded territory and the average for the same years of the revenues of the whole Empire[151]. Like the *Treaty of Versailles*, the other peace treaties made similar provisions for the partial assumption of the debts of Austria, Hungary, Bulgaria and Turkey. For example, the *Treaty of St. Germain* provided that each of the States to which territory of the former Austro-Hungarian Monarchy was transfer-

147. *Foreign Relations of the United States*, Washington, Government Print Office, 1904, at p. 282. It shall be noted that the United States through its treaty with Columbia of April 1914 agreed to pay to the latter the sum of $ 25,000,000 dollars, *League of Nations Treaties Series*, Vol. IX, p. 301.

148. *Treaty between Great Britain and the Irish Free State*, *in* ISRAEL, *op. cit. supra*, note 34, Vol. III, p. 2269.

149. *Ibid.*, Art. 5: "The amount of such sums being determined in default of agreement by the arbitration of one or more independent persons being citizens of the British Empire".

150. *Treaty of Lausanne*, October 18, 1912. Art. 10, *in*: ISRAEL, *op. cit. supra*, note 34, Vol. II, p. 1005.

151. *Treaty of Versailles*, June 28, 1919. Art. 254 *in*: ISRAEL, *op. cit. supra*, note 34, Vol. II.

red should assume responsibility for a portion of the unsecured bonded debt of the former Austrian Government[152].

One may thus conclude that the treaties of 1919 were in accord with the general practice of the nineteenth century in regard to the division of debts. But the extent to which this practice had become a principle of international law in 1920 is surely a matter for dispute[153]. If such a rule did not exist at that time, one may ask why certain treaties provided expressly that an apportionment would not be required[154]. A more recent illustration of this tendency is seen in the *Italian Peace Treaty* of 1947 which specifies that Trieste "(. . .) shall be except from the payment of the Italian public debt"[155]. This provision suggests that the Allied Powers established an exception to a general rule otherwise valid, in favour of Trieste. Nevertheless, it should be noted that the Free Territory of Trieste assumed the obligations of the Italian State towards holders who continued to reside in its territory.

Since World War II, the practice of apportionment can be retraced at least in two important instances. In the Indian case, India assumed entire responsability for all the liabilities of the old Government of undivided India, subject, however, to an equitable contribution by the Pakistan Government. Pakistan's share was made up of the value of physical and financial assets lying in Pakistan, or taken over by Pakistan. Pakistan's share of the central debt was fixed at 17 and half per cent[157]. The same principle was applied in the Indonesian case. The debt agreement reached between the Netherlands and Indonesia provided that Indonesia should assume responsability for a number of consolidated loans and debts to third countries[158]. More particularly, the new sovereign State assumed its share of the Netherlands National Consolidated Debt of 1896. As noted

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152. *Treaty of St. Germain*, September 10, 1919. Art. 203, *in*: ISRAEL, *op. cit. supra*, note 34, Vol. III. See also *Treaty of Neuilly*, Art. 141: "Any power to which Bulgarian territory is ceded in accordance with the present treaty undertakes to pay a contribution towards the charge for the Bulgarian Public Debt as it stood on October 11, 1915. . .", *Treaty of Trianon*, June 4, 1920, Art. 186; *Treaty of Sevres*, August 10, 1920, Art. 241.
153. *Supra*, note 132.
154. *Treaty of Riga*, March 18, 1921, *in*: ISRAEL, *op. cit. supra*, note 34, Vol. III, p. 2215.
155. ISRAEL, *op. cit. supra*, note 34, Vol. IV, p. 2503.
156. *Ibid.*
157. *Keesing's Contemporary Archives*, Vol. VI, Part. 2, at p. 9066. The total amount owing by Pakistan to India was to be paid in 60 annual equal instalments.
158. Round Table Conference Agreement between the Government of Kingdom of the Netherlands and the Government of the Republic of Indonesia, Draft Financial and Economic Agreement, Art. 25, *U.N.T.S.* Vol. 69, p. 200.

earlier, the Indonesian case is the only instance where a dependent colony agreed to assume a part of the central debt[159].

### 2.2.2. Legal foundations of the rule

It would appear from the foregoing cases that the old doctrine which says that there is no legal obligation on the part of the successor State to assume public and general financial obligations of its predecessor is not so absolute as it is generally propounded. Even though the rule of apportionment "(. . .) cannot be said with any certainty to be as yet part of international law"[160], the practice shows, that instances in which it was applied are too important to be overlooked or dismissed without further investigation. In reality, this practice shows that no unqualified affirmation concerning the assumption of general public debts can be made, and it does suggest that the difficult choice which ought to be made between two conflicting systems should be based on the relative and specific values of their respective underlying theory. In this respect, it is interesting to discuss briefly the various reasons which were presented in the past in order to justify the principle of distribution of the general debt. Three of these shall be analysed here.

#### 2.2.2.1. The benefit theory

First of all, it is possible to argue that the secessionist State must bear a share of the national debt on the following grounds: debts incurred by the predecessor State for general purposes benefited all the provinces directly or indirectly and *in globo*[161]. For example, when the federal government makes unconditional payments to provinces under the *Federal-Provincial Fiscal Arrangement Act*[162] it may be argued that part of these grants comes from the proceeds of various debt issues. More generally, it may be maintained that part of the current national debt was built up in order to cover expenditures relating to the seceding territory. *Prima facie*, this theory is appealing but its premise is not so obvious because it takes for granted an area that needs more evidence. Theoretically, it is possible that the secessionist State was at a disadvantage within the framework of its former association; under such circumstances, the benefit theory does

159. *Supra*, note 135.
160. O'CONNELL, *op. cit. supra*, note 7, p. 396.
161. H.J.F.X. BONFILS, *Manuel de droit international public*, 7th Ed., Paris, Rousseau, 1914, p. 144.
162. R.C.S. 1970, C. F-6.

not make sense[163]. Moreover, the same remarks which were made regarding the so-called locally connected debts can be applied here; the fact that such and such a loan benefited the territory is very vague and proves nothing. Finally, adoption of this theory would logically mean that distribution of the debt should be proportional to the amount of benefits procured effectively for the territory of the new State; in these circumstances, too, the benefit theory is not very useful because it makes room for endless disputes between the two parties.

#### 2.2.2.2. Heffter and Appleton's theory

A more unusual view concerning the legal basis of the obligation made on the successor State to assume a proportional part of the national debt was presented by Heffter and developed by Apleton[164]. For these publicists, the dismembered State suffers a partial extinction of its personality when it loses a part of its territory; as a part of its international personality is transferred to the new State, so the new State is required to take over a part of debts proportional to the part of international personality lost by the predecessor State. Apart from the fact that this theory never gained much acceptance among other publicists, the doctrine of Heffter and Appleton cannot be accepted. The mistake of these writers is that they confuse State territory with international personality. As was stated earlier, territorial changes do not affect a State's identity so long as these transformations are not total or very considerable.

In the face of evidence, the theories examined so far suggest that any attempt to base the rule of apportionment on sound legal principles is bound to fail. The inescapable conclusion would seem to be that the successor State can do as it pleases with the general debt. However, such a conclusion would be premature. First of all, there is a legal basis for the rule of apportionment and secondly, one cannot forget that the justice of a repartition has been asserted by most publicists.

#### 2.2.2.3. Sack's theory

Indeed, it is interesting to note that Sack's theory, which was worked out after World War I, did not receive all the attention which it deserves.

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163. An interesting study prepared by the Financial Department of the Government of Quebec suggests that this situation is closer to reality than one could imagine. Ministère des Finances, *La part du Québec dans les dépenses et les revenus du gouvernement fédéral en 1971-1972*, Unpublished Document, Quebec, 1973.

164. H. APPLETON, *Des effets des annexions de territoire sur les dettes de l'Etat démembré ou annexé et sur celles des provinces, départements annexés*, Paris, éditeur, 1895.

In his masterly book published in 1927[165], Sack tries to found on legal grounds the obligation of the successor State for taking over some part of the central debt. According to this learned publicist, all parts of the territory are permanently burdened with the contributions to the public debt:

> La base juridique du crédit public réside précisément dans ce fait que les dettes publiques grèvent le territoire de l'Etat débiteur.[166]

If confusion is to be avoided here, one must say that Sack does not suggest that public debts burden the territory like a loan on mortgage; nor does he suggest that creditors would have the right to ask full payment on some part of State territory in the event of default. On the contrary, Sack's argument is chiefly based on the idea that the financial resources of the whole country constitute the sole guarantee possessed by the State's creditors. It is my submission that this theory is entirely supported by facts. Before investing, investors will look, first of all, at the strength of an economy through various factors such as the Gross National Product, population, labor force, gross investment, compound annual rate of economic growth, political stability, and so on. Potential investors will reach a final decision once they are sure that there is no great risk for their investment. In the same manner, the State which wishes to borrow will look at its present and future resources in order to keep a fair relationship between its Gross National Product and the total amount of its consolidated debt. From a general viewpoint, this relationship is important because too heavy a debt restricts the State's freedom of action over the determination of its domestic policies as well as over the determination of its financial and commercial relations with other countries[167]. In fact, an elementary analysis of the borrowing process shows that public credit is firstly a question of confidence towards a particular economy, and that this confidence is based on the fact that all public resources of the land are allocated for the payment of the national debt. From this viewpoint, Sack's theory makes sense; indeed, to the extent that it is admitted that all financial resources of the State are allocated for servicing the national debt, it is not difficult to admit also that a State loses a portion of its resources when it loses a part of its territory. Although it is correct to say that the loss of territory does not necessarily cause injury to the interests of creditors, this conclusion does not mean that the predecessor State

165. SACK, *Les effets des transformations des Etats sur leurs dettes publiques et autres obligations financières*, Paris, Hachette 1927.
166. *Ibid.* p. 54.
167. Generally, see BUCHANAN, *The Public Finances : an Introductory Textbook*, 34d Ed., Georgetown, Ontario, Irwin-Dorsey, 1970.

cannot be injured by the same event. Therefore, to the extent that the old State suffers a diminution of its paying capacity, it seems fair enough to rule that the successor State is bound to assume the difference.

Sack's theory was critized vigorously by Feilchenfeld on the major ground that it did not give definitive rights to creditors and was not an expression of positive law[168]. From Feilchenfeld, this criticism is not surprising. First, Feilchenfeld maintains that if only a part of the territory is lost, this fact does not affect the legal identity of the predecessor State which remains responsible towards creditors. Second, Feilchenfeld bases his entire analysis from the starting point of creditor's interests; surely this approach is a sound one, but its major failure lies in the fact that it does not take into account economic relations between the predecessor State and the successor State. According to Feilchenfeld, so long as the debt relationship is unaffected by the change, there is no problem from the point of view of the person who has lent money to the predecessor State, because the contractual rights between it and the creditor still subsist. It is my submission that Sack's theory is not incompatible with Feilchenfeld's views; on the contrary, it is complementary: while the former analyses the relationship between creditors and the debtor State, the latter discusses the relationship between the debtor State and the new State.

### 2.2.3. The role of equity

While it is impossible to make a positive general statement on the basis of the material cited in the preceding section, it still might be argued, at least, that the predecessor State could demand the allocation of its general debt on the sole basis of equity. As it was correctly pointed out by O'Connell, "(. . .) the justice of a repartition has been universally admitted"[169] and a strong case can be made, indeed, in order to put the predecessor State in as good a position as it would have occupied had the successor State performed its implicit promise to stay within the old

168. *Op. cit. supra*, note 111 p. 737: "The assertion that burdens of an absolute and permanent character are permanent and therefore outlast territorial changes is merely a truism. Such an assertion is inconclusive without the proof that certain burdens actually possess an absolute and permanent character which protect them for all time against all third persons. It would have to be shown that burdens exist which gave definitive rights to creditor, that such rights are recognized in positive law and either that they have a permanent legal character which outlast territorial changes, or that interference with their permanence by the cessionary would constitute a violation of positive rules of law."

169. O'CONNELL, *op. cit. supra*, note 7 p. 395.

State. Basically, there is a close analogy to be drawn between a case of secession and cases which give rise to application of the injurious-reliance theory in common law[170]. Although it is not generally advisable to use municipal law for the determination of international issues, it does not necessarily follow that general principles of law "(. . .) recognized by civilized nations" cannot be used as a source of international law. In 1867, the Province of Quebec expressed its desire to be federally united into one Dominion under the Crown of the United Kingdom. Relying on that political fact, the new Dominion created a national debt, year after year, when federal expenditures were in excess of federal revenues collections. It is also clear, from the viewpoint of sound management of public debt, that the new Dominion took into account that all its resources could be assigned for the payment of its debt. Should the Province of Quebec now want to put an end to its political association, in all fairness, it should protect the expectation interests of the predecessor State by assuming a proportional part of the national debt. There is, indeed, "(. . .) a general moral feeling that not only promises ought to be kept but that anyone innocently inspired by relying on them is entitled to have his loss "made good" by the one who thus caused it"[171]. It is my belief that ideas of justice are as relevant in the sphere of international relations as they are in the sphere of private relations among individuals. Refusal to take over a part of the general debt would suggest that there might be an unjust impoverishment with an unjust gain and this idea appears strong enough to support claims based on that consideration.

### 2.3. The basis of repartition

The weight of authority clearly supports the general doctrine, founded upon obvious principles of justice, that in the case of a partial succession the successor State should assume a part of the debts of the predecessor State; yet, there is an important question to be settled: how should one apply this principle? On a theoretical level, traditional doctrine suggests that apportionment can be fixed in accordance with three different indexes, namely: the extent of territory, the number of popula-

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170. The essence of that theory can be put in this way: contractual liability arises where someone makes a promise explicitly in words or implicity by some acts, and someone else relies on it and suffers some loss thereby. Generally, see JACKSON, *Contract Law in Modern Society, Cases and Materials*, St. Paul, Minnesota, 1973; DOWSON and HARVEY, *Contracts and Contracts Remedies*, Brooklyn, 1959.

171. SHEPHERD, *Cases and Materials on Contract*, Chicago, 1939.

tion and the economic resources of the land[172]. In practice, these three factors have been applied occasionally but their application is not without serious difficulties.

### 2.3.1. Territory

First of all, it might be argued that the amount which ought to be assumed by the seceding territory should be in direct correlation with the extent of territory which was lost from the old State. However, such a claim cannot stand up under serious analysis. The size of a territory does not prove anything because it is a bad index of the wealth of its population; indeed, the seceding territory can be a large desert with a small population or a rich and over populated small area. For example, Quebec, the largest province in Canada, covers an area of approximately 600,000 square miles, or 16% of the whole country[173]. The population of the Province 6,208,000 or about 27% of the total population of Canada. Moreover, in 1975, the Province accounted for 24.4% of the Gross National Product of Canada. If the territory-basis must be chosen, such a policy might be considered as unfair by the remaining part of the old country because it could be viewed as too arbitrary and not representative of the financial capacity of its inhabitants.

### 2.3.2. Population

Population might be considered a better factor. After all, population is the chief source of the State's revenues. But this factor also has some disadvantages, for population can be poor here and rich there, crowded or sparse. An example will show some consequences which could be brought about by application of that index. State A, with a population of 100,000,000 inhabitants, loses territory B with a population of 25,000,000. If the population—factor is applied, the new State B will assume 25% of the general debt—but this solution is not necessarily just in all cases. In a first hypothesis, it might happen that territory B accounted for more than 25% of the Gross National Product of State A and then State B's contribution might be seen as too low. In a second hypothesis, it might happen that territory B accounted for less than 25% of the Gross National Product of State A and then State B's contribution might be seen as too heavy. For these reasons it is my submission that the basis of

172. *Inter alia*: A.N. SACK, *op. cit. supra*, note 165, p. 547; PAENSON, *op. cit. supra*, note 88, p. 22.

173. Canada covers an area of 3,851,787 square miles.

population is not a good index for the determination of a fair proportion, because it ignores, like the territory-basis, important economic realities[174].

### 2.3.3. Economic indexes

Indeed, it would seem that the best basis for repartition of the debt must depend on economic indexes. This idea is shared by the majority of publicists and does not have much opposition. However, once it is admitted that the factor which ought to be considered is an economic one, divergences of opinion arise as to the right economic index which must be chosen. In this respect, it does not seem that any special economic factor has been recognized in the practice of States.

For example, the great peace treaties of 1919-20 apply the revenues method; indeed, the *Treaty of Versailles* provides that:

> The powers to which German territory is ceded shall (. . .) undertake to pay a portion of the debt of the German Empire as it stood on August 1st, 1914, calculated on the basis of the ratio between the average for the three financial years 1911, 1912, 1913 of such revenues of the ceded territory and the average for the same years of such revenues of the whole German Empire as in the judgment of the Reparation Commission are best calculated to represent the relative ability of the respective territories to make payments.[175]

But the difference of terminology used in these treaties shows that the revenues index is not as easy as it would appear at first sight. The Treaty *of Versailles*, like the *Treaties of St. Germain and Trianon*, deals with such revenues as represent the relative ability of the respective territories to make payments; on the contrary, the *Treaties of Neuilly, Sèvres and Lausanne* speak of the "total revenues"[176]. This difference is important because it governs the practical operation of computing these revenues. Indeed, the question can be asked whether all revenues have to be considered or only certain kinds of revenues. If an "all revenues" system is to

174. It should be noted that Quebec's population (27%) corresponds with its contribution to the Gross National Product (24.4% in 1975).

175. *Treaty of Versailles*, Art. 254, *in*: ISRAEL, *op. cit. supra*, note 34, Vol. II, p. 1422. See also *Treaty of Neuilly*, Art. 141; *Treaty of St-Germain*, Art. 203(2). In providing for the distribution of the Ottoman public Debt, the Treaty of Lausanne established also that territories detached from Turkey after the Balkan Wars and World War I were to assume liability for both the annuity and capital of the debt in the same proportion as the average total revenue of each detached territory for the fiscal years 1910-1911 and 1911-1912 bore to average total revenue of the Ottoman Empire for those two years (Art. 49 and 51(1)).

176. *Treaty of Lausanne*, Art. 51: *Treaty of Sevres*, Art. 243.

be adopted, this index may involve glaring injustices; indeed, the total amount of these revenues depends on the former economic and political organization and it is not necessarily true that the new State will enjoy the same revenues in the future. Moreover, new expenditures shall be encountered by the new State, such as the establishment of an army, the setting up of new institutions, and so on. Therefore, an all revenues method can be very unfair because it ignores the actual financial capacity of the secessionnist population. Does this mean that a selective approach is to be preferred? Tax revenues can offer a better basis, possibly. In this case, the only index which would be considered would be the percentage of taxes paid to the central State by the seceding territory. Another possible index would be a method based on budgetary revenues collected by the predecessor State from the seceding area. However, these last two approaches have a close connection with the number of inhabitants: an over-populated territory would have to pay more than a less populated area, everything else being equal.

In reality, a review of the different principles on which the proportion of the debt ought to be taken over by the successor State appears to be a frustrating exercice. There is no scientific method for this purpose and each factor, when taken individually, is subject to criticism. I believe that professor O'Connell is basically right when he writes:

> The only principle that emerges from a consideration of all the possible tests is that the distributive key must be related to what Sack calls "the contributive force of each part of dismembered territory" and this contributive force can only be realized by a consideration of all the possible influential factors.[177]

This point is really the boundary beyond which jurists must give way to economists. Once it is admitted that the successor State should assume a part of the public debt and that its financial contribution should be related to some economic index, the work which has to be done later depends more on a slide-rule than on legal rules. Sack's merit consists in the fact that he was the first publicist who pointed out that a financial contribution should be based on economic keys. However, his attempt at defining how one should apply his notion of contributive force contains so many reservations, so many exceptions and so many qualifications that it is difficult to imagine how it could be applied in practice. By definition, an equitable solution must take into account the concrete facts of each particular case and no general rule, consequently, can be elaborated beforehand.

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177. O'CONNELL, *op. cit. supra*, note 7, p. 456.

That being so, one might consider that a combination of different indexes could produce better results than the application of only one of them. For example, the financial contribution could be fixed as follows:

| | |
|---|---|
| — Population | 26% |
| — Contribution to the G.N.P. | 24% |
| — Contribution from tax revenues | 18% |
| — Budgetary revenues collected from the successor State by the predecessor State | 22% |
| — Other combined indexes | 20% |
| Average : | 22% |

N.B. : these data are given by way of illustration only.

From this average, there is ground for subtracting loss of benefits as a result of secession, increase of expenditures required by the creation of a new sovereign State and advantages and privileges granted to the predecessor State. There would also be ground for adding to this total a fair proportion of the market value of federal buildings taken over by the new State, and generally, of elements of assets which have an economic value. Above all, the main consideration should be that the secessionnist State must not be put into a better or worse situation after secession, and that its relative paying capacity must be evaluated in the light of all possible important factors. As Feilchenfeld put it:

> No single test actually leads to justice but all relevant principles of justice must be considered if equity is to be achieved. Justice, distinguished from positive law, has in view not individual technical theories but fairness of total and final results.[178]

On the whole, the general principle which seems to follow from the above considerations is that the parties should tend to bring about a general settlement based on relative rather than absolute data. If we bear in mind that the successor State is not strictly bound to assume the slightest part of the general debt, it could then be very difficult for the predecessor State to require a settlement based on a precise investigation of profit and loss. Above all, it is essential that justice should be done and justice is not necessarily the outcome of a book-keeping operation.

**General conclusion**

In the event of Quebec's secession, the following rules can be established regarding the general problem of State succession to public property and debt. First, the new independent State will succeed to all federal

178. FEILCHENFELD, *op. cit. supra*, note 111, p. 869.

public property which is located within the Province of Quebec. This rule means that lands and buildings belonging to the Federal Government or to a federal Crown corporation will pass automatically to the successor State on Independence Day. This also means that the new State will succeed to moveable property and incorporeal rights which were vested in the federal Crown; indeed, it seems to be a rule of international law that the successor State is entitled to take over public funds and various assets which are closely linked to its territory and, furthermore, to collect taxes which have not been paid to the former State. As a matter of law, "public property" would mean also "rights and interests". Moreover, at the same time as it takes possession of this public property, there appears to be no legal obligation to pay a fair compensation to the predecessor State. As has been pointed out, the old distinction between private and public domain is inapplicable in this case and, therefore, the predecessor State could not claim some compensation on that doctrinal basis. In regard to public debt, the most conservative theory seems to be that the successor State does not have to assume a proportional share of the general and unsecured public debt of the predecessor State. The rationale underlying this point of view lies in the fact that the predecessor State remains in existence and is still responsible towards its creditors despite the loss of a part of its territory. However, this theory asserts that the new State has the general obligation to assume debts which had been contracted for its exclusive benefit: indeed, traditional doctrine assimilates these "localised" debts to pure local debts. From a general viewpoint, it must be admitted that the negative theory is widely supported by the practice of States; since 1960, no cases can be found where a dependent territory had to take over a part of the British or French general debt.

As far as it was possible to investigate the matter, the foregoing statements appear to be correct regarding present international law. However, it should not be forgetten that the results are rather peculiar: on the one hand, the new State could take over all rights, but on the other hand it would assume no obligation at all. There can be no doubt that such results correspond completely with positive doctrines on international law: first, by virtue of its territorial sovereignty, the secessionist State can appropriate for itself everything which belonged to the predecessor State; second, by virtue of its new international personality, the new State cannot be held responsible for the debts of another international person.

Although the theories stated above are perfectly clear and logical, they still have the major disadvatange of rationalizing *post facto* practices which took shape in the turmoils of wars of conquest. Once international law recognized the right of a State to conquer another State, it was easy to

conclude that the property of conquered States falls to the victor and that there is no obligation upon the conqueror to assume, the financial obligations of the conquered State. *Ex facto jus oritur*. One must say, at the same time, that these theories have served the interests of newly independent States very well since 1960. However, the period of decolonization is terminated and it is questionable whether the old doctrines can be relied upon to solve problems which arise in a different economic and political context. It is my belief that the *tabula rasa* principle should be relegated to the past and that the law of State succession should tend to bring "(. . .) the reconciliation of the independence of successor States with the expectations of other States". . .[179]. In this respect, it is interesting to note the great divergence of practice with regard to the succession both to public property and to public debts.

For example, the traditional distinction between public and private domain of States simply means that questions of compensation are not so crystal clear as they would appear to be at first sight. Although one agrees that the successor State has no obligation to offer compensation for the lands that it takes over, the case is still debatable concerning properties which have a real economic value. For instance, it is not sure that the federal State would easily give up Air Canada property which is located in Quebec. Moreover, the territorial link qualification is not always self-evident. How should the line be drawn in this matter? For example, are military vehicles closely linked with the territory? In reality, these questions merely suggest that proper solutions can be arrived at only within the framework of an agreement between the two parties concerning State property and financial matters.

As has been seen, leading theories admit that the new State is not required to take over a certain portion of the national debt. The starting point of these theories is the protection of creditors' rights. But these theories are basically unjust for the predecessor State. It is my submission that the successor State should assume a part of the central debt, calculated on the basis of its actual economic resources. It is true that it is very difficult to present sound principles on which the proportion of the debt should be taken over; but the difficulty of the task should not be viewed as a valid excuse for putting it aside. As the International Court of Justice said in the *North Sea Continental Shelf Cases*,

> there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitables procedures, and more

179. D.P. O'CONNELL, "Recent Problems of State Succession in Relation to New States", (1970) 11 *R.C.A.D.I.* 120.

> often than not it is the balancing-up of all such considerations that will produce this result rather than reliance on one to the exclusion of all other. The problem of the relative weight to be accorded to different considerations naturally varies with the circumstances of the case.[180]

In fact, there is no legal reason why a global settlement could not be reached concerning both public property and public debt, in the event of a secession in Canada.

180. *Op. cit. supra*, note 8, par. 96.