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STATE SUCCESSION AND BITS: CHALLENGES FOR INVESTMENT ARBITRATION

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INTRODUCTION

State succession has always been a complex and controversial subject.¹ Its political nature makes it unpredictable in that it is not treated consistently by the international community. Such is its complexity that under customary international law, the matter is governed by two Conventions: the Vienna Convention on Succession of States in Respect of Treaties (“VCSST”) and the Vienna Convention on Succession of States in Respect of State Property, Archives, and Debts. And even with two conventions on the issue, it is still a battleground for opposing doctrinal views.²

In the late 1980s and 1990s we have seen many cases where there was no common agreement on the law of State succession, especially with respect to the changes in Central and Eastern Europe, where we saw the dissolution of the USSR, Yugoslavia, and Czechoslovakia, and the unification of Germany.³ More recently, South Sudan’s secession from Sudan (2011) and Kosovo’s unilateral declaration of independence from Serbia (2008) brought back to the table the issue of State succession, the latter even provoking a ruling – in 2010 – of the International Court of Justice with respect of such unilateral declaration.⁴

Oppenheim, referring to succession of international persons in general, explains that succession takes place when “one or more International Persons take the place of another International Person, in consequence of certain changes in the

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¹ Mohammed Bedjaoui, *Problemes récents de succession d’États nouveaux*, 130 RECUEIL DES COURS DE L’ACADÉMIE DE DROIT INTERNATIONAL 455 (1970).

² Patrick Dumberry & Daniel Turp, *State Succession with Respect to Multilateral Treaties in the Context of Secession: From the Principle of Tabula Rasa to the Emergence of a Presumption of Continuity of Treaties*, 13 BALTIC Y.B. OF INT’L LAW 27, 28 (2013).

³ Matthew Craven, *The Problem of State Succession and the Identity of States under International Law*, 9 EUR. J. INT’L L. 142, 143-44 (1998). For example, after the dissolution of Yugoslavia it remained unclear whether Serbia and Montenegro were still bound by the former State’s treaties.

⁴ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 403, 453 (2010), <http://www.icj-cij.org/docket/files/141/15987.pdf>. By ten votes to four, the Court decided that the declaration of independence of Kosovo did not violate international law.

latter's condition."⁵ Article 2(b) of the Vienna Convention on Succession of States in Respect of Treaties defines succession of States as "the replacement of one State by another in the responsibility for the international relations of territory."⁶ Yet, as correctly explained by Malcolm Shaw, "[T]his formulation conceals a host of problems since there is a complex range of situations that stretches from continuity of statehood through succession to non-succession,"⁷ that is, there is no use covering the sun with your finger. Among the problems concealed, we can cite those relating to achievement of statehood, nationality, property, membership in international organizations, allocation of public debt, natural resources and other assets, distribution of military forces, and more; all these issues are highly politicized and therefore their resolution is highly unpredictable.

One of the problems concealed by such a definition – and the subject of this article – is that of the continuation (or not) of treaty obligations concluded by the previous State, specifically with respect to bilateral investment treaties ("BITs"). While opposite approaches remain in place within the international community in this regard, once the application of the doctrine of State succession is requested, the issue becomes much more sensitive than doctrinal opinions embodied in books and articles. This is the case in *World Wide Minerals Ltd. v. The Republic of Kazakhstan*, an investor-State arbitration initiated in 2013 under the 1989 Canada-USSR BIT, which in January of this year culminated its jurisdictional phase.⁸

In the aforementioned case, the tribunal held that Kazakhstan, as a former constituent of the USSR, is a legal successor to the USSR's commitments under its BITs, dismissing all Kazakhstan's objections that the Canada-USSR BIT was not in force between Canada and Kazakhstan. Moreover, the investments at stake were made in 1996-1997, five years after the USSR was dissolved. Unfortunately, the *World Wide Minerals* award on jurisdiction is confidential and thus not much is known about the tribunal's reasoning on the issue of State succession, which appears to be one of Kazakhstan's objections, namely, the fact that the Canada-USSR BIT cannot be considered in force between Canada and Kazakhstan.⁹ Yet,

⁵ LASSA OPPENHEIM, I INTERNATIONAL LAW, A TREATISE 119 (1858).

⁶ Vienna Convention on Succession of States in Respect of Treaties, 1978 UNTS 3 (Nov. 6, 1978), Art. 2(b), available at http://legal.un.org/ilc/texts/instruments/english/conventions/3_2_1978.pdf.

⁷ MALCOLM N. SHAW, INTERNATIONAL LAW 959 (2008).

⁸ The arbitration was started pursuant to Article IX of the Canada-USSR BIT and is being conducted under the 1976 UNCITRAL Arbitration Rules. The dispute concerns the management of uranium operations and assets. For an overview of the investment history, see *The Kazakhstan Story*, Feb. 12, 2015, available at <http://www.worldwideminerals.com/World-Wide-Minerals-Kazakhstan-Story.pdf>.

⁹ While the award is confidential, several press releases inform of the status of the case and some details of the award on jurisdiction. See, e.g., Luke Peterson, *In a dramatic holding, UNCITRAL Tribunal finds that Kazakhstan is bound by the terms of former USSR BIT with Canada*, INVESTMENT ARB. REP. Jan. 28, 2016, available at <http://www.iareporter.com/articles/in-a-dramatic-holding-uncitral-tribunal-finds-that-kazakhstan-is-bound-by-terms-of-former-ussr-bit-with-canada>; Disclosure Statement 1/16 "Tribunal finds jurisdiction for WWM claims against Kazakhstan under Soviet Treaty," available at

in a recent interview with Law360, Baiju Vasani, who was leading counsel to World Wide Minerals, stated that the issue of state succession to the Canada-USSR BIT played an important role in the tribunal's decision, which held Kazakhstan to be a successor to the USSR, a "title" that has only been held by Russia since the dissolution to the USSR.¹⁰

Although international arbitration is not ruled by precedents, this holding again opens the door for claims against successor States under BITs signed and ratified only by the succeeded State, an issue that was already touched upon in at least 28 investor-State arbitrations, but never with a thorough analysis by the tribunals in order to clarify the matter and thus, to avoid raising diplomatic conflicts between States over such a sensitive and politicized matter.¹¹

This article will first deal with a general overview of the two main doctrinal schools on succession of States, in order to later analyze the practice involving the succession of BITs specifically. It will then touch upon the issues at stake when State succession must be analyzed by arbitral tribunals in the jurisdictional phase, and finally, concludes by attempting to identify the most appropriate standards to analyze the issue, both in order to avoid imposing on a State an obligation it never undertook, and to avoid depriving foreign investors of the protection of their investments that they reasonably expected.

I. SUCCESSION OF TREATY RIGHTS AND OBLIGATIONS IN A NUTSHELL: TWO CONFLICTING APPROACHES

In order to succeed one State in its rights and obligations, the successor must first become a State as well. While international law does not require that a particular pattern be followed in order to become a State,¹² there is a widely accepted formulation of statehood criteria laid down by Article 1 of the 1933 Convention on Rights and Duties of States: (i) permanent population; (ii) a defined territory; (iii) government; and (iv) the capacity to enter into relations with other States.¹³ Yet, "[w]hether the birth of a new state is primarily a question of fact or law, [is a question] of considerable complexity and significance."¹⁴

<http://www.investorx.ca/Doc/T32U0PTVTBB/2016/01/28/world-wide-minerals-ltd/news-release-english>; Hannah Sheehan, *Tribunal's Ruling Opens Door for claims against Kazakhstan*, Law360, Jan. 28, 2016, available at <http://www.law360.com/articles/752344/tribunal-s-ruling-opens-door-for-claims-against-kazakhstan>; Douglas Thomson, *USSR Treaty binds Kazakhstan, tribunal holds*, GLOBAL ARB. REV., Feb. 1, 2016, available at <http://globalarbitrationreview.com/news/article/34532/ussr-treaty-binds-kazakhstan-tribunal-holds>.

¹⁰ *Q & A with Jones Day's Baiju Vasani*, Law360, May 2, 2016, available at <https://www.law360.com/articles/789371/q-a-with-jones-day-s-baiju-vasani>.

¹¹ These cases involved generally the former Czech and Slovak Federal Republic (CSFR) and Yugoslav Republic, and now the USSR.

¹² Western Sahara Advisory Opinion, I.C.J. Reports 12, 43-44 (1975).

¹³ Convention on the Rights and Duties of States adopted by the Seventh International Conference of American States in Montevideo, 3802 UNTS (Dec. 26, 1934), available at <https://treaties.un.org/pages/showDetails.aspx?objid=0800000280166aef>.

¹⁴ SHAW, *supra* note 7, at 197-98.

Equally complex and significant is the question of whether or not a new State inherits the predecessor State's rights and obligations. The political context in which a succession occurs plays a decisive role on its effects and therefore, many theories have been developed over the years. For instance, scholar Yilma Makonnen identified six theories on the issue: (i) universal succession; (ii) continuity theory; (iii) the organic substitution theory of continuity; (iv) the clean-slate theory; (v) the theory of continuity of rights and obligations by virtue of general principles of international law; and (vi) intermediate theories in between the clean-slate and universal succession theories.¹⁵

Two opposing theories have polarized the issue. On the one hand, there is the "universal succession" doctrine, which supports the inheritance by the new State, of the rights and obligations of its predecessor. This doctrine, which is similar to the continuity theory,¹⁶ dates back to the 17th century, developed by some of the fathers of international law, such as Hugo Grotius, Alberico Gentili, and Samuel von Pufendorf.¹⁷ Through their works, they intended to import the Roman law concepts concerning civil inheritance into the international law spectrum.

On the other hand is the "clean slate" (or *tabula rasa*) doctrine, under which the new State "does not succeed to the treaties to which the predecessor State was a party."¹⁸ This theory appears to have emerged in the 19th century based on the understanding that the transformation of a State creates a legal gap separating the sovereignty of the successor from the predecessor.¹⁹ Interestingly, Sir Thomas Baty supported the clean slate doctrine by asserting that "[w]ere it otherwise, Italy, as the heir of the Roman Empire, would have a good title to the continent of Europe."²⁰

A. *Adoption of both doctrines by the Vienna Convention on Succession of States in respect of Treaties*

The VCSST contemplates both doctrines, depending on the nature of the succession. The universal succession doctrine applies to the *secession* and *dissolution* of States. The former occurs when the predecessor State continues to

¹⁵ YILMA MAKONNEN, INTERNATIONAL LAW AND THE NEW STATES OF AFRICA: A STUDY OF THE INTERNATIONAL LEGAL PROBLEMS OF STATE SUCCESSION IN THE NEWLY INDEPENDENT STATES OF EASTERN AFRICA 129-33, 137, 142 (1983).

¹⁶ Gerhard Hafner & Gregor Novak, *State Succession in Respect of Treaties*, in OXFORD GUIDE TO TREATIES 396, 401 (Duncan B. Hollis ed., 2012).

¹⁷ As cited in Claude Emanuelli, *State Succession, Then and Now, with Special Reference to the Louisiana Purchase (1803)*, 63(4) LOUISIANA L. REV. 1277, 1280 (2003).

¹⁸ Patrick Dumbery, *An Uncharted Question of State Succession: Are New States Automatically Bound by the BITs Concluded by Predecessor States before independence?*, 6 J. INT'L DISPUTE SETTLEMENT 74 (2015).

¹⁹ Craven, *supra* note 3 at 148.

²⁰ Thomas Baty, *The Obligation of Extinct States*, 35 YALE L. J. 434, 434 (1925).

exist after suffering a disruption of its territorial integrity.²¹ The latter concerns the disappearance of the predecessor State, its dissolution in order to create new States.²² The VCSST establishes in its Article 34 that before a secession or dissolution of a State any treaty in force in the predecessor State *automatically* continues in force in respect of each successor State so formed.²³

As for the clean slate doctrine, the VCSST applies this approach to “Newly Independent States,” that is, successor States that, immediately before succession took place, were territories over which the predecessor States were responsible with regard to international relations,²⁴ but whose territory was never part of the predecessor State.²⁵ The VCSST establishes in its Article 16 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.

Further, Article 24 of the VCSST establishes the same principle, specifically addressing only bilateral treaties. It provides two exceptions to the clean slate doctrine for Newly Independent States with regard to the other non-predecessor State that is party to the bilateral treaty: (a) that both States (i.e., the newly independent and the other State) agree to its continuity; or (b) that, by reason of

²¹ This was the case of, for example, with Kosovo and Bangladesh, which seceded from Serbia and Pakistan respectively.

²² This was the case of the former USSR, Czechoslovakia, and Yugoslavia, among others.

²³ VCSST, Art. 34: 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.

²⁴ *Id.*, Art. 1(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) (emphasis added).

²⁵ This was the case of those American States that were colonized by European States such as the United Kingdom, France, Spain, and Portugal, among others. It is normally understood under international law that Newly Independent States, before their independence, had the status of a protectorate, colony, trust, or mandate. See 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(2) AM. U. J. INT’L L. & POL’Y 525, 533-34 (1994). For definitions of protectorate, colony, trust, and mandates, see, *inter alia*, JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 187-201 (1979); YASSIN EL-AYOUTY, *THE UNITED NATIONS AND DECOLONIZATION: THE ROLE OF AFRO-ASIA* 3 (1971); and SHAW, *supra* note 7, at 216, 224.

their conduct, it can be inferred that both States (i.e., the newly independent and the other State) agreed to the continuity of the bilateral treaty.²⁶

Various authors indicate that the reason for adopting the clean slate doctrine towards Newly Independent States lies in the fact that first, their territories were never formally part of the predecessor State; and second, regard is to be given to their particular “historical and political characteristics in the context of decolonization.”²⁷ Therefore, a Newly Independent State “begins its international life free of any general obligation to take over the treaties of its predecessor,”²⁸ in order to safeguard its right to self-determination, breaking its chains from economic domination.

It is worth noting that both doctrines have also been criticized by scholars, arguing, for instance, that both theories are not enough to encompass the whole range of legal issues that come with State succession, like cases of cession of territory, where the “successor” will neither begin its new status with a clean slate nor will it succeed to any rights, since it will not be a new State.²⁹ This criticism is somewhat weak, since State succession should not be analyzed only through the application of two limited doctrines, especially in the context of succession to BITs. As explained by O’Connell, “The effect of change of sovereignty on treaties is not a manifestation of some general principle or rule of State succession, but rather a matter of treaty law and interpretation.”³⁰ Thus, the customs and uses, and the practices by States, also play an important role when defining the fate of a BIT after one of its parties becomes a predecessor State to two or more successor States.

II. SUCCESSION OF BILATERAL INVESTMENT TREATY OBLIGATIONS

Although the VCSST is considered to be a source of international law,³¹ only 22 States have ratified it,³² and state practice with regard to succession of rights and obligations emerging from BITs does not necessarily follow the strict continuity principle set out in Article 34 of the Convention.

²⁶ VCSST, Art. 24. It is important to note that, should the exceptions of Article 24 apply, it does not mean that the once bilateral treaty between the predecessor State and the third State becomes a multilateral treaty, since Article 25 provides that when Article 24 applies, this does not mean that the bilateral treaty will also be in force between the Newly Independent state and the predecessor State.

²⁷ See, e.g., Dumberry, *supra* note 18, at 77. See also Yilma Makonnen, *State Succession in Africa: Selected Problems* 200 RCADI, 130, 131 (1986-V).

²⁸ *Report of the International Law Commission on the Work of its Twenty-Sixth Session*, May 6-July 26, 1974, 2 Y.B. INT’L L. COMM’N, PT. I 236.

²⁹ Craven, *supra* note 3, at 148.

³⁰ DANIEL PATRICK O’CONNELL, *THE LAW OF STATE SUCCESSION* 15 (2015).

³¹ United Nations, Statute of the International Court of Justice, 1 UNTS (Oct. 24, 1945), Art. 38(1)(a).

³² VCSST, *supra* note 6.

The International Law Association's ("ILA") *Conclusions of the Committee on Aspects of the Law on State Succession*³³ are illustrative of such practice. According to this document, state practice demonstrated that "the fate of these [bilateral] treaties is generally decided through negotiation between the successor State and the other party, no matter the category of State succession involved [i.e., secession, dissolution, or Newly Independent State]."³⁴ That is, even though some States decided to continue honoring the obligations entered into by the predecessor State,³⁵ there was always an element of *prior consent* to such continuation, since the circumstances at the time of the conclusion of the BIT clearly changed after the succession.³⁶ This practice is supported by the United Nations as well, the Secretary-General of which requests of every successor State "to produce specific declarations of succession to each multilateral treaty to which the UN is the depositary,"³⁷ without regard to the type of State succession involved. In the same way, some scholars have indicated that "the consent of the other parties to the treaties in question or an agreement with the predecessor state with regard to bilateral issues is *required*."³⁸

In addition to the aforementioned, the *travaux préparatoires* of the VCSST show that the clean slate principle was to be applied in every type of succession, whether it were secession, dissolution, or a Newly Independent State.³⁹ However, when the first draft articles were adopted in 1972, the ILC distinguished Newly Independent States from the cases of secession and dissolution, cases that were outside the context of decolonization.⁴⁰

This kind of uncertainty with regards to the proper solution as to the continuity or not of BIT obligations following any form of State succession leads to the conclusion that "no rule of customary international law has emerged on succession to bilateral treaties."⁴¹ Plus, as it will be seen next, case law addressing

³³ Resolution No. 3/2008, *Conclusions of the ILA Committee on Aspects of the Law of State Succession, adopted at the 73rd Conference of the ILA, held in Rio de Janeiro, Brazil, Aug. 17-21, 2008*, file:///C:/Users/Raul%20Pereira/Downloads/resolution_3_aspects_of_the_law_of_state_succession.pdf.

³⁴ *Id.* ¶ 8.

³⁵ For example, the cases of the dissolutions of the USSR, Czechoslovakia, and Yugoslavia, where some successor States expressly confirmed their wish to continue to be bound by the BITs signed by their predecessors.

³⁶ ILA Resolution, *supra* note 33, ¶ 8 ("The *rebus sic stantibus* rule is sometimes invoked as a way to obtain the renegotiation of the treaty").

³⁷ *Id.* ¶ 6.

³⁸ SHAW, *supra* note 7, at 967 (emphasis added).

³⁹ In his *Fourth Report on Succession in Respect of Treaties* (1971), Special Rapporteur Sir Humphrey Waldock used the general expression "new States" to refer to *all States*, A/CN.4/249, [1971] 2 Y.B. INT'L L. COMM'N, PT. I 145.

⁴⁰ *Report of the International Law Commission on the Work of its Twenty Fourth Session*, A/8710/Rev.1, May 2, - July 7, 1972, 2 Y.B. INT'L L. COMM'N 227. See also Dumberry, *supra* note 18, at 79, 80.

⁴¹ Dumberry, *supra* note 18, at 82; STATE PRACTICE REGARDING STATE SUCCESSION AND ISSUES OF RECOGNITION 116 (Jan Klabbbers et al. eds., 1999).

these issues is scarce and the few cases touching upon state succession of BITs lack sufficient reasoning on the matter to clarify it.

III. INVESTOR-STATE ARBITRATION AND JURISDICTIONAL ISSUES

Although investor-State arbitrations have been brought under BITs in which the respondent is the successor State, very few of them have touched upon the issue of whether the respondent State continues to be, *ipso jure*, bound by the BIT signed by its predecessor.⁴² This issue is particularly relevant in the field of investment arbitration, where jurisdictional issues arises in almost every case, and more often than not, one of the specific jurisdictional issues is consent.

A. *Consent*

Arbitration in general is a matter of consent.⁴³ Going further, arbitration is a matter of consent, “not coercion,”⁴⁴ as the Supreme Court of the United States has held. The jurisdiction of an arbitral tribunal is based exclusively on the consent of the parties,⁴⁵ and in the context of investor-State arbitration, the issue of consent becomes even more sensitive. As explained by Jan Paulsson, investment arbitration through BITs is arbitration without privity, since it allows investors to “arbitrate a wide range of grievances arising from the actions of a large number of public authorities, whether or not any specific agreement has been concluded with the particular complainant.”⁴⁶ That is, through BITs with arbitration clauses,

⁴² In some cases, the tribunal did not address the issue at all. *See e.g.*, Ronald S. Lauder v. Czech Republic, UNCITRAL, Award (Sept. 3, 2001) under the U.S.-Czech and Slovak Federal Republic BIT; Frontier Petroleum Services Ltd. v. The Czech Republic, PCA/UNCITRAL, Award (Nov. 12, 2010) under the Canada-Czech and Slovak Federal Republic BIT; and Renta 4 SVSA, Ahorro Corporación Emergentes FI, Ahorro Corporación Eurofond FI, Rovime Inversiones SICAV S.A., Quasar de Valores SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. v. The Russian Federation, SCC Case No. 24/2007, Award on Preliminary Objections (March 20, 2009). Yet it is worth noting that, with regard to the obligations arising from the U.S.-Czech and Slovak Federal Republic BIT, the diplomatic relations between the U.S. and the Czech Republic were conditioned upon The Czech Republic’s maintenance of all the treaty commitments made by the former Czechoslovakia with the U.S., and the Czech Republic agreed to this condition. *See* Paul R. Williams, *The Treaty Obligations of the Successor States of the former Soviet Union, Yugoslavia, and Czechoslovakia: Do They Continue in Force?*, 23 DENV. J. INT’L L. & POL’Y 1, 46 (1994).

⁴³ *See* FOUCHARD GAILLARD GOLDMAN, INTERNATIONAL COMMERCIAL ARBITRATION 29 (Emmanuel Gaillard & John Savage eds., 1999) (“an arbitrator’s power to resolve a dispute is founded upon the common intention of the parties to that dispute”).

⁴⁴ *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010).

⁴⁵ *ICS Inspection and Control Services Limited (United Kingdom) v. The Argentine Republic*, UNCITRAL, PCA Case No. 2010/9, Award on Jurisdiction (Feb. 10, 2012), ¶ 255.

⁴⁶ Jan Paulsson, *Arbitration without Privity*, 10(2) ICSID REV. 232, 233 (1995).

States provide the nationals of the other State party to the BIT a standing offer to arbitration that requires the acceptance of the private investor. Moreover, multilateral investment treaties like NAFTA and the Energy Charter Treaty (“ECT”) do the same.⁴⁷

By now, the reader might see why consent is an important issue vis-à-vis State succession to BIT obligations. While the offer to arbitrate disputes can be withdrawn and can also provide for conditions necessary to access the mechanism,⁴⁸ the fact is that States are offering such consent in advance, and for a wide range of issues, such as the right to fair, equitable, and non-discriminatory treatment, the observing of undertakings (i.e., umbrella clauses), expropriation, and much more. Thus, when facing State succession to BITs, arbitrators must know to what extent the new successor State would agree to such a provision, as well as to what extent the other State party to the BIT would agree to continue having in force the BIT with the successor State.

Cases involving the former Czechoslovakia, Yugoslavia, and the USSR are illustrative of these issues; however, few of these cases addressed them properly in order to have a solid basis to build principles of interpretation.

1. *Interpretation of Consent by Tribunals in Cases involving State Succession to BITs*

Tribunals dealing with arbitrations where the underlying BIT was signed by the predecessor State of the respondent have done little to analyze to what extent the respondent State consented to the BIT underlying the dispute. They gave even less attention as to what extent the other State party to the BIT consented to having the treaty in force with the successor State.

One of the first cases dealing with the issue was *CME v. Czech Republic*. The tribunal faced a dispute arising under a claim by CME that the Czech Republic breached the Netherlands-Czechoslovakia BIT of 1992 following a series of actions and omissions that deprived CME of its broadcasting operation rights in the respondent’s territory.⁴⁹ The only reference to the issue of succession was made in the “Background of the Dispute” section of the award, where the tribunal stated that “after the Czech and Slovak Federal Republic ceased to exist . . . the Czech Republic succeeded to the rights and obligations of the [CSFR] under the Treaty.”⁵⁰ The same brief reasoning on the issue was made by tribunals in other cases, such as *HICEE v. Slovakia*,⁵¹ where the tribunal only stated that neither

⁴⁷ Christoph Schreuer, *Consent to Arbitration*, in *THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW* 830, 831, 835 (Peter Muchlinski, Frederico Ortino & Christoph Schreuer eds., 2008).

⁴⁸ Such as cooling off periods, exhaustion of local remedies, and fork-in-the-road provisions.

⁴⁹ *CME Czech Republic BV v. The Czech Republic*, UNCITRAL, Partial Award (Sept. 13, 2001), ¶¶ 20-22.

⁵⁰ *Id.* ¶ 3. The same statement was made in the Final Award of March 14, 2003, ¶ 3.

⁵¹ *HICEE BV v. The Slovak Republic*, PCA/UNCITRAL Case No. 2009-11, Partial Award (May 23, 2011), ¶ 3. Other cases with similar reasoning from the tribunal are

party disputed the fact that “after the dissolution of the Czech and Slovak Federal Republic on 31 December 1992, the Slovak Republic succeeded to the [BIT].”

Along with the straightforward reasoning that the successor simply inherits the BITs of its predecessor, the tribunal in *Eastern Sugar v. Czech Republic* added that “no notice of termination of the BIT was given by either the Czech Republic or the Kingdom of the Netherlands.”⁵²

In two cases against the Russian Federation, the tribunal relied upon notes sent by the Russian Ministry of Foreign Affairs in which it stated the willingness of the Russian Federation to continue to honor the BITs signed by the former USSR. In both *Franz Sedelmayer v. Russian Federation*⁵³ and *RosInvestCo UK Ltd. v. Russian Federation*,⁵⁴ since Russia did not dispute the production of those diplomatic notes, the tribunal did not delve into Russia’s status as the successor of the USSR. However, in *RosInvestCo*, the tribunal did mention that under international law Russia is the successor or “continuator” of the USSR,⁵⁵ and the fact that the negotiators of the BIT were the United Kingdom and the USSR was not enough to substitute the treaty concluded by the USSR for “another treaty which might have been concluded by the Russian Federation had it then been in existence and pursuing different economic policies.”⁵⁶

Other cases have also relied on letter exchanges where the successor State confirms the enforceability of the BIT concluded by its predecessor, yet in only one case did the tribunal confirm the consent of the other original party to the BIT. This was in *Austrian Airlines v. Slovak Republic*, where the tribunal first noted that “at the time of the conclusion of the Treaty [the Slovak Republic] did not exist as a sovereign State,” and then concluded that the Austria-Czechoslovakia BIT was enforceable upon the Slovak Republic “by an exchange of diplomatic notes on 4 August and 25 November 1995 (and entered into force on 1 January 1995).”⁵⁷ The *Austrian Airlines* case, while not providing an in-depth analysis of the issue, at least confirmed the bilateral consent of both the Slovak Republic (the successor State) and Austria (the original State party to the BIT underlying the dispute).

William Nagel v. The Czech Republic, SCC Case No. 049/2002, Award (Sept. 9, 2003), ¶ 266; Jan Oostergetel and Theodora Laurentius v. The Slovak Republic, UNCITRAL, Decision on Jurisdiction (Apr. 30, 2010), ¶ 56; and Alps Finance and Trade AG v. The Slovak Republic, UNCITRAL, Award (Mar. 5, 2011), ¶ 1.

⁵² *Eastern Sugar BV v. The Czech Republic*, SCC Case No. 088/2004, Partial Award (Mar. 27, 2007), ¶ 153.

⁵³ *Mr. Franz Sedelmayer v. The Russian Federation*, SCC, Award (Jul. 7, 1998).

⁵⁴ *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Award on Jurisdiction (Oct. 1, 2007).

⁵⁵ *Id.* ¶ 37.

⁵⁶ *Id.* ¶ 42.

⁵⁷ *Austrian Airlines v. The Slovak Republic*, UNCITRAL, Final Award (Oct. 9, 2009), ¶ 8.

2. *Consent to ICSID Jurisdiction*

As ICSID is the most important institution concerned with the administration of investor-State dispute settlement, it is worthwhile to add a few words concerning consent to ICSID's mechanism in the context of State succession.

In order to benefit from the jurisdiction of ICSID, an investor's host State must be a Contracting State of the ICSID Convention. In other words, "Consent to jurisdiction under the ICSID Convention is intimately linked to the host State's status as a Contracting State."⁵⁸ State succession has not appeared to be a problem in ICSID arbitrations. However, the practice regarding succession of multilateral treaties, like ICSID, has been that the new State should make a unilateral declaration of willingness to continue the status of its predecessor as a Contracting State.⁵⁹

Therefore, in the context of the ICSID Convention (and other multilateral treaties, such as the Energy Charter Treaty and the yet to be ratified Trans Pacific Partnership and EU-Canada Comprehensive Economic Trade Agreement), absent a declaration of continuation by the successor State, "it may be subject to doubt whether a successor State is still a Contracting State to the Convention and whether any consent to the jurisdiction of the Centre given by its predecessor binds the new State."⁶⁰

B. *Other Jurisdictional Issues*

While consent may be the most relevant jurisdictional issue underlying an investor-State arbitral procedure where the respondent is a successor State, other problems relating to the jurisdiction of the tribunal may arise.

1. *Jurisdiction Ratione Personae over Respondent*

In the case *Mytilenos v. Serbia & Montenegro and Serbia*, the tribunal faced a rather unique situation. The case was brought by a Greek investor under the Greece-Yugoslavia BIT. It is important to note that the Federal Republic of Yugoslavia, which signed the BIT in 1997 and had suffered the secession of Croatia, Slovenia, Macedonia, and Bosnia and Herzegovina in 1991-1992, changed its name to the "State Union of Serbia & Montenegro" in 2002. In this case, the investor initiated arbitration against Serbia & Montenegro and Serbia, spawning a discussion about the tribunal's jurisdiction *ratione personae* over Serbia.⁶¹

⁵⁸ CHRISTOPH H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* 169 (2d ed. CUP 2009).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Mytilenos Holdings SA v. The State Union of Serbia & Montenegro and Republic of Serbia*, UNCITRAL, Partial Award on Jurisdiction (Sept. 8, 2006), ¶ 170 *et seq.*

From the wording of the award, it seems that the claimant sued the State Union of Serbia & Montenegro and Serbia from the outset,⁶² which does not make sense because at the time the arbitration was initiated Serbia & Montenegro was still one State. Yet even more relevant is the fact that during the arbitration, Montenegro seceded from the Union.⁶³ Therefore, there is a possibility that Serbia was added as a second respondent after Montenegro's secession.

During the arbitration, the respondents contended that Serbia could not be listed as co-respondent with Serbia & Montenegro due to the fact that the BIT was signed by Serbia & Montenegro as a union of States and therefore, Serbia was not a party to the BIT.⁶⁴ For the claimant, Serbia was bound by the BIT because of its status "as a constituent subdivision of Serbia and Montenegro."⁶⁵

The tribunal found that "it appear[ed] uncontroversial that the Republic of Serbia will continue the legal identity of [Serbia & Montenegro] on the international level." Yet, the tribunal conducted its reasoning based on the "well-established principle that jurisdiction is to be determined in light of the situation as it exists on the date the judicial proceedings are instituted,"⁶⁶ and therefore, it held that only Serbia & Montenegro was bound by the arbitration agreement in the BIT.

In its reasoning, the tribunal analyzed the wording of Article 9 of the BIT, which provided for the *Settlement of Disputes between an investor and a Contracting Party*. It explained that the "[p]ossible parties to such mixed arbitration are, on the one hand, investors of a Contracting Party and, on the other hand, 'the other Contracting Party.'"⁶⁷ It was clear for the tribunal that the *Contracting Parties* of the BIT at the time the arbitration was initiated were Greece and Serbia & Montenegro (named the Federal Republic of Yugoslavia at the time). Thus, the tribunal held that Serbia, as a constituent party of Serbia & Montenegro, could not be bound by the BIT. It stressed that binding constituent parts of a State to an investment arbitration agreement is exceptional. One way is through Articles 25(1) and 25(3) of the ICSID Convention. However, this case

⁶² *Id.* ¶ 7. In the "Procedural History" section of the award, the tribunal explains that "[o]n 27 January 2004, Claimant sent notice to *Respondents* pursuant to Article 9 of the 1997 Agreement between the Government of the Hellenic Republic and the Federal Government of the Federal Republic of Yugoslavia on the Reciprocal Promotion and Protection of Investments" (emphasis added).

⁶³ On June 3, 2006, Montenegro declared its independence from the State Union of Serbia & Montenegro, following the result of a referendum on the matter held on May 21, 2006.

⁶⁴ *Mytilineos Award*, *supra* note 61, ¶ 170.

⁶⁵ *Id.* ¶ 171.

⁶⁶ *Id.* ¶ 159. See the Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), Feb. 14, 2002, I.C.J. Reports (2002), ¶ 26; *Compañía de Aguas del Aconquija and Universal v. Argentine Republic (Vivendi II)*, ICSID Case No. ARB/97/3, Decision on Jurisdiction (Nov. 14, 2005), ¶ 63.

⁶⁷ *Id.* ¶ 172.

was brought under the UNCITRAL Rules, and the possibility of binding Serbia as a constituent party of Serbia & Montenegro was not provided for in the BIT.⁶⁸

Notwithstanding its decision, the tribunal did not discard the possibility of finding Serbia & Montenegro responsible for the actions of Serbia under Article 4(1) of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts,⁶⁹ which “applies equally to organs of the central government and to those of regional or local units.”⁷⁰ However, even if Serbia’s actions could trigger the international responsibility of Serbia & Montenegro, the tribunal added that the application of the ILC Articles on State Responsibility could “only lead to the international responsibility of [Serbia & Montenegro]” and therefore, it was not possible to rely upon them to establish jurisdiction over Serbia as well.⁷¹

The tribunal determined that it did not have jurisdiction *ratione personae* over Serbia and therefore decided that only the disputes between Claimant and Serbia & Montenegro were within its jurisdiction.⁷²

The interesting issue in this case is the fact that in applying the principle that jurisdiction is to be determined in light of the situation as it existed on the date the judicial proceedings were instituted and asserting jurisdiction only over Serbia & Montenegro, the tribunal continued the proceedings with a party (i.e., Respondent) that no longer existed. Although the final award of September 2009 is not publicly available, reports on the case seem to indicate that the only respondent at the end of the case was the Republic of Serbia, as the continuing State of Serbia & Montenegro.⁷³ Clearly, an analysis and decision regarding State succession was necessary for the *Mytilineos* case to avoid the uncomfortable gap between the jurisdictional phase (where only Serbia & Montenegro was considered part of the arbitration) and the merits (where only Serbia stood as the respondent).

2. *Extending the Scope of the Arbitration Clause*

Practice shows that State succession questions can arise in different contexts. In *Vladimir Berschader v. Russia*, the tribunal analyzed a request by the claimant to import a more favorable dispute settlement provision from other BITs signed by

⁶⁸ *Id.* ¶ 173.

⁶⁹ Article 4(1) reads: The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.

⁷⁰ ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Commentaries, 53 UN GAOR Supp. (No. 10) at 43, 88.

⁷¹ *Mytilineos* Award, *supra* note 61, ¶ 178.

⁷² *Id.* ¶ 226.

⁷³ See the report of Lise Johnson, *In final UNCITRAL Award, door left open for Greek company to bring another BIT claim against Serbia*, IA REPORTER, Apr. 26, 2013, <http://www.iareporter.com/articles/in-final-uncitral-award-door-left-open-for-greek-company-to-bring-another-bit-claim-against-serbia> (“all claims against *Serbia* were dismissed”) (emphasis added).

Russia in the late 1990s through the Most Favored Nation Clause (“MFN”) contained in the 1992 Belgium/Luxemburg-USSR BIT.⁷⁴

In a nutshell, the MFN provision is a treaty standard adopted in BITs in order to ensure “a level playing field between all trading partners” and “equality of competitive conditions between foreign investors of different nationalities.”⁷⁵ In investment arbitration cases, MFN clauses have been used for three main purposes: (i) to claim compensation for discriminatory measures of the State;⁷⁶ (ii) to invoke more favorable dispute settlement provisions in other BITs;⁷⁷ and (iii) to import more favorable substantive provisions from other BITs.⁷⁸

⁷⁴ Vladimir Berschader and Moïse Berschader v. The Russian Federation, SCC Case No. 080/2004, Award (Apr. 21, 2006).

⁷⁵ *Most-Favored-Nation Treatment*, UNCTAD Series on Issues in International Investment Agreements II 13, http://unctad.org/en/Docs/diaeia20101_en.pdf.

⁷⁶ In *Parkerings v. Lithuania*, the investor (Norwegian) claimed that its investment was being treated less favorably than that of an investor from a third State (Pinus Proprius). While the City of Vilnius rejected claimant’s project because of cultural heritage concerns at the site of the project, the Municipality authorized Pinus Proprius to carry on an identical project on the same site. The tribunal explained that the “essential condition of the violation of a MFN clause is the existence of a different treatment accorded to another foreign investor in a similar situation,” and identified three conditions to be met to determine that Parkerings was in *like circumstances* with Pinus Proprius: (i) Pinus Proprius must be a foreign investor; (ii) Pinus Proprius and Parkerings must be in the same economic sector; and (iii) The investors are treated differently, provided that the State does not have a reasonable motif to treat both investors differently. The investor proved conditions (i) and (ii), but failed to prove condition (iii) because of the significant size of its project, which would affect specific and more sensitive historical areas of the site. Thus, Parkerings and Pinus Proprius were not in *like circumstances*. *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, ¶¶ 363, 365, and 371 (Sept. 11, 2007).

⁷⁷ In *Maffezini v. Spain*, the tribunal found that the MFN clause embraces the dispute settlement provisions of the BIT. The investor invoked the MFN clause contained in the Argentina-Spain BIT in order to disregard the application of an article in the same BIT providing for the submission of a dispute to local courts for the period of 18 months before submission of the dispute to arbitration, justifying its petition on the fact that the Chile-Spain BIT did not impose such condition. The tribunal held that notwithstanding the fact that the basic treaty does not refer expressly to dispute settlement as covered by the most favored nation clause, “dispute settlement arrangements are inextricably related to the protection of foreign investors, as they are also related to the protection of rights of traders under treaties of commerce.” Therefore, the tribunal concluded that “if a third party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor’s rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favored nation clause.” *Emilio Agustin Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, ¶¶ 54, 56 (Jan. 25, 2000). Yet, this feature of the MFN clause is far from being absolute. Other tribunals have held that the MFN clause does not extend to dispute resolution provisions.

⁷⁸ Some tribunals have permitted investors to claim the benefit from more favorable substantive provisions which are absent in the underlying BIT. In *MTD v. Chile*, claimant

In *Berschader*, the investor invoked the MFN clause in the Belgium/Luxemburg-USSR BIT to seek more favorable dispute settlement provisions in other BITs signed by Russia, namely, dispute settlement provisions contained in post-Soviet BITs signed by the Russian Federation that allowed the tribunal to rule on the existence or not of an illegal expropriation because the Belgium/Luxemburg-USSR BIT was applicable only to disputes “concerning the amount or mode of compensation to be paid under Article 5 of the Treaty [expropriation].”⁷⁹

Russia objected to the application of the MFN clause contending that the fact that the MFN clause was contained in a BIT signed and ratified by the Soviet Union meant that the MFN clause “may only be applied in relation to BITs signed by the Soviet Union and not BITs signed by the Russian Federation.”⁸⁰ Russia’s grounds for objection clearly reflected the concern of changing economic policies that may of course occur after the dissolution of a State such as was the case of the USSR, much like happened in *RosInvestCo*.⁸¹ The tribunal disregarded this objection by simply stating that “the official position consistently adopted by the Respondent in international affairs is that the Russian Federation is the legal successor to the Soviet Union,”⁸² without citing, however, even one example to support the fact that Russia had adopted such a position. But even if the tribunal were in fact right in this conclusion, what is of concern is the slim reasoning in response to a quite strong objection from Russia.

IV. LAW APPLICABLE TO JURISDICTION AND STATE SUCCESSION

As seen above, important issues can arise when the respondent is a successor to one of the signatories to the underlying BIT. Therefore, there is a need for objective criteria to guide arbitrators through the process of deciding whether the successor State is still bound by the BIT and the arbitration clause contained in it. In the cases seen previously, the respondents raised the objection of State succession as a jurisdictional one, which had to be dealt with by the arbitrators before proceeding to the merits. In this author’s view, the main and foremost question will be whether the tribunal has jurisdiction to decide a dispute in which the respondent did not exist at the time the arbitration clause was signed.

was denied the required planning licenses to develop its investment after receiving the proper authorization by the Chilean investment authority. Claimant argued that other BITs signed by Chile (namely Chile-Denmark and Chile-Croatia BITs) contained more favorable conditions which granted “necessary permits” subsequent to the approval of the government, and therefore invoked the MFN clause contained in the Chile-Malaysia BIT to import such conditions. The tribunal agreed with the investor, reasoning that including an MFN clause as part of the protection “was in consonance” with the purpose of the Chile-Malaysia BIT to “protect and create more favorable investments.” *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile*, ICSID Case No. ARB/01/7, Award, ¶ 104 (May 25, 2004).

⁷⁹ *Vladimir Berschader Award*, *supra* note 74, ¶ 151.

⁸⁰ *Id.* ¶ 161.

⁸¹ *RosInvestCo Award*, *supra* note 54, ¶ 42.

⁸² *Vladimir Berschader Award*, *supra* note 74, ¶ 161.

An express acceptance by both the successor State respondent and the other State party to the BIT, as in *Austrian Airlines*, saves a lot of work for the tribunal. But in the absence of such bilateral acceptance, and without a strong and persuasive instrument to reflect the international customs on the matter, arbitrators must engage in an exercise in order to reach a well reasoned decision as to whether the successor State really continues to be bound by the BIT signed by its predecessor. In this regard, the exercise needed is to find the applicable law in order for the tribunal to decide on its jurisdiction in the face of State succession.

Previously it was explained that in investment treaty arbitration, the tribunal's jurisdiction is "based on an offer to consent to arbitration made by the States parties to a treaty."⁸³ Therefore, its regulatory instrument is primarily the BIT that confers jurisdiction. Domestic law may also be referred to for certain specific issues, such as the investor's nationality⁸⁴ and the legality of the investment.⁸⁵ However, tribunals have held that for purposes of jurisdiction, the applicable law mainly consists of the BIT, the ICSID Convention (when applicable), and principles of international law. For instance, in *CMS v. Argentina*, the tribunal concluded that a decision on jurisdiction is "governed solely by Article 25 of the [ICSID] Convention and those other provisions of the consent instrument which might be applicable, in the instant case the Treaty provisions."⁸⁶

In *Daimler v. Argentina*, the tribunal added principles of international law to the equation. It held that for "jurisdictional issues, including the existence of an investment, the presence of an eligible investor and the parties' consent to arbitration, must be determined by reference to the legal instruments establishing jurisdiction and by general international law."⁸⁷ In the recent award in *Vestey Group v. Venezuela*, the tribunal made a similar statement, explaining that,

⁸³ Christoph Schreuer, *Jurisdiction and Applicable Law in Investment Treaty Arbitration*, 1(1) MCGILL J. OF DISPUTE RESOLUTION 1, 2 (2014).

⁸⁴ Section A, Art. 1 of the 2012 U.S. Model BIT, states that a *national of the United States* shall be established in accordance with Title III of the Immigration and Nationality Act. *See also Ioan Micula et al v. Romania*, where the tribunal held that "[u]nder the BIT, the Tribunal must examine whether Messrs. Micula were Swedish nationals in accordance with Swedish law." *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, ¶ 85 (Sept. 24, 2008).

⁸⁵ *See, inter alia*, *Metal-Tech LTD v. The Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, ¶¶ 282-90 (Oct. 4, 2013); *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, ¶ 135 (Aug. 27, 2008); and *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of Philippines (Fraport I)*, ICSID Case No. ARB/03/25, Award, ¶ 401 (Aug. 16, 2007).

⁸⁶ *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Decision on Jurisdiction, ¶ 88 (Jul. 17, 2003).

⁸⁷ *Daimler Financial Services v. Argentina*, ICSID Case No. ARB/01/5, Award, ¶ 50 (Aug. 22, 2012).

besides the ICSID Convention and the BIT, “[i]t is ... undisputed that the Tribunal’s jurisdiction is governed by international law.”⁸⁸

In addition, many BITs establish that international law is the sole applicable law for resolving conflicts regarding the interpretation or application of the BIT.⁸⁹ This is especially important. First, it is exactly this determination of the applicability of the BIT that must be made after one of the signatory States is dissolved in full or in part (i.e., secession); and second, rules and principles of international law are powerful and highly persuasive when it comes to their applicability.

Therefore, the fact that many variants of clauses on applicable law include international law,⁹⁰ means that such set of principles and rules must be defined in order to help decide whether a successor State is still bound by the BIT signed by its predecessor.

A. *What Constitutes International Law for the Purposes of Jurisdiction in Investment Arbitration after the Dissolution or Secession of States?*

As mentioned above, only 22 States have ratified the VCSST, and state practice with regard to succession of rights and obligations emerging from BITs in cases of dissolution or secession do not necessarily follow the strict continuity principle set out in Articles 34 of the Convention. Therefore, there will be cases where arbitrators will need to resort to the principles of international law in order to decide the matter.

Hersch Lauterpacht defined International Law as “the body of rules of conduct . . . which confer rights and impose obligations . . . upon sovereign States and which owe their validity both to consent of States as expressed in custom and treaties and to the fact of the existence of an international community of States and individuals.”⁹¹ At the same time, in order to apply international law, one must resort to its sources,⁹² which are many, and they will apply individually or jointly depending on the issue at stake. Article 38(1) of the Statute of the International

⁸⁸ *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, ¶ 115 (Apr. 15, 2016).

⁸⁹ *E.g.* France Mexico BIT, Art. 11(5); U.S.-Croatia BIT, Art. XI(1); Argentina-U.S. BIT, Art. VIII(1); Germany-China BIT, Art. 8(5).

⁹⁰ Schreuer, *supra* note 83, at 16; ICSID Convention, Art. 42(1); Trans Pacific Partnership (TPP) Ch. 9, Art. 9.25; Canada-EU Comprehensive Economic and Trade Agreement (CETA) Ch. 8, Art. 8.31; North American Free Trade Agreement (NAFTA) Ch. 11, Article 1131; Italy-Argentina BIT, Art. 8(7); France-Mexico BIT, Art. 9(6), among others.

⁹¹ HERSCH LAUTERPACHT, *INTERNATIONAL LAW. COLLECTED PAPERS, VOLUME I THE GENERAL WORKS* 9 (E. Lauterpacht ed., 1970).

⁹² Scholar Rebecca Wallace explains that the sources “articulate what the law is and where it can be found,” that is, the sources are the very essence of the law. *See* REBECCA M.M. WALLACE, *INTERNATIONAL LAW* 7 (5th ed. 2005).

Court of Justice (“ICJ”) contains the most accepted list of what should be considered as the sources of international law:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognized by civilized nations;
- (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.⁹³

Although Article 38(1) does not explicitly establish a hierarchy, Ian Brownlie explained that in one of the Statute’s drafts the word “successively” was used. Therefore, one could argue that first, if there is a valid treaty between the parties, such instrument should be applied to the dispute, since it is a more specific source than the others.⁹⁴ In the absence of a treaty or a specific treaty provision, then custom, as accepted as legally binding by the parties, should be applied. And finally, if no treaty or custom can be identified to apply to the dispute, then the court would resort to the general principles of law recognized by civilized nations.

Following the logic previously indicated, the first instrument available for arbitrators to refer to the issue of dissolution or secession of States would be the VCSST. However, as analyzed earlier in this article, the VCSST was ratified by only 22 States and, as reported by the International Law Association, the fate of BITs is decided through negotiation between the successor State and the other party, no matter the category of State succession involved (i.e., secession, dissolution, or Newly Independent State).⁹⁵ The undermined authority of the VCSST is also evidenced by the fact that not one award or decision on jurisdiction cited in this article included the VCSST as part of the reasoning. Thus, the VCSST has played a small and almost null role in the issue, and there is no real expectation for this to change.

A convention that does play an important role in the international law of treaties is the Vienna Convention on the Law of Treaties (“VCLT”),⁹⁶ often cited by international tribunals, including tribunals from the ICJ, ICSID, and the Permanent Court of Arbitration (“PCA”). However, although the VCLT governs a

⁹³ Statute of the International Court of Justice, *supra* note 31, Art. 38(1).

⁹⁴ IAN BROWNLIE, *BROWNLIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 22, 23 (84th ed. by James Crawford, 2012).

⁹⁵ *Conclusions of the ILA Committee on Aspects of the Law of State Succession*, *supra* note 33.

⁹⁶ Vienna Convention on the Law of Treaties, May 23, 1969, U.N.T.S. 18232.

wide range of areas concerning treaties, one area that it does not cover is State succession. By virtue of Article 73, the provisions of the VCLT “shall not prejudice any question that may arise in regard to a treaty from a succession of States.”

Therefore, neither the VCSST nor the VCLT can offer a final response to the issue of State succession concerning BITs. Following Article 38(1) of the Statute of the ICJ, the next most relevant legal regulations governing State succession would be customary international law along with the general principles of law as recognized by civilized nations.

1. *Customs and General Principles of Law*

Also known as customary international law, customs, as a source of international law bear two basic elements that must interact together: a generalized repetition of acts by the State (material element) and the conviction that such acts are legally binding on States as necessary elements to maintain and develop international relations (psychological element).⁹⁷ As such, customary international law rests upon a “generality of will.”⁹⁸

For its part, the validity of the general principles of law, as articulated by Hersch Lauterpacht, rest on three foundations: (i) the fact that it is laid down in the Statute of the International Court of Justice, a universal international instrument; (ii) they have their roots in international custom; and (iii) “it stems . . . from the twin circumstances that there exists an international community both as a matter of paramount fact and as a society of States claimed and recognized by them to be a society under the rule of law.”⁹⁹ More importantly, the general principles of law are those principles that are common to the legal systems existing in the legal world today (i.e., common and civil law) and that have been applied by international tribunals, such as the principle of a State’s responsibility for the acts of its agents, estoppel, and the principle of full reparation.¹⁰⁰ In this context, in the *Barcelona Traction* case, the ICJ noted the importance of municipal law, explaining that disregarding it in an international case would, “without justification, invite serious legal difficulties . . . It is to rules generally accepted by municipal legal systems . . . and not the municipal law of a particular State, that international law refers.”¹⁰¹

In the context of State succession, well known scholar and arbitrator Brigitte Stern has explained that most of this customary international law was in fact formed by general principles of international law (Article 38(1)(c) of the Statute

⁹⁷ 1 D.P. O’CONNELL, INTERNATIONAL LAW 15 (1970).

⁹⁸ *Id.*

⁹⁹ LAUTERPACHT, *supra* note 91, at 75-76.

¹⁰⁰ WALLACE, *supra* note 92, at 24, citing the cases of *Fabiani* (State’s responsibility for its agent’s acts) [10 R.I.A.A. 83 (1986)], *Temple* (estoppel) [I.C.J. Reports 1962 at 6], and *Chorzow Factory* (full reparation) [17 P.C.I.J. (Series A) at 29 (1928)].

¹⁰¹ *Barcelona Traction, Light and Power Co. Ltd (Judgment)*, I.C.J. Reports 3, 37 (1970).

of the ICJ) translated into the field of State succession, such as the *uti possidetis* principle,¹⁰² the principle of effectiveness of territorial regimes, fundamental change of circumstances (contained in Article 62 of the VCLT), and the principle of consent (contained in Article 57 of the VCLT).¹⁰³ This statement by Ms. Stern is important in the context of BIT arbitration, since it provides real tools for arbitrators facing issues of State succession.

a. *Fundamental change of circumstances*

While application of Article 62(1) of the VCLT will not be possible due to the express exclusion contained in Article 73, the principle of fundamental change of circumstances has its roots in the older principle of *rebus sic stantibus*. This principle has its origins in medieval canon law or *ius commune* of the 14th century¹⁰⁴ and has been recognized as a principle of customary international law.¹⁰⁵ It provides that “where there has been a fundamental change of circumstances since an agreement was concluded, a party to that agreement may withdraw from or terminate it.”¹⁰⁶

This exceptional rule to that of *pacta sunt servanda* can be found in various forms and variations throughout different jurisdictions, whether it is the doctrine of frustration or impossibility of English and U.S. law,¹⁰⁷ the *Wegfall der Geschäftsgrundlage* in Germany, the *theorie de l'imprévision* in France,¹⁰⁸ or the doctrine of excessive burden found in the civil code of various Latin American

¹⁰² *Uti Possidetis* is an international law principle that secures the territorial boundaries of States at the moment of their independence. See *Burkina Faso v. Republic of Mali*, 1986 I.C.J. Reports 554; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)* case, 1992 I.C.J. Reports 351, 286–387: “*uti possidetis juris* is essentially a retrospective principle, investing as international boundaries administrative limits intended originally for quite other purposes.”

¹⁰³ Brigitte Stern, *La Succession d'Etats*, 262 R.C.A.D.I. 164 (1996), cited in THE OXFORD GUIDE TO TREATIES 399 (Duncan B. Hollis ed., 2012).

¹⁰⁴ Pascal Pichonnaz, *From Clausula Rebus sic Stantibus to Hardship: Aspects of the Evolution of the Judge's Role*, 17 FUNDAMINA 125 (2011).

¹⁰⁵ In its report of the VCLT, the ILC stated that “[a]lmost all modern jurists, however reluctantly, admit the existence in international law of the principle . . . *rebus sic stantibus*.” [1966] 2 Y.B. INT'L L. COMM'N 257.

¹⁰⁶ SHAW, *supra* note 7, at 950. See also Detlev F. Vagts, *Rebus Revisited: Changed Circumstances in Treaty Law*, 43 COLUM. J. TRANSNAT'L L. 459 (2004); O. Lissitzyn, *Treaties and Changed Circumstances (Rebus Sic Stantibus)*, 61 AJIL 895 (1967).

¹⁰⁷ See Allan Farnsworth et al., *Relief for Mutual Mistake and Impracticability*, 1 J.L. & COM. 1 (1981); A.H. Puelinckx, *Frustration, Hardship, Force majeure, imprévision, Wegfall der Geschäftsgrundlage, Unmöglichkeit, Changed Circumstances*, 3 J. INT'L ARB. (1986).

¹⁰⁸ The *theorie de l'imprévision* was elaborated following the 1916 *Gaz de Bordeaux* case, in which the French *Conseil d'Etat* set the conditions that would permit the readjustment of administrative contracts. *Conseil d'Etat, Compagnie Générale d'Eclairage de Bordeaux*, Rec. 125, Mar. 30, 1916.

jurisdictions.¹⁰⁹ State legislative practice has shown that, notwithstanding the high deference that must be given to the principle of contractual sanctity, “there is nevertheless a relatively small segment of cases in which the law will recognize that the contract has, as result of an unforeseen change of circumstances, failed to realize the true will of the parties and that it cannot be maintained in whole or in part.”¹¹⁰

Therefore, as a matter of general principles of law, recognized by States not only internationally, but also domestically (with variations, but with the same underlying origin), the succession of a State, depending on the socioeconomic and political context in which it occurred, should not be taken for granted in the context of arbitrations initiated under the umbrella of a BIT, when the parties to such BIT are no longer the same, a circumstance that not only is different from the time the BIT was concluded, but it was also unexpected and very probably out of the parties’ control.

Of course, the applicability of this principle will have to be narrow and restricted, given its exceptional nature. Whether the State succession affecting the underlying BIT is to be considered a fundamental change will have to be decided on a case-by-case basis. Some guidance can be found in the ICJ’s case law as to whether to characterize a change of circumstance as fundamental or not. In the *Gabčíkovo–Nagymaros Project* case, the Court held that “[a] fundamental change of circumstances must have been unforeseen; the existence of the circumstances at the time of the Treaty’s conclusion must have constituted an essential basis of the consent of the parties to be bound by the Treaty.”¹¹¹ The European Court of Justice (“ECJ”) followed this same reasoning in *Racke v. Hauptzollamt Mainz*, explaining that:

to contemplate the termination or suspension of an agreement by reason of a fundamental change of circumstances, customary international law . . . lays down two conditions. First, the existence of those circumstances must have constituted an essential basis of the consent of the parties to be bound by the treaty; secondly, that change must have had the effect of radically transforming the extent of the obligations still to be performed under the treaty.¹¹²

Therefore, the analysis of whether a BIT remains valid after one party is affected by State succession will depend in great part on the treaty negotiations between the predecessor State and the State of the investor and the political and socioeconomic environment surrounding such negotiations, in order to define

¹⁰⁹ See, e.g., Código Civil [Cód. Civ.] [Civil Code] Art. 1198 (Arg.), Código Civil [Cód. Civ.] [Civil Code] Arts. 478, 479, 480 (Braz.)

¹¹⁰ HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 283 (reprint, OSAIL, 2011).

¹¹¹ *Gabčíkovo–Nagymaros Project* (Hungary/Slovakia), 1997 I.C.J. Reports 65.

¹¹² Case C-162/96 *Racke GmbH&Co. v. Hauptzollamt Mainz*, [1996] ECR I-3688, I-3706.

whether the changed circumstance was unforeseen at the time of the conclusion of the BIT, and whether such circumstance at the outset was an essential basis for bilateral consent.¹¹³

b. *The principle of self-determination*

Another important principle of international law to take into account in a case of State succession is that of self-determination. The principle appears in Articles 1(2) and 55 of the United Nations Charter,¹¹⁴ where it is referred as “the principle of equal rights and self-determination of peoples,” and later included in Article 1 of both U.N. Covenants of 1966.¹¹⁵

In the context of State succession, the principle of self-determination is concerned with the “right to be a state.” This has important ramifications because the formation of a new State, whether it is through secession or dissolution, entails the right of self-determination of the people of the newly formed State, and such right to self-determination may involve the right of the new State to decide on its own socioeconomic and political relations. As put forward by Article 1 of both 1966 U.N. Covenants, by virtue of the right to self-determination, all people may “freely determine their political status and freely pursue their economic, social and cultural development.” In this sense, regard is to be given to the fact that the socioeconomic, political, and cultural status of a new State might very well be different from those of the predecessor State, but at the same time, it can also be similar or identical to it.

CONCLUSIONS

Many rules and practices have emerged in the context of State succession to bilateral treaties and therefore, to place treaty succession under the umbrella of one of such rules would not be responsible, given the dynamic nature of treaty succession. Even if international practice seems to be inclined towards continuity in the case of bilateral treaties, one cannot disregard the fact that negotiations play an important role in the contexts of secession and dissolution of States.¹¹⁶

¹¹³ A possible obstacle to be encountered here can be to find any evidence of those very negotiations. As once explained by Professor Christoph Schreuer during his oral testimony in *Wintershall v. Argentina*, “BITs are very often pulled out of a drawer, often on the basis of some sort of model, and are put forward on the occasion of state visits when the heads of states need something to sign. In other words, they are very often not negotiated at all.” *Wintershall Aktiengesellschaft v. Argentina*, ICSID Case No. ARB/04/14, Award, ¶ 85 (Dec. 8, 2008).

¹¹⁴ United Nations, *Charter of the United Nations*, 1 UNTS XVI (Oct. 24, 1945).

¹¹⁵ United Nations, *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3 (Dec. 16, 1966); *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 (Dec. 16, 1966). See also JAMES CRAWFORD, *BROWNLIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 141 (8th ed. 2012).

¹¹⁶ Hafner & Novak, *supra* note 16, at 426, 427.

Thus, State succession raises important questions that go to the core of investor-State arbitration, such as consent or jurisdiction *ratione personae* over the State respondent; at the same time, it can arise in relation to other issues, such as using the MFN clause to import more favorable provisions into the BIT signed by the predecessor, from BITs signed by the successor.

All these issues remain unanswered, mainly because of a lack of proper reasoning on the issue, especially in those cases where there are no express declarations of continuity from both the successor State and the third State party to the BIT. A complete analysis of the issue of succession to BITs would represent an important addition to the rich database of principles and standards established by investor-State arbitration case law, especially because it would decide whether the investment existed or not, or if the claimant is in fact an investor, in order to establish whether the underlying BIT continue to exist.

In deciding these matters, arbitrators are not alone. International law has provided useful tools to apply to these circumstances, even when treaty law is not available, such as *rebus sic stantibus* or fundamental change of circumstances, and the self-determination principle.

The fact is that our international community of States continues to move at a dynamic pace, so that we must assume that the world will continue to evolve with the creation of new States. Therefore, cases like *World Wide Minerals Ltd. v. The Republic of Kazakhstan*, which unfortunately is not publicly available, might still arise, especially because many BITs signed by predecessor States are still in force. For instance, on June 4, 2015, the ICSID Secretariat registered a claim filed by ACP Axos Capital against Kosovo¹¹⁷ under the Germany-Yugoslavia 1989 BIT. Most certainly, the issue of State succession will arise again.

The hope is that the tribunal in the *World Wide Minerals* case provided a more complete reasoning on the issue of State succession, and if not, hopefully the tribunal in the *ACP Axos Capital* case will do so, since it will definitely not be lost words, but bring important enlightenment to the issue.

¹¹⁷ ACP Axos Capital GmbH v. Republic of Kosovo, ICSID Case No. ARB/15/22. The case is also brought under Kosovo's Law 04/L-220 on Foreign Investment. The last procedural act in this case was claimant's memorial submission on the merits, on June 24, 2016.

