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Comparative Law

# State Succession in International Investment Law



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## Overview of the presentation

widely perceived to be technical, complex and controversial

**“succession of States” means the replacement of one State by another in the responsibility for the international relations of territory** - Vienna Convention on Succession of States in respect of Treaties 1978

- Succession rules and principles which apply to territories transferred from one State to another
- Succession rules and principles which apply to new States
- Succession and territorial disputes, including in the context of armed conflicts
- Cases illustrating complex problems

# Vienna Convention on Succession of States in respect of Treaties – new States

- Continuity approach
- Clean slate approach
- Outside the colonial context, and outside the relatively narrow exception of Article 34(2)(b) of the Vienna Convention on Succession of States in respect of Treaties, new States are presumed to continue all treaty rights and obligations of their predecessors, irrespective of whether these derive from multilateral or bilateral agreements.
- In practice - clean slate approach dominates
- The 1978 Vienna Convention's attempt to provide a strong default rule favouring continuity has met with limited success. Rather than endorsing one guiding principle, practice and debates since 1978 have reflected a trend towards process (encouraging negotiated agreements on treaty succession) and flexibility (proposing differentiated solutions for different categories of treaties).



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## Succession to treaties of new States: the clean slate approach

- Clean slate doctrine
- Not enough for a new state to declare that they accept the rights and obligations created by the treaty

Step 1. Notice of succession

Step 2. Acceptance by other states

## Vienna Convention on Succession of States in respect of Treaties – transfer of territory

- “When part of the territory of a State ... becomes part of the territory of another State,’ **the treaties of the ‘predecessor State** cease to be in force’ and the **‘treaties of the successor State** are in force in respect of the territory to which the succession of States relates from the date of the succession of States’” (Article 29 of the Vienna Convention on Succession of States in respect of Treaties)
- This rule would not apply if either **‘incompatible with the object and purpose** of the treaty or would **radically change the conditions for its operation’** (Article 17(2) of the Vienna Convention on Succession of States in respect of Treaties)



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## Transfer of territory: 'moving treaty frontiers' rule

The default rule in customary international law and in the relevant treaties (the Vienna Convention on the Law of Treaties and the Vienna Convention on Succession of States in respect of Treaties).

Under this rule, when certain territory becomes part of a new state, that state's treaties automatically begin applying to the territory.

### [Sanum Investments Limited v. Lao People's Democratic](#)

Discuss in detail by the Singapore Court of Appeal: the starting point for the court was that **the China-Laos BIT would apply to Macau following Macau's transfer from Portuguese to Chinese sovereignty in December 1999**, unless an exception to this default rule applied.



## Exceptions to the clean slate doctrine

The rule of non-transferability does not apply to

- 1) Treaties evidencing rules of general international law (Convention on the High Seas, Convention on Continental Shelf)
- 2) Objective regimes (rights of transit, demilitarised zones, fishing rights)
- 3) Boundary treaties
- 4) Some multilateral treaties (1978 Vienna Convention adopts a fairly restrictive view of participation in multilateral treaties but allows a less formal regime for participation of “newly independent States” on the basis on “a notification of succession” (Arts. 10, 17, 23, and 31)



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## Succession of bilateral treaties: two approaches

- Inter-party deals
- Intent of the parties
- Conduct during proceedings





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## World Wide Minerals v Kazakhstan

- **World Wide Minerals and company CEO** Paul Carroll, briefly operated one of Kazakhstan's **largest uranium-processing facilities** in the mid-1990s, however they allege that they were later driven into bankruptcy by a series of arbitrary or discriminatory measures taken by Kazakh authorities.
- Representations indicative of the **intentions of Kazakhstan and Canada to apply the USSR-Canada BIT to their relationship.**
- Canada-Kazakhstan free trade agreement that entered into force in 1997 with a preamble referencing the USSR-Canada BIT
- 1991 **Declaration of Alma Ata**, wherein Kazakhstan and other former USSR members signalled an intention to fulfil commitments contained in USSR-era treaties.
- Investors from those states with **claims against Kazakhstan** (or potentially other former Soviet Republics), can conceivably take advantage of those treaties, even if there is **no treaty in force** with the now-independent CIS State. (one has already taken advantage of it)



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## The theory of acquired rights

- A change in sovereignty has no effect on the acquired rights of foreign nationals
- Private rights are not affected by the change of sovereignty as such
- The successor must comply with the minimum standards of international law

## Articles on the Effects of Armed Conflict on Treaties (AREAC)

- Investment treaties typically do not contain provisions that protect investors in situations of armed conflicts
- AREAC adopted by the UN General Assembly in 2011 and aimed to codify customary international law with respect to "the effects of armed conflict on the relations between States under a treaty
- Article 2 of the Articles: The existence of an armed conflict **does not ipso facto terminate or suspend the operation of treaties:** (a) as between States parties to the conflict; (b) as between a State party to the conflict and a State that is not.
- Russia-Ukraine BIT states that "[w]ith respect to the investments which were carried out before the termination of this Agreement ... the provisions of all other Articles...shall remain valid within the next ten years after that date of termination."

# Military occupation of territory

- State succession to treaties does not apply to situations of **military occupation** of territory (Article 40 the Vienna Convention on Succession of States in respect of Treaties) to preclude the validation in law of the situation created in fact.
- According to the Vienna Convention on Succession of States in respect of Treaties Article 6, the Convention ‘applies only to the effects of a succession of States occurring **in conformity with international law**’.
- “Territory” refers to territories over which the treaty party has sovereignty in accordance with international law (Art 15 *ibid*; Art 29 of the VCLT)
- The conduct of the occupying State is governed by the regime of **belligerent occupation, human rights law** and **international humanitarian law**.

## Prohibition of benefit to an aggressor State

- A State committing aggression within the meaning of the Charter of the United Nations and resolution 3314 (XXIX) of the General Assembly of the United Nations shall not terminate or withdraw from a treaty or suspend its operation as a consequence of an armed conflict that **results from the act of aggression if the effect would be to the benefit of that State.** (Article 15 AREAC)
- The characterization of a State as an aggressor will depend, fundamentally, on the definition given to the word “aggression” and, in terms of procedure, on the **Security Council.** (Commentary to Article 15 AREAC)

## Do BITs apply in the context of an armed conflict? Eritrea Ethiopia Claims Commission

18. The issue of the automatic termination of bilateral agreements with the outbreak of a conflict is currently debated in the literature. Nevertheless, **there is a broad consensus that bilateral treaties, especially those of a political or economic nature, are at the very least suspended by the outbreak of a war.** Taking into account the nature and objectives of the five agreements cited by Ethiopia to support its economic claims, the Commission cannot but consider that they fall within the category of treaties which become ineffective in time of war (either through termination, or suspension). Consequently because of the war, the treaties ceased to be operative. Ethiopia thus cannot claim compensation for economic losses because of violation of the treaties, and Ethiopia's claims in this regard are dismissed on the merits.

**(Eritrea Ethiopia Claims Commission, Partial Award, Economic Loss Throughout Ethiopia, 19 December 2005)**

# Do BITs apply in the context of an armed conflict? Articles on the effects of armed conflicts on treaties

Article 7 Continued operation of treaties resulting from their subject matter An indicative list of treaties the subject matter of which involves an implication that they continue in operation, in whole or in part, during armed conflict, is to be found in the annex of the present draft articles.

AREAC commentary: “(e) Treaties of friendship, commerce and navigation and agreements concerning private rights; “

Articles on the effects of armed conflicts on treaties

# Crimea-related cases: general overview



- Tribunals composed of well-known western arbitrators
- Alleged jurisdiction basis: Russia-Ukraine BIT of 27 November 1998
- UNCITRAL Arbitration Rules (except for Naftogaz – under SCC Rules)
- Most claimants are members of Igor Kolomoisky's group of companies
- Claimants contend that protection of their investments falls to Russia under the BIT because Crimea is now part of Russia
- Russia does not participate in the proceedings