

**TREATY APPLICATION IN KOSOVO THROUGH RULES OF SUCCESSION AND AS
DOMESTIC LAW: THE EXAMPLE OF THE CISG**

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ABSTRACT

This dissertation discusses the legal status of the United Nations Convention on Contracts for the International Sale of Goods (“CISG”) in the Republic of Kosovo (“Kosovo”). It provides information on the application of the CISG in Kosovo from 1989, when Kosovo was still part of Yugoslavia, to date. Uncertainties characterizing the application of this international treaty in Kosovo are both substantial and unique. The resulting circumstances and challenges are reviewed in this dissertation, providing information regarding the current status of the CISG in Kosovo (Section 2), its use both as domestic law (Sections 1.2.2, 1.2.3, 2.2 and 2.3) and as an international treaty (Sections 1.2.1 and 2.1), the efforts to make the Convention applicable through the principle of succession of treaties (Sections 2.1.1, 2.1.2 and 2.1.3), and the alternative methods of application that have been adopted through Kosovo’s domestic law (Sections 2.2 and 2.3).

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PREFACE

The completion of this dissertation has been a very long journey. One of the joys of completion, apart from achieving a life-long dream, is to look over the journey of the past and remember all those who have inspired and supported me along these five long years. I am extremely grateful to my Mentor, Professor Harry Flechtner for his valuable guidance, scholarly input and consistent encouragement I received throughout the research work and writing this dissertation. He spent his valuable time with my drafts in order to best capture the vision of my thoughts. Professor Ronald Brand, for all the discussions, ideas, advice and comments on my drafts. Most importantly, I want to thank Professor Brand and Professor Flechtner for their patience and their unwavering belief in me, despite my extremely busy schedule in Kosovo, and for managing to keep my spirit and hopes high towards finishing this work. They are both a role model and I hope I can be half as helpful to my students as they have been to me since my first encounter with the University of Pittsburgh. My gratitude also goes to Professor Franco Ferrari and Professor Kenneth Lehn for their comments and their help in making this dissertation better in quality. In addition, I'd like to thank Drew Roberts, Flamur Abdullahu and Sahit Bajraktari for their valuable input and ideas.

No dissertation would ever reach completion without my family. In fact, it would have never started without their persistence and untiring support. My parents have taught me the importance of education at times of hardship when our existence as a people was at stake.

Having been denied my right to education by the 1989-1999 regime has made me better appreciate and understand the weight and magnitude of education. My parents were a great role model of strength, patience and love of country, and this work is also dedicated to them and my siblings.

Finally and most importantly, I want to acknowledge the role of my most patient reader and my most generous critic: my husband Prindon. Without his patience, love, friendship, humor, sacrifice and advice, this achievement would have literally been impossible. This work, is therefore, dedicated to him and to the biggest inspiration of my life, my twin daughters: Dua & Anda, who have made me believe that a mother of twins can do anything; for letting me experience the kind of love that no words or actions can express and for making it possible for me to enjoy the most important title in life: that of a Mother.

INTRODUCTION

The CISG was completed on 11 April 1980 and entered into force for the first eleven Contracting States on 1 January 1988. It is one of the most important texts of the UN Commission on International Trade Law (UNCITRAL), the purpose of which is to provide a modern, uniform and fair regime for contracts for the international sale of goods.¹ The phenomenon of the “domestication” of the CISG, which has already occurred in a number of countries,² primarily involves “borrowing” the text of the CISG for use in the domestic sales law of a country. Depending on the approach, this may result in the application of the provisions of the CISG not only for cross-border sales, but also for sales where both parties to the contract are located in the same country.

¹ United Nations Convention on Contracts for the International Sale of Goods (1988), United Nations, Treaty Series, vol. 1489, at 3. See the Explanatory Note by the UNCITRAL Secretariat on the United Nations Convention on Contracts for the International Sale of Goods, at 1, available at <http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf> (last accessed 09/01/2015).

² Apart from Kosovo, examples include Norway, Sweden, Finland and the Tokelau Islands. According to Peter Schlechtriem, arguing that

Some countries have enacted the CISG not only as their law for cross-border sales but also as their domestic sales law. The Scandinavian countries are the examples that are best known, although there are some differences in their respective implementations. While Sweden and Finland introduced the CISG alongside domestic sales laws based on the CISG, Norway enacted just one sales law – Kjøpsloven – for both international and internal sales. Norway is not the only example for a nation implementing the CISG both as an international convention and as its domestic sales law – and, lacking codified rules on the general law of obligations, thereby provisions on breach of contract and the obligee’s remedies in general. The Tokelau Islands ... in the South Pacific ... enacted the CISG in 2004 as a sales law, both for international and domestic sales, along with some supplementation to make it a basic set of rules for contracts in general.

Peter Schlechtriem, *Basic Structures and General Concepts of the CISG as Models for Harmonization of the Law of Obligations*, JURIDICAN INTERNATIONAL x/2005, at 30.

One example of this phenomenon is Kosovo. While the reasons behind Kosovo's adoption of the CISG as domestic sales law are not fully known (and some believe it was simply an experiment), a brief analysis of Kosovo's administration by the UN from 1999 to 2008, as well as of its political and legal system, can shed light on what might have been the reasons. The legal office of UNMIK which administered Kosovo for about nine years, confirms that it looked to UN documents as examples when laws and regulations for Kosovo were drafted and adopted.³ This may be the reason why, when Kosovo's law on sales was being drafted, the UN legal office in Kosovo simply decided to take the text of the CISG and "domesticate" it.⁴

Regulation No.2000/68 on Contracts for the Sale of Goods, which was adopted in Kosovo in 2000, is almost identical to the text of the CISG. Only a few provisions from the CISG text were removed or replaced when it was adopted as Kosovo's domestic sales regulation.⁵ Section 1 of this Regulation provides that "The present regulation is based on the United Nations Convention on the International Sale of Goods, and accordingly *shall be interpreted consistently with reported decisions on that Convention.*"⁶ What makes this requirement interesting is not only that uniformity with the international interpretation of the CISG was required in domestic sales, but that the level of observance of the uniformity mandated is higher than that required by the text of the CISG itself.⁷ While the CISG provides that those who interpret the Convention shall "have regards to ... uniformity,"⁸ Kosovo's domesticated

³ Interview with a lawyer from the United Nations Legal Office in Kosovo. This Office had the primary duty of drafting all UNMIK Regulations and reviewing laws and regulations adopted by the Provisional Institutions of Self Government for about nine years (1999-2008).

⁴ United Nations Mission in Kosovo (UNMIK) Regulation No.2000/68 on Contracts for the Sale of Goods, adopted by the Special Representative of the Secretary General (SRSG) on 29 Dec. 2000, *available at* <http://www.unmikonline.org/regulations/2000/reg68-00.htm> (last accessed 13/1/2014).

⁵ *Id.* at Section 7 of the Regulation.

⁶ *Id.* at Chapter I, Section 1. *Emphasis added.*

⁷ See Article 7(1) of the CISG which provides that "in the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application."

⁸ *Id.*

version of the CISG mandates interpretation “consistently with reported decisions on the Convention.”⁹ This issue will be further elaborated in Part II of this dissertation.

While Kosovo has now replaced the UNMIK Regulation (as well as its former Obligations law) with a new Law on Obligations,¹⁰ which includes a section on contracts law, it was not clear what the role and the status of the CISG (as an international treaty) would be. Given Kosovo’s *sui generis* developments related to its state-building process, including the history of its legal system, the fate of the application of the CISG (as a treaty) in Kosovo is not yet crystal clear.

In order to see the understanding of the CISG among judges, arbitrators and practitioners, a mix of qualitative and quantitative research methods were used while interviewing these categories and distributing the questionnaires. The questionnaires that were distributed to judges and practitioners (See Appendix 1) were at the same time discussed with them in person in order to get as much detail as possible of their experience with the CISG as well as to clarify any potential uncertainties they may have while responding to the questions. On the other hand, the Questionnaires distributed to Arbitrators (See Appendix 2) were delivered electronically and the answers were also received electronically.

⁹ *Supra* note 5.

¹⁰ Law No. 04/L-077 on Obligations was adopted by the Assembly of the Republic of Kosovo on 10 May 2012 and promulgated by the President on 30 May 2012. Pursuant to Article 1059 of that same Law, it entered into force six months after its publication in the Official Gazette. This new Law is not a domesticated version of the CISG.

A BRIEF OVERVIEW OF KOSOVO'S LEGAL SYSTEM

Kosovo belongs to the group of countries that have enacted a civil law system,¹¹ like most other European states. While Kosovo was a part of Yugoslavia, the legislation applicable to Kosovo was the legislation in force for the Yugoslav Federation. A major development with regard to the legislation and decentralization in the Socialist Federative Republic of Yugoslavia (“SFRY”) was the adoption of the Constitution of the SFRY on February 21, 1974. Among the reforms in that Constitution was the internal strengthening of the position of the constituent units of Yugoslavia, including Kosovo. Kosovo gained voting power equal to that of the republics, was given its own administration, assembly and judiciary, had its own Constitutional Court, and had its own President (which, according to a rotation procedure, would take his/her turn as the President of Yugoslavia).¹² Thus, Kosovo received membership in the Yugoslav Federal Presidency and the Yugoslav Parliament, in which it held a veto power.¹³

In 1989, Kosovo lost its autonomy when Yugoslavia’s President Slobodan Milošević revoked it, and returned Kosovo to its pre-1974 status. From this period until the Kosovo war in 1999, the rights that Kosovo had according to the 1974 Constitution were abolished.¹⁴ Serbia developed new laws that were discriminatory towards Kosovo Albanian citizens.¹⁵ The police,

¹¹ Hansjörg Strohmeyer, *Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor*, 95 AM. J. INT’L L. 46,54 (2001).

¹² Constitution of the Socialist Federal Republic of Yugoslavia, Feb. 21, 1974. See Part IV of the Constitution: Organization of the Federation, at arts. 282-345 and 398-403. Online version available at <http://dediserver.eu/hosting/ethnodoc/data/YU19740221-2.pdf> (last accessed 14/1/2014).

¹³ *Id.* at art. 5.

¹⁴ Richard Caplan, *International Diplomacy and the Crisis in Kosovo*, in INTERNATIONAL AFFAIRS 748 (Royal Institute of International Affairs 1944-, vol. 74, No. 4, Oct. 1998); DENISA KOSTOVICOVA, KOSOVO: THE POLITICS OF IDENTITY AND SPACE 2 (Routledge 2005). See also A Guide to the United States’ History of Recognition, Diplomatic, and Consular Relations, by Country, since 1776: Kosovo, para. 3, available at <http://history.state.gov/countries/kosovo> (last accessed 1/1/2014).

¹⁵ E.g., the “Law on Changes and Supplements on the Limitation of Real Estate Transactions and the Law on the Conditions, Ways and Procedures of Granting Farming Land to Citizens Who Wish to Work and Live in the Territory of the Autonomous Province of Kosovo and Metohija.”

courts, national defense and foreign affairs of Kosovo were placed back in Serbian hands. Kosovar Albanian workers were expelled from their jobs because they did not want to accept the loss of autonomy.¹⁶ Schools were closed for Albanians and university teaching in the Albanian language was forbidden.¹⁷ An apartheid-like system, with systematic oppression and discrimination against Albanians in Kosovo, was installed.¹⁸ Kosovo was not allowed to develop or contribute to new laws or to its legal system until 1999, when Kosovo was put under the administration of the United Nations.¹⁹

On June 10, 1999, the UN Security Council passed Resolution 1244, which placed Kosovo under transitional UN administration (United Nation Interim Administration Mission in Kosovo – UNMIK).²⁰ UNMIK issued a number of regulations to fill gaps in Kosovar laws. One of the first Regulations was the UNMIK Regulation “On the Laws Applicable to Kosovo,”²¹ which provided that the law applicable to Kosovo would be: 1) the regulations promulgated by the Special Representative of the Secretary-General (SRSG) and subsidiary instruments issued thereunder; and 2) the law in force in Kosovo on 22 March 1989.²² In case of a conflict, the regulations and subsidiary instruments issued by the UN-SRSG would take precedence.²³

By Regulation 2001/9 UNMIK promulgated the Constitutional Framework for Provisional Self-Government in Kosovo, by which it established the Assembly, the President, the

¹⁶ See authorities cited in *supra* note 14.

¹⁷ KOSTOVICOVA, *supra* note 14, at 1. See also *Kosovo: History of a Human Rights Crisis: Part One*, at para. 24, available at <http://www.wcl.american.edu/hrbrief/v6i2/kosovo.htm> (last accessed 1/1/2014).

¹⁸ KOSOVO’S FINAL STATUS: A KEY TO STABILITY AND PROSPERITY IN THE BALKANS, U.S. STATE DEPARTMENT, BUREAU OF PUBLIC AFFAIRS, at para. 2, available at <http://2001-2009.state.gov/r/pa/scp/2008/99611.htm> (last accessed 1/1/2014).

¹⁹ Kosovo was put under the administration of the United Nations through Resolution 1244 (1999) of the UN Security Council, S/RES/1244 (1999), 10 June 1999, available at [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1244\(1999\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1244(1999)), (last accessed 1/1/2014).

²⁰ *Id.*

²¹ UNMIK/REG/1999/24, Dec. 12, 1999.

²² *Id.* at art. 1(1)(a) and 1(1)(b).

²³ *Id.* at art. 1.

Government, the Courts, and other bodies and institutions.²⁴ According to the Constitutional Framework it was within the Assembly's mandate to adopt laws, which were to be signed by the President of Kosovo.²⁵ However, no law or regulation could enter into force without promulgation by the UN Special Representative of the Secretary General.²⁶ UNMIK, therefore, was the final legal authority in Kosovo from 1999 until 2008.

This situation lasted until February 17, 2008 when Kosovo declared its independence. Since then, the Assembly of Kosovo has had the right to adopt laws, which must then be both signed and promulgated by the President of Kosovo. Striving for European Union (EU) membership, and consistent with the Comprehensive Proposal for the Kosovo Status Settlement (Ahtisaari Plan),²⁷ Kosovo drafts and adopts laws that are in compliance with *acquis communautaire*²⁸ of the European Union. Nevertheless, the laws drafted and adopted in Kosovo are also affected by the American legal system. This is mainly because USAID, through its different projects, assists and advises Kosovo institutions in law drafting, thus working together with and providing expertise for Kosovo institutions in developing modern and functional legislation. As a result, many of Kosovo's laws are a mixture of European and U.S. practices.

²⁴ UNMIK/REG/2001/9, May 15, 2001.

²⁵ *Id.* at art. 9.1.26.

²⁶ *Id.* at art. 9.1.45.

²⁷ The Ahtisaari Plan, formally "The Comprehensive Proposal for the Kosovo Status Settlement (CSP)," is a status settlement proposal covering a wide range of issues related to the final status of Kosovo, developed by the UN Special Envoy Martti Ahtisaari in 2007. The Plan is available at http://www.unosek.org/docref/Comprehensive_proposal-english.pdf (last accessed 9/1/2014).

²⁸ *Acqui Communautaire* is the body of common rights and obligations which bind all the Member States together within the European Union. Applicant countries have to accept the Community *Acquis* before they can join the Union. For more on what *Acqui* comprises of, see http://europa.eu/legislation_summaries/glossary/community_acquis_en.htm (last accessed 9/1/2014).

A BRIEF OVERVIEW OF KOSOVO'S CONTRACT LAW

The first written law that covered contracts in general and sales contracts in particular in the SFRY was the Law on Obligations adopted in 1978.²⁹ Besides regulating different types of contracts, the Law on Obligations also covered torts, unjust enrichment, etc. The part of the law covering contracts regulated all basic legal elements of a contract, such as offer and acceptance, time of the conclusion of the contract, form requirement of the contract, the ability of natural or legal entities to enter into contractual relations, etc.³⁰

Chapter VII of the Law on Obligations covered sales contracts. Detailed provisions provide for the quality, features and capabilities of the goods required by the contract, passage of risk, price determination, buyer's and seller's obligations under the contract, damages, late delivery, late payment, etc.³¹ Overall, the Law on Obligations effectively regulated contracts in general, and sales contracts in particular.

The Law on Obligations was the sole law regulating contracts in Kosovo until 2000, when the United Nations Mission in Kosovo (UNMIK) issued Regulation 2000/68 to regulate sales contracts.³² This text of this regulation was almost entirely based on the CISG, but like many other UNMIK regulations, it only covered a part of the issues related to sales of goods. The Law on Obligations of 1978 was, therefore, still applicable for the issues that were not regulated by this UNMIK Regulation. This situation lasted until 2012, when the new Law on Obligations was passed by the Assembly of Kosovo and promulgated by the President of

²⁹ Law on Obligations of the Socialist Federal Republic of Yugoslavia, Mar. 30, 1978, *available in English at* http://www.eulex-kosovo.eu/training/justice/docs/The_Law_of_Contract_and_Torts.pdf (also referred to as Law on Contracts and Torts). Published in the Official Gazette of the SFR of Yugoslavia (Sluzbeni list SFRJ) No. 29/1978; Amendments in No.39/1985, 45/1989, and 57/1989 final amendments in the Official Gazette of the FR of Yugoslavia (Sluzbeni List SRJ) No. 31/1993.

³⁰ *Id.*

³¹ *Id.* at Chapter VII.

³² UNMIK/REG/2000/68, *supra* note 4.

Kosovo. This law repealed both the former Law on Obligations of 1978 and UNMIK Regulation 2000/68.

CHAPTER 1: APPLICABILITY OF THE CISG IN KOSOVO FROM 1988 TO 2008

This Chapter provides an overview of two important periods in the history of Kosovo and the history of application of the CISG in the country. The first period covers the ten years beginning in 1988, when the CISG entered into force³³ in Yugoslavia,³⁴ during which period Kosovo was a part of Yugoslavia, until 1999, when the war in Kosovo was finished and the country's administration by the United Nations started. The second period covers 1999-2008, during which Kosovo was administered by the United Nations Mission in Kosovo (UNMIK), and Kosovo's laws were heavily influenced by the practice of the United Nations. Unfortunately, little information exists with respect to cases of application of the CISG during these two decades.

³³ For more information of the status of the CISG and the Contracting States, see http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (last accessed 28/11/2014).

³⁴ Yugoslavia was one of the original signatory parties to the CISG. It had signed and ratified the Convention on 11 April 1980 and 27 March 1985, respectively. The Convention entered into force in this country once the necessary number of signatures were deposited, i.e. on 1 January 1988. The Law on Ratification of the Convention was published in the Official Gazette of the SFRY, MU 10/84. Article 99 of the CISG provides that: "This Convention enters into force, subject to the provisions of paragraph (6) of this article, on the first day of the month following the expiration of twelve months after the date of deposit of the tenth instrument of ratification, acceptance, approval or accession, including an instrument which contains a declaration made under article 92." This precondition was met in December 1986, thus, the CISG entered into force on 1 January 1988. For more information of the status of the CISG, see *supra* note 33.

1.1 APPLICABILITY OF THE CISG WHILE KOSOVO WAS A PART OF YUGOSLAVIA

From 1989, when Kosovo's autonomy was revoked, to 1999, when the war was finished, Kosovo Albanian judges were not allowed to be part of the judicial system.³⁵ In these circumstances, only Serbian judges were involved in the work of the court system, including the Commercial Court and Municipal Courts which would have normally dealt with contracts cases. When the war occurred during 1998-1999, Serbian troops and staff of the courts took the entire archives of courts located in Kosovo with them and left for Serbia. Thus, almost no court records were found after the war was over in June 1999 and Albanian and other judges returned to work in Kosovo. For that reason, it is currently not possible to find any evidence of cases that were decided during that period, including contracts cases that might have applied the CISG.³⁶

In a questionnaire that was distributed to a number of Kosovo judges and practitioners and during meetings with them, one of the questions was whether they considered the CISG applicable as an international treaty in Kosovo (since Yugoslavia was a signatory party) from 1989-1999. If the answer to the first question was yes, a follow-up questions asked whether there are cases from that period that are available and accessible.³⁷ Out of twenty-five judges and practitioners who responded to the questionnaire, twenty answered that they were not aware if the CISG was applicable in 1989-99, since they were not part of the system from 1989-1999 as they had been illegally removed from their jobs.³⁸ Those same Respondents also said that

³⁵ Because of discriminatory laws adopted during the Milosevic' regime, judges (and all other professionals) were expelled from their workplace simply for being Albanian. *See supra* notes 12-18.

³⁶ The list of translated Arbitration awards and court cases that were decided by Serbian courts only include decisions that were made from 1999 and onwards. For more information, see <http://www.cisg.law.pace.edu/cisg/text/casecit.html#serbia>.

³⁷ Questionnaire and interviews with judges and practitioners in Kosovo, done between September-December 2013. The author met with those interviewed and during those interviews posed the questions in the questionnaires. See also the consolidated results of the questionnaires and interviews reproduced in Appendix 1 of this Dissertation.

³⁸ *Id.*

accessing cases from that period is not possible, as court records could not be found after they returned to the courts in 1999.³⁹ Five Respondents said that, from an international law point of view, the CISG should have applied since Kosovo used to be part of Yugoslavia, but that they were not aware of any cases applying the treaty since Kosovo Albanian judges were not allowed to work in the courts during those periods.⁴⁰

Kosovo and Serbia are undergoing a technical dialog which, among other things, aims at returning to Kosovo documents and archives taken away from Serbian troops.⁴¹ However, the agreements reached between the parties have not been fully implemented.

1.2 APPLICABILITY OF THE CISG WHILE KOSOVO WAS ADMINISTERED BY THE UNITED NATIONS (1999-2008)

United Nations Resolution 1244 of 1999 on the administration of Kosovo by the United Nations provided that Kosovo would be administered by the UN, but at the same time called for respect of Federal Republic of Yugoslavia's territorial integrity during this interim period, until the final status of Kosovo was resolved.⁴² The question is on whether this also meant that until Kosovo would resolve its final status, international treaties that were adopted by Yugoslavia, would continue to apply in the territory of Kosovo. One may argue that the preservation of a country's

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Press Conference by the Deputy Prime Minister of Kosovo, Chief Negotiator in the Technical Dialog with Serbia, available at <http://www.kryeministri-ks.net/?page=1,9,3021> (last accessed 1/1/2014).

⁴² See Kosovo's Written Contribution to the International Court of Justice on the case of *Compliance with International Law of Kosovo's Declaration of Independence*, arguing that: "*Resolution 1244 (1999) provided for an interim period, during which the United Nations would establish an international civil presence in Kosovo headed by a Special Representative of the Secretary General (SRGS). The purpose of that presence was to provide for an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia with gradual transfer of powers and responsibilities to Kosovo institutions of self-government. Following the period of interim administration, governance would be assumed by the institutions under the final status settlement, for which independence was one clear option.*" Para. 4.02. Official document available at <http://www.icj-cij.org/docket/files/141/15678.pdf> (last accessed 1/1/2014).

territorial integrity (as foreseen in Resolution 1244) also means that all treaties ratified by that country continue to apply. However, as it is further discussed below, most interviewed judges and practitioners stated that this was unclear to them given that Kosovo was administered by the United Nations during that period. The practice shows, thus, that the courts of Kosovo simply decided to ignore not just the CISG, but most international treaties ratified by Yugoslavia, while dealing with cases in practice.⁴³

While cases of application of the CISG as an international treaty during the period of UN administration are unknown, there were some instances when the text of the CISG was applied to domestic sales, since it had become a part of Kosovo's own sales law through Regulation 2000/68. The number of these cases, however, is very few, and the judges have only agreed to give this author information about the existence of cases, not their content, and they have refused to share their decisions.⁴⁴

After Kosovo independence in 2008, the fate of the CISG as an international treaty became unclear from a practical point of view. The next Chapter (Chapter II) will further analyze whether the CISG is applicable in Kosovo as an international treaty by way of succession.

1.2.1 Application of the CISG as an international treaty during the UNMIK administration

When asked whether the CISG was applicable as an international treaty in Kosovo from 1999-2008, during the UNMIK administration, out of twenty five respondents, thirteen said that because of the legal vacuum in Kosovo during that time, they were not sure which international

⁴³ See information from the questionnaire and interviews with judges and practitioners on this issue in the next section, summarized in Question no. 3 in Appendix 1 of this Dissertation, *supra* note 37.

⁴⁴ The author has met with and interviewed a number of judges that were involved in contracts cases. They agreed that UNMIK Regulation 2000/68 was rarely applied, because they continued to apply the old Law on Obligations of 1978. Moreover, none of the court cases from that period that involve contract law are either published or available to the public. *See also* Appendix 1 of this Dissertation, *supra* note 37.

treaties they were supposed to apply.⁴⁵ Four Respondents said that, since UNMIK had competence both for Kosovo's legal system and for its international affairs, the treaty would have applied if UNMIK had signed it on behalf of Kosovo (but it did not apply since it had not done so), and another four responded that since Kosovo was under international administration during that time, it was not obliged to apply treaties that had been signed by Yugoslavia.⁴⁶ The remaining four did not respond to the question. On the other hand, out of these twenty-five Respondents, twenty-one responded that they were not involved in cases during the UNMIK administration where the CISG was applied as an international treaty, whereas four responded that they were not aware if such cases existed.⁴⁷ Thus not a single judge or lawyer who responded indicated any knowledge of the CISG being applied in Kosovo as a treaty during the period of UN administration.

The interviews showed that there was, clearly, confusion among Kosovo judges and practitioners on whether the CISG was applicable in Kosovo during this period. Ultimately, this confusion led to the non-application of the CISG in practice.

1.2.2 Application of the CISG as domestic law during the UNMIK administration

Twenty-five judges and practitioners were also asked whether they applied UNMIK Regulation 2000/68 in cases related to domestic sales law during the period of UNMIK administration, and if yes, whether they would be able to share those cases.⁴⁸ Seven responded that they did apply the Regulation (but never answered on whether they would share the cases); ten responded that

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

they do not remember, and eight responded that they did apply the Regulation but that they would not be able to share or publish the cases.⁴⁹

Case publication remains a challenge in Kosovo. Commercial cases, including those involving contracts, are within the jurisdiction of the Basic Courts in Kosovo.⁵⁰ While the Law on Courts does not contemplate the publication of the decisions of these courts, there is an obligation to publish decisions of the court of second instance, the Court of Appeals. The Law on Courts provides that “Decisions of the Court of Appeals are public documents. The Kosovo Judicial Council shall ensure the publication of decisions of the Court of Appeals. Such decisions, at a minimum, shall be published on the website of the Kosovo Judicial Council, but otherwise subject to regulations of the Kosovo Judicial Council.”⁵¹ Nevertheless, the Kosovo Judicial Council has yet to publish court decisions. Its website has published only one case from 2013 so far.⁵² The same goes for the Kosovo Supreme Court, the highest ranking judicial authority in Kosovo. The Law on Courts provides for the same rule on publication of Supreme Court decisions as it does for the Appeals Court, i.e. it considers the decisions of this court as public documents and it mandates the Kosovo Judicial Council to publish them, at least in their website.⁵³ As indicated above, only one decision of the Special Chamber of the Supreme Court on privatization issues has been made public so far.⁵⁴

Another issue on which respondents to the author’s Questionnaire were interviewed was whether UNMIK Regulation 2000/68 was bypassed in favor of the application of the 1978 Law

⁴⁹ *Id.*

⁵⁰ Basic Courts are the courts of first instance in the Republic of Kosovo, pursuant to the Articles 2 and 11 of the Law on Courts, Law No. 03/L-199, which entered into force on 1 January 2013. The Basic Courts include a Department of Commercial Matters, which has its seat in the capital, Prishtina (Article 12 of the Law).

⁵¹ Article 19(2) of the Law on Courts.

⁵² Official Website of the Kosovo Judicial Council, *available at* <http://kgjk-ks.org/?cid=1,1> (last checked 28 Nov. 2014).

⁵³ See Article 24 of the Law on Courts.

⁵⁴ *Supra* note 52.

on Obligations, the predecessor sales law in Kosovo applicable during the time that Kosovo was part of the SFRY, with respect to domestic sales.⁵⁵ Out of twenty-five judges and practitioners, twelve responded that they applied the sales part of the 1978 Law on Obligations even after the UNMIK Regulation was adopted. Another five responded that it was not clear whether the UNMIK Regulation repealed the 1978 Law on Obligations.⁵⁶ The final five Respondents said that they only applied the 1978 Law for issues that were not dealt within the UNMIK Regulation, whereas another 3 did not respond to the question.⁵⁷

Judges and a number of practitioners were also asked how they understood the requirement under UNMIK Regulation 2000/68 to apply this law in compliance with the reported decisions on the CISG, and whether they ever met this requirement.⁵⁸ Out of twenty-five judges and practitioners interviewed: seven responded that they were not aware that such a requirement existed; five responded that they did not clearly understand the requirement; ten responded that it was impossible to meet this requirement as they did not have access to reported decisions on the CISG (some emphasizing lack of knowledge of foreign languages, some mentioning lack of computer or internet resources, or lack of training for accessing those decisions).⁵⁹ The final two did not respond to the question.⁶⁰ A group of ten arbitrators was also asked whether they encountered any case where UNMIK Regulation 2000/68 applied and all of them responded negatively.⁶¹

The interviews again showed that, despite UNMIK's adoption of Regulation 2008/68, which was modeled on the CISG, courts continued to apply the 1978 law on Obligations, either

⁵⁵ See Appendix 1 of this Dissertation, *supra* note 37.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ See Appendix 2 to this Dissertation which includes Consolidated Results of Questionnaires filled in by Arbitrators in Kosovo, done during August-October 2014.

concurrently with the UNMIK Regulation or instead of this Regulation. While many judges attributed this to the uncertainties that existed in Kosovo's legal system, to some extent it is also a result of their decision to simply continue applying what they knew best, which was the old law, rather than challenge themselves with new legal frameworks that were adopted by UNMIK. The fact that most judges did not understand (or were not aware of) the uniformity requirement contained in the UNMIK Regulation shows that many of them did not bother to analyze this law properly, let alone apply it accurately.

1.2.3 Differences between UNMIK Regulation 2000/68 and the CISG

Pursuant to the authority given him under United Nations Security Council resolution 1244 (1999) of 10 June 1999, the Special Representative of the UN Secretary General (SRSG) adopted UNMIK Regulation 2000/68 on Contracts for the Sale of Goods.⁶² In 2000, none of the competences for adopting laws or regulations were vested in the local authorities. All these functions were included in the authority given to the SRGS, who exercised these powers by adopting Regulations, which, in terms of legal hierarchies, were equal to laws.⁶³

UNMIK Regulation 2000/68, as stipulated in its Preamble, was adopted for the purpose of reconstructing and enhancing the economy of Kosovo and creating a viable market-based economy by providing for the regulation of contracts for the sale of goods. This suggests that the drafters of this Regulation (or at any rate, those who decided to use the text of the CISG) understood the importance of having this text apply in Kosovo, rather than simply choosing it because it was easier to copy-paste than to draft something from the very beginning.

⁶² See Article 11 of the UNSC Resolution 1244 (1999), *supra* note 19, on the authority of the international civilian presence in Kosovo.

⁶³ *Id.*

Section 1 of the Regulation,⁶⁴ perhaps the most important one, explains that it is based on the United Nations Convention on Contracts for the International Sale of Goods. More importantly, it requires that the text of the Regulation “shall be interpreted consistently with reported decisions on that Convention.” As is evident from the text, this requirement is mandatory, and not a simple consideration that courts must keep in mind while interpreting the Regulation. It entails an obligation for those who interpret the Regulation to look at CISG decisions on a matter before making a final decision, and to ensure that their decision is based in an interpretation consistent with the reported decisions on the CISG. As was stated earlier,⁶⁵ the results of a Questionnaire given to judges and practitioners show that most of them were unaware of such a requirement; for some it was unclear what they were supposed to do based on that requirement, and some stated that it was difficult to implement this provision.⁶⁶

Apart from the changes in the preamble, this requirement in Section 1 is another change, which the authors of the Regulation decided to make to the approved text of the CISG. The reasons behind this change are unknown. However, it may be that the authors of the Regulation felt that it was necessary to include this requirement since they had deleted CISG Article 7 from the text of the Regulation. CISG Article 7 provides that “regard is to be had to its international character and to the need to promote uniformity in its application” whenever a judge or other authority interprets the provisions of the CISG. This has been interpreted to encourage courts and tribunals to look at previous CISG decisions, including those from foreign jurisdictions, before making a final decision. Nevertheless, the “requirement” of CISG Article 7 is much milder

⁶⁴ Section 1 explains that, for ease of reference, the organization and numbering system of the regulation follows that of the Convention, with the exception that “sections” in the Convention are “subchapters” in the regulation, and “articles” in the Convention are “sections” in the present regulation. Where the corresponding provisions in the Convention are not applicable and have been deleted, this is indicated by an asterisk under the relevant sections. See Annex 1 of this Dissertation for the entire text of the Regulation.

⁶⁵ See Section 1.2.2 in Chapter One of this Dissertation, on the Applicability of the CISG as domestic law.

⁶⁶ See Appendix 2 of this Dissertation, *supra* note 61.

compared to the one in Section 1 of UNMIK Regulation 2000/68. If, on the other hand, the provision in Section 1 of the Regulation would have been respected, this would have led to quite a high level of uniformity between international practice and the practice in Kosovo in the interpretation of CISG provisions (which, in the case of Kosovo, became domestic law provisions). As explained below, compliance with Section 1 of the UNMIK Regulation would have been hard to achieve for provisions of the CISG which were deleted in the Regulation. Apart from Article 1, provisions that have either been changed or deleted include Articles 2, 7, 12, 13, 28 as well as the Final Provisions of the Convention.

Section 2 of the Regulation (Article 2 of the CISG) was changed in order to include a definition for “goods” as well as to delete paragraph 1 of CISG article 2 which refers to the sale of “goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use.” While the CISG excluded this category of sales and made the Convention inapplicable to them, the Regulation applies to that category. On the other hand, the definition of goods added in the Regulation reads as follows:

“Goods” means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities and things in action. “Goods” also includes the unborn young of animals and growing crops and other identified things attached to but severable from realty.⁶⁷

The text quoted above is a copy-paste of the definition of goods provided in Section 2-105 of the Uniform Commercial Code of the United States (UCC). It is unclear why the authors of the Regulation chose a definition of goods from the UCC while basing the Regulation on the text of the CISG. A possible motivation is that the CISG does not offer a clear definition of “goods” but

⁶⁷ Section 2(1) of UNMIK Regulation 2000/68, *supra* note 4.

rather lists categories of transaction that are not covered by the Convention.⁶⁸ Given the requirement in this Regulation to look at decisions of other jurisdictions on the CISG, it would be interesting to see how courts would interpret this section on the definition of goods and whether they would look at decisions from U.S. courts on this issue. Clearly, they would have no obligation to look at decisions that do not relate with the text of the CISG but rather the text of the U.S. domestic law. However, they could have certainly found it helpful to see how U.S. courts have dealt with interpreting the definition of goods found in UCC Article 2.

Article 7 of the CISG was deleted in the text of the Regulation. In addition to promoting uniformity in interpreting the CISG (a requirement that has been included in Section 1 of the Regulation), this article addresses the international character of the Convention and the need to observe good faith while interpreting it.⁶⁹ Paragraph 2 of CISG Article 7 addresses the principles according to which questions that are not governed by the Convention would be settled.⁷⁰ The deletion of the two paragraphs of CISG Article 7 might have occurred because of references to the international character of the Convention and to international private law, since the Regulation is a piece of legislation representing domestic law. The same reasons might have led to the deletion of Article 12 (Section 12 in the Regulation), which refers to the right of Contracting States that have made an article 96 reservation.⁷¹ Regulation's Section 13, on the other hand, has been modified to include "facsimile, e-mail, and any similar form of electronic

⁶⁸ CISG Article 2, *supra* note 1.

⁶⁹ "In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade." CISG Article 7(1), *supra* note 1.

⁷⁰ "Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law." CISG Article 7(2), *supra* note 1.

⁷¹ "Any provision of article 11, article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention. The parties may not derogate from or vary the effect of this article." CISG Article 12, *supra* note 1.

communication” in the definition of “writing,” in addition to telegrams and telexes that are mentioned in CISG Article 13.⁷²

Another provision deleted in the Regulation is CISG Article 28, which provides “[i]f, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgment for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.” Again, since this article has to do with the international character of the Convention, it has been deleted from the Regulation. Finally, Part IV of the Convention (Final Provisions) has been deleted entirely, as it deals with rules related to the signing, ratification, entering into force of the Convention and other issues related to reservations and declarations. Since the Regulation is domestic law and not an international treaty, such provisions were not necessary. However, two new provisions were added to the Regulation under Final Provisions: one explains the language used in the Convention, and the other provides that 29 December 2000 was the date the Regulation entered into force.

⁷² “For the purposes of this Convention ‘writing’ includes telegram and telex.” CISG Article 13, *supra* note 1.

CHAPTER 2: APPLICABILITY OF THE CISG AFTER THE DECLARATION OF INDEPENDENCE OF KOSOVO

Kosovo declared its independence on 17 February 2008.⁷³ Its history, as well as the political, legal and constitutional development surrounding its declaration, make Kosovo, as most countries agreed, a *sui generis* case.⁷⁴ On 22 July 2010, the International Court of Justice (ICJ), in an advisory opinion on the legality of Kosovo's Declaration of Independence, decided that the Declaration was not in violation of general international law, or of any UN Security Council resolutions, including Resolution 1244(see pg.10 and 14 for details regarding this resolution).⁷⁵ Hence, this act of the representatives of the people of Kosovo, which reflected the will of the people, was considered to be not in violation of any applicable rule of international law.

This Chapter aims at providing information on the application of the CISG in Kosovo after the Declaration of Independence of 2008. While it would be expected that this historical act also removes confusion with respect to the application of international treaties in Kosovo, this

⁷³ Declaration of Independence of the Republic of Kosovo. Official Albanian version *available at* http://assembly-kosova.org/common/docs/Dek_Pav_sh.pdf.

⁷⁴ *See, e.g.*, Written Statement of the United Kingdom, at 9, *available at* <http://www.icj-cij.org/docket/files/141/15638.pdf>, and Written Statement of Estonia at 11, *available at* <http://www.icj-cij.org/docket/files/141/15648.pdf>, on the ICJ Advisory Opinion on Kosovo's Declaration of Independence (last accessed 1/1/2014).

⁷⁵ In its landmark Advisory Opinion of 22 July 2011, the ICJ held that "*the adoption of the declaration of independence of 17 February 2008 did not violate general international law, Security Council resolution 1244 (1999) or the Constitutional Framework. Consequently the adoption of that declaration did not violate any applicable rule of international law.*" (Para.22 of the Opinion). See the Kosovo Advisory Opinion available at the official webpage of the International Court of Justice, <http://www.icj-cij.org/docket/files/141/15987.pdf> (last accessed 9/1/2014).

did not occur in practice, at least not entirely. Since Kosovo has not yet become a member of the United Nations, issues related to treaty succession (for UN sponsored treaties) are far from clear. As a result, the status of the CISG as an international treaty in Kosovo remains unclear to some, including judges and practitioners.

2.1 POST-INDEPENDENCE APPLICABILITY OF THE CISG AS AN INTERNATIONAL TREATY

Kosovo's Declaration of Independence commits to living in peace and at peace with its neighbors and to respecting and applying the UN Charter and other UN principles recognized by democratic nations.⁷⁶ The Declaration of Independence also expresses Kosovo's commitment to the principle of continuity of application of treaties that were signed on its behalf by UNMIK, as well as treaties that were signed by the Socialist Federal Republic of Yugoslavia (SFRY).⁷⁷ Article 9 of the Declaration of Independence states the following: "*[w]e hereby undertake the international obligations of Kosovo, including those concluded on our behalf by the United Nations Interim Administration Mission in Kosovo (UNMIK) and treaty and other obligations of the former Socialist Federal Republic of Yugoslavia to which we are bound as a former constituent part.*" This commitment is known in international law as the "continuity principle" of international treaties. The principle assumes that treaties that were applicable to the Predecessor State automatically continue to apply to the Successor State. Moreover, Article 145 of the Constitution of the Republic of Kosovo follows the same principle by endorsing the principle of continuity of application for all international treaties that were applicable in Yugoslavia while

⁷⁶ See *supra* note 73, at arts. 8-12.

⁷⁷ One of the treaties which was signed by the Socialist Federal Republic of Yugoslavia was the CISG. SFRY signed the CISG on 11 April 1980 and ratified it on 27 December 1984. The Law on Ratification of the Convention was published in the Official Gazette of the SFRY, MU 10/84. See *supra* note 33.

Kosovo was a constituent part of that state or were signed by UNMIK on behalf of Kosovo.⁷⁸ In the case of the CISG, however, the issue is not that clear-cut, as will be discussed in the following section.

Despite this lack of clarity as to whether Kosovo can be considered a state party to the CISG, parties nevertheless may choose the CISG as the applicable law in an international sale of goods. Although there have been only a few such cases, two out of ten arbitrators who were sent questionnaires on the applicability of the CISG responded that they had encountered cases when the CISG applied to a contract for the international sale of goods.⁷⁹ One arbitrator responded that these were mostly cases when one of the parties was local (from Kosovo) and the other one was from another country and the application of the CISG, combined with arbitration as dispute resolution had been chosen by the foreign investor as a means for legal protection.⁸⁰ He further explained that there have been cases when the parties opted out of the application of the CISG with clear language.⁸¹ According to this arbitrator, whenever the application of the CISG was included in the contract, there would also be an arbitration clause, because this is how the foreign party to the contract was ensured that there would be no jurisdiction for Kosovo courts and that no Kosovo laws would apply. In cases where the application of the CISG was excluded, on the other hand, the domestic law of a developed country was chosen, (such as the United Kingdom, Germany, the United States, etc.).⁸² Another arbitrator explained that the only case where he encountered the CISG as the applicable law was where one party was from Kosovo and the other

⁷⁸ Article 145 of the Constitution of the Republic of Kosovo, which entered into force on 15 June 2008. Available in the online version of the Official Gazette of the Republic of Kosovo at <http://gazetazyrtare.rks-gov.net/KK.aspx> (last accessed 9/1/2014).

⁷⁹ See Appendix 2 to this Dissertation, *supra* note 61.

⁸⁰ *Id.* See Responses of Arbitrator No.5.

⁸¹ *Id.*

⁸² *Id.*

from a state party to the CISG.⁸³ Most arbitrators that responded to the questionnaire said that it is unclear as to whether Kosovo can be considered a contracting state to the CISG.⁸⁴

2.1.1 Does the CISG apply in Kosovo as a matter of succession?

The 1978 Vienna Convention on Succession of States with Respect to Treaties defines “succession of States” as “the replacement of one State by another in the responsibility for the international relations of territory.”⁸⁵ As a Successor State, Kosovo inherited many obligations from the Predecessor State, including treaty obligations. Among the treaties which it inherited was the CISG, which applied to the former SFRY.⁸⁶ However, compared to the succession process of many other countries, which has mostly been smooth,⁸⁷ Kosovo’s succession process involves some complications, as will be discussed below.

2.1.1.1 The notion of succession Succession is the process of one state replacing a Predecessor State (whether that state continues in another capacity or disappears altogether) in sovereignty over a specific piece of territory.⁸⁸ A Successor State, according to the Vienna Convention on the Succession of Treaties, means “the State which has replaced another State on the occurrence of a succession of States.”⁸⁹ Article 6 of the same Convention further clarifies that the Succession of States Convention applies only to the effects of a succession of States

⁸³ *Id.* See Answers from Arbitrator No.9.

⁸⁴ Appendix 2, *supra* note 61.

⁸⁵ Article 2(1)(b) of the Vienna Convention on Succession of States with respect to Treaties. Done at Vienna on 23 August 1978. Entered into force on 6 November 1996. United Nations, *Treaty Series*, vol. 1946, at 3.

⁸⁶ UNCITRAL Status of the CISG, UNCITRAL Reports: “The former Yugoslavia had signed and ratified the Convention on 11 April 1980 and 27 March 1985, respectively. Reference C.N.254.2001.TREATIES-1 (Depositary Notification), available at <http://www.cisg.law.pace.edu/cisg/countries/cntries-Yugoslav.html> (last accessed 1/1/2014).

⁸⁷ Other Successor States of Former Yugoslavia have not, for the most part, encountered the same problems as Kosovo, and they are now listed by UNCITRAL as Successor States to the CISG. For more information, see UNCITRAL Country reports at <http://www.cisg.law.pace.edu/cisg/countries/cntries-Yugoslav.html> (last accessed 1/1/2014).

occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations. In the case of Kosovo, the International Court of Justice, the principal judicial body of the United Nations, confirmed that Kosovo's Declaration of Independence did not contravene any rule or regulation of international law.⁹⁰ Thus, Kosovo's succession can be considered to fall within the scope of this Convention.

Through its Declaration of Independence, Kosovo has committed to honor the international obligations taken on by the SFRY, including treaty obligations.⁹¹ The question, however, is whether this commitment expressed through the Declaration of Independence is sufficient to ensure the continuing application of these treaties in the territory of Kosovo. As one of the constituent parts of former Yugoslavia, Kosovo has inherited debts and other successor obligations.⁹² Naturally, obligations with relation to treaties, whether bilateral or multilateral, should also continue to apply ipso jure, unless stated otherwise by the Successor State.

One of the multilateral treaties to which the former Yugoslavia became a party was the UN Convention on Contracts for the International Sale of Goods (CISG).⁹³ From a legal point of view, international treaties adopted by Yugoslavia continued to apply in the territory of Kosovo until 2008 when Kosovo became independent. Since 2008, the question of continuation of application of treaties by way of succession arises. It is not, however, clear-cut whether this

⁸⁸ Summary of Practice of Secretary General as Depository of Multilateral Treaties, Prepared by Treaty Section of Office of Legal Affairs, at 21-301, 86, UN DOC. ST/LEG/7/REV. 1 (1999).

⁸⁹ Vienna Convention, *supra* note 85, at art. (2)(1)(d).

⁹⁰ ICJ Advisory Opinion, *supra* note 75.

⁹¹ Declaration of Independence, *supra* note 73, at art. 9, and Kosovo Constitution, *supra* note 78, at art. 145.

⁹² See Kosovo Final Status Settlement (the Ahtisaari Proposal), *supra* note 27, at art. 8.2, as well as Annex VI, Articles 1-3 of this Proposal, which provides that: "*allocated external debt shall become a liability of Kosovo where the final beneficiary is located in Kosovo whereas non-allocated external debt shall be apportioned to the parties according to a proportional key to be established by agreement between the parties, in cooperation with the International Monetary Fund.*" See also Henry H. Perritt, Jr., *Resolving Claims When Countries Disintegrate: The Challenge of Kosovo*, 80 CHI.-KENT L. REV. 3 (2005), at art. 8.

⁹³ Yugoslavia was one of the first countries to sign the CISG, which made its entry into force possible. The first eleven countries to ratify the Convention were Argentina, the People's Republic of China, Egypt, France, Hungary, Italy, Lesotho, Syria, the United States, Yugoslavia, and Zambia. See Meredith Kolsky Lewis, Comments on Luke Nottage's Paper, 860, available at <http://www.cisg.law.pace.edu/cisg/biblio/lewis.html> (last accessed 9/1/2014).

succession is automatic in all cases. Thus, in order to determine whether the CISG automatically continues to apply in Kosovo since Kosovo became an independent state, issues related to state succession need to be further analyzed. In particular, it is important to determine whether automatic succession of treaties applies to Successor States – in this case, whether the CISG automatically continued to apply once Kosovo become a Successor State on the date of its independence, i.e. succession,⁹⁴ or whether its application would not start until the notification of succession is deposited at the United Nations treaty office.

2.1.1.2 Automatic Succession Issues related to the succession of treaties, as explained above, have been codified in the Vienna Convention on Succession of States with Respect to Treaties (1978). The Convention entered into force only in 1996, after it received the necessary number of ratifications.⁹⁵ Since the former Yugoslavia had signed and ratified the Convention on 6 February 1979 and 28 April 1980, respectively, this Convention applies to issues that arise from succession of treaties in the Successor States to Yugoslavia. Seven independent countries have emerged from the former Yugoslavia, including Kosovo. The succession of these states to the CISG, a UN treaty, is not that simple in actual practice. At least, this was the case with the independent countries that emerged from the dissolution of the former Yugoslavia.

The Succession Convention provides for general rules that are embodied in Part I, as well as rules for specific circumstances provided in Part II (Succession in Respect of Part of Territory), Part III (Newly Independent States) and Part IV (Separation of States). Depending on whether Kosovo's succession is analyzed under Part II, Part III or Part IV, results may differ

⁹⁴ See *supra* note 85. Paragraph (e) of Article 2(1) of the Vienna Convention on Succession of States with respect to Treaties states that, “‘date of the succession of States’ means the date upon which the Successor State replaced the Predecessor State in the responsibility for the international relations of the territory to which the succession of States relates.”

⁹⁵ The Convention entered into force on 6 November 1996, in accordance with article 49(1) which required fifteen ratifications or accessions. *Supra* note 85.

because the provisions differ with respect to succession to a multilateral treaty (such as the CISG) and the issue whether filing a notification of succession to a treaty is required. The main difference is that if Kosovo is considered a newly independent state,⁹⁶ it would have the choice to decide whether it would want to be bound by a treaty from the date of its succession.⁹⁷ This is also known as the *clean-slate principle* or theory.⁹⁸ If, however, Kosovo is considered as a state separating from a predecessor, succession is considered to be automatic, and the continuity principle applies.⁹⁹ Paragraph 1 of Article 34 (referring to cases of a state separating from a predecessor) of the Succession Convention stipulates the following:

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

(a) any treaty in force at the date of the succession of States in respect of the entire territory of the Predecessor State ***continues in force in respect of each Successor State so formed;***

(b) any treaty in force at the date of the succession of States in respect only of that part of the territory of the Predecessor State which has become a Successor State continues in force in respect of that Successor State alone.

This article makes it clear that, in the case of Kosovo, as it was with all other independent states that emerged from the Former Yugoslavia, treaties to which the Predecessor State was a party, continue to apply in the Successor State, i.e. Kosovo. This was further enforced by the strong commitment to succession made in the Declaration of Independence of Kosovo (see Article 9 above) and in the Constitution of Kosovo (Article 145). Nevertheless, as discussed below, in the case of other independent states that emerged from the dissolution of Yugoslavia,

⁹⁶ In order for a country to be considered a newly independent state, it would have had to be a “dependent territory” previously. “According to the representative for the United States to the International Law Commission (ILC), a Successor State will be deemed to have been a “dependent territory” if it previously had the status of a colony, as demonstrated by protectorate, colonial, trust, or mandate status.” Andrew M. Beato, *Newly Independent and Separating States’ Succession to Treaties: Considerations on the Hybrid Dependency of the Republics of the Former Soviet Union*, 9 AM. U. J. INT’L L. & POL’Y 525 (1994), at 534.

⁹⁷ See Article 16 of the Succession Convention, *supra* note 85.

⁹⁸ Beato, *supra* note 96, at 535.

⁹⁹ See Article 34 of the Succession Convention, *supra* note 85.

the act of breaking up from a Predecessor State and making a commitment in the declaration of independence about continuity of treaties did not in itself suffice in practice for the automatic application of treaties like the CISG in the territory of the Successor State.¹⁰⁰ These states felt it necessary to deposit a notice of succession with the depository in order to induce the UN to include them in the list of states in which a certain treaty is applicable. It is, however, worth mentioning that, after the notice of succession to the CISG was sent by these countries to the depository, the depository considered the state's succession date to be the date of its independence, not the date when notice was deposited, i.e. the notice had a retroactive effect.¹⁰¹ In this regard, Article 9 of the Vienna Convention on Succession of States with Respect to Treaties provides that:

[o]bligations or rights under treaties in force in respect of a territory at the date of a succession of States do not become the obligations or rights of the Successor State or of other States Parties to those treaties **by reason only of the fact that the Successor State has made a unilateral declaration providing for the continuance in force of the treaties in respect of its territory.**¹⁰²

Thus a unilateral declaration by the Successor State, such as the ones made by the seven independent states that resulted from the dissolution of Yugoslavia, is not sufficient for the continuity of application of a treaty in the territory of that state. It also seems, however, that there is a clash between this provision (Article 9 – which provides that a mere declaration is not sufficient) and Article 34 of the same Convention, which endorses the principle of automatic continuity of application of the treaty in the Successor State, once the Successor State comes into being. This conflict leaves Successor States in confusion as to whether they have to undertake

¹⁰⁰ See part 2.1.3.1 of this Chapter for more information on the Practice of Succession to the CISG.

¹⁰¹ *Id.*

¹⁰² Vienna Convention, *supra* note 85, at art. 9.

concrete actions in order to make the treaties of their predecessor apply to their territory, regardless of the principle of automatic succession.

2.1.1.3 Continuity principle vs. clean-slate principle The “clean slate” rule applies to newly independent states that were previously dependent on the predecessor, in particular with respect to their foreign affairs.¹⁰³ The Vienna Convention on Succession of Treaties clarifies that,

[a] newly independent State is not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of the succession of States the treaty was in force in respect of the territory to which the succession of States relates.¹⁰⁴

Nevertheless, the treaty does allow these states to become party to such treaties, if they wish so, by simply depositing a notification of succession.¹⁰⁵ Authors have argued that the clean slate rule mainly applies to decolonized nations, who have had no say in their territory’s foreign affairs, and in particular no say on the treaties that were signed and ratified while they were colonies.¹⁰⁶ According to the representative for the United States to the International Law Commission (ILC), a Successor State will be deemed to have been a “dependent territory” if it previously had the status of a colony, as demonstrated by protectorate, colonial, trust, or mandate status.¹⁰⁷ Moreover, in his separate opinion in the Genocide case (*Bosnia and Herzegovina v. Yugoslavia*), Judge Weeramantry argued the reasonableness of the clean slate theory. He stated that:

¹⁰³ Maren Tamke, *Succession of States to Multilateral Treaties*, Institut Universitaire des Hautes Etudes International (2001) at 7. See also Beato, *supra* note 96, at 533; Marko Milanovic, *The Tricky Question of State Succession to International Responsibility*, EJIL Talk, available at <http://www.ejiltalk.org/the-tricky-question-of-state-succession-to-international-responsibility/> (last accessed 5/1/2014).

¹⁰⁴ Vienna Convention, *supra* note 85, at art. 16.

¹⁰⁵ *Id.* at art. 17(1).

¹⁰⁶ Tamke, *supra* note 103, at 7; Beato, *supra* note 96, at 533; Milanovic, *supra* note 103, at para. 3.

¹⁰⁷ Beato, *supra* note 96, citing IAN MCTAGGART SINCLAIR, THE INTERNATIONAL LAW COMMISSION 120 (1987) (discussing the creation of the ILC by the United Nations in 1947 in an effort to catalog and develop international law).

Theoretically, the clean slate principle can be justified on *several powerful bases*: the principle of individual State autonomy, the principle of self-determination, the principle of *res inter alios acta*, and the principle that there can be no limitations on a State's rights, except with its consent. Newly independent States should not have to accept as a *fait accompli* the contracts of Predecessor States, for it is self-evident that the new State must be free to make its own decisions on such matters.¹⁰⁸

While it was clear that these newly independent states did not have to accept the treaties of their predecessor as a *fait accompli*, state practice with respect to the clean slate principle also shows that states have refused to reject *a priori* all treaties that had applied in their territory while they were part of the Predecessor State. In the words of Andrea Beato:

One such alternative theory is the optional doctrine of state succession. The optional doctrine shares with the clean slate theory the conviction that a new state does not automatically assume the obligations of its predecessor. The doctrine departs from clean slate precepts, however, by rejecting a categorical discontinuity of treaties once sovereignty is attained. Instead, as originally proposed, the doctrine gives a newly independent state the ability to “opt in” or selectively consent to treaties over a designated period of time.

This doctrine has been applied in the decolonization process of East Africa where the newly independent states of the region rejected the categorical application of clean slate principles to pre-independence treaties, and, instead, employed various mixtures of treaty continuity and discontinuity, since they have found it counter-productive to reject all treaties previously applied to their territories.¹⁰⁹

We now turn to the question of whether Kosovo should be considered a newly independent state or a Successor State separated from its predecessor through a dissolution process. Cases of dissolution of a Predecessor State, are included within the concepts of separated states. As such, since Kosovo's independence is a result of, among other things, the dissolution of Yugoslavia, it would fit more within the concept of a Successor State that

¹⁰⁸ Separate opinion of Judge Weeramantry to the Genocide case (*Bosnia and Herzegovina v. Yugoslavia*), at 9, available at: <http://www.icj-cij.org/docket/files/91/7361.pdf> (last accessed 5/1/2014).

¹⁰⁹ Beato, *supra* note 96, at 540.

separated from its predecessor through dissolution. While there may be scholars who would disagree with this assertion,¹¹⁰ many countries that have recognized Kosovo have in fact referred to the independence of Kosovo as a result of the dissolution of Yugoslavia.¹¹¹ Moreover, the international community relied on Kosovo's commitment to continuity of treaties, which was inserted both in the Declaration of Independence and the Constitution of the Country. By endorsing the principle of automatic succession, as opposed to the clean slate principle, Kosovo identified itself with the category of a Successor State that separated from its predecessor (the same as other countries that gained independence as a result of the process of dissolution of Yugoslavia).

Automatic succession is the opposite of the clean slate principle, and it applies to cases of separating states.¹¹² As explained in the previous section, this principle provides that when a state separates into one or more parts, each part inherits all pre-separation treaties whether or not the Predecessor State continues to exist.¹¹³ The Vienna Convention on Succession of Treaties has endorsed this principle in Article 34, which reaffirms that any treaty in force at the date of the succession of States in respect of the entire territory of the Predecessor State continues in force in

¹¹⁰ Beato argues that as long as a country was not in charge of its foreign affairs, it should fall within the category of "newly independent states." He adds that "International law should recognize that the substantive lack of sovereign control over foreign relations can occur in a non-traditionally colonial context." Beato, *supra* note 96, at 556. While Kosovo did enjoy a large degree of autonomy under the Yugoslav 1974 Constitution, foreign affairs were mostly in the hands of the Federation, and not of its units (Art. 281(7), Chapter II of the 1974 Constitution). Furthermore, from 1999 to 2008, while Kosovo was administered by the United Nations, foreign affairs belong to the UN Mission, and not to Kosovo authorities.

¹¹¹ Kosovo's Declaration of Independence and its compliance with international law was a matter before the International Court of Justice. In its Advisory Proceedings, the Court received written statements from a number of countries which provided their positions on Kosovo's independence as a result of the disintegration of Yugoslavia. *See, e.g.*, Written Statement of Albania, at 5-7 (<http://www.icj-cij.org/docket/files/141/15618.pdf>); Written Statement of Denmark, at 8 (<http://www.icj-cij.org/docket/files/141/15664.pdf>); Written Statement of the United States, at 1 (<http://www.icj-cij.org/docket/files/141/15704.pdf>); Written Statement of the United Kingdom, pp.30-35 (<http://www.icj-cij.org/docket/files/141/15638.pdf>). In the words of the UN Secretary General Special Envoy for the future of Kosovo, President Martti Ahtisaari, the independence of Kosovo could be seen as "the conclusion of the last episode in the dissolution of the former Yugoslavia." *See* Report of the Special Envoy to the Secretary General on Kosovo's future status process, S/2007/168 March 2007, para. 16.

¹¹² Tamke, *supra* note 103, at 8; Beato, *supra* note 96, at 543; Milanovic, *supra* note 103.

¹¹³ Beato, *supra* note 96, at 542-43.

respect of each Successor State so formed. In contrast to the case with newly independent states, which must send a notice of succession if they wish to become party to the treaty that was in force in the Predecessor State, in the case of separated states, this does not appear to be mandatory from the text of the Convention. Instead, the Convention on Succession provides that a Successor State *may*, by making a notification, establish its status as a contracting State to a multilateral treaty.¹¹⁴

2.1.2 Automatic succession or succession upon notice

The main question that remains to be answered is whether Kosovo is required to deposit a notification of succession to multilateral treaties to which its predecessor was a party, or whether it may assume that this is not mandatory. The Vienna Convention on Succession provides in several places that a notice of succession *may* be made to the depository of the treaty.¹¹⁵ While it is clear from the provisions of the Vienna Convention that the principle of continuity of treaties applies for Successor States, it is not a clear-cut issue in international public law whether the notice of succession has a “declaratory” or “constitutive” character. With respect to this, Shroeter states:

While the legal certainty created by the notification procedure is only too welcome, it is worth remembering that, from a dogmatic point of view, the Contracting State status of the above mentioned States arguably arose *ipso iure* because of the “continuity principle”: Their notifications of succession were therefore purely declaratory in nature, merely confirming a situation which, by international law, already existed.¹¹⁶

¹¹⁴ Vienna Convention, *supra* note 85, at Article 36(1) (emphasis added).

¹¹⁵ *Id. See, e.g.*, arts. 10(2), 17(2), 22, 23 and 38.

¹¹⁶ SHARING INTERNATIONAL COMMERCIAL LAW ACROSS NATIONAL BOUNDARIES: FESTSCHRIFT FOR ALBERT H. KRITZER ON THE OCCASION OF HIS EIGHTIETH BIRTHDAY 425-69 (Camilla B. Andersen & Ulrich G. Schroeter eds., Wildy, Simmonds & Hill Publishing 2008).

This is important because, if the notification has solely a declaratory nature, then the treaty starts to apply in the Successor State from the date of succession (as per Article 34 of the Convention on Succession of Treaties). However, if it has a constitutive character, the treaty starts (or, more accurately, continues) to apply only if notice of succession is deposited and becomes effective. Taking the example of CISG in particular, a clear determination of this issue is important for several of reasons:

1. *First*, the examples of other countries that have emerged as independent as a result of the break-up of Yugoslavia have shown that there can be a long period of time from the moment of succession to the moment when the notification is deposited.¹¹⁷ This creates confusion and legal uncertainty for parties to a contract as well as for judges or arbitrators who interpret a contract, as they will not be certain whether they can or must apply the CISG for that period.¹¹⁸
2. *Second*, the notification of succession itself, according to the Vienna Convention on Succession of States with respect to Treaties, has a retroactive character. That is, when a state deposits a notice of succession to a treaty, it is considered to have been a contracting party from the moment when the succession took place.¹¹⁹ Although Article 23(2) of this Convention provides that (in the case of newly independent states) the operation of the treaty between the newly independent

¹¹⁷ While Montenegro waited only four and a half months from the date of its independence to file a notification of succession to the CISG, it took Bosnia little less than two years, Croatia six and a half years and over 15 years in case of Macedonia. See Vladimir Pavic & Milena Djordjevic, *Application of the CISG Before the Foreign Trade Court of Arbitration at the Serbian Chamber of Commerce – Looking Back at the Latest 100 Cases*, 28 J.L. & COM. 1 (2009).

¹¹⁸ *Id.* These effects, especially in the case of Macedonia, might have important consequences on the application of the CISG in the region. Namely, should Macedonian parties to contracts concluded in the period between the date of state succession (17 November 1991) and the date of notification of succession to the Convention (22 November 2006) be considered as coming from CISG Contracting States for the purposes of Art. 1(1)(a) CISG? Should Macedonian law be considered to include the CISG if the rules of private international law lead to its application under Art. 1(1)(b) CISG while the underlying contract is concluded in the abovementioned period?

¹¹⁹ See Vienna Convention, *supra* note 85, at art. 23(1).

state and other parties to the treaty should be deferred until the filing of notification, it does allow for provisional application of the treaty¹²⁰ even from the moment when the succession happened to the moment when the filing of notification took place. Further, this “abortion of operation” is mentioned only with respect to newly independent states, and not with regard to other situations such as succession of a territory, unification, separation, etc. Consequently, the question arises whether this is fair to parties who entered into a contract thinking the CISG does not apply since the notification of succession was not made, but later find out it is applicable because the notification has a retroactive effect and it covers contracts made before the notification.¹²¹ There is also the question of whether this is in line with Article 100(1) of the CISG, which stipulates that “[t]his Convention applies to the formation of a contract only when the proposal for concluding the contract is made on or after the date when the Convention enters into force in respect of the Contracting States.” The same issue may be raised in the application of article 100(2) of the CISG, which provides that “*this Convention applies only to contracts concluded on or after the date when the Convention enters into force.*”

3. *Third*, this notification is especially important for the case of Kosovo, which, as the situation stands right now and as will be further elaborated below, might face political hurdles depositing its notification of succession with the UN Secretary

¹²⁰ *Id.* at art. 27.

¹²¹ This is particularly important given the fact that for former Yugoslav states, the effective date for CISG was considered the date of their succession (i.e. when they became independent states), and not the date of their filing of notification. For example, Macedonia became an independent country in 1991, but it filed its notice of succession in 2006 (after 15 years). Yet, CISG effective date for Macedonia is considered to be 1991, the date of succession. See *supra* note 33 on CISG treaty status and the effective dates for all contracting states.

General. Thus, if the notification is considered of a purely declaratory character and not of a constitutive one, the CISG would be considered as applicable in Kosovo from the date of succession and its emergence as an independent state, i.e. 17 February 2008.

Thus, it is clear that succession has its bearing on the application of the CISG to Successor States, and this ultimately impacts the rights and obligations of parties to a contract where the CISG may potentially apply.

2.1.2.1 Notice of succession: a legal or bureaucratic requirement? An analysis of the Vienna Convention on Succession of Treaties' Article 17(1) on Newly Independent States and Article 34(1) on Separation of States shows that these two provisions do not simply differ on the category of Successor States they cover. One of the issues left unclear from the text of these provisions relates to the notification of succession. The text of the Convention does not clarify whether notice is a legal requirement or a simple bureaucratic procedure. While Article 17(1) states that a newly independent state's status with respect to a multilateral treaty may be established through a notification of succession, Article 34(1) provides for continuity of application of treaties that were in force on the date of succession, without mentioning a requirement for notification. With respect to cases of separation of states, Article 36 provides that a Successor State *may*, by making a notification, establish its status as a contracting State to a multilateral treaty which is not in force if, at the date of the succession of States, the Predecessor State was a contracting State to the treaty in respect of the territory to which the succession of States relates"¹²² and that it also "may, by making a notification, establish its status as a party to a multilateral treaty which enters into force after the date of the succession of States

¹²² Vienna Convention, *supra* note 85, at art. 36(1).

if at that date the Predecessor State was a contracting State to the treaty in respect of the territory to which the succession of States relates.”¹²³ Rather than clarifying this matter, the Vienna Convention on Succession of Treaties seems to have complicated it even further. Brigitte Stern argues that the principle of continuity of treaties endorsed in Article 34(1) serves the stability of treaty relations in cases of succession. In her words:

This article (34(1)) is based on the premise of continuity and stability of treaty relations in cases of state succession. Comparing the text of article 34(1) with that of article 17(1), which provides that “a newly independent State may, by a notification of succession, establish its status as a party to any multilateral treaty, which at the date of the succession of states was in force in respect of the territory to which the succession of states relates”, we see that article 34(1) means automatic succession. Even notification is not required.¹²⁴

Stern’s interpretation is, therefore, that in cases of automatic succession arising from separation of states, the notification of succession is *not* required. Nevertheless, looking at the practice of the UN Secretary General as Depositary of UN Treaties, it appears that the Secretariat considers the notification a requirement, since it does not list or consider a country as a contracting state without the deposit of this notification.¹²⁵ Clarifying this issue is of a particular importance in order to determine the date of succession of a certain treaty, and this is even more significant when treaties (such as the CISG) also involve rights and duties of private parties. In his book on Modern Treaty Law and Practice, Anthony Aust argues that:

There is no consistent practice as to the date on which succession takes effect, but the better (and logical) view is that it is the date of independence, the essence of succession to treaty rights and obligations being that the notification of succession is merely formal confirmation of what has already happened by operation of law, even though the confirmation may take some time in coming.¹²⁶

¹²³ *Id.* art. 36(2).

¹²⁴ BRIGITTE STERN, DISSOLUTION, CONTINUATION, AND SUCCESSION IN EASTERN EUROPE 22 (Martinus Nijhoff Publishers 1998).

¹²⁵ UN ST/LEG/7, *supra* note 88.

¹²⁶ ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 385 (Cambridge Univ. Press 2007).

Shroeter agrees that the notification of succession, while creating some legal certainty on one hand, simply confirms a status that legally arose because of the “continuity principle,” and therefore, the notification is purely declaratory in nature.¹²⁷ He further explains that a difference between a notification of succession establishing Contracting State status (in cases of Newly Independent States) and a notification (unnecessarily) confirming it (in cases of Separation of States) would only impact the period between the date of succession and the notification of succession.¹²⁸

It seems then that the requirements for depositing a notification of succession depend on the category of Successor State with which we are dealing. If we are dealing with a Newly Independent State, which does not inherit treaties automatically, that state has to deposit a notification in order to *establish* its status as a contracting state to a treaty. On the other hand, if we are dealing with cases of Separation of States, where the principle of automatic succession comes into play, then the notification of succession, while not legally required, serves to *confirm* an already existing status which arose on the date of succession. Practice has, however, shown that while notification (in cases of separation of states) may be a procedure introduced simply for bureaucratic reasons, it has become an administrative, but not a legal, necessity without which a country has not been listed as or considered to be a contracting state by a treaty depository.

This lack of clarity as to the notice of succession also has its effect on the applicability of the Vienna Convention on the Law of the Treaties, the provisions of which have been used in this dissertation to understand some of the notions related to treaty succession. Yugoslavia was a party to this treaty, which would mean that its provisions, based on the continuity principle,

¹²⁷ Ulrich Schroeter, *Backbone or Backyard of the Convention? The CISG's Final Provisions*, in SHARING INTERNATIONAL COMMERCIAL LAW ACROSS NATIONAL BOUNDARIES: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday 425-469, at 460 (Camilla B. Andersen & Ulrich G. Schroeter eds., Wildy, Simmonds & Hill Publishing 2008).

¹²⁸ *Id.* at n.133.

would continue to apply in Kosovo, as a Successor State. However, even with respect to the application of this treaty, the same questions would arise as to whether Kosovo can inherit treaty obligations since it has not deposited a notice of succession for any of the UN treaties. Nevertheless, since some consider the Succession Treaty a codification of customary international law rules, at least parts of it would create obligations upon countries, despite their status as a member state. In at least three separate letters of succession sent by countries to the UN Secretary General as the depository for UN treaties, they confirm that inheriting treaty obligations as a successor state to them is a duty under international customary law.¹²⁹ Moreover, if we look at the text used in all these notices of succession, the language used by the state is that of “informing” the depository of a situation that they consider has already occurred de jure, on the day of their independence, i.e. they simply confirm that they continue to be part of those treaties. In these letters, thus, they do not request to become part of treaties, but simply complete the administrative (rather than legal) requirement of informing the Secretary General of a situation which they believe has started to occur once the state was formed.¹³⁰

The fact that parts of the Vienna Convention on Succession of Treaties can be considered a restatement of customary international law has also been confirmed by the International Court of Justice in the Bosnia Genocide case as well as the Gabcikovo-Nagymaros case.¹³¹ The practice of states in international law shows that Successor States have considered themselves bound to continue treaty obligations of their Predecessor States even before the Vienna

¹²⁹ See Historical Information on Succession of member states to the Vienna Convention on Succession of States with respect to treaties (the notes from Slovenia and the Czech Republic), available at: <https://treaties.un.org/pages/HistoricalInfo.aspx> (last accessed: 28.02.2015). See also the Practice of UN Secretary General as Treaty Depository (the Notice of Succession by the State of Guyana), *supra* note 88, at 149 (last accessed: 28.02.2015)

¹³⁰ *Id.*

¹³¹ See *Application of the Genocide Convention (Bosnia and Herzegovina v. Yugoslavia)*, I.C.J. Reports 1996, at 595 and 611-12 and *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, I.C.J. Reports 1997, at 7 and 72).

Convention entered into force in 1996.¹³² This approach is supported by Zimmermann, who says that the principle of succession of treaties once a state become independent exists as international customary law.¹³³

Finally, automatic succession as a principles has been endorsed openly in cases of human rights treaties even by UN bodies. In 1994, the UN human rights treaty bodies pointed out “that successor States were automatically bound by obligations under international human rights instruments from the respective date of independence and that observance of the obligations should not depend on a declaration of confirmation made by the Government of the Successor State.”¹³⁴ Specifically, the Human Rights Committee, as the monitoring mechanism of one of the most significant UN treaties, the International Covenant on Civil and Political Rights, has been the most outspoken on the issue of State succession and declared “that all the peoples within the territory of a former State party to the Covenant remained entitled to the guarantees of the Covenant.”¹³⁵ In addition, the International Committee of the Red Cross (“ICRC”) has also long taken the view that a successor state is automatically bound by the international humanitarian instruments that were binding on the predecessor state, unless the successor state has made a specific declaration to the contrary.¹³⁶

Certainly, these examples alone do not necessarily prove that the Vienna Convention on Succession of Treaties reflects, in its entirety, international customary law. It has been, however, used in this dissertation to simply present some of the solutions that were foreseen in this international instrument with regards to treaty succession. As it is obvious, this Convention does

¹³² *Supra* note 88, at. 86-92 and 286-310.

¹³³ Andreas Zimmermann, *Staatenachfolge in völkerrechtliche Verträge : Zugleich ein Beitrag zu den Möglichkeiten und Grenzen völkerrechtlicher Kodifikation*, 2000. At 832.

¹³⁴ The 5th meeting of persons chairing UN human rights treaty bodies, 1994, UN Doc. E/CN.4/1995/80, at 4.

¹³⁵ Menno Kamming, *State Succession in Respect of Human Rights Treaties*, 7 *EJIL* (1996) at 469-484, citing UN Doc. A/49/40, para. 48.

¹³⁶ *Id.*

not answer some of the remaining dilemmas, among which the one related to depositing a notice of succession. The practice of succession to the CISG, outlined below, might shed a little more light on this issue.

2.1.2.2 The practice of succession to the CISG The issue of whether notification of succession is necessary to make a treaty legally applicable in a territory, or if alternatively treaties automatically come into force upon independence (automatic succession), is hazy at best. This is confirmed by the practice of succession to the CISG of a number of countries that are successors of a Predecessor State. Macedonia provides a prime example – discussed below – of how the succession process remains unclear. While automatic succession is technically the international legal standard, as discussed in the previous section, the practice shows that it remains confusing. Members and contracting states are not listed on treaty websites, databases, etc. as members and/or contracting states until they have formally deposited a notification of succession, accession, ratification, etc. with the depository. Therefore, while it is technically not legally necessary to deposit a notification of succession, it is advisable as it clears up legal uncertainties that could arise from a lack of notification.

Questions often arise as to what specific states may join certain treaties. When a Successor State succeeds a Predecessor State, it becomes responsible for all of its own international relations, including participation or membership in certain treaties or international agreements. The date when this occurs is the date when the successor replaces the predecessor, which is most commonly the date of formal independence.¹³⁷ It is not disputed that filing a notification of succession at the very least formalizes the application of a treaty in a new,

¹³⁷ UN ST/LEG/7, *supra* note 88, at 21-301.

Successor State.¹³⁸ On one hand, filing a notification seems to create an argument against automatic succession. If states felt that their status as members to treaties was automatic starting on the date of independence, then one would think that there would be no need for filing of notification.¹³⁹ However, it could also be argued that notification – at least with respect to the CISG – is not inconsistent with the idea of automatic succession; notice simply helps to clear up legal uncertainties and, as such, it is a bureaucratic measure. Notification assists the Secretary General as CISG treaty depository (see CISG Article 89); makes it easier to create a comprehensive list of members and participating states; and avoids the risk of future legal issues or the cancelling of decisions made or actions taken if they are challenged.¹⁴⁰

Unfortunately, even with notice of succession uncertainties arise from the fact that there is no time limit or deadline for depositing an instrument of succession. This leads some countries to deposit a notification more than a decade after independence, or the date when the treaty would have arguably gone into effect.¹⁴¹ The Secretary General is also limited in the role of depository. The Secretary General may only accept an instrument of notification of succession when two qualifications are met. First, the treaty must have been applied to the new state by the Predecessor State.¹⁴² For this to occur, the predecessor must have either explicitly extended the treaty to the territory of the predecessor or, if not, must not have explicitly excluded application of the treaty to the territory of the new state, and the successor must agree that the treaty was, in fact, applied in its territory.¹⁴³ Next, the territory wishing to succeed must be recognized as a state by the practice of the General Assembly of the United Nations.¹⁴⁴ This practice shows that

¹³⁸ Pavic & Djordjevic, *supra* note 117, at 1, 17.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ UN ST/LEG/7, *supra* note 88, at 86.

¹⁴² *Id.* at 88.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

the nature of succession and accession to treaties is fluid. It is never quite the same for any one region or country. A few examples will provide more insight into the various ways in which the Secretaries General have applied these principles over the years.

Yugoslavia

The former Yugoslavia presents what is probably the most challenging and unclear case study on succession to treaties, specifically to the CISG. In order to understand the issues surrounding it, one must understand the legal situation of succession and the breakup of the former Federation.

Socialist Federal Republic of Yugoslavia (SFRY)

The SFRY joined the United Nations as a founding member.¹⁴⁵ The SFRY ratified the CISG on 27 March 1985 and, after the required number of ratifications had been reached (see CISG Article 99(1)), the Convention became effective in the SFRY on 1 January 1988.¹⁴⁶ As war broke out surrounding the breakup of the SFRY, the issue of continuation or succession of treaties went from a possibility to inevitability. Opinion number 1 of the Arbitration Commission within the Badinter Commission of 29 November 1991 said that SFRY was “in process of dissolution,” and opinion number 8 of 4 July 1992 said that the SFRY had ceased to exist.¹⁴⁷ Several new states emerged from the SFRY, as discussed below.

¹⁴⁵ UN HANDBOOK, FINAL CLAUSES OF MULTILATERAL TREATIES 17-20 (2003).

¹⁴⁶ UNCITRAL country status for the CISG, *supra* note 33.

¹⁴⁷ Oksana Grishkevich, *General Approach of Newly Independent States to the Treaties of Their Predecessors*, at 1-2 (Inst. of State & Law Nat'l Acad. of Sci. of Belarus, Minsk).

Federal Republic of Yugoslavia (FRY)

The Federal Republic of Yugoslavia (consisting of the republics of Serbia and Montenegro) came into being on 27 April 1992.¹⁴⁸ The FRY advised the Secretary General that it wished to continue the legal personality of the SFRY, including its seat in the UN (much the way Russia had continued the Soviet Union's role after the breakup of the USSR).¹⁴⁹ This meant that the FRY intended to continue all legal obligations of the SFRY, including treaty obligations. Therefore, treaties would continue to apply in the FRY since it claimed to be the same state, essentially, as the former SFRY.¹⁵⁰ This request or claim was rejected by all of the other former SFRY republics.¹⁵¹ It was also rejected by the international community.

Resolution 47/1 of 22 September 1992 by the UN General Assembly stated that the FRY could not automatically continue the membership of the SFRY in the UN, but should instead apply for membership itself.¹⁵² This same resolution, however, said that while the FRY could not participate in conferences convened by the General Assembly or its organs, it could still participate in treaties, including those deposited with the Secretary General.¹⁵³

The UN Legal Counsel did not suspend the membership of the SFRY in the UN, but decided that the membership would terminate if the FRY were admitted.¹⁵⁴ This same decision also stated that the Secretary General was not in a position, as depository of certain treaties, to reject the FRY's claim of continuity without a legal decision to the contrary.¹⁵⁵ Therefore, the Secretary General continued to list the SFRY in the status list of treaties with the short name,

¹⁴⁸ UN Final Clauses, *supra* note 145, at 17.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² UN ST/LEG/7, *supra* note 88, at 24. *See also Participation of Former Yugoslav States in the United Nations*, Max Planck Yearbook of United Nations Law, at 241-43.

¹⁵³ *Id.*

¹⁵⁴ UN Final Clauses, *supra* note 145, at 17.

¹⁵⁵ *Id.* at 17-18.

“Yugoslavia.”¹⁵⁶ The FRY continued to take several treaty actions and deposited them with the Secretary General, who also listed them under the short name, “Yugoslavia.”¹⁵⁷

The FRY was admitted to the UN on 1 November 2000 and promptly dropped its claim to continue the legal personality of the SFRY.¹⁵⁸ An issue arose, however, concerning the treaties that FRY had deposited between the time that Resolution 47/1 was adopted and the time of its admittance to membership in the UN. This was exemplified in the UN Framework Convention on Climate Change of 1992. The FRY had signed this treaty on 8 June 1992, before resolution 47/1 was adopted.¹⁵⁹ Because the Secretary General did not have a decision at the time, he decided to keep the status quo with regard to “Yugoslavia” in the UN and accepted the FRY signature as an instrument of ratification.¹⁶⁰ The UN Legal Counsel then advised the FRY that:

- 1) It could succeed to treaty actions taken by the SFRY prior to 27 April 1992;
- 2) It could succeed to treaties to which the SFRY was a party and in relation to which the FRY had undertaken subsequent treaty actions – specifically actions between 27 April 1992 and 1 November 2000;
- 3) Treaty actions undertaken by the FRY in its own right and not dependent on prior treaty actions by the SFRY between 27 April 1992 and 1 November 2000 did not need further action; and
- 4) Treaty actions by the FRY that necessarily required membership to the UN or a specialized agency needed to be confirmed on a case by case basis.¹⁶¹

The Climate Change treaty issue was resolved when the Secretary General determined that he could not recognize the FRY’s treaty actions because the FRY was not considered to be a member state at the time when the treaty actions were undertaken, so the actions were voided.¹⁶²

¹⁵⁶ *Id.* at 18.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 19-20.

¹⁶² *Id.*

The CISG, however, may have technically remained in place through automatic succession. Even if it did not, on 12 March 2001, the FRY succeeded to the CISG and declared that its declaration would apply retroactively to 27 April 1992, the day the FRY took over responsibility for its international affairs from the former the SFRY.¹⁶³ As appears from this case, although automatic succession to the CISG did take place, it was not activated until the FRY had sent a notice of succession, which then had a retroactive effect.

Serbia and Montenegro

In 2003, the FRY became the State Union of Serbia and Montenegro.¹⁶⁴ Article 63 of the Constitutional Charter of the State Union said that the CISG remained in force in both republics.¹⁶⁵

In 2006, Montenegro separated from its union with Serbia and declared independence. Montenegro declared that it would assume all existing treaty obligations that had been extended to its territory under the union with Serbia.¹⁶⁶ Montenegro is listed as a CISG contracting state on the UNCITRAL website, effective on 3 June 2006, which was the date when Montenegro formally declared independence.¹⁶⁷ The official UNCITRAL status of the CISG, however, also lists 10 October 2006 as the date of succession of Montenegro, which assumedly is the date when Montenegro deposited its notice of succession.¹⁶⁸ The effectiveness of the CISG according

¹⁶³ USAID, SYSTEM FOR ENFORCING AGREEMENTS AND DECISIONS (SEAD) PROGRAM IN KOSOVO – UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INT’L SALE OF GOODS 5-9 (2011).

¹⁶⁴ Pavic & Djordjevic, *supra* note 117, at 3.

¹⁶⁵ *Id.*

¹⁶⁶ UNCITRAL Status of the CISG, *supra* note 33.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

to the UNCITRAL website is retroactive, dating back to 3 June, the day when Montenegro became an independent, and therefore, a Successor State.¹⁶⁹

As far as Serbia was concerned, according to Article 60(4) of the Constitutional Charter of State Union and due to a 5 June 2006 decision of the Serbian Parliament, all treaties, including the CISG, that had been in force under the State Union of Serbia and Montenegro remained in force in Serbia.¹⁷⁰ Since Serbia was considered the continuing¹⁷¹ (and not successor) state of the FRY, it did not need to deposit a new notice of succession, but rather, the date of its succession to the CISG would be considered the date when FRY deposited its notice, whereas the date of the effectiveness of the CISG in the territory of Serbia would be the date when the Convention was considered effective in the FRY. Serbia was, thus, a member of the CISG, effective retroactively to 27 April 1992,¹⁷² whereas its notice of succession was deposited by the FRY in 2001.

Slovenia

Slovenia declared independence from SFRY on 25 June 1991.¹⁷³ Slovenia was the earliest of the former Yugoslav republics to deposit a notification of succession to the CISG, doing so on

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ On June 5, 2006, the Serbian Parliament acknowledged the independence of the Republic of Montenegro by declaring Serbia as the continuing state of the former Serbia and Montenegro. This was further confirmed by a number of international organizations. See, e.g., The Hague Conference on International Private Law, acknowledging that the Ministry of Foreign Affairs of the Netherlands, depositary of the Hague Conventions, has notified the Member States of the Hague Conference on 5 July 2006 that “Following the declaration of the state independence of Montenegro, and under the Article 60 of the Constitutional Charter of the state union of Serbia and Montenegro, the Republic of Serbia is the continuing international personality of the state union of Serbia and Montenegro, which was confirmed also by the National Assembly of the Republic of Serbia at its session held on 5 June 2006.” Information *available at* http://www.hcch.net/index_en.php?act=states.details&sid=65 (last accessed 2/1/2014). Furthermore, the International Monetary Fund has recognized the “continuing state” status of Serbia, by accepting Serbia’s membership in this UN Agency based on that status. For more information, see <http://rs.one.un.org/index.php?org=10> (last accessed 2/1/2014).

¹⁷² UNCITRAL Status of the CISG, *supra* note 33.

¹⁷³ UN Final Clauses, *supra* note 145, at 17.

7 January 1994.¹⁷⁴ According to the UNCITRAL website, this country's succession entered into force retroactively to the date of its independence.¹⁷⁵ Despite this, there was almost a three year gap, from June 1991, the date of succession, to January 1994, the date of the notice of succession. During this time, i.e. in May 1993, the Appellate Court of Slovenia dealt with a case which treated the application of the CISG in Slovenia. The Court held that "It is true that [the CISG] was ratified by both Italy and ex Socialist Federal Republic of Yugoslavia, however, [at this time] Slovenia did not take over this Convention in its legal system with any succession act."¹⁷⁶ This case seem to take the position that, unless a country deposits a notice of succession and as a result is listed in the official UNCITRAL database as a contracting state, the CISG would not be considered applicable in its territory on the assumption of continuity of treaties under the automatic succession principle.

Bosnia and Herzegovina

Bosnia and Herzegovina declared independence from SFRY on 6 March 1992.¹⁷⁷ The CISG was put in place as law with domestic national legislation on 6 June 1992.¹⁷⁸ It then deposited a notification of succession to the CISG on 12 January 1994 which, according to the UNCITRAL website, went into force, retroactively, on 6 March 1992, the date of independence of Bosnia and Herzegovina.¹⁷⁹

¹⁷⁴ UNCITRAL Status of the CISG, *supra* note 33.

¹⁷⁵ THE CISG AND ITS IMPACT ON NATIONAL LEGAL SYSTEMS 107 & 265 (Franco Ferrari ed., Sellier 2006) [hereinafter FERRARI].

¹⁷⁶ Slovenia 4 May 1993 Higher Court [Appellate Court] in Koper, *available at* <http://cisgw3.law.pace.edu/cases/930504sv.html> (last accessed 11/1/2014).

¹⁷⁷ UN Final Clauses, *supra* note 145, at 17.

¹⁷⁸ UNCITRAL status of the CISG, *supra* note 33.

¹⁷⁹ *Id.*

Croatia

Croatia declared independence from the SFRY on 8 October 1991.¹⁸⁰ It deposited a notification of succession to the CISG on 8 June 1998 which went into force retroactively on 8 October 1991, its date of independence.¹⁸¹ This was further solidified when the Croatian Parliament enumerated point III of the Constitutional Decision on Sovereignty and Independence, saying that international treaties entered into by SFRY would continue to be applied in Croatia by virtue of rules of international law on succession to treaties.¹⁸²

Republic of Macedonia

Macedonia was the slowest in depositing a notification of succession to the CISG after independence, perhaps because the issue of its name was still being worked out. Macedonia declared independence from the SFRY on 17 September 1991.¹⁸³ However, Macedonia did not deposit a notification of succession to the CISG until 22 November 2006.¹⁸⁴ This lengthy interim period has led to confusion about whether the CISG was actually in place in Macedonia before its notification and, perhaps more importantly, whether notifications are of a constitutive and not a declaratory nature.¹⁸⁵ There has been a mixed approach as to how to address this dilemma.

The only reported cases involving application of the CISG where one of the parties was Macedonian is from the Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce (FTCA).¹⁸⁶ An arbitrator from two Macedonian cases (Awards T-14/04 and T-15/05 of 21 February 2005) applied the CISG *before* notification of succession was deposited, but only

¹⁸⁰ UN Final Clauses, *supra* note 145, at 17.

¹⁸¹ UNCITRAL Status of the CISG, *supra* note 33.

¹⁸² FERRARI, *supra* note 175, at 93.

¹⁸³ UN Final Clauses, *supra* note 145, at 17.

¹⁸⁴ UNCITRAL Status of the CISG, *supra* note 33.

¹⁸⁵ Pavic & Djordjevic, *supra* note 117, at 17-18.

¹⁸⁶ *Id.* at 3.

did so because: 1) Serbia was the seller and decided to apply the CISG as it was the appropriate Serbian law; and/or 2) both the Serbian seller and Macedonian buyer were on former SFRY territory and thus the CISG, being law during SFRY existence, was the most appropriate common ground.¹⁸⁷ Furthermore, although the decision applies the CISG to a Macedonian party, it does not settle the question of whether Macedonia had automatically succeeded to the treaty upon independence.

A different position was reached (Awards T-8/07 of 9 May 2008 and T-1/08 of 17 November 2008) when an arbitrator deemed that both parties (including one Macedonian party) had places of business in CISG contracting states even *before* Macedonia's notification of succession was deposited.¹⁸⁸ However, in yet another disjunctive decision (T-23/06 of 15 September 2008) that occurred *after* notification, the arbitrator decided not to apply the CISG because he believed that Macedonia was not a CISG contracting state at the time of the contract conclusion.¹⁸⁹ He rationalized this by saying that, since there was no notification, the contracting parties did not believe or have knowledge that the CISG was applicable law in Macedonia and therefore could not have expected to be bound by it.¹⁹⁰

There have not been enough cases to determine what the practice in Macedonia has historically been.¹⁹¹ As more cases are found, translated, and reported, more light will be shed on how the international legal community has approached the long gap between independence and notification, and more will be known about whether the international community's approach was correct.

¹⁸⁷ SEAD, *supra* note 163, at 8.

¹⁸⁸ *Id.* at 9.

¹⁸⁹ *Id.* at 8.

¹⁹⁰ Pavic & Djordjevic, *supra* note 117, at 19-20.

¹⁹¹ *Id.* at 18-20.

Kosovo

Kosovo is the last and seventh independent country to emerge from the dissolution of Yugoslavia. As mentioned previously in this Chapter, since Kosovo has yet to join the United Nations, its process of succession to treaties, including the CISG, is much more complex. Specific issues relating to Kosovo will be considered below.

The Former USSR

The breakup of the USSR provides an interesting example of treaty succession. After the breakup of the USSR, the Russian Federation continued the membership of the USSR in the UN and assumed its legal rights and obligations for its own territory.¹⁹² On the other hand, as it will be explained below, while many republics that had been part of the USSR were now independent Successor States, the Predecessor State continued alongside them. When the post-USSR Commonwealth of Independent States was formed, the members signed documents guaranteeing that they would fulfill certain treaty obligations arising out of those treaties signed by the former USSR.¹⁹³ Those states determined that, since multilateral treaties were of general interest to the Commonwealth states, they did not require joint actions and it would thus be up to each individual state to determine what action it would take in terms of ratifying those treaties or not.¹⁹⁴ On the other hand, the Baltic states of Estonia, Latvia, and Lithuania informed the Secretary General that, because they claimed to have been annexed unlawfully in 1940, they were not Successor States and did not regard themselves as parties by succession to any treaties

¹⁹² UN ST/LEG/7, *supra* note 88, at 88.

¹⁹³ Grishkevich, *supra* note 147, at 1.

¹⁹⁴ *Id.*

of the USSR (despite the fact that they would go on to ratify many treaties that had applied to them under the USSR).¹⁹⁵

After the breakup of the USSR, even to the present moment, some former republics have chosen not to join the contracting states of the CISG.¹⁹⁶ However, some countries have chosen to become parties to the CISG for a number of reasons. For example, Uzbekistan decided to ratify the CISG to replace the old Soviet civil code.¹⁹⁷ It was attempting to discard all traces of former Soviet influence, and replacing the communist law with the more capitalist CISG was seen as a step away from the past and into the future.¹⁹⁸ The USSR had made a declaration under CISG Article 96, pursuant to which the “informality” rules in Articles 11 and 29 were not applicable if a party to a CISG transaction was located in the USSR.¹⁹⁹ The USSR most likely wanted to keep contracts as formal as possible, and therefore wished to make this declaration. For whatever reason, Russia has continued this declaration, but other former Soviet states that have ratified the CISG have not.²⁰⁰

The USSR provides an interesting mixed example. In this situation, where the successors exist alongside the predecessor, treaties were acceded to, not succeeded to, which allowed each republic and state (other than the predecessor) to approach treaties and agreements in their own way while the legal personality of the USSR continues, essentially, in the form of the Russian Federation.

With respect to depositing a notice of succession to the CISG, this step was taken by the Russian Federation, Belarus and the Ukraine; another group of Successor States, however,

¹⁹⁵ AUST, *supra* note 126, at 314.

¹⁹⁶ Azerbaijan, Kazakhstan, Tajikistan and Turkmenistan do not appear in the CISG contracting states list. See UNCITRAL page for the status of the CISG at *supra* note 33. See also Rolf Knieper, *Celebrating Success by Accession to the CISG*, 25 J.L. & COM. 477 (2005).

¹⁹⁷ *Id.* at 478.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 477. See also UNCITRAL, *supra* note 33.

²⁰⁰ *Id.* at 479.

refrained from filing a notice of succession, and instead elected to ratify the CISG themselves, because they considered themselves as newly independent states that inherited a “clean slate.” This approach was adopted by Estonia, Georgia, Kyrgyzstan, Latvia, Lithuania, Moldova and Uzbekistan.²⁰¹ Finally, a number of States whose territory previously formed part of the USSR – Azerbaijan, Kazakhstan, Tajikistan and Turkmenistan, neither deposited an instrument of accession with the depositary of the CISG, nor made a notification of succession *establishing* their succession to the USSR’s rights and obligations arising from the CISG.²⁰² These states are not listed as contracting states to the CISG in the UNCITRAL website.²⁰³

The Former Czechoslovakia

The CSSR provides an interesting example of the situation where a Predecessor State dissolves completely and does not continue alongside Successor States. Here, the CSSR dissolved entirely and the Czech Republic and Slovak Republic each became Successor States.²⁰⁴ The CSSR ratified the CISG on 5 March 1990, with the treaty entering into force on 1 April 1991.²⁰⁵ Shortly after, the CSSR restructured itself to become the Czech and Slovak Federal Republic (CSFR).²⁰⁶ The CISG came into effect in the CSFR immediately on 4 April 1991.²⁰⁷

In early 1993, the CSFR/CSSR dissolved to form two new republics: the Czech Republic and the Slovak Republic. Both republics declared themselves bound by all multilateral treaties to which the CSSR was a party at the time of its dissolution.²⁰⁸ On 28 May 1993 the Slovak Republic deposited with the United Nations an instrument of succession, with effect from

²⁰¹ Schroeter, *supra* note 116, at 460.

²⁰² *Id.*

²⁰³ UNCITRAL status for the CISG, *supra* note 33.

²⁰⁴ UN ST/LEG/7, *supra* note 88, at 88.

²⁰⁵ FERRARI, *supra* note 175, at 107.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ Grishkevich, *supra* note 147, at 1.

1 January 1993, the date of succession of this State and of the Czech Republic.²⁰⁹ On 30 September 1993 the Czech Republic deposited its instrument of succession with the United Nations, with effect from 1 January 1993, which was the date when Czechoslovakia dissolved to form the two new republics.²¹⁰ The former Czechoslovakia had made a reservation pursuant to CISG Article 95 when it ratified the Convention in 1990, declaring that it was not bound by the provision of Article 1, paragraph 1, item (b) of the Convention.²¹¹ Since the “continuity principle” is based on the very idea that the predecessor’s scope of treaty obligations survives the succession unchanged, the reservation according to Article 95 CISG is still effective for the Czech and the Slovak Republic.²¹²

China (Hong Kong and Macao)

A different case exists in Hong Kong and Macao. These two areas are not independent nations, but are instead Special Administrative Regions of the People’s Republic of China (PRC). Hong Kong was essentially a colony of the United Kingdom and Macao was governed by Portugal until 1997 and 1998 respectively, when they were handed back to the PRC.²¹³ The PRC ratified the CISG in 1986 and it entered into force on 1 January 1988 (when enough ratifications had occurred).²¹⁴ However, the PRC did not have the legal authority to extend these treaties over Hong Kong or Macao.²¹⁵ In fact, the United Kingdom did not ratify the CISG, so courts in Hong

²⁰⁹ Information on CISG Participating Countries (Slovakia), *available at* <http://www.cisg.law.pace.edu/cisg/countries/cntries-Slovakia.html> (last accessed 2/1/2014).

²¹⁰ Information on CISG Participating Countries (Czech Republic), *available at* <http://www.cisg.law.pace.edu/cisg/countries/cntries-Czech.html> (last accessed 2/1/2014).

²¹¹ *Id.*

²¹² Schroeter, *Backbone or Backyard*, *supra* note 127, quoting Magnus *Kommentar*, *supra* note 40, at art. 95, para. 4 and Schlechtriem in Schlechtriem & Schwenger, *Commentary*, *supra* note 17, at art. 1, para. 41.

²¹³ Ulrich G. Schroeter, *The Status of Hong Kong and Macao Under the United Nations Convention on Contracts for the International Sale of Goods*, 16 PACE INT’L L. REV. at 307, 314 (2004).

²¹⁴ *Id.* at 312.

²¹⁵ *Id.*

Kong were never required to apply it, and have no history of doing so.²¹⁶ Portugal, on the other side, has never ratified the CISG which would result in no applicability of the CISG in Macao.

When the handovers occurred at the end of the 20th century, both territories were put under the administrative control of the PRC, but with a very high degree of autonomy. Specifically, in the Hong Kong Special Administrative Region (HKSAR) the PRC could only bind the territory to international agreements of the PRC after seeking advisory decisions from the HKSAR government and considering the needs and situation of HKSAR.²¹⁷ A similar situation exists in Macao. The Hong Kong Basic Law (and a similar law in Macao) states that HKSAR (and similarly Macao) may only participate in international treaties, organizations, or conferences that are not limited to states. For example, HKSAR is a party to the General Agreement on Tariffs and Trade and to the World Meteorological Organization while Macao is a member of the Asia and Pacific Development center, but neither participates as a full member state.²¹⁸ Therefore, because the CISG is limited to “states,” neither HKSAR nor Macao may accede to the treaty in its own name, but instead must have PRC extend it to their territories for it to be applicable.²¹⁹

Currently, it appears that PRC has not made the decision to extend the CISG to the two territories.²²⁰ In fact, after retrocession of the two territories, PRC deposited a declaration with the Secretary General stating the conventions to which it was a party and the applicability of which the PRC wished to extend to HKSAR and Macao, but the CISG was conspicuously absent from this list.²²¹ Therefore, it would appear that the CISG (having never been applicable in Hong

²¹⁶ *Id.* at 313.

²¹⁷ *Id.* at 315.

²¹⁸ UN ST/LEG/7, *supra* note 88, at 27.

²¹⁹ Schroeter, *supra* note 213, at 317.

²²⁰ *Id.* at 315.

²²¹ UNCITRAL, *Digest of Case Law of the UN Convention on Contracts for the Int’l Sale of Goods*, at 438 (United Nations, 2012).

Kong nor in Macao) is applicable in neither HKSAR nor in Macao, despite the fact that it is law in PRC. Schroeter, however, disagrees with this assertion, and refers to CISG article 93 to explain the situation. According to him, “[a]rticle 93(1) of the CISG presupposes that a Contracting State has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with in the UN Sales Convention.”²²² Article 93, according to this author, requires a state to declare whether the Convention applies or not to its territories, and China has never made such a declaration. Thus, he argues that article 93(4) is clear for these kind of circumstances, since it provides that “If a contracting state makes no declaration under para.(1), the Convention is to extend to all territorial units of that State.”²²³ He, therefore, concludes that the effect of article 93(4) of the CISG is that the UN Sales Convention extends to Honk Kong and Macao.²²⁴ Nevertheless, he agrees that the practical result is that courts in Honk Kong and Macao are currently unlikely to apply the Convention to contracts involving a party from one of these two territories.²²⁵ This confusion over the applicability of the CISG in these territories confirms that the lack of a clear declaration (or the absence of any declaration) sent to the United Nations creates a confusing situation for the courts and arbitral tribunals who are ultimately going to decide whether the CISG is applicable to a particular contract.

Germany

The situation in Germany involves a Contracting State (or part thereof) that became part of a Non-Contracting State. This happened when the German Democratic Republic (GDR), which

²²² Schroeter, *supra* note 213, at 16.

²²³ *Id.* at 19.

²²⁴ *Id.* at 20.

²²⁵ *Id.* at 22.

had been a CISG Contracting State since 1 March 1990, effective 3 October 1990 acceded to the Federal Republic of Germany (FRG)(at that time still a Non-Contracting State, as the Convention only entered into force for the Federal Republic of Germany on 1 January 1991).²²⁶ The Treaty on Establishment of Germany Unification of 31 August 1990 said that the GDR ceased to exist and that all FGR treaties would remain in place.²²⁷ A “moving treaty boundaries” principle would be applied, meaning that all of the FGR’s treaties would now be extended to the entire country, including the territory of the former GDR.²²⁸ For political and diplomatic reasons, the GDR’s treaties did not automatically expire, but negotiations were held with contracting parties to discuss the changing situation.²²⁹ As Schroeter explains:

Generally speaking, upon becoming part of the territory of another State, treaties of the Predecessor State cease to be in force in respect of the territory to which the succession States relates, as provided by Article 15(a) Vienna Convention on Succession of States in respect of Treaties. As the German reunification was marked by a number of unique circumstances, commentators are divided if this solution also applies to Eastern Germany’s status under the CISG between 3 October 1990 and 1 January 1991. Suffice it to say that the point has not gained any practical relevance, as no international sales contract concluded by an Eastern German party during this brief period has been reported that would have raised the question of the Convention’s applicability.²³⁰

Under the status for the CISG in Germany listed in the official UNCITRAL website, Germany appears as a contracting state as of January 1, 1991.²³¹

2.1.3 The filing of notification of succession by Kosovo

Kosovo has to date been recognized by 108 sovereign UN members.²³² Its recognition process, somewhat unique, did not go through the United Nations, as has been the case for most other

²²⁶ Schroeter, *supra* note 127, at 457.

²²⁷ Grishkevich, *supra* note 147, at 2.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ Schroeter, *supra* note 127, at 461.

²³¹ UNCITRAL Status of the CISG, *supra* note 33.

countries. Rather, it has been accomplished on a country-by-country basis. This was done primarily because of Russia's threat to use its veto in the UN Security Council, should Kosovo apply for a UN membership.²³³ For that reason, Kosovo is not yet a member of the United Nations, although it did join some UN Agencies (i.e. the International Monetary Fund and the World Bank). Consequently, it is yet unknown how UN bodies (including the Secretary General as the depositary for the CISG) would react, should Kosovo file a notice of succession to the CISG or to any other UN treaty. Because of these uncertainties, mostly caused by political circumstances, Kosovo has not yet filed notifications of succession for any UN treaty, including the CISG.

Until recently, a domestic Regulation that had borrowed the text of the CISG was applicable in Kosovo.²³⁴ This UNMIK Regulation continued to be in force even after the end of the UNMIK administration, i.e. after the declaration of independence was made, because Kosovo, as an independent state, could not adopt all laws on all areas within a short time; thus, it continued with the application of UNMIK Regulations until they were replaced by a law adopted in the Assembly of the independent Kosovo. On the other side, however, the Convention's reception in Kosovo as international sales law was unclear, primarily because it was not certain whether Kosovo should simply assume the continuation of treaty obligations or send a written notification of succession to treaties to the respective depositaries.²³⁵ This is also because of the

²³² As of 28 November 2014. See official statements of the Prime Minister of Kosovo, available at www.kryeministri-ks.net and official statements of the Ministry of Foreign Affairs, available at <http://www.mfa-ks.net>.

²³³ See news reports on this matter, available at <http://rt.com/politics/churkin-kosovo-un-resolution/http://en.ria.ru/russia/20071221/93519661.html>, and <http://www.economist.com/node/8896630>. Last accessed: 14/1/2014.

²³⁴ See *supra* note 3. See also Section 1.2.2 and 1.2.3 of Chapter One of this dissertation. Kosovo had adopted the text of the CISG as its domestic sales law through UNMIK Regulation 2000/68. It is applicable as of 2000.

²³⁵ See Section 2.1 in Chapter Two of this dissertation.

practice of other former Yugoslav countries,²³⁶ which gave a notification of succession in order to re-trigger the application of the CISG.²³⁷ Consequently, the odd situation arose beginning with Kosovo's independence in 2008 that a court in Kosovo should apply the text of the CISG to domestic sales contracts (through Regulation 2000/68), but not necessarily to those of an international character.²³⁸ Of course, if a court or arbitration panel, located anywhere, would resort to a private international law analysis, and this would point to Kosovo law, then Regulation 2000/68 (i.e. the text of the CISG) would apply as Kosovo domestic law. Alternatively, if private international law pointed away from Kosovo law, but led to the application of a country that was a Contracting State to the CISG, then the CISG would apply as the law of that other country.²³⁹ If PIL led to the law of a country that was not a Contracting State to the CISG, then the domestic sales law of that country would apply. In order to clarify the situation and make sure that the ultimate interpreters of these situations, i.e. courts or arbitration panels, are clear with respect to the application of the CISG, and given the lack of clarity as far as succession of this treaty is concerned, Kosovo started exploring ways for an alternative adoption of the CISG as the applicable law to its international sales.

The controversy over automatic succession shows that, from a practical point of view, it may be wise for any Successor State to deposit a notice of succession in order to remove any ambiguity as to the application of the CISG. Even if such controversy did not exist, the practice of depositories has been to keep a country off the list of states party to a treaty unless a notice of

²³⁶ All other independent countries (Croatia, Bosnia and Herzegovina, Slovenia, Macedonia, Serbia and Montenegro) that emerged out of the breakup of Yugoslavia have filed notifications of succession for the CISG. *See* UNCITRAL, *supra* note 33, and the discussion in Part ii (1) of Chapter Two.

²³⁷ As was discussed earlier (See Section ii (1) of Chapter Two in this dissertation), the original date of succession to the treaty was considered the date of independence, not the date of notice of succession.

²³⁸ In cases when, through article 1(1)(b) a foreign court would decide that the applicable law is that of Kosovo, then, even in a sale of an international character, Regulation 2000/68 as the domestic law of Kosovo (which is the almost identical text of the CISG), would apply to that international contract.

²³⁹ *See* CISG Article 1(1)(b).

succession is deposited. Examples of that practice can also be found with respect to non-UN treaties, when the depository is other than the Secretary General of the UN.²⁴⁰ Such practice was also employed by UNCITRAL, which has not listed Successor States as contracting states until such status was confirmed by a notice of succession. As a result, courts of other states may not consider Kosovo as a contracting state to the CISG as long as it does not appear in the UNCITRAL list. One could, of course, argue to a court that, under the automatic succession doctrine, Kosovo is a Contracting State to the CISG even if it does not appear in the UNCITRAL Status Table. The response of a court to such an argument would vary, depending of their view of the automatic succession principle, as well their legal system and legal culture.

Kosovo, as mentioned before²⁴¹ would not be faced just with the simple question of whether it should send notice of succession. Whether such notice would be accepted by the depository is the real question here. In order to understand what has been the practice of the UN Secretary General as depository of treaties, the analysis below presents examples of how different cases were handled, as well as how this practice can be used in the case of Kosovo.

2.1.3.1 The practice of the UN Secretary General as treaty depository Article 2(1)(g) of the Vienna Convention on Succession of States with respect to Treaties states that “‘notification of succession’ means in relation to a multilateral treaty any notification, however phrased or named, made by a Successor State expressing its consent to be considered as bound by the treaty.” In order to better understand the purpose of such notifications, it is helpful to go through the practices that the UN Secretary General has observed in relation to this matter.

²⁴⁰ See e.g. the list of state parties to the four Geneva Conventions of 1949 that have codified the laws of war, available at https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=380. (last accessed: 3 March 2015). Yugoslavia was a party to these treaties.

²⁴¹ See Section 2.1.3 of Chapter Two in this dissertation.

The United Nations Treaty Office has published a compilation of practices of the UN Secretary General as a depositary for UN Treaties.²⁴² This document, although not legally binding, provides a guideline on most common practices of states as well as the ways that the UN Secretary General had dealt with specific and complicated cases whenever a party has deposited a treaty instrument.

As concerns treaties, this UN document provides that whenever a succession happens:

the Successor State has then the option of: (a) participating in any treaty which is open to it by signing and depositing an instrument of ratification or taking a similar action in order to become bound by the treaty, or (b) *succeeding to any treaty the application of which was extended to it by the Predecessor State (thus preserving the continuity of the application of the treaty), by depositing an instrument of succession in respect thereof.*²⁴³

Option (b), which addresses succession (i.e. continuation of application of a treaty, as opposed to its *de novo* ratification or accession) requires, according to this document, the deposition of an instrument of succession.²⁴⁴ Throughout this UN document, however, it is never stated that this is a legal requirement that stems from the Vienna Convention on Succession of States with Respect to Treaties. It is stated that “that the position of the Secretary-General, as depositary, is absolutely not binding on states, which may draw from the general declaration of succession any legal consequences which they may deem fit.”²⁴⁵ It seems, though, that the UN Secretary General, because of an established practice of depositing instruments of succession, assumes that this is how a Successor State should proceed if it wants to avoid uncertainties and make sure that it is listed as a contracting party. It has, therefore, confirmed that “it is only when such instruments are deposited with the Secretary-General that the State concerned is henceforth

²⁴² UN ST/LEG/7, *supra* note 88.

²⁴³ *Id.* at para. 289.

²⁴⁴ *Id.*

²⁴⁵ *Id.* at para. 306.

officially listed in the records of the treaty as a party thereto.”²⁴⁶ As it is evident from a number of cases, the UN has listed a succeeding state as a contracting party only upon the deposition of the instrument of succession.²⁴⁷

Although such an administrative requirement might have legal and political consequences for some states, the UN seems to have introduced it for the sake of bureaucratic procedures. Most importantly, this requirement ultimately can affect the understanding with respect to the application of treaties and it has introduced a dilemma in international public law and among states with respect to the applicability of the “automatic succession” principle.

One would think that requiring deposit of a notice of succession is not a big burden on states because it is a simple letter notifying the Secretary General that the state is the successor to a certain UN treaty (e.g., the CISG) and that it considers itself bound by it. This is correct, however, only with respect to UN member states. Once a Successor State becomes a member of the United Nations, it has no difficulties in addressing the UN Secretary General and other UN bodies. Nevertheless, non-UN member states may face unexpected hurdles when attempting to become a party to, or to succeed to, a UN treaty. And in this context, it is important to note that the CISG is open for accession to “all states,”²⁴⁸ not just UN member states. As Evans argues,

[t]he reference to “all States” in paragraph (2) is now a common feature of universal conventions and reflects Article 6 of the United Nations Convention on the Law of Treaties which provides that “[e]very State possesses capacity to

²⁴⁶ *Id.*

²⁴⁷ See, e.g., the practice of listing Successor States as parties to the CISG and the New York Convention on the Enforcement of Foreign Arbitral Awards, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html and http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html. In both cases, although the date of succession shown is the same as the date when the country succeeded (i.e. became independent), the country was not listed in the official website of contracting states until a succession notice was deposited. In some instances, 15 years have passed from the date of succession to the date of deposition of the instrument, which triggered the listing as a contracting state. See, e.g., the case of Macedonia and its status with the CISG. Macedonia became independent in 1991, but was listed as a contracting state (see website provided above on the status of the CISG) only in 2006, after it deposited an instrument of succession at the UN.

²⁴⁸ *CISG*, *supra* note 1, at art. 91.

conclude treaties.” Adoption of the Convention is not therefore restricted to States which are members of the United Nations Organization.

Despite this, the question is whether the Secretary General would accept notice of succession to the CISG by Kosovo.

A number of treaties provide that they are open to all United Nations member states.²⁴⁹ In these cases, whenever the UN Secretary General receives a notice of accession, ratification or succession from such a state, there is no question whether to register the notice or not since UN membership is the decisive criteria. Nevertheless, quite a number of treaties provide a formula that allows “all states” to become contracting parties.²⁵⁰ The question is how the UN Secretary General will determine what entity is a “state” that would fall within the aforementioned formula. According to the summary of practices of the UN Secretary General as depositary of treaties, a number of elements are taken into account to make that determination, including: whether that state is a member of the UN; whether the state is party to the Statute of the International Court of Justice;²⁵¹ whether the state is a member of specialized agencies of the UN; whether that state has been invited by UN specialized agencies or by the UN General Assembly to join those treaties, etc.²⁵² Based on this practice, three main formulas have emerged for treaty provisions designating which states may become parties to the treaty: 1. The Vienna Formula, 2. The “All States” formula, and 3. The Practice of the UN General Assembly.

²⁴⁹ *Id.* See also The Convention on the Prevention and Punishment of the Crime of Genocide, providing that it is open to the participation of “any Member of the United Nations and of any non-member State which has received an invitation” from the General Assembly. United Nations, Treaty Series, vol. 78, at 277.

²⁵⁰ See, e.g., Article 91 of the UN Convention on Contracts for the International Sale of Goods (CISG), Article XIII of the Convention on the Suppression and Punishment of the Crime of Apartheid (UN Treaty Series Vol. 1015, 1-14861) and Article XIV of the Convention on the Prevention and Punishment of Crimes against Diplomatic Agents and Other Internationally Protected Persons (UN Treaty Series, vol. 1035, p. 167).

²⁵¹ For example, the Convention on the Declaration of Death of Missing Persons has provided for the participation of States in their capacity as Parties to the Statute of the International Court of Justice. UN Treaty Series, vol. 119, at 99.

²⁵² ST/LEG/7, *supra* note 88, at para. 79.

The Vienna Formula

A state's membership in the United Nations may become hostage to the political opposition of one of the permanent members of the UN Security Council.²⁵³ That is because the current membership rules require the recommendation of the UN Security Council²⁵⁴ (without a veto by any of the five-permanent members) before a vote takes place at the UN General Assembly.²⁵⁵ This difficulty, however, does not arise when a state attempts to join UN specialized agencies, where there is no procedure for a veto by an agency's members.²⁵⁶ For that reason the summary of UN Secretary General's practice shows that:

A number of conventions then provided that they were also open for participation to States members of specialized agencies. For example, the Vienna Convention on the Law of Treaties was opened for signature by all States Members of the United Nations or of any of the specialized agencies or of the International Atomic Energy Agency or Parties to the Statute of the International Court of Justice, and by any other State invited by the General Assembly of the United Nations to become a party to the Convention.²⁵⁷

This type of clause specifying which entities could become contracting parties to a treaty was called the "Vienna formula" and has helped the UN Secretary General to manage difficulties whenever a specific country was not a member of the UN. For example, if a treaty provides that it is open to accession for all members of the United Nations as well as World Health Organization, the International Monetary Fund and the World Bank, all the UN Secretary General has to do is check whether the state that has applied for accession, ratification or

²⁵³ The five permanent members of the United Nations Security Council are: the United States of America, France, United Kingdom, China and Russia. See more information on permanent and non-permanent members of UNSC at its official website *available at*: <http://www.un.org/en/sc/members/> (last accessed 13/1/2014).

²⁵⁴ *See* Article 4(2) of the United Nations Charter of 24 October 1945, 1 UNTS XVI, *available at* <https://www.un.org/en/documents/charter/> (last accessed 9/1/2014).

²⁵⁵ Russia has threatened to use its veto should Kosovo apply for membership in the United Nations. This is the main reason why Kosovo has not yet lodged an application for UN membership.

²⁵⁶ ST/LEG/7, *supra* note 88, at para. 79.

²⁵⁷ *Id.*

succession is a member of any of these organizations or specialized agencies. If the answer is yes, then the country can be listed as a contracting state to that specific treaty.

The “All-States” formula

As opposed to the Vienna Formula, which gives some specifications that aid the UN Secretary General when acting as a treaty depository, many treaties have opted for the “all states” formula, which gives no further specifications for which states may become contracting states other than simply indicating that the treaty is open for all states. Faced with the concerns that are raised with this formula, the Secretary-General has on a number of occasions, stated that there are certain areas of the world whose status is not clear.²⁵⁸ Since the Secretary General did not wish to determine which entities are states, and he believed that such a determination fell outside of his competence, he decided to seek the assistance of the UN General Assembly in such cases.²⁵⁹ Thus, in cases when a treaty has adopted the “any State” or “all States” formula, “he would be able to implement it only if the General Assembly provided him with the complete list of the States coming within the formula, other than those falling within the ‘Vienna formula,’ i.e. States that are Members of the United Nations or members of the specialized agencies, or Parties to the Statute of the International Court of Justice.”²⁶⁰

²⁵⁸ See, *inter alia*, the statement of the Secretary-General at the 258th plenary meeting of the General Assembly, at the eighteenth session, on 18 November 1963 (Official Records of the General Assembly, Eighteenth Session. 258th plenary meeting); and the statement by the Secretary-General at the 918th meeting of the Sixth Committee, on 25 October 1966, Sixth Committee. 918th meeting. Cited in: ST/LEG/7/Rev.1, *supra* note 88, at para. 80.

²⁵⁹ ST/LEG/7, *supra* note 88, at para. 80.

²⁶⁰ *Id.*

The Practice of the UN General Assembly

The challenges faced by the UN Secretary General in cases when a treaty refers to the “all states” formula led to the creation of the practice of the UN General Assembly. In 1973, the General Assembly adopted an understanding that:

the Secretary-General, in discharging his functions as a depositary of a convention with an “all States” clause, will follow the practice of the Assembly in implementing such a clause and, whenever advisable, will request the opinion of the Assembly before receiving a signature or an instrument of ratification or accession.²⁶¹

If the Secretary General seeks the advice of the General Assembly, the latter is supposed to unequivocally state whether it considers a particular entity a “state.”²⁶² This has occurred in the past, when, for example, the General Assembly made deliberations with respect to granting independence to colonial countries or people and took a clear position in accepting those entities as states, even before they became members of the United Nations. Such positions were taken by the Secretary General as a clear indication that those particular entities fell within the “all states” formula.²⁶³

The Secretary General had to deal again with the “all states” formula in the cases of Cook Islands and Marshall Islands. Although Cook-Islands were considered a self-governing entity, its foreign affairs and defense were run by New Zealand. In order to determine whether this entity fell within the “all-states” formula, the UN Secretary General referred to a Resolution of the UN General Assembly which had reiterated that Cook Islands had not attained full independence

²⁶¹ United Nations Juridical Yearbook, 1973 (United Nations publication, Sales No. E.75.V.I), p. 79, note 9, 1974 (United Nations publication, Sales No. E.76.V.I), p. 157. Cited in: ST/LEG/7/Rev.1, *supra* note 63, at para. 82.

²⁶² Such indications are to be found in General Assembly resolutions, for example in resolution 3067 (XXVIII) of 16 November 1973, in which the Assembly invited to the Third United Nations Conference on the Law of the Sea, in addition to States at that time coming within the long-established “Vienna formula,” the “Republic of Guinea-Bissau” and the “Democratic Republic of Viet Nam,” which were expressly designated in that resolution as “States.” Cited in: ST/LEG/7/Rev.1, *supra* note 88, at para. 83.

²⁶³ ST/LEG/7, *supra* note 88, at para. 84.

yet.²⁶⁴ Having this in mind, the Secretary General concluded that Cook Islands could not participate in a treaty by invoking the “all states” formula, unless specifically invited to such treaty.²⁶⁵ However, the situation changed when the Cook Islands became a member of the World Health Organization (WHO) in 1984 and subsequently joined the UN Food and Agriculture Organization, the UN Educational, Scientific and Cultural Organization, and the International Civil Aviation Organization as a full member without any specifications or limitations. Following this development, the Secretary-General considered that the Cook Islands could be included in the “all States” formula, were it to wish to participate in treaties deposited with the Secretary-General.²⁶⁶

The case of the Marshall Islands was similar as it wished to participate in treaties deposited with the Secretary General after it had joined the International Civil Aviation Organization. However, in this case there was a UN Security Council Resolution in place which had put the Marshall Islands under Security Council trusteeship.²⁶⁷ Furthermore, there were doubts as to whether the Marshall Islands had observed all procedures for becoming a member of the International Civil Aviation Organization.²⁶⁸ In these circumstances of ambiguity, the Secretary General could not act upon the “all states” formula with respect to the Marshall

²⁶⁴ The General Assembly, in its resolution 2064 (XX) of 16 December 1965 on the question of the Cook Islands, had reaffirmed the responsibility of the United Nations “to assist the people of the Cook Islands in the eventual achievement of full independence, if they so wish, at a future date.” That resolution, which was adopted in view of a change in the status of the Cook Islands, further indicated that the latter had not yet attained full independence within the meaning of the term in United Nations usage. *Id.* para. 85.

²⁶⁵ *Id.*

²⁶⁶ *Id.* para 86.

²⁶⁷ See UN Security Council resolution 21 (1947) of 2 April 1947 on trusteeship of Marshall Islands.

²⁶⁸ Admission apparently had been effected on the basis of article 92 of the Chicago Convention, which provides that States Members of the United Nations, associates of the United Nations and States neutral in the Second World War could accede simply by depositing an instrument with the United States of America, the depositary. In all other cases, new members could be admitted, under article 93, only by a vote of four fifths of the members of the International Civil Aviation Organization. See ST/LEG/7/Rev.1, *supra* note 88, at para. 87.

Islands. However, once the Trusteeship Agreement had been terminated,²⁶⁹ the Secretary General applied the formula to this country as well.²⁷⁰

To sum up, it seems that the UN has already created a number of models of how to act once a request for accession or succession to a treaty is deposited. If a country is a member of the UN, then the answer is clear. However, if no UN membership has taken place yet, the UN will have to employ one of the methods explained above, i.e.: The Vienna Formula, the all states formula and the practice of the Secretary General. If the treaty provides for a possibility of membership if that country is a member of certain specialized agencies, then the UN can use the “Vienna formula.” If the treaty allows “all states” to join it, then the UN will refer to the “all states formula.” And finally, if there are doubts as to whether a certain entity that applies for a treaty membership is a “state,” then the UN can look at the practice of the Secretary General as depository, to see how to treat that specific situation.

2.1.3.2 Application of UN practice to the case of Kosovo With respect to the CISG, Kosovo is in a position to rely on the “all states” formula if it decides to send a notice of succession. As already stated, the CISG is open to all states, without any prerequisite for these states to be members of the United Nations. The cases of the Cook Islands and the Marshall Islands described above can help Kosovo argue its position.

Firstly, just as in the case of the Cook Islands, Kosovo has already joined UN Specialized Agencies by becoming a member of the International Monetary Fund (IMF) and the World Bank (WB). If membership in these types of organizations was considered the only requirement for

²⁶⁹ Furthermore, the Secretary-General was informed that there had been no formal objections by the members of the: International Civil Aviation Organization to the admission to membership of the Marshall Islands in the organization. *Id.* at para. 87.

²⁷⁰ *Id.*

deeming the Cook Islands to fall within the “all states” formula, Kosovo can certainly argue for the same treatment.²⁷¹ On the other hand, if we look at the example of Marshall Islands, this country was considered part of the “all states’ formula once its UN trusteeship was over, but before it became a UN member. Kosovo can argue similar circumstances, since its administration by the UN ended in 2008, when it gained its independence. Thus, the Kosovo situation arguably falls within the “all states” formula.

Despite these arguments, if Kosovo submitted a notice of succession with respect to the CISG there is still a possibility that, because of political pressure, the UN Secretary General might either: (a) postpone the entire process and not answer Kosovo’s request based on its notice of succession; or (b) be forced to ask for the opinion of the General Assembly on whether Kosovo is a state. The document outlining the practice of the UN Secretary General as depositary of treaties does not specify what majority of UN members would be required to vote in favor, in order for Kosovo to attain the status required for the “all states” formula. Depending on what majority would be required, the process would then become an issue of lobbying for votes at the UN General Assembly (“UNGA”). If the UNGA answers “Yes” to the question of whether Kosovo is a state falling within the “all states” formula, Kosovo would then have no problem in depositing its notice of succession for all treaties that provide for that formula (and were in force in the Predecessor State), including the CISG.

The letter of 17 February 2008 to the Secretary General as a notice of succession

On the day that Kosovo declared independence, the President and the Prime Minister of the country sent a joint letter to all UN member states seeking recognition and diplomatic relations,

²⁷¹ Kosovo’s case is, of course, even stronger, because it has been recognized as an independent state by more than half of UN members, as opposed to the Cook Islands, which never attained such recognition and is still part of New Zealand.

as well as confirming for Kosovo the principles of the UN charter and the continuing application of treaties that had been signed by Yugoslavia or UNMIK. A similar letter was sent to the UN Secretary General, outlining Kosovo's intentions to become a member of the UN as well as confirming the continuation of application of those treaties. Since neither the Vienna Convention on Succession of Treaties nor the practice of the Secretary General impose many formal requirements for notice of treaty succession, one may argue that the letter sent on the day of independence fulfils such requirements. In fact, the Vienna Convention on Succession of Treaties provides that, as long as a letter clarifies the intention of a state to be bound by a Convention, no matter how it is phrased or named, it can constitute a notice of succession.²⁷² Three specific article in the Vienna Convention provide information as to the form and effect of the notice of succession. First, in cases on newly independent states, articles 22 and 23 of the Vienna Convention clarify the steps to be undertaken with a notice as well as its effect. The text of these two articles is as follows:

Article 22

Notification of succession

1. A notification of succession in respect of a multilateral treaty under article 17 or 18 shall be made in writing.
2. If the notification of succession is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers.
3. Unless the treaty otherwise provides, the notification of succession shall:
 - (a) be transmitted by the newly independent State to the depositary, or, if there is no depositary, to the parties or the contracting States;
 - (b) be considered to be made by the newly independent State on the date on which it is received by the depositary or, if there is no depositary, on the date on which it is received by all the parties or, as the case may be, by all the contracting States.
4. Paragraph 3 does not affect any duty that the depositary may have, in accordance with the treaty or otherwise, to inform the parties or the contracting States of the notification of succession or any communication made in connection therewith by the newly independent State.

²⁷² Article 2(1)(g) of the Vienna Convention on Succession of States with respect to Treaties states that “‘notification of succession’ means in relation to a multilateral treaty any notification, however phrased or named, made by a Successor State expressing its consent to be considered as bound by the treaty.”

5. Subject to the provisions of the treaty, the notification of succession or the communication made in connection therewith shall be considered as received by the State for which it is intended only when the latter State has been informed by the depositary.

Article 23

Effects of a notification of succession

1. Unless the treaty otherwise provides or it is otherwise agreed, a newly independent State which makes a notification of succession under article 17 or article 18, paragraph 2, shall be considered a party to the treaty from the date of the succession of States or from the date of entry into force of the treaty, whichever is the later date.

2. Nevertheless, the operation of the treaty shall be considered as suspended as between the newly independent State and the other parties to the treaty until the date of making of the notification of succession except insofar as that treaty may be applied provisionally in accordance with article 27 or as may be otherwise agreed.

3. Unless the treaty otherwise provides or it is otherwise agreed, a newly independent State which makes a notification of succession under article 18, paragraph 1, shall be considered a contracting State to the treaty from the date on which the notification of succession is made.

On the other side, a similar article on notification, which covers cases of separation, dismemberment (dissolution) of states and unification is included in Article 38 of the Convention, as follows:

Article 38

Notifications

1. Any notification under articles 31, 32 or 36 shall be made in writing.

2. If the notification is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers.

3. Unless the treaty otherwise provides, the notification shall:

(a) be transmitted by the successor State to the depositary, or, if there is no depositary, to the parties or the contracting States;

(b) be considered to be made by the successor State on the date on which it is received by the depositary or, if there is no depositary, on the date on which it is received by all the parties or, as the case may be, by all the contracting States.

4. Paragraph 3 does not affect any duty that the depositary may have, in accordance with the treaty or otherwise, to inform the parties or the contracting States of the notification or any communication made in connection therewith by the successor State.

5. Subject to the provisions of the treaty, such notification or communication shall be considered as received by the State for which it is intended only when the latter State has been informed by the depositary.

In this case, though, as opposed to the articles above related to newly independent states, there is no provision providing for the effect of notice of succession and suspension of the application of the treaty until a notice is made. It is, thus, indirectly understood that in the category of successor states stemming from dissolution or unification, the application of the treaty is not suspended while waiting for the notification. Moreover, as emphasized above, once the treaty is made, it would have a retroactive effect.

In any case, it is clear from the provisions above that the only formal requirements for a notice of succession are for it: 1) to be made in writing; 2) to be signed by a head of state or government or minister of foreign affairs and 3) to be sent to the depositary of the treaty. The letter of 17 February was in writing, was signed by both the head of state (President) and head of government (Prime Minister) and was sent to the depositary of UN treaties (the UN Secretary General). The letter, moreover, expressed the consent of Kosovo to be bound by treaties that had been signed by former Yugoslavia.

Nevertheless, Kosovo is not listed as a Contracting State to the CISG on the UNCITRAL Status Table, and is similarly not included in lists of Contracting States to other UN treaties.²⁷³ The fact that the UN Secretary General has never responded to Kosovo's independence letter, nor included Kosovo in its lists of contracting states for UN treaties, suggests that Kosovo's process of succession has not yet been accepted by the UN. However, the fact that the UN has not recognized that Kosovo has succeeded to being a party to treaties does *not* necessarily mean

²⁷³ See UNCITRAL, Status of the CISG, *supra* note 33.

that Kosovo is, as a legal matter, not a party by succession; it may merely mean that the UN has not yet recognized the fact. The UN's practice is not necessarily the same as the legal situation. The legal reality is independent of how the UN acts – although UN actions obviously may dictate de facto how Kosovo's legal situation is treated, and certainly UN action can be used as an argument for what the legal reality is. These actions are not, though, the only argument for establishing that reality.

Depositing the notice of succession before UN membership: risks and benefits

As noted above, Kosovo has been recognized by more than 100 UN members; however, it is hard to predict when it will be admitted to the UN as a member. This is primarily because membership in the UN does not directly depend on the number of recognitions but on the process of voting at the UN Security Council – voting that is subject to a veto by any of the permanent members. Russia is currently threatening the process with its veto, thus making it impossible for Kosovo to join the UN. The prospects of Russia changing its mind are unknown for the moment. Under these circumstances, Kosovo should start thinking about depositing notices of succession to UN treaties, including the CISG, even before it becomes a UN member.

There are, however, risks involved in that process. If Kosovo decides to send its notice of succession to the CISG before becoming a UN member, there is a possibility that the UN Secretary General, pursuant to the practice described previously,²⁷⁴ would refer the issue to the UN General Assembly to decide whether Kosovo falls within the “all-states” formula. While this will then become a matter for lobbying and the chances are very high that Kosovo would get the necessary numbers for a vote on its favor, there are still risks involved. Although the likelihood

²⁷⁴ See Section 2.1.3.1 in Chapter Two of this dissertation.

of the General Assembly saying that “Kosovo is not a state” is very slim, if that would happen it would have a very negative effect in Kosovo’s efforts to further strengthen its statehood.

On the other side, the benefits of a successful completion of such a process would be vast. If the General Assembly would answer “Yes” to the question of whether Kosovo falls within the “all-states” formula, Kosovo would be able to join not only the CISG as a full-fledged contracting party, but also any other UN Convention that is open to all states. The process of succession would be easy and smooth since Kosovo would simply have to send to the UN Secretary General the list of treaties that it wants to continue to apply and it would then be listed as a contracting state for all those treaties. There is, however, an additional benefit that does not relate to succession. With a positive outcome from the General Assembly, Kosovo would also be able to become a party to Conventions that it did not inherit from Yugoslavia (as long as they provide for the “all-states” system), by depositing an instrument of accession to those treaties and ratifying them through regular procedures. A “Yes” from the General Assembly would also strengthen Kosovo’s efforts to join other international treaties that are not part of the UN system, and it would give a boost to other processes, such as the process of recognition of independence and membership in international organizations.

The examples, discussed above, of dissolution or joining of countries shows that the practice of succession to the CISG, or to any other treaty for that matter, is far from uniform. In some instances emerging countries have used the “clean slate principle” by starting anew the process of signing and ratifying a treaty. In other examples, Successor States have used the continuity principle and assumed that existing treaty obligations continue to apply. None of these examples, however, answers the question of whether the notice of succession is mandatory or the treaty should be considered to have applied from the moment the country emerged as

independent. The arbitration awards from Macedonia, outlined previously, confirm the haziness of the situation around treaty succession. Kosovo has still not considered depositing its notice of succession to the CISG, but there may be other alternative options to make sure that the CISG applies in the country.

2.2 APPLICABILITY OF THE CISG THROUGH KOSOVO'S DOMESTIC LAW

Despite political problems that have hindered its recognition as a contracting party to many international treaties, Kosovo has adopted alternative methods of applying important international instruments. The Kosovo Constitution,²⁷⁵ under article 22 [Direct Applicability of International Agreements and Instruments], has made a number of international treaties (including UN treaties) directly applicable in Kosovo. Although this Chapter of the Constitution mainly covers international human rights instruments, it has paved the way for the Kosovo Parliament to make a number of other international treaties directly applicable to Kosovo, by adopting them through legislation. For example, the European Convention on Human Rights and Fundamental Freedoms is directly applicable in Kosovo (adopted through the Constitution and a number of laws that were passed before the Constitution entered into force), and both the Constitutional Court as well as regular courts (especially those dealing with criminal cases) must follow the provisions of this Convention as well as the practice of the European Court of Human Rights. In addition, a number of international treaties related to intellectual property have been made directly applicable in Kosovo through legislation that deals with copyright, trademarks, patents, industrial design, etc.

²⁷⁵ See *supra* note 78, at art. 22.

The model that was followed thus far was to simply include a provision in the law that states that a certain treaty is directly applicable in Kosovo and the courts must apply it based on the treaty's scope of application. In the case of CISG, would it be sufficient to simply include a similar provision in the New Law on Obligations (Chapter on Sales Contracts?) or should alternative methods be found that would secure the application of the CISG to international contracts subject to Kosovar law, thus making Kosovo a "functional contracting state."²⁷⁶ A number of options were taken into account while the New Law on Obligations was being considered, some of which are outlined in the next sections.

2.2.1 Option 1: Adoption of the CISG through a provision in the Law on Obligations

The new Law on Obligation includes over a thousand articles dealing with all types of contracts and torts. One of its most significant chapters is the one dealing with sales contracts. The entry into force of this law repeals UNMIK Regulation 2000/68 which had applied to domestic sales contracts since 2000, and which, as discussed above, had borrowed, almost in its entirety, the text of the CISG. For a few months leading up to the adoption of the new Law on Obligations, the Parliament of Kosovo had considered a number of options in order to make the CISG applicable to international sales, and thus to remove the confusion that existed among judges after Kosovo declared independence.

The first option considered was to make the CISG applicable in the fashion that has been the practice of Kosovo when adopting other texts of international treaties, that is, simply to include a provision in the law stating that "**the UN Convention on Contracts for the**

²⁷⁶ This would mean that, although Kosovo is not listed in the official UNCITRAL list of contracting state, it carries out the functions of such a state by making the CISG directly applicable through its legislation, and by acting as a contracting state, including undertaking all obligations that stem from such status.

International Sale of Goods – CISG (1980) is directly applicable in Kosovo.” Since the Kosovo Constitution provides that international law, and international treaties in particular, prevail over provisions of domestic law, the provision in the Law on Obligations could have added that **“in case of conflict, provisions of the CISG prevail over provisions of laws and other acts of public institutions in Kosovo.”** This approach, however, could create ambiguity as to how CISG Art. 1(1) applies – unless the law also declared that Kosovo should be considered a “Contracting State” to the CISG. Furthermore, it could also have been added that **“courts in Kosovo are obliged to apply the CISG to international sales,²⁷⁷ unless the contract between the parties provides otherwise, or the rules of Private International Law would lead to the application of the law of a CISG non-contracting state.”**

Such a provision, which would be easy to draft and, more importantly, easy to pass in the Parliament, would seem to put Kosovo in the position of a “functional contracting state,” which, without going through the ratification procedure, embraced the provisions of the Sales Convention. The main question would then be its application in practice. Some possible problems are elaborated later in this chapter.²⁷⁸

2.2.2 Option 2: Adoption of the CISG through the incorporation of its entire text in the Law on Obligations

Another option discussed in Kosovo for adopting the CISG was the incorporation of all of its text into the Law on Obligations. In this way, the Law on Obligations would include a new chapter called “International Sales” that would provide that the text of the CISG (all of which would be copy-pasted into the law) applies to international sales contracts.

²⁷⁷ Presumably this would have the same meaning in the Kosovar law as it does in the CISG – e.g., consumer contracts and contracts for vessels, hovercraft etc. are excluded. *See supra* note 1, at art. 2.

²⁷⁸ *See* Section b(i) later in this Chapter.

This model has, to some extent, previously been tried in Norway. Norway decided to adopt an act which transformed and integrated rules for domestic and international sales into a single Code, an approach that has been criticized because instead of adopting the text of the CISG as is, Norway created a Norwegian version of the CISG that, in some respects, is quite distinct from the original CISG and includes a number of non-uniform rules.²⁷⁹ This has resulted in conflicting interpretations, which is in contradiction with the principle of uniformity as a central policy of the CISG.

Based on the example of Norway, it was essential that, if Kosovo decided to incorporate the CISG into its Law on Obligations, it should incorporate the text in its entirety and without changes that may later create confusion in the interpretation of the text. Otherwise, any alteration of the text will undermine the most important goal of this Convention, the creation of a uniform legal regime for international sales. Norway, as previously stated, is one of the countries where the CISG has had an effect on its domestic law.²⁸⁰ Many, however, have considered the Norway model to be a disaster that should be avoided.²⁸¹

Norway has chosen a different way of making the Sales Convention applicable to international sales.²⁸² The Ratification of the CISG in the Norwegian Parliament was made through a separate piece of legislation, and was adopted by way of a “consolidated act” that

²⁷⁹ Joseph Lookofsky, *Understanding the CISG in Scandinavia*, at 5–6 (2d ed. DJOF Publishing Copenhagen).

²⁸⁰ According to Schlechtriem, Norway is not the only country that has adopted the CISG as both, domestic and international sales law. Tokelau Islands, as he explains (a territory of New Zealand) has enacted the CISG for both, domestic and international sales. *See supra* note 2, at 4. *See, however*, the CISG treaty status at <http://www.cisg.law.pace.edu/cisg/countries/cntries-New.html>, which provides that New Zealand adopted the Convention with a declaration of non-application to the Cook Islands, Niue and Tokelau. It appears that despite this declaration, Tokelau has unilaterally decided to apply the Sales Convention.

²⁸¹ Fra Kai Kruger, *International sales under present Norwegian Law*, at § 26.1 (Bergen, Alma Mater, 4th ed. 1999). Joseph Lookovsky, *Understanding the CISG in Scandinavia, A Compact Guide to the 1980 United Nations Convention on Contracts for the International Sale of Goods*, at 5 (DJØF Publ. 2002).

²⁸² Norway and the other Nordic countries have all made an article 94 (or 92) reservation, which means the CISG would not be applicable to contracts between parties which both have their places of business in Scandinavian countries. *See more information available at* <http://www.cisg.law.pace.edu/cisg/countries/cntries-Norway.html> (last accessed 10/01/2014).

included provisions which, in conjunction with domestic rules, were meant to reflect the Convention.²⁸³ This means that the final “consolidated” act, did not reflect the Convention in its entirety and as written, but rather some provisions were modified in order for the Act (hereinafter referred to as SGA of 1988) to serve for both domestic and international sales.

According to Kruger, the SGA makes 6 *specific exceptions* within the provisions otherwise common for national and international sales, stating that provisions otherwise applicable *shall not apply to international sales*.²⁸⁴ Moreover, section 88 and 89 of the SGA set out the rules for interpreting the provisions of the Act, and they are not the same for international and domestic sales. Thus the very same provision with the very same text has different rules of interpretation, depending on whether it is being applied to a domestic or international contract. Therefore, there can be different results under the exact same wording of the exact same provision.²⁸⁵

As we can see from this example, the method of adopting a unified code cannot work if the text of the Convention would be transformed and changed in order to also apply for domestic sales. Kosovo institutions, therefore, considered that they should be vigilant in making sure that the provisions for domestic sales, no matter how much they are influenced by the CISG, should be completely separate from those incorporating the CISG’s official text, without changes. The homeward trend is already too apparent in many CISG contracting states, and a method similar to Norway’s would only complicate the application of the Convention further and would go against the goal of uniform interpretation.

²⁸³ Kruger, *supra* note 281.

²⁸⁴ *Id.*

²⁸⁵ *Id.*

2.2.3 Option 3: Reaffirming that Kosovo is already a party to the CISG by way of treaty succession

Another option would be to include a provision in the Law on Obligations that would simply reaffirm that Kosovo is already a party to the CISG, and thus, the Convention applies to its international sales. The provision would assume the application of the principle of automatic succession, according to which the CISG has *continued* to apply since Kosovo became a Successor State, i.e. from the date of its independence.

Kosovo has taken such a stance on a number of other international treaties. One example is the continued application of the Vienna Convention of Diplomatic Relations (1961) and the Vienna Convention on Consular Relations (1963). Immediately after declaring independence, Kosovo acted as if these treaties continued to apply, although it had not specifically referred to them in the Constitution and it had sent no notification of succession to their depository. Following a similar path, Kosovo could simply reaffirm that the CISG continues to apply, pursuant to the principle of continuity in application.

2.2.4 Option 4: Do nothing: Simply apply the CISG assuming that, according to the continuity principle, it continues to apply in Kosovo

An almost-identical path to that followed in the case of the Vienna Conventions of Diplomatic and Consular Relations would be to undertake no legal measures whatsoever. The courts in Kosovo would simply behave as if the CISG continues to apply, although there would be no reference in the new Law on Obligations and no notification of succession sent to the depository (i.e. UN Secretary General). This would mean that the courts recognize the automatic succession principle and they would treat Kosovo as a contracting state to the CISG based on this principle.

This approach has not, however, worked well in practice, as the courts have failed to apply the CISG as the law applicable to international sales.

2.3 THE CISG IN THE NEW LAW ON OBLIGATIONS OF 2012

Law No. 04/L-077 on Obligations was adopted by the Assembly of the Republic of Kosovo on 10 May 2012 and promulgated by the President on 30 May 2012. Pursuant to Article 1059 of that Law, it entered into force six months after its publication in the Official Gazette. It included a provision (Article 1058) making the CISG applicable in Kosovo.

2.3.1 Adoption in the domestic law as an alternative way to ensuring the application of the CISG

Since 1999 when Kosovo was put under the administration of the United Nations,²⁸⁶ a lack of legal clarity has arisen among judges and legal practitioners with respect to application of laws, in particular international treaties that had applied until 1999, when the war took place. Since the country was at first under UN administration, the latter had the power to adopt and promulgate new laws, and it did so with respect to many areas, in order to repeal the Yugoslav laws that had applied until then, in particular those that were considered to be of a discriminatory character.²⁸⁷ With regard to contracts, the 1978 Law on Obligations and the UNMIK Regulation 2000/68 on Sales Contracts applied concurrently, and created confusion as to which one prevailed.²⁸⁸

²⁸⁶ Based on Resolution 1244/1999 of the United Nations Security Council. *See supra* note 19.

²⁸⁷ *See supra* note 21. The applicable law in Kosovo was initially determined through UNMIK Regulation 1999/24 of 12 Dec. 1999. Article 1.1 of this Regulation provided that the applicable law in Kosovo shall be “(a) the regulations promulgated by the Special Representative of the Secretary-General and subsidiary instruments issued thereunder; and (b) The law in force in Kosovo on 22 March 1989.

²⁸⁸ *See* Appendix 1 of this Dissertation, *supra* note 37.

Although from a legal standpoint, the latter, (i.e. the UNMIK Regulation) prevailed as far as its scope of application was concerned (i.e. sales contracts), most judges in Kosovo courts hesitated to start working with a new law, and preferred using what they had been used to for about 20 years, i.e. the 1978 Law on Obligations.²⁸⁹

One thing that the courts were not clear on was whether international treaties to which Yugoslavia was a party would continue to apply in Kosovo. The situation remained confusing for the courts after Kosovo declared independence in 2008, even though both Kosovo's Declaration of Independence²⁹⁰ as well as its Constitution²⁹¹ provided for continuity of application of international treaties that had been signed by Yugoslavia. Most courts decided to ignore international treaties, unless a treaty was specifically mentioned by name in the Constitution or in one of the laws adopted by the Assembly of the independent state of Kosovo.²⁹² Given this lack of clarity in the practice of courts, it was essential that the new Law on Obligations clearly specify the application of the CISG to international sales. With such language, judges would know for sure that they must apply the CISG whenever:

1. There is a contract between two parties the places of business of which are in CISG contracting states (CISG article 1(1)(a));
2. The rules of international private law lead to the application of the law of Kosovo (thus the law of Kosovo with respect to international sales, clearly, would be the CISG);
3. The rules of private international law lead to the application of the law of another contracting state; or
4. The parties to the contract have agreed to make the CISG applicable.

Law No. 04/L-077 on Obligations entered into force in early 2013. The Law was a result of countless discussions among political groups, professionals, law professors, judges, practitioners,

²⁸⁹ *Id.*

²⁹⁰ Kosovo's Declaration of Independence. *See supra* note 73, at art. 9.

²⁹¹ Kosovo's Constitution. *supra* note 78, at art. 145.

²⁹² *See* Appendix 1 of this Dissertation, *supra* note 37.

international community representatives, etc., over several years.²⁹³ In the Chapter on Transitional and Final Provisions of the Law, the issue of termination and validity of other laws is addressed. It provides as follows:

Termination of validity and application of other laws

1. On the day of entry into force of the present law, the provisions of the UNMIK Regulation 2000/68 on contracts of sales of goods shall cease to exist.
2. In the meaning of this Law, and in accordance with Article 145 of the Constitution of Republic of Kosovo, the applicable Law on Contracts on International Sale of Goods shall be the United Nations Convention on Contracts for the International Sale of Goods.²⁹⁴

Another subsection of this provision repealed the old Obligations Act of 1978, with the exception of the provisions of Title XXXI (Bank deposits), Title XXXII (Lodging of securities), Title XXXIII (Streamline bank accounts), Title XXXIV (Contracts for safe deposit boxes), Title XXXV (Contracts for credit), Title XXXVI (Contracts for credit on the ground of charging the securities), Title XXXVII (Letters of credit), Title XXXVIII (Bank guarantee) and Title XXXIX (Application of provisions of banking business), which are to continue to be applied as appropriate as national regulations until the issue of the relevant regulations.²⁹⁵

The first draft of the Law, presented to the Assembly by the Ministry of Justice (the sponsor of the law),²⁹⁶ did not include a provision making the CISG applicable. However, during the first reading in the Assembly, it was proposed that such a provision be included. This ended up in an amendment that was finally reflected in paragraph 2 of article 1058.

²⁹³ The author of this thesis participated in the early stages of the drafting of this law, as a representative of the Office of the President of Kosovo in the working groups, and was later involved in discussions, deliberations, drafting and decision-making in the Parliament of Kosovo (including cooperation with the international community), in the capacity of Member of Parliament.

²⁹⁴ Kosovo Law No.04/L-077 on Obligations, *supra* note 10, at art. 1058.

²⁹⁵ *Id.* at art. 1058, para.3.

²⁹⁶ See the Draft Law on Obligation Relationships, adopted by the Government, *available at* http://www.md-ks.org/repository/docs/PROJEKTLIGJI_PER_MARREDHENIET_E_DETYRIMEVE.pdf (last accessed: 10/01/2014).

This provision has achieved results which to a great extent change the situation with respect to the laws applicable to sales contracts. First, it repealed Regulation 2000/68, which was based on the text of the CISG. This means that a ‘domesticated’ version of the CISG will not apply to domestic sales contracts any longer. Second, it repealed the old Law on Obligations of 1978, with the exception of some parts that do not deal with sales law. Finally, and most importantly, it included an explicit provision making the CISG applicable to international sales contracts.

2.3.2 Advantages of the language adopted in the new Law on Obligations

The text in paragraph 2 of article 1058 seems to have adopted a combination of Option 1 and Option 3 explained above. First, this provision provides that “*in the meaning of this Law...* the applicable Law on Contracts on International Sale of Goods shall be the United Nations Convention on Contracts for the International Sale of Goods.” This is similar language to that used in many other laws in Kosovo, which have made international treaties directly applicable to Kosovo by mentioning them and their scope of application within the text of the law.²⁹⁷ This provision, however, contains another element that, in the past, was not usually part of laws making international treaties applicable in Kosovo. The language “**in accordance with Article 145 of the Constitution of Republic of Kosovo**” shows that this provision confirms the continuity principle, i.e. a continued, rather than a *de novo* application of the CISG, based on the automatic succession of the treaty.

²⁹⁷ See e.g., Caption 13 of Law on Trademarks (Law No. 02-L-54), making the Paris Convention applicable in Kosovo. See also Article 150 of the Criminal Code of Kosovo (Law No: 04-L-082), making the Geneva Conventions directly applicable in Kosovo.

From now on, when parties to an international sales contract choose the application of the Kosovo Law on Obligations, the CISG will apply, since Article 1058 clarifies that this Convention is Kosovo's law with respect to international sales. This, in some aspect, creates legal certainty for parties to a contract. On the other hand, the judges in Kosovo cannot hide behind a lack of clarity anymore and say that they are not certain whether the CISG applies, because the Law on Obligations has cleared that up. Although it's been about a year since this Law has entered into force, none of the interviewed arbitrators had yet the chance to work on a case where the application of article 1058 came into play.²⁹⁸

While the new law appears to be a good result that will clarify much for judges in Kosovo courts who might have to deal with international sales, it may also present a number of hurdles from a practical point of view, as discussed below. Since Kosovo has not yet chosen to submit a notice of succession for the CISG, however, any option that it chose in its Law on Obligations might have led to the same kind of problems in practice.

2.3.3 Potential problems with the application of the new Law on Obligations

With the adoption of the new Law on Obligations, which makes a clear reference to the CISG, the assumption is Kosovar judges would, from now on, apply the Convention every time they deal with an international sales contract (unless at least one of the parties is located in a non-Contracting State and PIL rules point to the substantive law of a non-Contracting state). Nevertheless, there are a number of practical problems that may arise. Twenty-five judges and practitioners were interviewed and asked whether, after the adoption of the new Law on Obligations (and the language therein that refers to the CISG), they now consider Kosovo a

²⁹⁸ See Appendix 2 of this Dissertation, *supra* note 61.

contracting state to the CISG. Twenty-one responded that they now do consider Kosovo a contracting state to the CISG, whereas three responded that they do not know and only one responded that Kosovo had to ratify the treaty in order to be considered a contracting state.²⁹⁹ A separate Questionnaire sent to arbitrators asked whether they believe that the incorporation of Article 1058 in the new Law on Obligations is sufficient to make Kosovo a contracting party to the CISG.³⁰⁰ Out of ten arbitrators, two gave a short ‘NO’ answer and two others a short “I’m not sure” answer, without giving any further explanation.³⁰¹ Five arbitrators, while responding “NO” to the question, also gave reasons as to why they believe that the incorporation of this provision does not make Kosovo a contracting state. The reasons included the lack of ratification of the Convention by the country’s institutions and the lack of a notice of succession sent to the treaty depository. In a lengthier response, one of the arbitrators stated as follows:

The incorporation of Article 1058 in the Law on Obligations cannot make Kosovo a state party to the Convention. The interpretation of this article leads us to the conclusion that Kosovo has unilaterally made the CISG part of its internal legal system. Kosovo has not ratified the CISG (pursuant to the rules of the law on treaties), cannot make declarations pursuant to CISG Article 92 (with respect to the non-applicability of Part II of the Convention). This can also have an effect in the interpretation of cases when one of the parties has made a declaration that it does not apply article 1(1)(b). Finally, taking into account the nature of article 1(1)(b) and the way how other courts or tribunals would interpret it if International Private Law leads to the application of the law of Kosovo, it is unclear whether the court would respond by applying the CISG as a part of Kosovo’s internal legal system or by considering Kosovo a contracting state.³⁰²

The rest of the arbitrators underlined that the issue remains unclear, despite the inclusion of article 1058 in the law. And if it is unclear for judges and arbitrators in Kosovo, it will certainly be unclear for courts and tribunals of other jurisdictions. Some potential challenges are outlined below.

²⁹⁹ Appendix 1 of this Dissertation, *supra* note 37.

³⁰⁰ See Appendix 2 of this Dissertation, *supra* note 61.

³⁰¹ *Id.*

³⁰² *Id.* See the responses from Arbitrator No.5 in the Appendix.

2.3.3.1 Challenges from interpretations by courts of other jurisdictions Significant problems could arise with courts of other jurisdictions and their interpretation of the provision of Kosovo's Law on Obligations that makes the CISG applicable in Kosovo. Those courts might deal with the issue in many ways, such as: treating Kosovo as a CISG contracting party; treating Kosovo as a functional contracting party;³⁰³ treating Kosovo as a non-contracting party, but if the rules of PIL lead to the application of Kosovo laws, applying the text of the CISG pursuant to the Kosovo Law of Obligations; treating Kosovo as a non-contracting party, and if the rules of PIL lead to the application of Kosovo laws, only applying its domestic sales law, ignoring the provision on the application of the CISG. Some of the possible scenarios are elaborated below.

Application of CISG article 1(1)(a)

Pursuant to Article 1(1)(a) of the CISG, the Convention applies to contracts for the sale of goods between parties whose places of business are in different States, when those States are Contracting States. Based on this criterion, the Convention is directly applicable, without the need to resort to the rules of private international law, when the States in which the parties have their relevant places of business are Contracting States.³⁰⁴ Assume the following scenario:

*A dispute arises from a contract between a Swiss buyer and a Kosovo seller. The dispute is being settled by a Swiss court. The contract does not contain a choice of law clause. Switzerland is a contracting party to the CISG, but Kosovo does not appear in the official list of contracting states.*³⁰⁵ The court in this case has a few choices:

³⁰³ See *supra* note 276 on the reference to a “functional contracting state.”

³⁰⁴ The 2012 UNCITRAL Digest, *supra* note 221, at art. 1, para.9.

³⁰⁵ UNCITRAL, Status of the CISG, *supra* note 33.

- First, it can assume that Kosovo is a contracting party to the CISG by taking into account the automatic succession principle and/or Kosovo's declaration that it would be bound by the treaty, and based on CISG Article 1(1)(a) it can decide that the CISG is directly and automatically the applicable law to the contract between the parties.
- Second, it can assume that Kosovo is a 'functional' contracting party. This means that although Kosovo does not appear in the list of contracting states, it did make the CISG applicable through its Law on Obligations, and as a result, Kosovo is a contracting state from a functional point of view. The Swiss court thus might apply the CISG pursuant to Article 1(1)(a). Alternatively, the Swiss court might decide application of the CISG pursuant to Article 1(1)(a) is inappropriate because Kosovo, although functionally a Contracting State, is not listed as an official Contracting State. In that case the court would presumably engage in a PIL analysis. If that analysis pointed to Kosovar law, the court could (and should) apply the CISG as specified in Kosovo's Law on Obligations. Whether application of the CISG after a PIL analysis leading to Kosovo law should be considered an application of CISG Article 1(1)(b) (see the discussion below) is an interesting question.³⁰⁶
- Third, the Swiss court could assume that Kosovo is not a Contracting State. As a result, with only one of the parties located in a CISG contracting state, the court would have to apply the rules of Article 1(1)(b) – a situation discussed below.

³⁰⁶ If the Swiss court's PIL analysis pointed to Swiss law, the court would presumably again apply the CISG pursuant to Article 1(1)(b).

Application of CISG article 1(1)(b)

It is hard to foresee at this point whether any court of a contracting state would consider Kosovo a contracting state, despite it not appearing in the official list yet. Whenever both parties to a contract do not come from contracting states, the CISG may apply through Article (1)(1)(b), which provides that the Convention applies to a contract of sale when the rules of private international law lead to the application of the law of a Contracting State. In these circumstances, we have to keep in mind that a country might have made an article 95 reservation when adopting the CISG. In such a case, the most likely result is that the CISG would not be applicable through the rules of Article 1(1)(b).³⁰⁷ At least, this would be the interpretation of a country that has made an article 95 reservation. That result is, however, not clear if the case is being heard by courts of a CISG contracting state that has not made an article 95 declaration and is, thus, bound by article 1(1)(b).

Even case law shows that there have been conflicting decisions on this issue. There are several decisions in which one party was from a Contracting State that has made an article 95 declaration and the other party was from a non-Contracting State. As such, the Convention was not applicable via article 1(1)(a) and the court or tribunal applied domestic conflict of law rules leading to the application of domestic sales law rather than the CISG.³⁰⁸ However, in one case

³⁰⁷ In a case of a dispute between a party from a Contracting State that has made an article 95 declaration and a party located in a non-contracting State, the applicable law is determined based on the domestic conflict of laws rules. This means that if PIL points to the law of the Article 95 declaring state, in most cases, that state's non-uniform (domestic) sales law would apply. The States that have made an article 95 declaration are: the People's Republic of China, Czech Republic, Saint Vincent and the Grenadines, Singapore, Slovakia and the United States of America. *See* the 2012 UNCITRAL Digest of case law on the CISG, *supra* note 221, at 442.

³⁰⁸ UNCITRAL Digest of case law on the CISG, *supra* note 221, Article 9, citing [CHINA Supreme Court of the People's Republic of China 20 July 1999 (*Zheng Hong Li Ltd. Hong Kong v. Jill Bert Ltd*)] (a contract between a buyer from Hong Kong and a seller from Switzerland designated the law of the People's Republic of China, which has made an article 95 declaration; although not expressly stated by the court, the article 95 declaration likely was the basis for the application of domestic PRC Law on Economic Contracts); [CHINA International Economic and Trade Arbitration Commission, People's Republic of China, 24 December 2004] (because the seller was not from a Contracting State (Japan at the time) and the buyer was from a State that made an article 95 declaration (the People's Republic of China), the tribunal applied the domestic contract law of the People's Republic of China); CLOUT case

the Court applied the CISG based on article 1(1)(b) even though the Contracting state had made an article 95 declaration,³⁰⁹ and in another case, the court emphasized that an article 95 declaration would not preclude application of the CISG, if the parties would agree otherwise.³¹⁰

In order to clarify such situations, Germany has made a declaration with respect to their understanding of the effect of an article 95 reservation. The notes on Germany in the UNCITRAL status table provide that “upon ratifying the Convention, Germany declared that it would not apply article 1, paragraph 1(b) in respect of any State that had made a declaration that that State would not apply article 1, paragraph 1(b).”³¹¹

Returning to the transaction between the Swiss buyer and the Kosovo seller, the Swiss court, based on the official list of Contracting States, may decide that Kosovo is not a Contracting State at all within the meaning of CISG article 1(1)(a), and therefore the court faces a situation in which only one of the parties comes from a Contracting State. That would lead to the application of private international law. If these rules lead to the application of the law of Switzerland, the CISG would apply pursuant to CISG Article 1(1)(b), since the Sales Convention represents the Swiss law with respect to international sales. However, if the rules of private international law lead to the application of the law of Kosovo, the court would have to look to Kosovo’s law on obligations. In this case, most probably the court would take into account article 1058 of the law, which again, would lead to the application of the CISG. Because the court did not consider Kosovo a Contracting State for purposes of Article 1(1)(a), the application of the CISG pursuant to the Kosovo Law on Obligations would appear not to be an application of

no. 616 [UNITED STATES U.S. District Court, Southern District of Florida 22 November 2002 (*Impuls v. Psion-Teklogix*)]; [UNITED STATES U.S. District Court, Western District of Washington, 17 July 2006 (*Prime Start Ltd. v. Maher Forest Products Ltd.*)].

³⁰⁹ *Id.* CLOUT case no. 49 [GERMANY Oberlandesgericht Dusseldorf 2 July 1993].

³¹⁰ *Id.* CLOUT case no. 280 [GERMANY Oberlandesgericht Jena 26 May 1998]

³¹¹ UNCITRAL Status of the CISG, *supra* note 33, Notes on Germany.

Article 1(1)(b), but rather an application of the CISG as Kosovo domestic law. Although much less likely, a court may also decide to simply apply Kosovo's domestic law sales rules and ignore article 1058 of the Law on Obligations. Such a solution would be employed if the court insisted that the only way for a country to provide for the application of the CISG is by officially being recognized as a Contracting State. However, the likelihood of a Swiss court insisting on application of the domestic sales law of Kosovo seems slim.

Suppose neither party to a contract comes from a state that has ratified the CISG, but the rules of private international law lead to the law of a third state, in this case, the law of Kosovo. This could occur, for example, if a seller from a non-contracting state has produced its goods in Kosovo, because of a cheaper labor market, and has also negotiated and delivered the goods from Kosovo to another non-contracting state. Because of the many factors that connect the contract to Kosovo, the court may resort to the law of the latter, through conflict of law rules. Other cases may include circumstances foreseen in CISG Article 10(a), which provides that "if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract." In that case, if there are factors connecting a contract to Kosovo, they may result in one (or both) of the parties being deemed located in Kosovo. And if all these factors lead to the application of the law of Kosovo, the court would have to decide whether the reference to the CISG in Article 1058 of Kosovo's Law on Obligations is sufficient to make the Convention applicable to the contract. Whether this would involve an application of the CISG pursuant to Article 1(1)(b) or simply as a matter of Kosovo domestic law is unclear.

2.3.3.2 Challenges in interpretation by Kosovo courts If a dispute that arises from an international sales contract ends up in Kosovar courts, law calls for the application of the CISG. The question is, would this always be true and what would happen if the contract was between a Kosovo buyer and a seller in a non-Contracting State, and the Kosovo court's PIL analysis led it to apply the law of the seller? Would Kosovo courts still apply the CISG? In order to answer this, we need to go back to the language used in the new Law on Obligations, which stipulates that "*in accordance with Article 145 of the Constitution of Republic of Kosovo, the applicable Law on Contracts on International Sale of Goods shall be the United Nations Convention on Contracts for the International Sale of Goods.*" Article 145 of the Constitution of Kosovo reaffirms the principle of continuity of application with respect to international treaties. This means, that a court in Kosovo, pursuant to this provision, would have to apply the CISG as an international treaty, and pursuant to CISG's own rules of application contained in article 1. In such a situation, and if the contract between the parties does not clearly call for the application of the CISG, the court would presumably resort to a PIL analysis. If that analysis leads to the application of the law of a Contracting State, the result would be the applicability of the CISG. A different result would obtain however, if the PIL analysis leads to the application of a non-contracting state.

If both parties come from Contracting States, a Kosovo court (which presumably would not be bothered by Kosovo's non-appearance on the list of official Contracting States) would not have to resort to the provisions of the domestic law in Kosovo at all, since the CISG would apply automatically, by the succession principle by virtue of Article 1(1)(a). The question is, therefore, in what cases would a Kosovo court have to resort to Kosovo's law on obligations, and thus to apply article 1058 of this law calling for the application of the CISG to international sales?

Assume a contract between a Kosovo company and a company located in a non-Contracting State and the parties have not agreed on choice of law. If the court's conflict of law rules lead to the law of Kosovo, the CISG would apply, since the Convention is Kosovo's law with respect to international sales. The court might reach this result as an application of Article 1(1)(b), if the court recognizes that Kosovo is bound by the treaty under the Successor State doctrine or as a result of Kosovo's declaration of the treaties it recognizes. Alternatively, this might result from an application of the CISG pursuant to Kosovo domestic law – Article 1058 of the Law on Obligations – rather than as a matter of the treaty itself.

Alternatively, suppose neither party is located in Kosovo and at least one of the parties is located in a non-Contracting State, but the court's application of the rules of private international law lead to the law of Kosovo. Kosovo courts would most certainly not be subject to the hesitations that courts of other jurisdictions might have with respect to considering Kosovo a Contracting State. Since Article 1058 of the Law on Obligations refers to Article 145 of the Constitution (which reaffirms the principle of continuity of treaties), the Courts in Kosovo would probably consider Kosovo a Contracting State based on that provision. Thus the CISG would apply as a matter of Article 1(1)(b) of the treaty. There might be, however, other hesitations and hurdles that will plague Kosovo's judges. One, as the practice has shown, will be the attempt to avoid applying any international treaty because of the lack of knowledge of that treaty. Such hesitations have made Kosovo judges, in many instances, go with the law they know best, instead of what they are required to apply. Thus, they might continue to apply Kosovo's domestic sales law, instead of resorting to the CISG. Another continuing challenge is the lack of access by Kosovo judges to CISG decisions from a tribunal outside Kosovo. For many years, judges had no computers in their offices, and then for a few years they had no internet. Now that

many of them have both, a problem remains with the lacks of translated decisions in a language they would understand, as the vast majority do not speak English. Because no CISG jurisprudence has been translated into Albanian, the judges would hardly understand the materials even if they were available to them. In this situation, CISG training and programs that would make the CISG materials accessible and understandable to judges are highly desirable.

2.3.3.3 Challenges in interpretation by arbitral tribunals An arbitral tribunal faced with deciding a case which involves a party from Kosovo, or that has any connection with Kosovo, would be dealing with issues similar to those faced by courts, discussed above. Since arbitration is based on the principle of the will of the parties, it means that the parties to the contract may resort to arbitration to resolve their potential disputes. And, of course, arbitration does not relate to territorial jurisdiction since parties can choose any arbitral institution anywhere in the world.

If the parties decide to arbitrate in Kosovo, through any of the arbitral institutions available in the country, and assuming that the substantive law chosen by the parties is the CISG, there would be no problem in determining the application of the latter.³¹² If, however, the parties did not determine the law applicable to the contract, the arbitral tribunal would face issues similar to those confronted by courts. An arbitral institution in Kosovo might well consider Kosovo as a Contracting State to the CISG, by considering the fact that Kosovo made the CISG applicable for international sales through its Law on Obligations; thus if one party is located in Kosovo and the other in a CISG Contracting State, the arbitral panel could well apply the CISG pursuant to Article 1(1)(a). However, this is just one of the possibilities. Arbitral tribunals are not obliged to apply the substantive law of the seat (which in this case would be the Law of Kosovo

³¹² Under Kosovar law, there are no limitations on party autonomy in choosing law. See Article 29 of Kosovo's Law on Arbitration. Law No.02/L-75 of 26 Jan. 2007, available at http://www.assembly-kosova.org/common/docs/ligjet/2007_02-L75_en.pdf. (last accessed: 28 February 2015).

on Obligations), unless required by the contract, or to fill in the gaps that cannot be resolved by the law chosen by the parties. As it would not be mandatory, the provision of the Law on Obligations which makes the CISG applicable in Kosovo would not be mandatory either.

Kosovo's Law on Arbitration provides that: *"In cases related to international issues, the arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the right³¹³ determined by the rules of private international law. In all other cases, the arbitral tribunal shall apply Kosovo legislation."*³¹⁴ This means that, unless the third possibility (i.e. application of Kosovo legislation) comes in play, there is a possibility for Kosovo not to be considered as a Contracting State by an arbitration institution residing in Kosovo. In such a case, when only one or none of the parties is located in a contracting state, the arbitral institution may resort to rules of private international law, and determine which state's law applies. If this takes us to the law of Kosovo, then the Law on Obligations would come into application, which, again, would result in application of the CISG. The same is true if the PIL analysis of the arbitration panel points to the application of the law of a Contracting State (at least if the Contracting State has not made an Article 95 declaration). But if the arbitration panel's application of PIL results in the designation of the law of a non-contracting state, then the domestic sales law of that state would be applicable.

Similar issues would be faced by foreign arbitral institutions. Much would depend on whether or not the foreign tribunal would consider Kosovo a Contracting State. An arbitration tribunal could consider Kosovo a Contracting State based on the continuity principle of

³¹³ The word "right" is an incorrect translation of the Albanian word "të drejtën" which should have been translated as "law."

³¹⁴ Article 29(1) of Kosovo's Law on Arbitration. Law No.02/L-75 of 26 Jan. 2007, available at http://www.assembly-kosova.org/common/docs/ligjet/2007_02-L75_en.pdf. (last accessed: 28 February 2015).

succession, the declaration by Kosovo of treaties that bind it, or a theory that Kosovo is a functional Contracting State, based on the alternative way that Kosovo has chosen to adopt the application of the CISG. The third possibility would be not to consider Kosovo a contracting party at all. However, even in such a situation, if private international law would lead to the application of Kosovo law, this should again result in application of the CISG due to the provision in Kosovo's law on obligations.

CONCLUSION

This Dissertation has shown the complexities of Kosovo's path towards becoming a full-fledged Contracting State to the CISG. The approach of Kosovo towards the CISG has been unique: it has 'domesticated' the text of the Convention and used it as Kosovo national sales law, adding a uniformity-in-interpretation requirement even for domestic sales. This influence of the CISG on the text of Kosovo's domestic law, however, did not translate into influence in practice. Even though they were supposed to apply Regulation 2000/68 (an almost mirror image of the CISG) to their domestic sales while that regulation was in force, Kosovo judges, in most cases, opted to apply the old Law on Obligations of 1978 to domestic transactions.

Unfortunately, because the court archives covering this period were largely either destroyed or taken away by Serbian troops, Kosovo still does not have access to court cases that might have dealt with the application of the CISG during the period of 1989-1999. On the other hand, the culture of not publishing cases continues today, so there is not much to be found even from the period of 2000-2008.

Kosovo's declaration of independence marks an important moment not only from a political point of view, but also from a legal perspective. Kosovo has undertaken to continue the application of all international treaties that had been signed by Yugoslavia, and based on the succession principle it inherited those treaty obligations. This includes the CISG, to which Yugoslavia was a party. The mere unilateral declaration with respect to this continuation of

treaty obligations, however, did not make Kosovo automatically a contracting party – at least, not one that would be listed in the official list of contracting states of these treaties. If we check the status of the CISG today, Kosovo does not appear among Contracting States on the UNCITRAL website. This leads to the issue of succession of treaties in international law.

In discussing the issue of succession to treaty obligations, I have tried to provide an analysis of a very complex and controversial matter in international law. Even the Vienna Convention on Succession of States in respect of Treaties does not eliminate the confusion. Actually, in some aspects it creates even more confusion. While some parts of the treaty confirm that the moment of a declaration of independence is the moment when a country is considered a successor and, as a result, the moment when the treaty would enter into force in the territory of the newly formed state, in other articles it mentions that such a Successor State may deposit a notice of succession in order to confirm this entire process. While the word “may” clarifies that this is not a legally binding obligation, the practice of the Secretary General as depositary has made it somewhat obligatory, as they do not list any Successor State as a contracting party until a notice of succession is sent.

Kosovo has not yet deposited its notice of succession to the CISG. However, the analysis of the practice of the Secretary General as depositary for UN treaties shows that there are paths that Kosovo could take in order to be considered a contracting party within the “all-states” formula, which is provided for in many UN Conventions, including the CISG. Because of political risks, however, Kosovo has yet to undertake this step.

In order to understand how Kosovo’s succession to the CISG as a UN treaty has worked, the practice of a number of countries has been examined, including: the former Yugoslavia and the countries emerging from its dissolution; USSR and the countries emerging from its

dissolution; Czechoslovakia and the path of succession by both the Czech Republic and Slovakia; Honk Kong and Macao as parts of China; and the practice of the two Germanies as they united. This research shows that the UN has listed these countries as Contracting States to the CISG only after they submitted a notification of succession. However, the “entry into force” date shown on the UNCITRAL website is not the date when the state deposited the notice of succession, but the date when the country became independent. The question would then arise, in the case of the CISG, what would happen to cases arising between the date of independence and the date of succession – that is, should judges consider a country, e.g. Macedonia, a Contracting State from the date of independence, or from the date it submits a notice of succession. Obviously, while it might have been arisen simply as a bureaucratic measure, the practice of depositing a notice of succession has complicated the matter of succession.

Finding itself in this ambiguous situation, Kosovo had to seek alternative options for adopting the CISG, to ensure that the CISG applies as its international sales law. I have presented a number of paths that Kosovo has considered in order to make that happen during the interim period until it becomes a UN member. The options included: adopting the CISG through a provision in the Law on Obligations; adopting the CISG through the incorporation of its entire text in the Law on Obligations; reaffirming that Kosovo is already a party to the CISG by way of treaty succession; or do nothing, and simply assume that the CISG continues to apply pursuant to the continuity principle.

Finally, in 2012, Kosovo adopted its new Law on Obligations. One of its articles provides that the CISG is the law applicable to international sales. As a result of this law, Kosovo courts should have no hesitation in deciding to apply the CISG to an international contract based on art. 1(1)(a) or 1(1)(b) of the CISG; foreign jurisdictions, however, might encounter problems in

deciding whether Kosovo can be considered a full Contracting State, simply a functional Contracting State (since it adopted the CISG for international sales through its domestic law), or even a non-Contracting State. A number of scenarios have been presented by the author to explain potential paths that courts and arbitral tribunals might take.

While the issue of the timing of treaty obligations arising through succession is still not clear and settled, it will be up to Kosovo authorities to decide whether they want to try to approach the UN with a notice of succession before actually becoming a member of the organization, or whether Kosovo should wait for membership and then take the normal smooth path of becoming a Contracting State for UN treaties, including the CISG.

APPENDIX ONE (1)³¹⁵

Table 1. CONSOLIDATED RESULTS OF QUESTIONNAIRES AND INTERVIEWS WITH JUDGES & LAW PRACTITIONERS

QUESTION ASKED³¹⁶	Do you consider the CISG applicable as an international treaty in Kosovo during the period of 1989-1999 (since Yugoslavia was a signatory party as of 1989)?	Are there any available and accessible cases applying the CISG during the period of 1989-1999, while Kosovo was part of Yugoslavia?	Was the CISG applicable as an international treaty in Kosovo during UNMIK Administration of the country (1999-2008)?	Have you applied UNMIK Regulation 2000/68 in cases related to domestic sales law during the period of UNMIK administration, and if yes, would you be able to share those cases?	In cases involving domestic contracts of sale of goods, was UNMIK Regulation 2000/68 bypassed in favor of the application of the 1978 Law on Obligations?	What is your understanding of the requirement in UNMIK Regulation 2000/68 to apply this law “<i>in compliance with the reported decisions on the CISG,</i>” and have you tried to meet this requirement?

³¹⁵ Translated from Albanian into English by the author of the dissertation.

³¹⁶ The possible answers to each question were: ‘Yes,’ ‘No,’ ‘I’m not sure,’ and ‘Give details:_____.’

Respondent 1	<i>Not sure</i>	<i>I don't think so</i>	<i>It is unclear, since UNMIK had the supreme powers in all areas, including applicability of laws.</i>	<i>I cannot recall exactly. I would have to go back to all the cases I've treated.</i>	<i>There were some cases when I applied the 1978 Law on Obligations to sales contracts.</i>	<i>This is unclear to me.</i>
Respondent 2	<i>I don't have that information since we were not part of the court system during those years</i>	<i>I believe not.</i>	<i>For the treaty to apply, UNMIK would have had to sign the CISG on behalf of Kosovo.</i>	<i>No, I did not apply this regulation.</i>	<i>N/A</i>	<i>It is hard to meet this requirement. I don't know how we could do it.</i>
Respondent 3	<i>I am not sure, since we did not work as judges at that time.</i>	<i>Probably not.</i>	<i>There were lots of legal uncertainties during UNMIK times, including applicability of treaties.</i>	<i>I am not sure.</i>	<i>The old law on Obligations continued to apply even after the UNMIK Regulation was adopted.</i>	<i>I am not aware of such a requirement.</i>
Respondent 4	<i>Most probably yes, since Yugoslavia was a signatory party, then it also applied in Kosovo.</i>	<i>I am not aware of such cases.</i>	<i>Many lawyers and judges believed that once Serbia was gone, none of their laws or treaties should apply anymore, so there was lots of confusion after 1999.</i>	<i>Yes, there have been cases when this Regulation was applied.</i>	<i>It did happen in some occasions, but not always.</i>	<i>I don't understand this requirement.</i>
Respondent 5	<i>We were not allowed to exercise our</i>	<i>No, because court files disappeared in</i>	<i>I am not sure.</i>	<i>I do not recall any case where this regulation</i>	<i>I know that there have been cases when the</i>	<i>I have not heard of this requirement</i>

	<i>profession at that time, so I am not aware of this.</i>	<i>1999 when the war ended.</i>		<i>applied.</i>	<i>1978 Law on Obligations applied to sales contracts even after 2000.</i>	<i>before.</i>
Respondent 6	<i>Yes, I consider it did apply during that period, since Kosovo used to be part of Yugoslavia, so the same treaties would have applied.</i>	<i>I don't have information as to possible cases.</i>	<i>UNMIK had competence both for Kosovo's legal system and for its international affairs, so the treaty would have applied if UNMIK had signed it on behalf of Kosovo.</i>	<i>I did apply the Regulation but I am not able to share or publish the cases at this point.</i>	<i>I believe that most judges understood that once the Regulation was in force, the old law was not applicable to sales contracts anymore.</i>	<i>We don't have the resources to meet this requirement.</i>
Respondent 7	<i>I am not sure. Decisions or information from that period is nowhere to be found.</i>	<i>No.</i>	<i>Probably not. But I do not have accurate information.</i>	<i>No.</i>	<i>N/A</i>	<i>I am not aware of this.</i>
Respondent 8	<i>It could have, but since we were not present in the courts, because of discrimination against Albanians, I am not sure how courts treated the CISG during that period.</i>	<i>Documents from that period were gone when Serb forces left Kosovo.</i>	<i>It was under UNMIK's competence to negotiate and sign treaties. So if UNMIK signed it, it did apply.</i>	<i>Not, as far as I can remember.</i>	<i>The Law on Obligations applied in most cases, since it has a chapter dealing with sales contracts.</i>	<i>I did not know that such a requirement existed.</i>

Respondent 9	<i>I don't know.</i>	<i>I don't know.</i>	<i>N/A</i>	<i>No.</i>	<i>The 1978 Law on Obligations continued to apply.</i>	<i>N/A</i>
Respondent 10	<i>I am not informed.</i>	<i>I don't think so.</i>	<i>N/A</i>	<i>No, I did not.</i>	<i>I did apply the Law on Obligations.</i>	<i>I am not aware of this.</i>
Respondent 11	<i>Albanian judges in Kosovo did not work during 1989-1999. Thus, I don't know.</i>	<i>We did not find court records when we returned to work after the war in 1999.</i>	<i>It depends on how the UNMIK Legal Office treated this document.</i>	<i>I believe so. I do remember some cases when this Regulation was applied. But I don't remember precisely which cases. I would have to check, but I cannot publish them.</i>	<i>I remember that the Law on Obligations continued to apply in many cases.</i>	<i>No, I did not.</i>
Respondent 12	<i>Yes, from an international law point of view, every treaty applicable in Yugoslavia, had to apply in Kosovo as well.</i>	<i>Not aware if such cases can be found.</i>	<i>It depends on whether UNMIK considered it applicable.</i>	<i>Because of the large number of cases, it is difficult to remember this detail.</i>	<i>Practically speaking, I believe it was not clear for many people if the UNMIK Regulation was supposed to entirely replace the chapter in the Law on Obligations which covered sales contracts.</i>	<i>Kosovo courts lack the necessary resources in order to decide in compliance with the reported decisions of the CISG.</i>

Respondent 13	<i>All judges of the majority Albanian community were kicked out of their jobs and were not allowed to exercise their profession during those years, so there is no way for us to know how this convention was treated and whether it applied at that time.</i>	<i>There might have been cases but they cannot be found.</i>	<i>After the war was ended in 1999, Kosovo was put under international administration and Yugoslavia's legal regime, including treaties it had signed, has ended with UNMIK's establishment.</i>	<i>Yes, the Regulation was the applicable law to domestic sales, so obviously there were cases when it applied.</i>	<i>I only applied this Law whenever we dealt with issues that were not covered by the UNMIK Regulations.</i>	<i>I am not sure where to find those decisions and if they are in a language that can be understood by Kosovo judges. Because if they are not translated in one of our official languages, no one will understand what the decisions say.</i>
Respondent 14	<i>I don't have information for that period.</i>	<i>I don't think so.</i>	<i>N/A</i>	<i>No.</i>	<i>N/A</i>	<i>I did not hear of this requirement before.</i>
Respondent 15	<i>The justice system at that time was only composed of Serb judges since Albanians were not allowed to work. They may have a more accurate information, although I doubt</i>	<i>That information is not available.</i>	<i>Since Kosovo was under international administration during that time, it was not obliged to apply treaties that had been signed by Yugoslavia.</i>	<i>Yes, there were some cases. I cannot share them at this point, though.</i>	<i>I did not apply the old law to sales contracts once the UNMIK Regulation was adopted.</i>	<i>Meeting this requirement is difficult. Normally we were not asked to look at previous decisions before, and especially not if they came from other countries.</i>

	<i>that they dealt with such cases, since business deals with Kosovo companies were probably very rare.</i>					
Respondent 16	<i>If it applied in Yugoslavia, then it also applied in Kosovo.</i>	<i>It is hard to know since Albanian judges were not in the courts, so I don't know whether such cases were ever treated.</i>	<i>I do not possess that information.</i>	<i>I do not remember.</i>	<i>Yes, I believe it was.</i>	<i>I am not sure what this means and how we were supposed to meet this requirement.</i>
Respondent 17	<i>Yes, I believe it did apply during that period.</i>	<i>I don't know where those court file are, if we are talking about the 1989-1999 period.</i>	<i>Kosovo had no obligation to continue to apply Yugoslav laws and treaties once the ruling by UNMIK started in 1999.</i>	<i>Yes, there have been some cases.</i>	<i>Sometimes.</i>	<i>I guess we would need trainings on how and where to access those decisions. And probably translation.</i>
Respondent 18	<i>I am not aware.</i>	<i>I am not aware of such cases.</i>	<i>I am uncertain how UNMIK treated those documents.</i>	<i>I might have, but I am not certain.</i>	<i>I did apply the old Law in some cases when it was clear that it is applicable.</i>	<i>We don't have access to those decisions, so it is difficult to meet this requirement.</i>
Respondent 19	<i>We don't have the archives for that period so</i>	<i>No.</i>	<i>I don't have that information.</i>	<i>I don't have the exact information at this point.</i>	<i>There was lack of clarity as to this issue.</i>	<i>This requirement cannot be met in Kosovo. Not right</i>

	<i>that we could access information on this regard.</i>					<i>now at least.</i>
Respondent 20	<i>I am not aware.</i>	<i>No.</i>	<i>N/A</i>	<i>No.</i>	<i>I don't know for sure.</i>	<i>N/A</i>
Respondent 21	<i>I don't have this information since it pertains to a period when I was not exercising my profession.</i>	<i>I don't know.</i>	<i>I'm not sure.</i>	<i>I don't recall exactly.</i>	<i>I am not sure.</i>	<i>I don't clearly understand this requirement.</i>
Respondent 22	<i>Yes, I consider it did apply since all treaties signed by Yugoslavia were also applicable in Kosovo.</i>	<i>Files from that period are not accessible.</i>	<i>None of the treaties signed by Yugoslavia applied during that time since Kosovo was under international administration and this administration had all competences with regards to international treaties.</i>	<i>Yes. There have been cases.</i>	<i>As far as I know, we only applied the 1978 Law for issues that were not dealt with in the UNMIK Regulation.</i>	<i>We would need those published decisions in our own language before we could think of meeting this requirement.</i>

Respondent 23	<i>Maybe...I do not have information on this issue.</i>	<i>Not sure.</i>	<i>It is an unclear situation because of the legal vacuum during that time.</i>	<i>I would have to check that as I cannot give a certain answer right now.</i>	<i>It was not clear whether the UNMIK Regulation repealed the old law on Obligations.</i>	<i>N/A</i>
Respondent 24	<i>I am not sure.</i>	<i>I don't think so.</i>	<i>It is unclear.</i>	<i>I don't recall the details.</i>	<i>I am not sure.</i>	<i>It is unclear what is exactly required and it should be met.</i>
Respondent 25	<i>It is hard to respond to this question, since one would have the information only if he or she worked as a judge during that time, which we did not, because we were not allowed.</i>	<i>This information is not available.</i>	<i>I know that UNMIK handled the foreign affairs of Kosovo, so whether Kosovo was considered part of this treaty depended on the actions of UNMIK.</i>	<i>I do remember some cases, but I cannot distribute them at this point.</i>	<i>In the cases that I was involved in, the 1978 Law did not replace the Regulation but was applied for issues not covered by the Regulation.</i>	<i>This requirement cannot be met in current circumstances in our courts.</i>

APPENDIX TWO (2)³¹⁷

Table 2. CONSOLIDATED RESULTS OF QUESTIONNAIRES WITH ARBITRATORS

QUESTION ASKED³¹⁸	Have you dealt with cases where parties to a contract (one of which is from Kosovo) have agreed for the application of the CISG as the applicable law in case of a dispute?	If yes, can you give details from those cases?	Have you dealt with cases where parties to a contract have agreed for the application of UNMIK Regulation 2000/68?	Do you believe that there is confusion among the legal community in Kosovo regarding the application of the CISG?	Are you aware of any case, after the new Law on Obligations was adopted, where the CISG was considered the applicable law based on article 1058 of the Law on Obligations?	Do you believe that the incorporation of Article 1058 in the new Law on Obligations is sufficient to make Kosovo a contracting party to the CISG?
Arbitrator 1	<i>No.</i>	<i>No cases.</i>	<i>No. I have no</i>	<i>Yes. For that</i>	<i>No.</i>	<i>No. In order for</i>

³¹⁷ Translated from Albanian into English by the author of the dissertation.

³¹⁸ The possible answers to each question were: ‘Yes’, ‘No’, ‘I’m not sure’ and ‘Give details:_____.’

			<i>knowledge of any arbitration case where either the CISG or Regulation 2000/68 has been applied.</i>	<i>reason, there is a need for lots of training and workshops with respect to the applicability of the CISG in practice.</i>		<i>Kosovo to be considered a contracting state of the CISG, it has to ratify the Convention just like any other contracting state.</i>
Arbitrator 2	<i>No.</i>	<i>No.</i>	<i>No.</i>	<i>Yes. However, there is mostly lack of knowledge about the existence of the CISG, rather than confusion.</i>	<i>No.</i>	<i>No. It does not suffice. A lot more needs to be done with respect to increasing the awareness of the legal community in Kosovo with respect to the application of the CISG, and especially for cases when there are disputes as to the applicable law. Moreover, it should be the obligation of the Government to only sign contracts for sale of goods if the applicable law is either the CISG or Kosovo's domestic</i>

						<i>law.</i>
Arbitrator 3	<i>No.</i>	<i>N/A</i>	<i>Yes.</i>	<i>Yes, unfortunately the legal community in Kosovo is not well informed regarding the applicability of the CISG or its content.</i>	<i>No.</i>	<i>No.</i>
Arbitrator 4	<i>No.</i>	<i>No such cases.</i>	<i>No such cases.</i>	<i>Yes. The legal community in Kosovo, and especially those belonging to the older generation are unclear and confused regarding the need for Kosovo to be a contracting party to the CISG. According to them, this Convention is just another unnecessary document, because the Law on Obligations is sufficient. Another comment that I</i>	<i>I am not aware of such cases.</i>	<i>No. I believe Kosovo should send a notice of succession to the CISG and to other treaties to which former Yugoslavia was a party (based on the Vienna Convention on Succession of Treaties), just like other constituent parts – Republics – of Yugoslavia did.</i>

				<p><i>often hear from them is that so far they have functioned well without the CISG, so it is entirely unnecessary. However, the younger generation in the legal community is more open minded with respect to the application of the CISG. While I organized trainings on the CISG for the legal community in Kosovo I faced lots of resistance among those present to accept the CISG.</i></p>		
<p>Arbitrator 5</p>	<p><i>Yes. These were mostly cases when one of the parties was local (from Kosovo) and</i></p>	<p><i>I've been involved in 3-4 cases in total where the CISG applied. Whenever the</i></p>	<p><i>No. Moreover, whenever parties were informed that Regulation 2000/68 has an identical</i></p>	<p><i>There is very little knowledge with respect to the CISG among the legal community in Kosovo. There is only one USAID</i></p>	<p><i>No. I am not aware of such cases and I have no information on whether the courts in Kosovo have yet dealt with any case where they</i></p>	<p><i>The incorporation of Article 1058 in the Law on Obligations cannot make Kosovo a state party to the Convention. The interpretation of this</i></p>

	<p><i>the other one was foreign (from another country) and the application of the CISG, combined with arbitration as dispute resolution where chosen by the foreign investor as means for legal protection. Another case that I encountered was where the parties opted out of the application of the CISG with clear language. This was a case which included a sale of good, but where some of</i></p>	<p><i>application of the CISG was included in the contract, there would also be an arbitration clause, because this is how the foreign party to the contract was ensured that there would be no jurisdiction for Kosovo courts and that no Kosovo laws would apply. Whereas in cases where the application of the CISG was excluded, this was done by choosing the law of one of the developed countries,</i></p>	<p><i>text to that of the CISG, they were surprised. Most standard clauses in contracts would only refer to Kosovo laws, without a specific mention of the Regulation.</i></p>	<p><i>program (CLE) that has offered professional materials on this area and which has tried to coordinate activities with the Kosovo Bar Association with respect to their professional trainings.</i></p>	<p><i>applied this article.</i></p>	<p><i>article leads us to the conclusion that Kosovo has unilaterally made the CISG part of its internal legal system. Kosovo has not ratified the CISG (pursuant to the rules of the law on treaties), cannot make declarations pursuant to CISG Article 92 (with respect to the non-applicability of Part II of the Convention). This can also have an effect in the interpretation of cases when one of the parties has made a declaration that it does not apply article 1(1)(b). Finally, taking into account the nature of article 1(1)(b) and the way how other courts or tribunals</i></p>
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	<i>the transactions included intellectual property rights.</i>	<i>such as the United Kingdom, Germany, the United States, etc.).</i>				<i>would interpret it if International Private Law leads to the application of the law of Kosovo, it is unclear whether the court would respond by applying the CISG as a part of Kosovo's internal legal system or by considering Kosovo a contracting state.</i>
Arbitrator 6	<i>No.</i>	<i>No cases.</i>	<i>No.</i>	<i>Yes.</i>	<i>No.</i>	<i>I'm not sure how this will work out in practice.</i>
Arbitrator 7	<i>I have not encountered any case where the CISG was applicable.</i>	<i>None.</i>	<i>No.</i>	<i>There is lots of confusion among the legal community in Kosovo, both with regards to the application of the CISG, as well as on issues related to alternative dispute resolution. There is insufficient knowledge in Kosovo regarding</i>	<i>No.</i>	<i>The incorporation of the CISG in Article 1058 of the Law on Obligations does not make Kosovo a contracting state to this Convention. As a result, the application of the CISG may face challenges in disputes where one of the parties is from Kosovo and the other party is a</i>

				<i>the application of international treaties in general, and in the case of the CISG it gets further confusing since the text of the Convention was initially adopted in an UNMIK Regulation and was not sufficiently clarified through the legislation adopted by the Kosovo. Parliament.</i>		contracting state with an Article 95 reservation.
Arbitrator 8	<i>No.</i>	<i>I've not been involved in such cases.</i>	<i>No.</i>	<i>Yes, it is very unclear.</i>	<i>No.</i>	<i>I am not sure.</i>
Arbitrator 9	<i>Yes.</i>	<i>Only one case, where one party was from Kosovo and the other one from a state party to the CISG.</i>	<i>No.</i>	<i>From my experience, most people within the legal community in Kosovo have no knowledge whatsoever about the CISG and they try to avoid its application.</i>	<i>No.</i>	<i>I think this issue is a little confusing. I don't know whether Kosovo would be treated a state party to the CISG, but what I know for sure is that if a case of an international character is in front</i>

						<i>of a judge or arbitrator, he/she will have to apply the CISG, as this article says.</i>
Arbitrator 10	<i>No.</i>	<i>No.</i>	<i>No.</i>	<i>Yes.</i>	<i>No.</i>	<i>I am not sure.</i>

LIST OF ABBREVIATIONS

CISG – United Nations Convention on Contracts for the International Sale of Goods

CSFR – Czech and Slovak Federal Republic

CSSR – Czechoslovak Socialist Republic

CSP – Comprehensive Proposal for the Kosovo Status Settlement

EU – European Union

FRG – Federal Republic of Germany

FRY – Federal Republic of Yugoslavia

FTCA – Foreign Trade Court of Arbitration

GDR – German Democratic Republic

HKSAR – Hong Kong Special Administrative Region

ICJ – International Court of Justice

ILC – International Law Commission

IMF – International Monetary Fund

KJC – Kosovo Judicial Council

PIL – Private International Law

PRC – People's Republic of China

SFRY – Socialist Federative Republic of Yugoslavia

SGA (1988) – Norwegian Sales Law

SRSR (UNSRSG) – Special Representative of Secretary General

UN – United Nations

UNGA – United Nations General Assembly

UNCITRAL – United Nations Commission on International Trade Law

UNMIK – United Nations Mission in Kosovo

USAID – United States Agency for International Development

USSR – Union of Soviet Socialist Republics

WB – World Bank

WHO – World Health Organization

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ANNEX 1

Vjosa Osmani
SJD Questionnaire

Pyetësor për Gjyqtarë dhe Avokatë lidhur me aplikimin e CISG/Questionnaire for Judges and Practicing Lawyers on the application of the CISG

1. **A konsideroni se CISG (Konventa Ndrkombëtare për Shitjen Ndërkombëtare të Mallrave) ishte e aplikueshme si traktat ndërkombëtar në Kosovë gjatë periudhës 1989-1999 (meqë Jugosllavia ishte palë kontraktuese e kësaj Konvente qysh nga viti 1989)?/ Do you consider that the CISG was applicable as an international treaty in Kosovo during the period of 1989-1999 (since Yugoslavia was a signatory party as of 1989)?**

2. **A ka raste të qasshme ku CISG është aplikuar gjatë viteve 1989-1999, përderisa Kosova ishte ende pjesë e Jugosllavisë?/ Are there any available and accessible cases applying the CISG during the period of 1989-1999, while Kosovo was part of Yugoslavia?**

3. **A ka qenë CISG e aplikueshme si traktat ndërkombëtar në Kosovë gjatë kohës së administrimit të vendit nga UNMIK-u (1999-2008)? / Was the CISG applicable as an international treaty in Kosovo during UNMIK Administration of the country (1999-2008)?**

4. **A e keni aplikuar Rregulloren e UNMIK-ut 2000/68 në raste të kontratave vendore të shitjes së mallrave, gjatë periudhës së administratës së UNMIK-ut, dhe nëse po, a mund të tregoni detaje nga çështjet ligjore të trajtuara në ato raste?** *Have you applied UNMIK Regulation 2000/68 in cases related to domestic sales law during the period of UNMIK administration, and if yes, would you be able to share those cases or details on legal issues discussed therein?*

5. **Në raste që kishin të bëjnë me kontrata vendore për shitje të mallrave, a e keni aplikuar ndonjëherë Ligjin e Detyrimeve të vitit 1978 në vend të Rregullores së UNMIK-ut 2000/68 duke e anashkaluar këtë të fundit?** / *In cases involving domestic contracts of sale of goods, was UNMIK Regulation 2000/68 bypassed in favor of the application of the 1978 Law on Obligations?*

6. **Si e kuptoni ju kërkesën në Rregulloren e UNMIK-ut 2000/68 që ky ligj të interpretohet “në përputhje me vendimet e raportuara për CISG”?** / *What is your understanding of the requirement in UNMIK Regulation 2000/68 to interpret this law “in compliance with the reported decisions on the CISG,” and have you tried to meet this requirement?*

ANNEX 2

Vjosa Osmani
SJD Questionnaire

Pyetësor për Arbitra lidhur me aplikimin e CISG / Questionnaire for Arbitrators on the application of the CISG

1. A keni pasur raste ku në një kontratë palët (së paku njëra prej të cilave është nga Kosova) janë marrë vesh për aplikimin e CISG (Konventës Ndërkombëtare për Shitjen Ndërkombëtare të Mallrave) si ligj i aplikueshëm në rast kontesti mes palëve?/ *Have you had cases where the parties to a contracts (at least one of which was in Kosovo) have agreed to make the CISG (UN Convention on Contracts for the International Sale of Goods) applicable to the contract as the applicable law in case any dispute arises between them?*

2. Nëse po, a ju kujtohet sa raste të tilla keni pasur, dhe a mund të tregoni specifika rreth çështjeve ligjore që janë trajtuar në ato raste?/ *If yes, do you remember how many such cases you've had and can you share some of the details on the legal issues that were treated in such cases?*

3. A keni hasur në raste kur palet janë marrë vesh që ligji I aplikueshëm të jetë Rregullorja e UNMIK-ut 2000/68 (e cila ka qenë kryesisht copy-paste e CISG)?/ *Have you encountered cases where the parties have agreed for the applicable law to be UNMIK Regulation 2000/68 (Which was mostly a copy-paste of the CISG)*

4. A keni qenë të involvuar (ose a jeni në dijeni) në raste kur arbitrazhi apo gjykata ka aplikuar qoftë Konventën CISG, qoftë Rregulloren 2000/68 në një kontratë të shitjes, si rezultat të analizës së konfliktit të ligjeve? Nëse po, a mund të tregoni specifika të atyre rasteve?/ *Have you been involved in (or are you aware of) cases where an arbitral tribunal or a court has applied either the CISG or UNMIK Regulation 2000/68 as a result of a conflict of laws analysis? If yes, can you provide specifics?*

5. A mendoni se ekzistojnë paqartësi në komunitetin juridik të Kosovës rreth aplikueshmërisë së Konventës CISG?/ *Do you think that there is confusion among the legal community in Kosovo with respect to the application of the CISG?*

6. A kenihasurnëndonjërast, pas miratimit të ligjit të detyrimeve në Kosovë, kuligjiaplikueshëm (ashtusiç e parashehneni 1058 ikëtijLigji) ështëpërcaktuarKonventa CISG?/ *Are you aware of any case, after the adoption of the new Law on Obligations, where the CISG was considered the applicable law as foreseen in article 1058 of this Law?*

7. A mendoni se mjafton inkorporimi i CISG në nenin 1058 të Ligjit për Marrëdhëniet e Detyrimeve për të konsideruar Kosovën shtet pale të kësaj Konvente?/ *Do you think that the incorporation of the CISG in Article 1058 of the Law on Obligations is sufficient to consider Kosovo a contracting state to this Convention?*

ANNEX 3

UNMIK/REG/2000/68

29 December 2000

REGULATION NO. 2000/68

ON CONTRACTS FOR THE SALE OF GOODS

The Special Representative of the Secretary-General,

Pursuant to the authority given to him under United Nations Security Council resolution 1244 (1999) of 10 June 1999,

Taking into account United Nations Interim Administration Mission in Kosovo (UNMIK) Regulation No. 1999/1 of 25 July 1999, as amended, on the Authority of the Interim Administration in Kosovo,

For the purpose of reconstructing and enhancing the economy of Kosovo and creating a viable market-based economy by providing for the regulation of contracts for the sale of goods,

Hereby promulgates the following:

Part I. Sphere of Application and General Provisions
Chapter 1

Sphere of Application

Section 1

The present regulation is based on the United Nations Convention on the International Sale of Goods, and accordingly shall be interpreted consistently with reported decisions on that Convention. For ease of reference, the organization and numbering system of the present regulation follows that of the Convention, with the exception that "sections" in the Convention are "subchapters" in the present regulation, and "articles" in the Convention are "sections" in the present regulation. Where the corresponding provisions in the Convention are not applicable and have been deleted, this is indicated by an asterisk under the relevant sections.

Laws inconsistent with the provisions of the present regulation are repealed.

Section 2

2.1 The present regulation applies to contracts for the sale of goods. "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to but severable from realty.

2.2 The present regulation does not apply to sales:

(deleted)*;

-by auction;

-on execution or otherwise by authority of law;

-of stocks, shares, investment securities, negotiable instruments or money;

-of ships, vessels, hovercraft or aircraft;

-of electricity.

Section 3

3.1 Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

3.2 The present regulation does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.

Section 4

The present regulation governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in the present regulation it is not concerned with:

-the validity of the contract or of any of its provisions or of any usage;

-the effect which the contract may have on the property in the goods sold.

Section 5

The present regulation does not apply to the liability of the seller for death or personal injury caused by the goods to any person.

Section 6

The parties may exclude the application of the present regulation or derogate from or vary the effect of any of its provisions.

Chapter 2

General Provisions

Section 7

(Deleted)*

Section 8

8.1 For the purposes of the present regulation statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

8.2 If section 8.1 is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

8.3 In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

Section 9

9.1 The parties are bound by any usage to which they have agreed and by any practices, which they have established between themselves.

9.2 In the case of contracts of an international character, the parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

Section 10

For the purposes of the present regulation:

-if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;

-if a party does not have a place of business, reference is to be made to his habitual residence.

Section 11

A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.

Section 12

(deleted)*

Section 13

For the purposes of the present regulation "writing" includes telegram, telex, facsimile, e-mail, and any similar form of electronic communication.

Part II. Formation of the Contract

Section 14

14.1 A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.

14.2 A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.

Section 15

15.1 An offer becomes effective when it reaches the offeree.

15.2 An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.

Section 16

Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.

However, an offer cannot be revoked:

-if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or

-if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

Section 17

An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror.

Section 18

18.1 A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.

18.2 An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

18.3 However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph.

Section 19

19.1 A reply to an offer, which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counteroffer.

19.2 However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

19.3 Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.

Section 20

20.1 A period of time of acceptance fixed by the offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by the offeror by telephone, telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.

20.2 Official holidays or non-business days occurring during the period for acceptance are included in calculating the period. However, if a notice of acceptance cannot be delivered at the address of the offeror on the last day of the period because that day falls on an official holiday or a non-business day at the place of business of the offeror, the period is extended until the first business day which follows.

Section 21

21.1 A late acceptance is nevertheless effective as an acceptance if without delay the offeror orally so informs the offeree or dispatches a notice to that effect.

21.2 If a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror orally informs the offeree that he considers his offer as having lapsed or dispatches a notice to that effect.

Section 22

An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time, as the acceptance would have become effective.

Section 23

A contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of the present regulation.

Section 24

For the purposes of this Part of the present regulation, an offer, declaration of acceptance or any other indication of intention "reaches" the addressee when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence.

Part III. Sale of Goods

Chapter 1

General Provisions

Section 25

A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

Section 26

A declaration of avoidance of the contract is effective only if made by notice to the other party.

Section 27

Unless otherwise expressly provided in this Part of the present regulation, if any notice, request or other communication is given or made by a party in accordance with this Part and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication.

Section 28

(deleted)*

Section 29

29.1 A contract may be modified or terminated by the mere agreement of the parties.

29.2 A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

Chapter 2

Obligations of the seller

Section 30

The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and the present regulation.

Subchapter I

Delivery of the goods and handing over of documents

Section 31

If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists:

-if the contract of sale involves carriage of the goods - in handing the goods over to the first carrier for transmission to the buyer;

-if, in cases not within the preceding subsection, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place - in placing the goods at the buyer's disposal at that place;

-in other cases - in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract.

Section 32

32.1 If the seller, in accordance with the contract or the present regulation, hands the goods over to a carrier and if the goods are not clearly identified to the contract by markings on the goods, by shipping documents or otherwise, the seller must give the buyer notice of the consignment specifying the goods.

32.2 If the seller is bound to arrange for carriage of the goods, he must make such contracts as are necessary for carriage to the place fixed by means of transportation appropriate in the circumstances and according to the usual terms for such transportation.

32.3 If the seller is not bound to effect insurance in respect of the carriage of the goods, he must, at the buyer's request, provide him with all available information necessary to enable him to effect such insurance.

Section 33

The seller must deliver the goods:

- if a date is fixed by or determinable from the contract, on that date;
- if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or
- in any other case, within a reasonable time after the conclusion of the contract.

Section 34

If the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract. If the seller has handed over documents before that time, he may, up to that time, cure any lack of conformity in the documents, if the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in the present regulation.

Subchapter II

Conformity of the goods and third party claims

Section 35

The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.

Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:

- are fit for the purposes for which goods of the same description would ordinarily be used;
- are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;
- possess the qualities of goods which the seller has held out to the buyer as a sample or model;
- are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner -adequate to preserve and protect the goods.

35.3 The seller is not liable under subsections (a) to (d) of section 35.2 for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.

Section 36

36.1 The seller is liable in accordance with the contract and the present regulation for any lack of conformity, which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time.

36.2 The seller is also liable for any lack of conformity which occurs after the time indicated in section 36.1 and which is due to a breach of any of his obligations, including a breach of any guarantee that for a period of time the goods will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities or characteristics.

Section 37

If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in the present regulation.

Section 38

38.1 The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.

38.2 If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.

38.3 If the goods are redirected in transit or redispached by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispach, examination may be deferred until after the goods have arrived at the new destination.

Section 39

The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.

Section 40

The seller is not entitled to rely on the provisions of sections 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.

Section 41

The seller must deliver goods, which are free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim. However, if such right or claim is based on industrial property or other intellectual property, the seller's obligation is governed by section 42.

Section 42

42.1 The seller must deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that the right or claim is based on industrial property or other intellectual property:

under the law of the place where the goods will be resold or otherwise used, if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that place; or

in any other case, under the law of the place where the buyer has his place of business.

42.2 The obligation of the seller under section 42.1 does not extend to cases where:

at the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim; or

the right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer.

Section 43

The buyer loses the right to rely on the provisions of section 41 or section 42 if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he has become aware or ought to have become aware of the right or claim.

The seller is not entitled to rely on the provisions of section 43.1 if he knew of the right or claim of the third party and the nature of it.

Section 44

Notwithstanding the provisions of sections 39.1 and 43.1, the buyer may reduce the price in accordance with section 50 or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the required notice.

Subchapter III

Remedies for breach of contract by the seller

Section 45

45.1 If the seller fails to perform any of his obligations under the contract or the present regulation, the buyer may:

exercise the rights provided in sections 46 to 52;

claim damages as provided in sections 74 to 77.

45.2 The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.

45.3 No period of grace may be granted to the seller by a court or arbitral tribunal when the buyer resorts to a remedy for breach of contract.

Section 46

46.1 The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy, which is inconsistent with this requirement.

46.2 If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under section 39 or within a reasonable time thereafter.

46.3 If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under section 39 or within a reasonable time thereafter.

Section 47

47.1 The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.

47.2 Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in performance.

Section 48

48.1 Subject to section 49, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. However, the buyer retains any right to claim damages as provided for in the present regulation.

48.2 If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.

48.3 A notice by the seller that he will perform within a specified period of time is assumed to include a request, under the preceding paragraph, that the buyer make known his decision.

48.4 A request or notice by the seller under sections 48.2 and 48.3 is not effective unless received by the buyer.

Section 49

49.1 The buyer may declare the contract avoided:

if the failure by the seller to perform any of his obligations under the contract or the present regulation amounts to a fundamental breach of contract; or

in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with section 47.1 or declares that he will not deliver within the period so fixed.

49.2 However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so:

in respect of late delivery, within a reasonable time after he has become aware that delivery has been made;

in respect of any breach other than late delivery, within a reasonable time:

after he knew or ought to have known of the breach;

after the expiration of any additional period of time fixed by the buyer in accordance with section 47.1, or after the seller has declared that he will not perform his obligations within such an additional period; or

after the expiration of any additional period of time indicated by the seller in accordance with section 48.2, or after the buyer has declared that he will not accept performances.

Section 50

If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to

perform his obligations in accordance with section 37 or section 48 or if the buyer refuses to accept performance by the seller in accordance with those sections, the buyer may not reduce the price.

Section 51

51.1 If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, sections 46 to 50 apply in respect of the part which is missing or which does not conform.

51.2 The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract.

Section 52

52.1 If the seller delivers the goods before the date fixed, the buyer may take delivery or refuse to take delivery.

52.2 If the seller delivers a quantity of goods greater than that provided for in the contract, the buyer may take delivery or refuse to take delivery of the excess quantity. If the buyer takes delivery of all or part of the excess quantity, he must pay for it at the contract rate.

Chapter 3

Obligations of the buyer

Section 53

The buyer must pay the price for the goods and take delivery of them as required by the contract and the present regulation.

Subchapter I

Payment of the price

Section 54

The buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any laws and regulations to enable payment to be made.

Section 55

Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.

Section 56

If the price is fixed according to the weight of the goods, in case of doubt it is to be determined by the net weight.

Section 57

57.1 If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller:

at the seller's place of business; or

if the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place.

57.2 The seller must bear any increase in the expenses incidental to payment, which is caused by a change in his place of business subsequent to the conclusion of the contract.

Section 58

58.1 If the buyer is not bound to pay the price at any other specific time he must pay it when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and the present regulation. The seller may make such payment a condition for handing over the goods or documents.

58.2 If the contract involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price.

58.3 The buyer is not bound to pay the price until he has had an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity.

Section 59

The buyer must pay the price on the date fixed by or determinable from the contract and the present regulation without the need for any request or compliance with any formality on the part of the seller.

Subchapter II

Taking delivery

Section 60

60.1 The buyer's obligation to take delivery consists:

in doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery; and

in taking over the goods.

Subchapter III

Remedies for breach of contract by the buyer

Section 61

61.1 If the buyer fails to perform any of his obligations under the contract or the present regulation, the seller may:

exercise the rights provided in sections 62 to 65; and

claim damages as provided in sections 74 to 77.

61.2 The seller is not deprived of any right he may have to claim damages by exercising his right to other remedies.

61.3 No period of grace may be granted to the buyer by a court or arbitral tribunal when the seller resorts to a remedy for breach of contract.

Section 62

The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy, which is inconsistent with this requirement.

Section 63

63.1 The seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations.

63.2 Unless the seller has received notice from the buyer that he will not perform within the period so fixed, the seller may not, during that period, resort to any remedy for breach of contract. However, the seller is not deprived thereby of any right he may have to claim damages for delay in performance.

Section 64

64.1 The seller may declare the contract avoided:

if the failure by the buyer to perform any of his obligations under the contract or the present regulation amounts to a fundamental breach of contract; or

if the buyer does not, within the additional period of time fixed by the seller in accordance with section 63.1, perform his obligation to pay the price or take delivery of the goods, or if he declares that he will not do so within the period so fixed.

64.2 However, in cases where the buyer has paid the price, the seller loses the right to declare the contract avoided unless he does so:

in respect of late performance by the buyer, before the seller has become aware that performance has been rendered; or

in respect of any breach other than late performance by the buyer, within a reasonable time:

after the seller knew or ought to have known of the breach; or

after the expiration of any additional period of time fixed by the seller in accordance with section 63.1, or after the buyer has declared that he will not perform his obligations within such an additional period.

Section 65

65.1 If under the contract the buyer is to specify the form, measurement or other features of the goods and he fails to make such specification either on the date agreed upon or within a reasonable time after receipt of a request from the seller, the seller may, without prejudice to any other rights he may have, make the specification himself in accordance with the requirements of the buyer that may be known to him.

65.2 If the seller makes the specification himself, he must inform the buyer of the details thereof and must fix a reasonable time within which the buyer may make a different specification. If, after receipt of such a communication, the buyer fails to do so within the time so fixed, the specification made by the seller is binding.

Chapter 4

Passing of risk

Section 66

Loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.

Section 67

67.1 If the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale. If the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of the risk.

67.2 Nevertheless, the risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise.

Section 68

The risk in respect of goods sold in transit passes to the buyer from the time of the conclusion of the contract. However, if the circumstances so indicate, the risk is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage. Nevertheless, if at the time of the conclusion of the contract of sale the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller.

Section 69

69.1 In cases not within sections 67 and 68, the risk passes to the buyer when he takes over the goods or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery.

69.2 However, if the buyer is bound to take over the goods at a place other than a place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place.

69.3 If the contract relates to goods not then identified, the goods are considered not to be placed at the disposal of the buyer until they are clearly identified to the contract.

Section 70

If the seller has committed a fundamental breach of contract, sections 67, 68 and 69 do not impair the remedies available to the buyer on account of the breach.

Chapter 5

Provisions common to the obligations of the seller and the buyer

Subchapter I

Anticipatory breach and installment contracts

Section 71

71.1 A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of:

a serious deficiency in his ability to perform or in his creditworthiness; or

his conduct in preparing to perform or in performing the contract.

71.2 If the seller has already dispatched the goods before the grounds described in section 71.1 become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document, which entitles him to obtain them. The present section relates only to the rights in the goods as between the buyer and the seller.

71.3 A party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance.

Section 72

72.1 If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided.

72.2 If time allows, the party intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance.

72.3 The requirements of section 71 do not apply if the other party has declared that he will not perform his obligations.

Section 73

73.1 In the case of a contract for delivery of goods by installments, if the failure of one party to perform any of his obligations in respect of any installment constitutes a fundamental breach of contract with respect to that installment, the other party may declare the contract avoided with respect to that installment.

73.2 If one party's failure to perform any of his obligations in respect of any installment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future installments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.

73.3 A buyer who declares the contract avoided in respect of any delivery may, at the same time, declare it avoided in respect of deliveries already made or of future deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract.

Subchapter II

Damages

Section 74

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach

foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

Section 75

If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under section 74.

Section 76

76.1 If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under section 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recoverable under section 74. If, however, the party claiming damages has avoided the contract after taking over the goods, the current price at the time of such taking over shall be applied instead of the current price at the time of avoidance.

76.2 For the purposes of the preceding paragraph, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at such other place as serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

Section 77

A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.

Subchapter III

Interest

Section 78

If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under section 74.

Subchapter IV

Exemption

Section 79

79.1 A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

79.2 If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:

he is exempt under section 79.1; and

the person whom he has so engaged would be so exempt if the provisions of that section 79.1 were applied to him.

79.3 The exemption provided by this section has effect for the period during which the impediment exists.

79.4 The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

79.5 Nothing in this section prevents either party from exercising any right other than to claim damages under the present regulation.

Section 80

A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission.

Subchapter V

Effects of avoidance

Section 81

81.1 Avoidance of the contract releases both parties from their obligations under it, subject to any damages, which may be due. Avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract.

81.2 A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently.

Section 82

The buyer loses the right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them.

Section 82.1 does not apply:

if the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which the buyer received them is not due to his act or omission;

the goods or part of the goods have perished or deteriorated as a result of the examination provided for in section 38;
or

if the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered or ought to have discovered the lack of conformity.

Section 83

A buyer who has lost the right to declare the contract avoided or to require the seller to deliver substitute goods in accordance with section 82 retains all other remedies under the contract and the present regulation.

Section 84

84.1 If the seller is bound to refund the price, he must also pay interest on it, from the date on which the price was paid.

84.2 The buyer must account to the seller for all benefits, which he has derived from the goods or part of them:

if he must make restitution of the goods or part of them; or

if it is impossible for him to make restitution of all or part of the goods or to make restitution of all or part of the goods substantially in the condition in which he received them, but he has nevertheless declared the contract avoided or required the seller to deliver substitute goods.

Subchapter VI

Preservation of the goods

Section 85

If the buyer is in delay in taking delivery of the goods or, where payment of the price and delivery of the goods are to be made concurrently, if he fails to pay the price, and the seller is either in possession of the goods or otherwise able to control their disposition, the seller must take such steps as are reasonable in the circumstances to preserve them. He is entitled to retain them until he has been reimbursed his reasonable expenses by the buyer.

Section 86

86.1 If the buyer has received the goods and intends to exercise any right under the contract or the present regulation to reject them, he must take such steps to preserve them as are reasonable in the circumstances. He is entitled to retain them until he has been reimbursed his reasonable expenses by the seller.

86.2 If goods dispatched to the buyer have been placed at his disposal at their destination and he exercises the right to reject them, he must take possession of them on behalf of the seller, provided that this can be done without payment of the price and without unreasonable inconvenience or unreasonable expense. This provision does not apply if the seller or a person authorized to take charge of the goods on his behalf is present at the destination. If the buyer takes possession of the goods under this paragraph, his rights and obligations are governed by the preceding paragraph.

Section 87

A party who is bound to take steps to preserve the goods may deposit them in a warehouse of a third person at the expense of the other party provided that the expense incurred is not unreasonable.

Section 88

88.1 A party who is bound to preserve the goods in accordance with section 85 or 86 may sell them by any appropriate means if there has been an unreasonable delay by the other party in taking possession of the goods or in taking them back or in paying the price or the cost of preservation, provided that reasonable notice of the intention to sell has been given to the other party.

88.2 If the goods are subject to rapid deterioration or their preservation would involve unreasonable expense, a party who is bound to preserve the goods in accordance with section 85 or 86 must take reasonable measures to sell them. To the extent possible he must give notice to the other party of his intention to sell.

88.3 A party selling the goods has the right to retain out of the proceeds of sale an amount equal to the reasonable expenses of preserving the goods and of selling them. He must account to the other party for the balance.

Part IV. Final Provisions

Section 89

As used herein, the singular includes the plural and the plural includes the singular, unless the context otherwise requires. The personal pronoun "he" includes "she" and "it"; and the word "him" includes "her" and "it" unless the context otherwise requires.

Section 90

The present regulation shall enter into force on 29 December 2000.

Bernard Kouchner

Special Representative of the Secretary-General

ANNEX 4

OFFICIAL GAZETTE OF THE REPUBLIC OF KOSOVA / No. 16 / 19 JUNI 2012, PRISTINA

LAW NO. 04/L-077 ON OBLIGATIONAL RELATIONSHIPS

Assembly of Republic of Kosovo,

Based on Article 65 (1) of the Constitution of the Republic of Kosovo,

Approves:

LAW ON OBLIGATIONAL RELATIONSHIPS

BOOK 1 GENERAL PROVISIONS PART I BASIC PRINCIPLES

Article 1

Application of present Law

1. The present Law contains the basic principles and general rules for all obligational relationships.
2. The provisions of the present Law shall apply to obligational relationships regulated by other acts of law

regarding matters not regulated in such acts.

PART XXX TRANSITIONAL AND FINAL PROVISIONS

Article 1057

Implementation of the present Law

The provisions of the present Law shall not apply to obligational relationships which arose before the entry into force of the present Law.

Article 1058

Termination of validity and application of other laws

1. On the day of entry into force of the present law, the provisions of the UNMIK Regulation 2000/68 on contracts of sales of goods shall cease to exist.
2. In the meaning of this Law, and in accordance with Article 145 of the Constitution of Republic of Kosovo, the applicable Law on Contracts on International Sale of Goods shall be the United Nations Convention on Contracts for the International Sale of Goods.
3. On the day the present Law enters into force the Obligations Relations Act (Official Gazette of the SFRY, Nos. 29/78, 39/85 and 57/89) shall cease to apply, with the exception of the provisions of Title XXXI (Articles 1035 to 1046), Title XXXII (Articles 1047 to 1051), Title XXXIII (Articles 1052 to 1060), Title XXXIV (Articles 1061 to 1064), Title XXXV (Articles 1065 to 1068), Title XXXVI (Articles 1069 to 1071), Title XXXVII (Articles 1072 to 1082), Title XXXVIII (Articles 1083 to 1087) and Title XXXIX (Article 1088), which shall continue to be applied as appropriate as national regulations until the issue of the relevant regulations.
4. Upon entry into force of the present law, the provisions of previous laws that regulated this matter shall cease to exist, unless the law provides otherwise.

ANNEX 5

Vienna Convention on Succession of States in Respect of Treaties 1978 *Selected Provisions*

Article 1 *Scope of the present Convention*

The present Convention applies to the effects of a succession of States in respect of treaties between States.

Article 2 *Use of terms*

1. For the purposes of the present Convention:

- (a) “treaty” means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments, and whatever its particular designation;
- (b) “succession of States” means the replacement of one State by another in the responsibility for the international relations of territory;
- (c) “predecessor State” means the State which has been replaced by another State on the occurrence of a succession of States;
- (d) “successor State” means the State which has replaced another State on the occurrence of a succession of States;
- (e) “date of the succession of States” means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates;
- (f) “newly independent State” means a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible;
- (g) “notification of succession” means in relation to a multilateral treaty any notification, however phrased or named, made by a successor State expressing its consent to be considered as bound by the treaty;
- (h) “full powers” means in relation to a notification of succession or any other notification under the present Convention a document emanating from the competent authority of a State

designating a person or persons to represent the State for communicating the notification of succession or, as the case may be, the notification;

(i) “ratification”, “acceptance” and “approval” mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty;

(j) “reservation” means a unilateral statement, however phrased or named, made by a State when signing, ratifying, accepting, approving or acceding to a treaty or when making a notification of succession to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State;

(k) “contracting State” means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force;

(l) “party” means a State which has consented to be bound by the treaty and for which the treaty is in force;

(m) “other State party” means in relation to a successor State any party, other than the predecessor State, to a treaty in force at the date of a succession of States in respect of the territory to which that succession of States relates;

(n) “international organization” means an intergovernmental organization.

2. The provisions of paragraph 1 regarding the use of terms in the present Convention are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State.

Article 5

Obligations imposed by international law independently of a treaty

The fact that a treaty is not considered to be in force in respect of a State by virtue of the application of the present Convention shall not in any way impair the duty of that State to fulfill any obligation embodied in the treaty to which it is subject under international law independently of the treaty.

Article 6

Cases of succession of States covered by the present Convention

The present Convention applies only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.

Article 9

Unilateral declaration by a successor State regarding treaties of the predecessor State

1. Obligations or rights under treaties in force in respect of a territory at the date of a succession of States do not become the obligations or rights of the successor State or of other States Parties to those treaties by reason only of the fact that the successor State has made a unilateral declaration providing for the continuance in force of the treaties in respect of its territory.

2. In such a case, the effects of the succession of States on treaties which, at the date of that succession of States, were in force in respect of the territory in question are governed by the present Convention.

PART II. SUCCESSION IN RESPECT OF PART OF TERRITORY

Article 15 Succession in respect of part of territory

When part of the territory of a State, or when any territory for the international relations of which a State is responsible, not being part of the territory of that State, becomes part of the territory of another State:

- (a) treaties of the predecessor State cease to be in force in respect of the territory to which the succession of States relates from the date of the succession of States; and
- (b) treaties of the successor State are in force in respect of the territory to which the succession of States relates from the date of the succession of States, unless it appears from the treaty or is otherwise established that the application of the treaty to that territory would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

PART III. NEWLY INDEPENDENT STATES

SECTION 1. GENERAL RULE

Article 16 Position in respect of the treaties of the predecessor State

A newly independent State is not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of the succession of States the treaty was in force in respect of the territory to which the succession of States relates.

SECTION 2. MULTILATERAL TREATIES

Article 17 Participation in treaties in force at the date of the succession of States

1. Subject to paragraphs 2 and 3, a newly independent State may, by a notification of succession, establish its status as a party to any multilateral treaty which at the date of the succession of States was in force in respect of the territory to which the succession of States relates.

2.Paragraph 1 does not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the newly independent State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

3.When, under the terms of the treaty or by reason of the limited number of the negotiating States and the object and purpose of the treaty, the participation of any other State in the treaty must be considered as requiring the consent of all the parties, the newly independent State may establish its status as a party to the treaty only with such consent.

Article 21

Consent to be bound by part of a treaty and choice between differing provisions

1.When making a notification of succession under article 17 or 18 establishing its status as a party or contracting State to a multilateral treaty, a newly independent State may, if the treaty so permits, express its consent to be bound by part of the treaty or make a choice between differing provisions under the conditions laid down in the treaty for expressing such consent or making such choice.

2.A newly independent State may also exercise, under the same conditions as the other parties or contracting States, any right provided for in the treaty to withdraw or modify any consent expressed or choice made by itself or by the predecessor State in respect of the territory to which the succession of States relates.

3. If the newly independent State does not in conformity with paragraph 1 express its consent or make a choice, or in conformity with paragraph 2 withdraw or modify the consent or choice of the predecessor State, it shall be considered as maintaining:

- (a) the consent of the predecessor State, in conformity with the treaty, to be bound, in respect of the territory to which the succession of States relates, by part of that treaty; or
- (b) the choice of the predecessor State, in conformity with the treaty, between differing provisions in the application of the treaty in respect of the territory to which the succession of States relates.

Article 22

Notification of succession

1.A notification of succession in respect of a multilateral treaty under article 17 or 18 shall be made in writing.

2. If the notification of succession is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers.

3.Unless the treaty otherwise provides, the notification of succession shall:

(a) be transmitted by the newly independent State to the depositary, or, if there is no depositary, to the parties or the contracting States;

(b) be considered to be made by the newly independent State on the date on which it is received by the depositary or, if there is no depositary, on the date on which it is received by all the parties or, as the case may be, by all the contracting States.

4.Paragraph 3 does not affect any duty that the depositary may have, in accordance with the treaty or otherwise, to inform the parties or the contracting States of the notification of succession or any communication made in connection therewith by the newly independent State.

5.Subject to the provisions of the treaty, the notification of succession or the communication made in connection therewith shall be considered as received by the State for which it is intended only when the latter State has been informed by the depositary.

Article 23

Effects of a notification of succession

1.Unless the treaty otherwise provides or it is otherwise agreed, a newly independent State which makes a notification of succession under article 17 or article 18, paragraph 2, shall be considered a party to the treaty from the date of the succession of States or from the date of entry into force of the treaty, whichever is the later date.

2.Nevertheless, the operation of the treaty shall be considered as suspended as between the newly independent State and the other parties to the treaty until the date of making of the notification of succession except insofar as that treaty may be applied provisionally in accordance with article 27 or as may be otherwise agreed.

3.Unless the treaty otherwise provides or it is otherwise agreed, a newly independent State which makes a notification of succession under article 18, paragraph 1, shall be considered a contracting State to the treaty from the date on which the notification of succession is made.

PART IV.

UNITING AND SEPARATION OF STATES

Article 31

Effects of a uniting of States in respect of treaties in force at the date of the succession of States

1.When two or more States unite and so form one successor State, any treaty in force at the date of the succession of States in respect of any of them continues in force in respect of the successor State unless:

(a) the successor State and the other State party or States Parties otherwise agree; or

(b) it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

2. Any treaty continuing in force in conformity with paragraph 1 shall apply only in respect of the part of the territory of the successor State in respect of which the treaty was in force at the date of the succession of States unless:

(a) in the case of a multilateral treaty not falling within the category mentioned in article 17, paragraph 3, the successor State makes a notification that the treaty shall apply in respect of its entire territory;

(b) in the case of a multilateral treaty falling within the category mentioned in article 17, paragraph 3, the successor State and the other States Parties otherwise agree; or

(c) in the case of a bilateral treaty, the successor State and the other State party otherwise agree.

3. Paragraph 2 (a) does not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the entire territory of the successor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

Article 32

Effects of a uniting of States in respect of treaties not in force at the date of the succession of States

1. Subject to paragraphs 3 and 4, a successor State falling under article 31 may, by making a notification, establish its status as a contracting State to a multilateral treaty which is not in force if, at the date of the succession of States, any of the predecessor States was a contracting State to the treaty.

2. Subject to paragraphs 3 and 4, a successor State falling under article 31 may, by making a notification, establish its status as a party to a multilateral treaty which enters into force after the date of the succession of States if, at that date, any of the predecessor States was a contracting State to the treaty.

3. Paragraphs 1 and 2 do not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

4. If the treaty is one falling within the category mentioned in article 17, paragraph 3, the successor State may establish its status as a party or as a contracting State to the treaty only with the consent of all the parties or of all the contracting States.

5. Any treaty to which the successor State becomes a contracting State or a party in conformity with paragraph 1 or 2 shall apply only in respect of the part of the territory of the successor State in respect of which consent to be bound by the treaty had been given prior to the date of the succession of States unless:

(a) in the case of a multilateral treaty not falling within the category mentioned in article 17, paragraph 3, the successor State indicates in its notification made under paragraph 1 or 2 that the treaty shall apply in respect of its entire territory; or

(b) in the case of a multilateral treaty falling within the category mentioned in article 17, paragraph 3, the successor State and all the parties or, as the case may be, all the contracting States otherwise agree.

6.Paragraph 5 (a) does not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the entire territory of the successor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

Article 34

Succession of States in cases of separation of parts of a State

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

(a) any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed;

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

2. Paragraph 1 does not apply if:

(a) the States concerned otherwise agree; or

(b) it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

Article 38

Notifications

1. Any notification under articles 31, 32 or 36 shall be made in writing.

2. If the notification is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers.

3. Unless the treaty otherwise provides, the notification shall:

(a) be transmitted by the successor State to the depositary, or, if there is no depositary, to the parties or the contracting States;

(b) be considered to be made by the successor State on the date on which it is received by the depositary or, if there is no depositary, on the date on which it is received by all the parties or, as the case may be, by all the contracting States.

4. Paragraph 3 does not affect any duty that the depositary may have, in accordance with the treaty or otherwise, to inform the parties or the contracting States of the notification or any communication made in connection therewith by the successor State.

5. Subject to the provisions of the treaty, such notification or communication shall be considered as received by the State for which it is intended only when the latter State has been informed by the depositary.

**PART VII.
FINAL PROVISIONS**

***Article 46
Signature***

The present Convention shall be open for signature by all States until 28 February 1979 at the Federal Ministry for Foreign Affairs of the Republic of Austria, and subsequently, until 31 August 1979, at United Nations Headquarters in New York.

***Article 49
Entry into force***

1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the fifteenth instrument of ratification or accession.

2. For each State ratifying or acceding to the Convention after the deposit of the fifteenth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

ANNEX 6

KOSOVO DECLARATION OF INDEPENDENCE 17 FEBRUARY 2008 Selected Provisions

9. We hereby undertake the international obligations of Kosovo, including those concluded on our behalf by the United Nations Interim Administration Mission in Kosovo (UNMIK) and treaty and other obligations of the former Socialist Federal Republic of Yugoslavia to which we are bound as a former constituent part, including the Vienna Conventions on diplomatic and consular relations. We shall cooperate fully with the International Criminal Tribunal for the Former Yugoslavia. We intend to seek membership in international organisations, in which Kosovo shall seek to contribute to the pursuit of international peace and stability.

10. Kosovo declares its commitment to peace and stability in our region of southeast Europe. Our independence brings to an end the process of Yugoslavia's violent dissolution. While this process has been a painful one, we shall work tirelessly to contribute to a reconciliation that would allow southeast Europe to move beyond the conflicts of our past and forge new links of regional cooperation. We shall therefore work together with our neighbours to advance a common European future.

12. We hereby affirm, clearly, specifically, and irrevocably, that Kosovo shall be legally bound to comply with the provisions contained in this Declaration, including, especially, the obligations for it under the Ahtisaari Plan. In all of these matters, we shall act consistent with principles of international law and resolutions of the Security Council of the United Nations, including resolution 1244 (1999). We declare publicly that all states are entitled to rely upon this declaration, and appeal to them to extend to us their support and friendship.

ANNEX 7

CONSTITUTION OF THE REPUBLIC OF KOSOVO 15 JUNE 2008 Selected Provisions

Article 16 [Supremacy of the Constitution]

1. The Constitution is the highest legal act of the Republic of Kosovo. Laws and other legal acts shall be in accordance with this Constitution.
2. The power to govern stems from the Constitution.
3. The Republic of Kosovo shall respect international law.
4. Every person and entity in the Republic of Kosovo is subject to the provisions of the Constitution.

Article 17 [International Agreements]

1. The Republic of Kosovo concludes international agreements and becomes a member of international organizations.
2. The Republic of Kosovo participates in international cooperation for promotion and protection of peace, security and human rights.

Article 18 [Ratification of International Agreements]

1. International agreements relating to the following subjects are ratified by two thirds (2/3) vote of all deputies of the Assembly:
 - (1) territory, peace, alliances, political and military issues;
 - (2) fundamental rights and freedoms;
 - (3) membership of the Republic of Kosovo in international organizations;
 - (4) the undertaking of financial obligations by the Republic of Kosovo;
2. International agreements other than those in paragraph 1 are ratified upon signature of the President of the Republic of Kosovo.
3. The President of the Republic of Kosovo or the Prime Minister notifies the Assembly whenever an international agreement is signed.
4. Amendment of or withdrawal from international agreements follows the same decision making process as the ratification of such international agreements.
5. The principles and procedures for ratifying and contesting international agreements are set forth by law

Article 19 [Applicability of International Law]

1. International agreements ratified by the Republic of Kosovo become part of the internal legal system after their publication in the Official Gazette of the Republic of Kosovo. They are directly applied except for cases when they are not self-applicable and the application requires the promulgation of a law.
2. Ratified international agreements and legally binding norms of international law have superiority over the laws of the Republic of Kosovo.

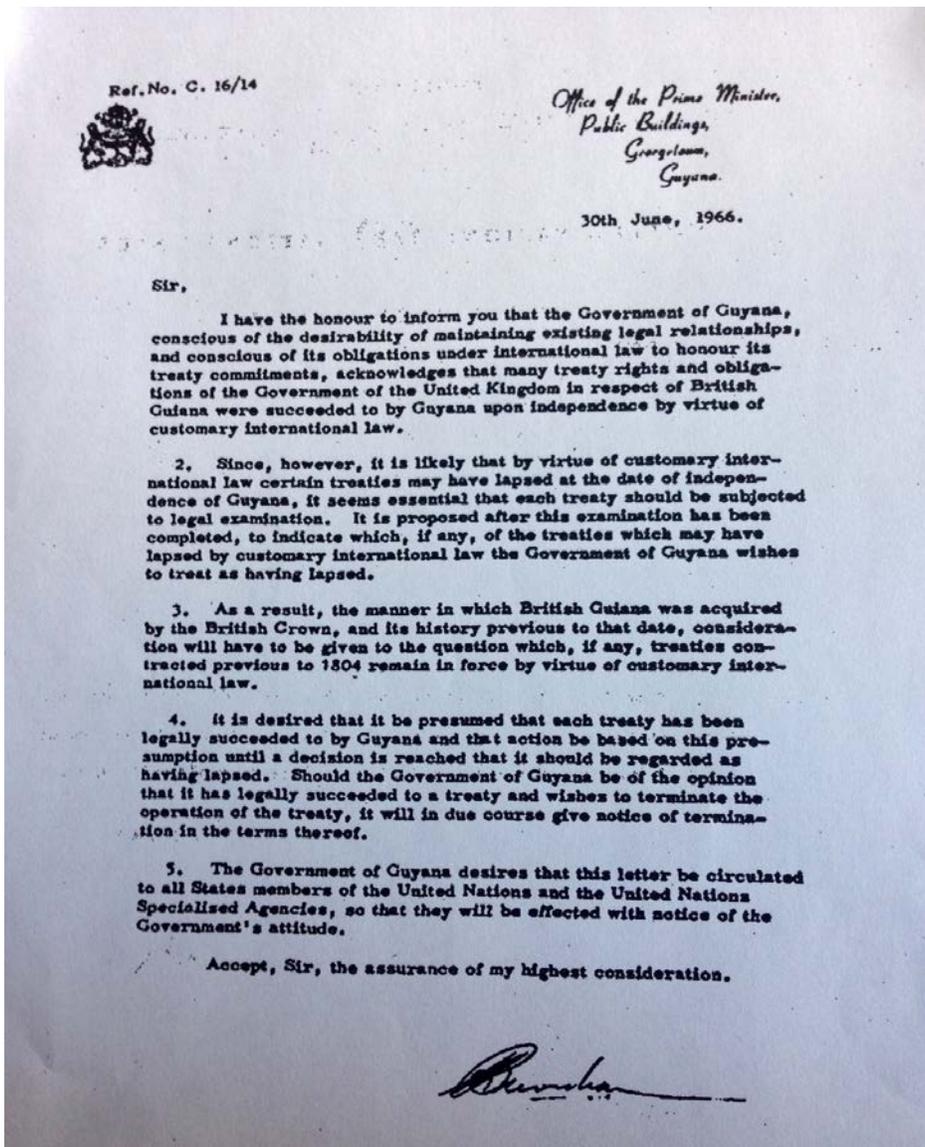
Article 145³¹⁹ [Continuity of International Agreements and Applicable Legislation]

1. International agreements and other acts relating to international cooperation that are in effect on the day this Constitution enters into force will continue to be respected until such agreements or acts are renegotiated or withdrawn from in accordance with their terms or until they are superseded by new international agreements or acts covering the same subject areas and adopted pursuant to this Constitution.

2. Legislation applicable on the date of the entry into force of this Constitution shall continue to apply to the extent it is in conformity with this Constitution until repealed, superseded or amended in accordance with this Constitution.

³¹⁹ * Article 145 has been moved to Chapter I – Basic provisions with amendment 6 to the Constitution.

ANNEX 8 – SAMPLE NOTICE OF SUCCESSION (I)



ANNEX 9– SAMPLE NOTICE OF SUCCESSION (II)

Notification of succession by Slovenia, available at:
<https://treaties.un.org/pages/HistoricalInfo.aspx#Slovenia>

Note 1.

In a letter dated 1 July 1992, received by the Secretary-General on the same date and accompanied by a list of multilateral treaties deposited with the Secretary-General, the Government of the Republic of Slovenia notified that:

"When declaring independence on 25 June, 1991 the Parliament of the Republic of Slovenia determined that international treaties which had been concluded by the SFRY [Socialist Federal Republic of Yugoslavia] and which related to the Republic of Slovenia remained effective on its territory (Article 3 of the Constitutional Law on the implementation of the Constitutional Charter on the Independence and Sovereignty of the Republic of Slovenia...). This decision was taken in consideration of customary international law and of the fact that the Republic of Slovenia, as a former constituent part of the Yugoslav Federation, had granted its agreement to the ratification of the international treaties in accordance with the then valid constitutional provisions.

The Republic of Slovenia therefore in principle acknowledges the continuity of treaty rights and obligations under the international treaties concluded by the SFRY before 25 June 1991, but since it is likely that certain treaties may have lapsed by the date of independence of Slovenia or may be outdated, it seems essential that each treaty be subjected to legal examination.

The Government of the Republic of Slovenia has examined 55 multilateral treaties for which [the Secretary-General of the United Nations] ...has assumed the depositary functions. ...[T]he Republic of Slovenia considers to be bound by these treaties by virtue of succession to the SFR Yugoslavia in respect of the territory of the Republic of Slovenia...

Other treaties, for which the Secretary-General of the United Nations is the depositary and which had been ratified by the SFRY, have not yet been examined by the competent authorities of the Republic of Slovenia. [The Government of the Republic of Slovenia] wim [the Secretary-General] ...on [its] ...position concerning these treaties in due course."

**ANNEX 10 – SAMPLE INSTRUMENTS OF RATIFICATION, ACCESSION AND
SUCCESSION BY THE ICRC**



ICRC

**Additional Protocols to the Geneva Conventions of 1949 –
Ratification kit**

31-05-2003

Model instruments of ratification / accession / succession

SPECIMEN

RATIFICATION / ACCESSION TO THE TWO ADDITIONAL PROTOCOLS OF 8 JUNE 1977

To the Swiss Federal Council

Bern

Mr President,

Members of the Council,

I have the honour to bring to your notice that the Government of, in conformity with the decree of [1] , declares its ratification of / accession to the two Protocols additional to the Geneva Conventions of 12 August 1949 for the protection of war victims, adopted on 8 June 1977, namely:

· Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict (Protocol I);

· Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Conflicts (Protocol II).

I should be obliged if you would kindly bring the above to the notice of the States party to the Geneva Conventions of 12 August 1949.

Please accept the assurance of my highest consideration.

.....

Date Minister of Foreign Affairs

[1] This could also be an act, a governmental decree or a law.

SUCCESSION TO THE FOUR GENEVA CONVENTIONS

OF 12 AUGUST 1949

AND THEIR TWO ADDITIONAL PROTOCOLS OF 8 JUNE 1977

Depositary: Swiss Federal Council, Bern, Switzerland

The Government of is honoured to inform the Swiss Federal Council that it considers itself, by virtue of succession, to be bound by the following treaties to which was Party:

1. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, of 12 August 1949;
2. Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, of 12 August 1949;
3. Geneva Convention relative to the Treatment of Prisoners of War, of 12 August 1949;
4. Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949;

5. Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977;

6. Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977.

(optional clause)

However, the Government ofdoes ot maintain any of the reservations made to those treaties byand, therefore, considers itself bound by the said treaties without any reservation.

(optional clause)

The Government ofdeclares that it recognizes *ipso facto* and without special agreement, in relation to any other High Contracting Party accepting the same obligation, the competence of the International Fact-Finding Commission to enquire into allegation by such other Party, as authorized by Article 90 of Protocol I.

Seal Date Signature