The Question of State Succession: New Challenges for International Arbitration

André del Solar Garzón
Litigation and International Arbitration

The question of state succession in international arbitration has passed from being a minor bump in the road in some cases to becoming a cornerstone of an increasing number of arbitral proceedings where the tribunal's jurisdiction builds upon the answer to the question of succession.

When we take a look at any world map we may get the impression that states are almost as immovable as mountains. However, we often forget that the geopolitical composition of our world has evolved —and continues to do so— at a surprisingly accelerated rate. Only in the past 30 years we have seen, among many other examples, the unification of Germany, the dissolution of the Soviet Union ('USSR'), Yugoslavia and Czechoslovakia (with the resulting formation of 23 new states in total), the secession of Namibia, Eritrea, Kosovo, East Timor and South Sudan, the transfer of Hong Kong and Macau to China, and the accession of Crimea to Russia.

In this world in which the only constant is change, investors, nevertheless, continue to seek security and legal certainty in their investments and in such quest the key question arises: is a successor state bound by an investment treaty concluded by the predecessor state with another state? The answer to this question will depend on the type of succession that takes place.

State succession may adopt many forms[1] and the solutions for each scenario vary significantly. In approaching each case, the tribunal will

1 We can differentiate six types of state succession: (i) unification (two or more states merge to form a new state); (ii) dissolution (a state becomes extinct and several new states are formed); (iii) incorporation (a state completely absorbs another state); (iv) secession (a new state emerges from another state, while the latter continues to exist); (v) newly independent state (a new state emerges in the context of decolonization); and (vi) transfer of territory (a portion of one existing state is transferred to another existing state).

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have to weigh in the type of succession that has taken place and the type of treaty that is being analysed (e.g., bilateral or multilateral).

For the purposes of this article, we will only focus on the most recurrent and important issues for investment arbitration, that is, events of secession (including newly independent states and transfers of territory) and dissolution in relation to the continuance —or not— of bilateral investment treaties ('BITs').

The 1978 Vienna Convention on Succession of States in Respect of Treaties ('VCSST') defines state succession as '*the replacement of one State by another in the responsibility for the international relations of territory*'.[2] However, this definition conceals many problems since it fails to cover a wide range of situations that may occur in an event of succession. It may be that the successor state may not achieve the status of statehood; there may also be problems regarding nationality, property or issues regarding the membership to international organisations. In addition, a key problem with this definition —which, as mentioned, will be the focus of this article— is the continuation (or not) of treaty obligations in the form of BITs undertaken by the predecessor state.

While the VCSST is useful as a starting point to jump into the issue of state succession, unfortunately it is not a

2 Vienna Convention on Succession of States in Respect of Treaties ('**VCSST**'), signed on 23 August 1978 and entered into force on 6 November 1996, 1946 UNTS 3, in 17 ILM, 1978, 1488, Article 2(1)(b).

binding source of law in most cases. As at this date, only 23 states have ratified the convention and most of its provisions arguably do not reflect neither custom nor principles of international law. Lacking a strong treaty of reference to enlighten the problems of state succession, arbitrators are left to dive into the open waters of international law to figure out, case by case, what rules of law may be applied.

Six doctrines on state succession have been identified. However, two of those doctrines have polarized the issue: on the one hand, the automatic succession doctrine, which establishes that the new state inherits the rights and obligations of its predecessor; and, on the other hand, the clean slate or *tabula rasa* doctrine which supports that the new state does not succeed to the treaties to which the predecessor state was a party.

The VCSST contemplates both theories, but narrows the application of the automatic succession doctrine (Article 34) to cases of secession and dissolution and the clean slate doctrine (Article 16) to newly independent states (i.e., successor states that, immediately before succession took place, were territories over which the predecessor state was responsible with regard to international relations but whose territory was never a part of the predecessor state).[3] Therefore, following the provisions set out in the VCSST would lead to the application of the automatic succession doctrine as a general rule and of the clean slate doctrine as an exception, applicable only to cases in the context of decolonization. However, as stated above, the VCSST does not generally reflect custom and states frequently do not follow its provisions—and neither do arbitral tribunals when faced with the question of succession.

To this date, about 50 publicly known BIT arbitration cases have addressed issues of state succession, manly in the context of dissolution and secession. The issue of state succession has progressively acquired importance, going from merely being mentioned in the early cases to being at the centre of the stage of the later ones. From an analysis of the arbitral case law on the matter, two conclusions may be advanced: (i) there is no universal criteria followed by tribunals;[4] however, (ii) they all coincide in not applying a general rule of automatic succession.

The richest source of case law on the matter comes from Eastern Europe, where investors have filed numerous claims

3 Article 24 of the VCSST establishes two exceptions to the clean slate doctrine regarding the other non-predecessor state that is party to the bilateral treaty: (i) that both states agree to its continuity; or (ii) that, by reason of their conduct, it can be inferred that both states agreed to the continuity of the bilateral treaty.

4 To illustrate the lack of universal criteria on the matter, it must be noted that in the recent World Wide Minerals Ltd. and Mr. Paul A. Carroll, QC v Republic of Kazakhstan, UNCITRAL, Award on jurisdiction (19 October 2015), the tribunal held that the 1989 Canada-USSR BIT was binding on Kazakhstan as a legal successor of the USSR and thus it had jurisdiction. However, in the even more recent *Gold* Pool Limited Partnership v Republic of Kazakhstan, PCA, Award (30 July 2020) the tribunal reached the opposite conclusion and dismissed the claim for lack of jurisdiction as it held that the same 1989 Canada-USSR BIT was not binding on Kazakhstan. Both awards remain confidential and the reasoning behind them unknown, however the evidence presented in each case may have presumably differed and may have led the tribunals in each case to reach different conclusions.

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against the successor states of the USSR, Czechoslovakia and Yugoslavia, invoking BITs concluded between the predecessor states and the investors' respective states of origin.[5] When addressing the issue of succession, tribunals have generally determined the continuation of the BITs but never relying on the principle of automatic succession but on the declarations made by the successor states proclaiming their intentions to uphold the obligations of their predecessor states. These declarations reveal that (i) states deem it necessary to declare their intentions to uphold their predecessors' treaties and (ii) arbitrators deem such declarations (or other similar expressions of consent) necessary for the continuation of the BITs.

In view of the foregoing, there seems to be an approximation to a general application of the clean slate doctrine in the event of secession or dissolution regarding the continuity of BITs. Accordingly, a new state is not automatically bound by BITs that had been concluded by the predecessor state with other states. The continuation of the BITs will depend on the express or tacit agreement of both states concerned.

In cases of transfers of territory, however, we may find a clearer universal rule of international law to apply: the principle of moving treaty frontiers ('MTF'). This principle has been recognized as customary international law[6] and establishes that when a territory of state A becomes part of the territory of state B, then: (i) the treaties of state B become applicable to that territory, and (ii) the treaties of state A cease to be applicable to that territory. In this regard, in the *Sanum*[7] case, the tribunal addressed the controversial question of whether the China-Laos BIT extended to Macao after its cession to China in 1999, ultimately determining that the BIT did apply and that it had jurisdiction based on the MTF principle.

State succession is a complex issue of international law which, while neglected in the past, is starting to be in the spotlight of the international arbitration sphere, as it deals with the crucial question of determining the jurisdiction of tribunals and the applicability of treaties. Some of the upcoming challenges already lie ahead following the accession of Crimea to Russia in 2014, as new arbitration claims continue to be filed by Ukrainian investors against Russia under the Ukraine-Russia BIT.[8]

5 See, among others, Saluka Investments B.V. v Czech Republic, UNCITRAL, Decision on Jurisdiction over the Czech Republic's Counterclaim (7 May 2004); ECE Projektmanagement v Czech Republic, UNCITRAL, PCA Case No 2010–5, Award (19 September 2013); European American Investment Bank AG (EURAM) v Slovak Republic, UNCITRAL, Award on Jurisdiction (22 October 2012); Mr Franz Sedelmayer v Russian Federation, SCC, Award (7 July 1998); RosInvestCo UK Ltd. v Russian Federation, SCC Case No V079/2005, Award on Jurisdiction (1 October 2007); and Mytilineos Holdings SA v State Union of Serbia & Montenegro and Republic of Serbia, UNCITRAL, Partial Award on Jurisdiction (8 September 2006).

6 In this case, Article 15 VCSST serves as a reflection of the customary rule along with Article 29 of the Vienna Convention on the Law of Treaties (opened for signature on 23 May 1969 and entered into force on 27 January 1980, UNTS, vol 1155, p 331, Number 18232).

7 Sanum Investments Limited v Lao People's Democratic Republic, UNCITRAL, PCA Case No 2013–13, Award on Jurisdiction (13 December 2013).

8 See, among others, recent claims filed by PJSC DTEK Krymenergo and by NEK Ukrenergo against The Russian Federation; and more advanced proceedings such as PrivatBank and Finance Company Finilon LLC v The Russian Federation (PCA Case No 2015-21), and Everest Estate LLC et al. v The Russian Federation (PCA Case No 2015-36).