NAVIGATING THE CAPACITY CONUNDRUM: UNRAVELLING STATE SUCCESSION'S IMPACT ON INVESTOR-STATE DISPUTE SETTLEMENT

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ABSTRACT

State succession in investment arbitration has been a relatively unexplored topic until recently. A few tribunals faced such issues in the context of cession, secession, accession, dissolution, and other forms of state succession. The approaches followed by these tribunals can be expressed on a spectrum which, on one side, favours automatic succession and, on the other, considers a clean slate to apply for all successors. In the middle lies the contemporary practice of treaty negotiations on succession issues. However, no approach on this spectrum has been proven to be flawless. The result is a fragmented field of law with complexities involving controversial questions such as sovereign competence and statehood gained upon independence. Its jurisprudence has undergone constant evolution, and the issues finally came to a head when the tribunals of a few landmark cases dealt with these issues comprehensively. Only upon a closer examination of the history and the context of these cases can one fully understand the scale of addressing these nuanced problems. The present article delves into the issues of state succession in the context of investment arbitration, including any inadequacies in the approaches followed by tribunals while balancing conflicting considerations. It analyses these differing approaches in cases with a background of state succession instances to understand the corresponding theories and concepts that tribunals may apply. Brief comments are made on the contemporary practice of states, along with a hypothetical case being examined for a possible solution.

1. INTRODUCTION

In public international law, questions of state succession have often been controversial. Cropping up in the context of wars, disputed territories, or internationally wrongful acts, they often have public interest involved.

In cases where states that are involved in instances of succession have contracted Bilateral Investment Treaties (hereinafter, **"BITs"**) or entered into agreements of Investor Protection, the questions are even more complicated.

The broader international regime governing state succession is the Vienna Convention on Succession of States in respect of Treaties, 1978[1] (hereinafter, **"VCST"**); however, this Convention does not have universal application, nor does it allow for application to non-state actors. Except for a few provisions considered to be codifying customary international law, the VCST does not bind non-parties.[2] Moreover, a state that is not even a party to the dispute may have an interest in succession issues, as they might be future respondents in arbitrations involving the BITs, whose interpretation is in question. These states are generally the treaty partners, i.e., contracting parties to the BIT along with the respondent-predecessor, and may make submissions as a non-disputing state party or a non-disputing treaty party. These interpretative submissions have grown significantly, given the recent amendments to the ICSID Arbitration Rules and the existing UNCITRAL rules on Transparency in Treaty Based Investor State Arbitration.[3] One could say such complications are a factor, *inter alia*, contributing to the exodus of States from Investor-State Dispute Settlement (**"ISDS"**).[4]

In such circumstances, what happens when states party to BITs have not signed or ratified the VCST? What happens if the VCST does apply, but the entities concerned are not deemed 'states' under International Law? What is the capacity of such non-state entities in the ISDS regime? Do these new entities succeed to their predecessors' BITs, or do they have international capacity for some other reason? What happens if the Contracting Parties

1. 'Vienna Convention on Succession of States in Respect of Treaties' (adopted 23 August 1978, entered into force 6 November 1996) ('Convention on State Succession') 1946 UNTS 3.
2. Patrick Dumberry, *A Guide to State Succession in International Investment Law*, (Elgar Online 2018), citing Andreas Zimmermann and James G Devaney, 'Succession to Treaties and the Inherent Limits of International Law' in Christian J Tams, Antonios Tzanakopoulos, and Andreas Zimmermann (eds), *Research Handbook on the Law of Treaties*, (Edward Elgar 2014) 517.
3. ICSID Rules of Procedure for Arbitration Proceedings ('ICSID Arbitration Rules') (July 2022) r 68; UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration ('UNCITRAL Rules on Transparency') (April 2014) art 5.
4. Kendra Magraw, 'Trends and ISDS Backlash Related to Non-Disputing Treaty Party Submissions' in Catharine Titi (ed), *Public Actors in International Investment Law* (European Yearbook of International Economic Law 2021) 86-89.

have made interpretative statements on such issues? These are questions addressed in this article.

State succession issues are rare but highly complex in the context of the legal consequences that they entail. The VCST envisaged a process of codification during a time when several newly independent states (**"NIS"**) were created. In it, 'State Succession' is defined as "the replacement of one state by another in the responsibility for the international relations of a territory".[5] However, unlike the more successful Vienna Convention on the Law of Treaties, 1969 (hereinafter, **"VCLT"**),[6] the VCST only has 23 parties.[7] With a diverse range of state succession instances, debates revolve around two conflicting approaches. Firstly, whether successor states automatically continue their predecessor's treaties (the Continuity Principle) or whether they start with a clean slate (the Tabula Rasa Principle). The former favours stability in international legal relations and obligations as successor states inherit their predecessors' treaties' rights and obligations. However, it may not always be in the interests of such successors to favour continuity, much rather preferring complete independence and a '*clean slate*' to apply in specific circumstances such as decolonisation. Authors have held the view that neither of these approaches is appropriate, but rather, a balance needs to be achieved.[8] Diplomatic negotiations have played a significant role in achieving this balance.[9] States often negotiate on state succession questions and determine how the BITs may apply to successor states. Few tribunals faced these questions, and this complexity remained unaddressed until certain landmark cases which are analysed in this article.

The author will provide a brief description of the types of issues that Tribunals in these cases face in Part I. Subsequently, different theories and concepts of state succession and the consequences of their application in the investment arbitration regime are examined in Part II. In Part III, the varied approaches different Tribunals took to address these questions and their answers are analysed. Further, the contemporary practice of states

5. Convention on State Succession, art 2(1)(a).
6. 'Vienna Convention on the Law of Treaties' (adopted 22 May 1969, entered into force 27 January 1980) ('Vienna Convention') 1155 UNTS 331.
7. Details on 'Vienna Convention on Succession of States in Respect of Treaties' (United Nations Treaty Collection) <https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280044a0e&clang=_en> accessed 29 September 2023.
8. Christian J Tams, 'State Succession to Investment Treaties: Mapping the Issues' (2017) 31 ICSID Rev 314, 325-8; Also *cf* Dumberry (n 2) 138-42.
9. Raúl Pereira Fleury, 'State Succession and BITs: Challenges for Investment Arbitration' (2016) 27 Am Rev Int'l Arb, 451, 471-72.

to address these questions is analysed in Part IV. In Part V, the author will analyse the hypothetical situation of constituent subdivisions gaining independence and the legal capacity of such disputed entities formed through the state succession instances. Specifically, the capacity to be a party to investment arbitration proceedings based upon prior treaties will be analysed.

2. STATE SUCCESSION ISSUES IN ISDS

Questions of State Succession have an impact on not only the dispute submitted before the tribunal but also the international relations of the states and entities involved. Particularly, successor states may be subject to the predecessor's BIT, making future disputes based upon the predecessor's treaty obligations a possible liability to such successors. In that case, the successor should ideally negotiate treaty application questions with the predecessor's treaty partner at the earliest instance. Through such negotiations, the successor and the previous treaty partner may come up with adequate solutions, such as the continuation of the pre-existing BIT, the conclusion of a new BIT replacing the previous one, or the complete termination of the previous BIT without a new one. However, even in the presence of treaty negotiations, evidence of such negotiations is difficult to obtain in most arbitral proceedings as the BITs, at the time of their conclusion, are often based on some model and are rarely subject to negotiation on succession issues.[10] On the other hand, the investor, in most cases, wants the BIT to automatically apply, regardless of its consequences, in order to preserve the jurisdiction of the tribunal over the claims made.

In a few cases, parties are in agreement regarding the answer to state succession issues.[11] This may provide simplicity as the tribunals need not answer how the newly independent respondent state succeeds to the predecessor's BIT. Further, in a few such cases, no reference is made to the fact that the predecessor's treaty partner may have accepted the treaty succeeding to the NIS. The result is an inadequate explanation, if any, provided by tribunals to establish a concrete regime. More specifically, it has led to diverse approaches to the problem when succession issues are introduced to the tribunal as a challenge to jurisdiction by the successor-respondent. Being a highly political and controversial question,

10. Ibid; *cf Wintershall Aktiengesellschaft v Argentine Republic* ICSID Case No ARB/04/14, Award (8 December 2008), para 85.
11. Patrick Dumberry, 'State Succession to BITs: Analysis of Case Law in the Context of Dissolution and Secession' (2018) 34 Arb Int'l, 445, 452-53.

investment tribunals may not delve into the legality of these questions in the international adjudication of disputes. The only reason they need to answer these questions is to determine the investor's standing and their own jurisdiction based on the predecessor's treaty. Tribunals must carefully delineate what questions they are faced with and not go beyond their mandate, even when such international succession issues arise. To do otherwise is to undermine the rule of law and consent of the parties involved. Even consent of the predecessor's treaty partner may play a vital role in the state succession instance as they have a justifiable interest in such questions being answered. However, no adequate explanation of what role they play is given so far, especially when the new states object to the BIT's application and automatic succession.

How the tribunals approach these issues is evident in the case of *Stabil LLC v Russia*.[12] In *Stabil,* without indulging the question of the legal status of the Crimean Peninsula, the tribunal addressed the succession question as a matter of fact. Doing so, it held that the Russian Federation established effective control over the Crimean Peninsula and that the term 'territory' referred to the areas over which the Contracting States exercised *de facto control* and sovereignty despite not holding any lawful title under international law.[13] Interestingly, it referred to Article 29 of the VCLT to determine that a treaty applies to the state's "entire territory" unless the Contracting Parties have expressed a "different intention" with regard to the treaty's territorial scope.[14] Despite Article 73, by which state succession questions are not prejudged by the VCLT, the tribunal's application of Article 29 of the VCLT may be attributed to the Moving Treaty Frontiers (**"MTF"**) Rule recognised as customary international law. The MTF rule is examined in further detail below. A few of the other rules that several tribunals and courts followed in different types of State Succession Instances are also analysed below.

3. THEORIES AND CONCEPTS

A. MTF Rule

As previously stated, the Moving Treaty Frontier Rule is generally applied not through VCST but through Article 29 of VCLT, which is considered to be reflective of customary international law. More importantly, Tribunals

12. *Stabil v Russia* PCA Case No 2015-35, Award on Jurisdiction (26 June 2017).
13. ibid 146.
14. ibid; *cf* 'Vienna Convention', art 29.

have held the view that succession in cases of cession, secession, or accession demands a *de facto* effective control approach rather than commenting on the *de jure* nature of the succession. Effectively recognising the jurisdictional status quo post succession but possibly going against the principles of non-recognition.

B. Automatic Continuity

Whenever state succession occurs, the question often posed is whether the successor should be bound by treaties signed by its predecessor. As previously stated, the VCST under Article 34 envisages the principle of automatic succession. Simply put, all successors are presumed to continue their predecessor's rights and obligations under bilateral and/or multilateral agreements. The only exceptions are (1) the Article 34(2)(b) rule of incompatibility and radical change, as per which a treaty does not apply to successors if its application is incompatible with the treaty's object and purpose or would radically change the conditions for its operations; and (2) the clean slate rule applicable to successions in the colonial context.[15] However, the automaticity principle has been criticised as being overly broad and one of the reasons for a lack of acceptance of the VCST.[16] In fact, the VCST distinction made between newly independent states and successors in the non-colonial contexts is alleged to be discriminatory and unjust.[17]

C. Clean Slate (Tabula Rasa)

In the context of decolonisation, the succession of newly independent states is considered distinct from other forms of (traditional) succession.[18] This is because the nature of the NIS post succession is much different than that of any traditional successor.[19] Specifically, they start from a weaker standpoint and are still developing; hence, acquired rights of the colonial power (even those under investment arrangements) must not be recognised. Instead, the new state starts with a '*clean slate*' with no rights and obligations of the predecessor. Arguments may be made that in certain circumstances, such as unjust enrichment, the NIS must respect acquired rights. However, in contemporary colonial successor state practice, non-succession has been the rule.

15. Convention on State Succession, arts 16, 24.
16. Tams, 'State Succession to Investment Treaties' (n 8) 326.
17. ibid.
18. Dumberry (n 2) para 13.77.
19. ibid paras 13.78-13.84.

D. Consent of Parties (Including the Treaty Partner)

As seen in the post-2014 Crimean Cases examined below, state parties may effectively consent to a certain position on state succession issues in investment cases. Such consent may manifest in the interpretative statements made by the contracting parties to the BIT. Tribunals may pay regard to such statements so long as they are not made for the benefit of the states.[20]

E. Rebus Sic Stantibus or Fundamental Change in Circumstances

The principle of *rebus sic stantibus,* or fundamental change in circumstances, may be contrasted with the principle of *pacta sunt servanda,* meaning 'treaties must be complied with'. In the context of the present discussion, a crucial question that tribunals may have to answer is whether the instance of state succession is a fundamental change in circumstances for non-application of the BIT. The changing socioeconomic and political factors, coupled with the fact that neither the parties to the BIT nor the circumstances of its conclusion are the same, prove to be valid arguments for the principle to apply.[21] However, the principle must still apply only in exceptional circumstances on a case-to-case basis.[22] Whenever it does apply, tribunals have to consider whether (1) such change in circumstances was unforeseen, (2) the existence of circumstances during the treaty's conclusion constituted the essential basis of the parties' consent, and (3) the change in circumstances radically transforms the extent of obligations still to be performed.[23] In any case, the effect of *pacta sunt servanda* in the present context is such that, subject to other considerations, theories, and concepts, succession should favour continuity.

F. The Principle of Self-Determination

Recognised both in the UN Charter and the UN Covenants of 1966, the principle of self-determination is also something that future tribunals may choose to consider in their analysis of state succession issues. More specifically, the 'right to be a state' in the context of state succession in ISDS also includes the right to decide the socioeconomic and political

20. *cf* Sanum Investments v. Laos (I), PCA Case No 2013-13, Award on Jurisdiction (13 December 2013).
21. Fleury, 'State Succession and BITs' (n 9) 471.
22. ibid.
23. ibid.

relations (or even the investment treaties or agreements) the new state may enter.[24]

4. INSTANCES OF STATE SUCCESSION

Given the varied approaches that are possible, a few examples analysis of succession issues is provided to highlight the broad spectrum of decisions on this issue.

A. People's Republic of China and Laos BIT – Sanum v. Laos

Sanum v. Laos[25] is a case where the tribunal was faced with the issue of determining whether the China-Laos BIT applied to Macau, which was transferred to the People's Republic of China from the Portuguese. The Macau-based investor, Sanum Investments Ltd., commenced investment arbitration against Laos based on the 1993 BIT between China and Laos. The arbitration was seated in Singapore, and the question was first dealt with by the tribunal, which upheld its jurisdiction and passed an interim award holding that the BIT applied to Macau. Subsequently, when faced with challenge proceedings, the Singapore High Court considered diplomatic notes between China and Laos post-dating the award to deny jurisdiction.[26] The Singapore Court of Appeal (**SGCA**) reversed the High Court's decision and held that the BIT did apply to Macau applying the MTF Rule.[27] It referred to Article 29 of the VCLT and determined that no different intention was expressed by the Contracting Parties as the treaty was silent on such issue. The SGCA also relied crucially on the Critical Date doctrine, as per which any state conduct or evidence after the 'critical date', i.e., the date on which the dispute crystallises, cannot be used to improve legal titles. It held, considering the date of commencement of the arbitration as the 'critical date', that the post-critical date Diplomatic Notes could not be accorded any weight since they contradicted the pre-critical date position. Interestingly, it distinguished the case of *ADF Group Inc v United States of America,*[28] where the Contracting Parties' interpretative statements that were made after the notice of arbitration were considered

24. ibid 472.
25. *Sanum* (n 20).
26. *Govt. of the Lao People's Democratic Republic v Sanum Investments Ltd* 2015 SGHC 15.
27. *Sanum Investments Ltd v Govt. of the Lao People's Democratic Republic* 2016 SGCA 57.
28. *ADF Group Inc v United States of America* ICSID Case No ARB(AF)/00/1, Award (9 January 2003).

relevant by a NAFTA Tribunal. This was based on Articles 1105(1) and 1132, which provide for such interpretations to be made. No such provisions existed in the China-Laos BIT. The case is one of the most prominent and landmark cases on this issue, as it provided a comprehensive analysis of state succession in the context of investment arbitration.

B. Breakup of SFRY into Serbia and Montenegro – MNSS B.V. and Ors v. Montenegro

The case of *MNSS BV v Montenegro*[29] was related to Montenegro's succession to the ICSID Convention from its predecessor state, the Socialist Federal Republic of Yugoslavia (SFRY). There were two distinct issues in this case– (1) Succession to the ICSID Convention as Montenegro had not ratified the Convention at the time the request for arbitration was made, while SFRY had ratified the Convention; and (2) Succession to the predecessor's BIT as the claimant had based its claim on the Netherlands–Federal Republic of Yugoslavia (FRY) BIT to which Montenegro is clearly not a party. In the proceedings, the claimant, realising Montenegro was not a 'Contracting State' within the meaning of Article 25 of the ICSID Convention, resorted to the Additional Facility Rules to make its claim.[30] This was possible as it was provided for under the BIT in Article 9(2)(b). This article enabled submission of disputes to the Centre even when a contracting party is not a 'Contracting State' to the ICSID Convention. Any analysis of how Montenegro is a contracting party to the BIT signed between the Netherlands and FRY is notably absent from the tribunal's award. At least in ICSID Practice, a suitable substitute for dealing with issues relating to the ICSID Convention membership may be resorting to the Additional Facility Rules itself instead of proving succession of membership.

C. Breakup of Czech and Slovak Federal Republic (CSFR) – Agreement between Parties

In cases against the successors of the Czech and Slovak Federal Republic (CSFR), the newly independent Czech Republic and the Slovak Republic, the Tribunals barely addressed state succession issues. As Tams notes,[31] tribunals record in a single phrase that 'succession occurred under the

29. *MNSS BV v Montenegro* ICSID Case No ARB(AF)/12/8.
30. Tams, 'State Succession to Investment Treaties' (n 8) 324.
31. ibid 331.

predecessor's treaty'.[32] Continuity was favoured by both the Czech Republic and Slovak Republic, and the parties were not in dispute that the Czech Republic and Slovak Republic succeeded to CSFR's BIT.[33] The result is tribunals treating succession issues *en passant* and no development of the law in question.

D. Breakup of USSR – World Wide Minerals v. Kazakhstan

The case of *World Wide Minerals Ltd and Paul A Carroll v Republic of Kazakhstan*[34] concerned Kazakhstan's succession to the Canada– USSR BIT. As Kohen and Dumberry note,[35] the issue of tacit consent was central to the award. The tribunal considered both Canada's and Kazakhstan's conduct and if they impliedly agreed to the BIT's succession. Unfortunately, the award is confidential; hence, the tribunal's reasoning and analysis of both states' conduct are not available. Interestingly, Kohen and Dumberry[36] also note the case of *Gold Pool Ltd Partnership v Republic of Kazakhstan,*[37] which reached the exact opposite conclusion in a dispute based upon the same BIT.

E. Russia and Ukraine – The De Facto Controversy

Like the *Stabil* case, several tribunals have followed the de facto approach in the Crimean Cases post-2014, such as *PJSC CB Privat Bank and Finance Company Finilon LLC v Russian Federation,*[38] *Everest Estate LLC v Russian Federation,*[39] and *Aeroport Belbek LLC and and Igor Valerievich*

32. *CME Czech Republic BV v Czech Republic*, UNCITRAL, Partial Award (13 September 2001) para 3.
33. Tams, 'State Succession to Investment Treaties' (n 8) 334; See also *ECE Projektmanagement & Kommanditgesellschaft PANTA Achtundsechzigste Grundstu ̈cksgesellschaft mbH & Co v Czech Republic*, UNCITRAL, PCA Case No 2010-5, Award (19 September 2013) para 3.139; See also *Hicee BV v Slovak Republic*, UNCITRAL, PCA Case No 2009-11, Partial Award (23 May 2011) para 3, n 2: 'It is not in dispute that, after the dissolution of the Czech and Slovak Federal Republic on 31 December 1992, the Slovak Republic succeeded to the [CSFR–Netherlands BIT]'.
34. *World Wide Minerals Ltd and Paul A Carroll v Republic of Kazakhstan*, UNCITRAL, Award (19 October 2015).
35. Marcelo G Kohen and Patrick Dumberry, 'State Succession and State Responsibility in the Context of Investor-State Dispute Settlement' (2022) 37 ICSID Rev 85, 91.
36. ibid.
37. *Gold Pool Ltd Partnership v Republic of Kazakhstan*, PCA Case No 2016–23, Award (30 July 2020).
38. *PJSC CB PrivatBank and Finance Company Finilon LLC v Russian Federation*, UNCITRAL, PCA Case No 2015-21, Partial Award (4 February 2019) para 23.
39. *Everest Estate LLC v Russian Federation*, UNCITRAL, PCA Case No 2015-36, Judgement of the Hague Court of Appeal (19 July 2022) para 5.4.2.1.

Kolomoisk y v Russian Federation.[40] This approach, however, has not been universally accepted. Arguments have been made that adopting a de facto approach violates the principles of non-recognition of illegally annexed territories under international law, a jus cogens norm.[41] Adoption of the MTF Rule as customary law, following the *Sanum v. Laos* reasoning, is considered by such arguments to be inappropriate given that the rule must only apply to de jure successions and transfer of territory in conformity with international law. It is argued that a contrary view results in the implicit recognition by other States of the *effectivité* of an illegal action under international law.[42] In fact, analogies are made between investment protection and humanitarian law such that investors may be protected, not through the de facto approach but the non-recognition (de jure) approach. Under this non-recognition approach, investments in illegally annexed territories are given protection not under the BITs but under the minimum standards of treatment obligation imposed on the occupier, customarily under international law.[43] This essentially means the legality of the succession or annexation must be determined, and the de facto status quo is irrelevant. Arguably, however, the minimum standards of treatment obligations observed in customary international law are lower than the standards of protection provided for in the BIT. Hence, following a non-recognition approach may be detrimental to investors' claims for protection.

On the other side, some authors[44] also argue that adopting the de facto approach is consistent with customary law and the principle of non-recognition. Such arguments refer to the objectives and purposes of BITs, i.e., reciprocal protection of investments, to broadly interpret the definition of 'entire territory' as stated in Article 29, reflecting the customary MTF Rule.[45] Accordingly, a strict interpretation of the term and a strict application of the MTF rule defeats such a purpose of investor protection. Reference is also made to US and UK State Practices to hold that a broad interpretation of Article 29 in annexation cases entails recognising effective control and

40. *Aeroport Belbek LLC and Igor Valerievich Kolomoisky v Russian Federation*, Uncitral, PCA Case No 2015-07, Judgement of the Hague Court of Appeal (19 July 2022) para 5.6.1.
41. Patrick Dumberry, 'Requiem for Crimea: Why Tribunals Should have Declined Jurisdiction Over the Claims of Ukrainian Investors Against Russian Under the Ukraine-Russia BIT' (2018) 9 J Int'l Disput Settl 506-33.
42. ibid 515.
43. ibid 518, 519.
44. R Happ and S Wuschka, 'Horror Vacui: Or Why Investment Treaties Should Apply to Illegally Annexed Territories' (2016) 33 J Int'l Arb 255.
45. ibid 258-60.

not legal status.[46] This is in conformity with the tribunal's and SGCA's reasoning in *Sanum v. Laos,* as well as the approach of the Tribunals in the Crimean Cases.

Notably, Russia did not participate in any of the proceedings in the Crimean Cases, and Ukraine made submissions as a non-disputing party recognising, at least for the purposes of the BIT's application, that Crimea is de facto part of Russian territory.[47] Hence, both treaty parties (Russia and Ukraine) effectively consented to Crimea being considered part of Russian territory. Dealing with the more difficult question of what happens in the absence of such consent on the part of the states, tribunals must achieve a balance between two conflicting aspects – (1) non-violation of international law and/or non-recognition of illegally annexed territory through indirect means, and (2) providing adequate remedies to foreign investors left in a legal vacuum such that the annexing state benefits from its illegal annexation.[48] Hence, the observable trend is moving towards considering non-recognition not as an absolute rule upon which other sanctions are imposed but as a sanction in itself when it is to the detriment of the annexing state.[49]

5. CONTEMPORARY PRACTICE

As can be seen from the aforementioned state succession examples, theories, and concepts, much will depend on the state interactions made through diplomatic means. They can prove to be important factors for the tribunal in its interpretation of the bilateral treaties and state succession issues. The negotiations between the successor state and its predecessor's treaty partner, more often than not, solve the muddled position of law. The natural question is whether states could incorporate clauses that deal with state succession issues into their BITs. Even if such clauses were incorporated, Article 10 of the VCST provides that treaties providing for the participation of successor states will require notification of such successors (in case the option is given to become a party) or their consent (in case it mandates the participation of the successor). No BITs have such a clause so far. Rather,

46. ibid 259, 260.
47. Aeroport Belbek (n 40), PCA Press Release, <https://www.pcacases.com/web/sendAttach/1865> accessed 29 September 2023.
48. Athina Fouchard Papaefstratiou, 'Crimea as Russian Territory for the Purposes of the Russia-Ukraine BIT: Consent v. International Law?', Kluwer Arbitration Blog, 5 February 2023.
49. ibid.

they incorporate territorial scope of application clauses that refer generally to the Contracting Parties' territory during the treaty's conclusion.[50]

In any event, the successor's intent to uphold its predecessor's agreements determines the succession to the BITs in question. The consent that they may give rests on broader socioeconomic and political factors, including the need for recognition in the international community. As some authors note,[51] unilateral declarations may be made by the putative treaty partners, forming expectations that the prior treaties will stay in force. Such expectations formed in exchange for formal recognition may prove to be vital tools for navigating state succession issues despite their inconsistent effectiveness. In summary, contemporary practice suggests that state succession in Investment Arbitration depends primarily on treaty negotiations, amongst other factors. Tribunals must carefully decide on a case-to-case basis whether to pay deference to the new contracting state's intention, considering the impact of their interpretation.

6. LEGAL CAPACITY OF DISPUTED NON-STATED ENTITIES

The discussion above primarily focused on the succession of states and the various ways tribunals have dealt with its issues. In most cases, the answer is found in public international law, and it requires the application of principles developed beyond the investment arbitration regime. Given this context, the author poses the hypothetical that territorial entities whose statehood is in dispute could still be parties to investment arbitration proceedings. At least in ICSID practice, there may be circumstances where states notify and designate constituent subdivisions to the Centre that act as the Respondent in their own right.[52] These constituent subdivisions are

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50. Office of the United States Trade Representative, '2012 US Model BIT– Article 2' <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> accessed 29 September 2023; UNCTAD Investment Policy Hub, 'UK Model BIT– Article 13' <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2847/download> accessed 29 September 2023.
51. Tams, 'State Succession to Investment Treaties' (n 8) 333; See also, ibid fn 125 (Williams refers to letters sent by US President Bush to the Prime Ministers of the Czech and Slovak Republics on 1 December, proposing 'that the United States and the respective States ''conduct full diplomatic relations'', based on the affirmation of the Republics to fulfil a number of commitments, including the ''commitment to fulfil the treaty and other obligations of the former Czechoslovakia'').
52. *cf* 'Convention on the Settlement of Investment Disputes Between States and Nationals of Other States' (opened for signature 18 March 1965, entered into force 14 October 1966) ('ICSID Convention') art 25(1), (3).

listed as competent to become parties to disputes submitted to the Centre.[53] Interestingly, the legal capacity of such constituent subdivisions has been attributed to non-state actors in International Law.[54] As per one writer, the theories of consent and sovereign competence suggest that designated constituent subdivisions can be legally (and internationally) responsible for acts violating investor protection under international instruments such as BITs.[55]

So far, to the best of the author's knowledge, there have been no cases where constituent subdivisions have seceded or have become independent of their designating state. In such an instance, statehood itself may be in question. For the sake of the argument, assuming the territory in dispute has not achieved statehood, one could say none of the state succession rules apply. As Schreuer notes,[56] designation as a constituent subdivision strengthens the argument that a new state emerging from dependant status shall be bound by treaties specifically extended to it, including the ICSID Convention. The argument is also advanced in case of consent to the Centre's jurisdiction under different investment agreements. The essential factors are the territorial nexus of the investment to the new state and consent to be bound by the succession to treaties (generally through a unilateral declaration).[57]

It is an accepted principle that states cannot unilaterally withdraw consent.[58] In the context of subdivisions, the consent given, once effective, may not be vitiated by a repeal of the designation or restructuring of the constituent subdivision.[59] In fact, the idea that the designating state should succeed to the obligations of the abolished subdivision was considered during the ICSID Convention's drafting but not incorporated.[60] More specifically, it is suggested that the host state be nominated in the consent agreement at the outset so that it may succeed to its designated subdivision's obligations.[61]

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53. See Form ICSID 8/C, 'Designations by Contracting States Regarding Constituent Subdivisions or Agencies' <https://icsid.worldbank.org/sites/default/files/documents/2022_Oct%2028_ICSID.ENG.pdf#page=9> accessed 29 September 2023.
54. Douglas Pavnichny, 'Treaty-Based Claims Against Subdivisions of ICSID Contracting States' (2017) 16 Wash U Global S L Rev 125, 128.
55. ibid 162-71.
56. Christoph Schreuer and others, *The ICSID Convention: A Commentary* (2nd edn, CUP 2009) art 25, para 308.
57. ibid para 309.
58. See ICSID Convention, art 25(1).
59. Schreuer (n 56) para 613.
60. ibid para 313.
61. ibid para 316.

In any event, suggestions that the designating state must succeed to its designated subdivision's obligations may equally be valid even in cases of state succession. Ideally, in such cases, the disputed territory may be designated as a subdivision by the predecessor prior to the state succession instance, and the designating state may nominate itself as a successor in case of abolition of the subdivision. In the event that succession occurs, the subdivision may become an independent state, but it abolishes its status as a subdivision initially. This means, by virtue of the above hypotheticals, the designating state itself succeeds to the subdivision's obligations. Article 10 of VCST does not prohibit such clauses in the treaty as they do not relate to a successor state but rather a constituent subdivision. The only drawbacks to this approach are that (1) it does not apply in cases where the predecessor ceases to exist and (2) states may not want to designate disputed territories as subdivisions. At least in non-extinction cases, if negotiations between states incorporate such an approach in their treaties, investors are not left in a legal vacuum, nor are there any violations of international legal norms.

7. CONCLUSION

In conclusion, state succession is a complex and fragmented field that interacts with the ISDS regime in different and unpredictable ways. Common theories and concepts of state succession may be observed by exploring different scenarios and approaches that tribunals may take when dealing with state succession instances in the context of investment arbitration. These theories and concepts, like automatic continuity, clean slate, the Moving Treaty Frontier Rule, consent of parties, rebus sic stantibus, and the principle of self-determination, are potential factors for tribunals' decision-making. Additionally, the importance of diplomatic negotiations and state interactions in resolving state succession issues in investment arbitration cannot be overemphasised. State intentions and consent play a significant role in determining the application of treaties to succession cases. However, these negotiations and expressions of consent are not without their drawbacks. The hypothetical situation of designated constituent subdivisions gaining independence and the legal capacity of such entities transferring to the nominated predecessor may be an approach that future tribunals (and states in their practice) could follow. In any event, at the heart of these complex issues lie the fundamental principles of sovereignty, consent, and the pursuit of justice: a pursuit that continues to shape the ever-evolving landscape of international legal discourse on state succession in investment arbitration.