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State Succession and State Responsibility in the Context of Investor-State Dispute Settlement

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I. INTRODUCTION

International investment arbitration is based on the consent of the parties (the foreign investor and the host State of the investment) to have their dispute settled by a tribunal established either under (i) a direct agreement between the investor and the host State, (ii) a provision of the domestic legislation of the host State or (iii) a provision of an investment treaty. The majority of investment cases have been decided under bilateral investment treaties (BITs) for the protection and promotion of investments.[3] The present article will focus on BITs.[4]

It is now estimated that over 2946 BITs have been concluded worldwide.[5] In addition, more than 376 international agreements (such as free trade agreements) also include provisions on investment.[6] The substantive rules for the protection of foreign investments are mostly found in these treaties (collectively referred to as international investment agreements).[7] Most of these treaties provide foreign investors with significant procedural rights. They typically allow an investor of one party to a treaty to bring a direct claim before an international tribunal alleging breach of an investment

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[3] ICSID, 'The ICSID Caseload—Statistics' (Issue 2020–2) 11, indicating that 60% of cases registered at the ICSID Center (1966–2020) were filed under BITs, 16% under investment contracts between an investor and the host State, 9% of under investment laws of the host State, and the remaining under multilateral treaties (such as the Energy Chapter Treaty, NAFTA, CAFTA-DR).

[4] On the question of State succession to State contracts, see Patrick Dumberry, *A Guide to State Succession in International Investment Law* (Edward Elgar 2018) 271–399; Patrick Dumberry, 'State Succession to State Contracts: A New Framework of Analysis for an Unexplored Question' (2018) 19 J World Invest & Trade 595–627.

[5] UNCTAD, *Recent Developments in the International Investment Regime*, IIA Issues Note No 1 2018 (United Nations 2018) 2.

[6] ibid.

[7] Protection is also often found in contracts entered into directly between foreign investors and States (or State-owned entities) or in the legislation of the host State of the investment.

protection obligation in a BIT against the other party to the treaty (the host State). By the end of 2017, 855 claims had been initiated by investors against States and 542 final awards had been issued.[8]

Questions of State succession arose in at least 46 investor-State publicly known arbitration cases.[9] There is a general consensus regarding the definition of 'succession of States' as meaning 'the replacement of one State by another in the responsibility for the international relations of territory'. The definition has been adopted in the past by the different instruments dealing with the issue of State succession,[10] including two Resolutions adopted by the Institute of International Law in 2001[11] and 2015.[12] The majority of cases arose in the context of the dissolution of Czechoslovakia.[13] A few cases arose in the context of the break-up of the USSR,[14] including *WWM v Kazakhstan*.[15] A few other awards were rendered in the context of the break-up of Yugoslavia. For instance, the *Mytilineos Holdings* examined the question of Serbia's continuity of the State Union of Serbia–Montenegro after the separation of Montenegro in 2006.[16] Another recent award dealt with the question as to whether or not Montenegro succeeded to the 1995 FRY–Russia BIT.[17] The most famous (publicly available) award is probably the *Sanum v Laos* case in the context of the cession of the territory of Macao to China in 1999. The award rendered by the tribunal and the judgments of the Singapore High Court and the Singapore Court of Appeal have for the first time comprehensively addressed a number of important issues in relation to succession to BITs.[18] Finally, reference should be made to the existence of several cases arising from the annexation/incorporation of Crimea by Russia.[19]

[8] UNCTAD, 'Investor–State Dispute Settlement: Review of Developments in 2017' IIA Issues Note No 2, 2018.

[9] See Dumberry, *A Guide to State Succession* (n 4) 143ff. The survey is up to date as of May 2017.

[10] Article 2(1)(b), Vienna Convention on Succession of States in Respect of Treaties, signed 23 August 1978 and entered into force on 6 November 1996, 1946 UNTS 3, in (1978) 17 ILM 1488; art 2(1)(a), Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, in (1983) 22 ILM 306. The same definition can also be found at art 2 of the ILC's 'Draft Articles on Nationality of Natural Persons in Relation to the Succession of States', adopted by the ILC on second reading in 1999, ILC Report, UN Doc A/54/10, 1999, ch IV, in (1997) II Yearbook ILC, 14. The ILC Special Rapporteur on State succession to State responsibility also follows the same approach: see ILC, *First Report on Succession of States in Respect of State Responsibility*, by Pavel Šturma, Special Rapporteur, 69th session, 2017, A/CN.4/708, 31 May 2017, paras 65ff.

[11] Institut de Droit international, 'State Succession in Matters of Property and Debts' Session of Vancouver, 2001, in (2000–01) 69 Annuaire IDI.

[12] Institut de Droit international, *State Succession in Matters of State Responsibility*, 14th Commission (Rapporteur MG Kohen), Resolution, 28 August 2015, art 1 (hereafter 'IDI, State Succession to Responsibility, Resolution, 2015').

[13] Dumberry, *A Guide to State Succession* (n 4) 145.

[14] ibid 156ff, examining five cases involving the Russian Federation where a foreign investor based its claim under one of the 14 BITs to which the USSR was a party before 1992. All awards have considered that Russia (as the continuing State) remains bound by the treaties that had been previously entered into by the USSR.

[15] *World Wide Minerals Ltd and Mr Paul A Carroll, QC v Kazakhstan*, UNCITRAL, Award (19 October 2015). The award is confidential. The same legal issue arose in *Gold Pool Limited Partnership v Kazakhstan*, PCA Case No 2016–23, Award (30 July 2020). The award is also confidential.

[16] *Mytilineos Holdings SA v State Union of Serbia & Montenegro and Republic of Serbia*, UNCITRAL, Partial Award on Jurisdiction (8 September 2006).

[17] *Oleg Vladimirovich Deripaska v Montenegro*, PCA Case No 2017–07, Final Award (15 October 2019). See Vladislav Djanic, 'Revealed: Reasons Surface for Tribunal's Decision That Montenegro Was Not Bound by the RussiaYugoslavia BIT' *Investment Arbitration Reporter* (3 July 2020)

[18] *Sanum Investments Limited v Laos*, UNCITRAL, PCA Case No 2013–13, Award on Jurisdiction (13 December 2013). See also *Lao People's Republic v Sanum Investments Limited*, Singapore High Court, Judgment, [2015] SGHC 15; *Sanum Investments Ltd v Government of the Lao People's Democratic Republic*, Judgment, 29 September 2016, Court of Appeal, [2016] SGCA 57. On these cases, see CJ Tams, 'State Succession to Investment Treaties: Mapping the Issues' (2016) 31(2) ICSID Rev—FILJ; Patrick Dumberry, 'State Succession to BITs in the Context of the Transfer of Territory of Macao to China: Lessons Learned from the *Sanum* Saga' (2018) 35(3) J Int'l Arb 329–35.

[19] All awards which have been rendered by tribunals so far are confidential. On this question, see 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(3) J Int'l Disp Settlement 506–33.

The vast of majority of cases where tribunals have rendered non-confidential awards arose in the context of dissolution and separation of States.[20] Although different scenarios are theoretically possible,[21] these cases typically involved the following common factual pattern:

- a foreign investor files a claim before a tribunal against a *new* State *after* its independence (ie after the date of succession);[22]
- the foreign investor alleges that breaches/violations of its rights were committed by the new State *after* it became an independent State; and
- the foreign investor alleges that these actions/omissions were in breach of a BIT that had been entered *by the predecessor State* with another State (the 'other State party') *before* the date of succession.

This article will address two questions. First, it will examine the basic question of whether a successor State in the context of separation and dissolution is bound by the BITs to which the predecessor State was a party (Section II).[23] In other words, the question is whether or not *one State* (the successor State) is bound to respect the obligations contained in a treaty which was originally concluded by *another State* (the predecessor State). We will show that there is no automatic succession to BITs. Yet, it will also be explained that the parties (ie the successor State and the 'other State party') often *expressly* agree that a BIT should remain in force between them. There are also situations where there is a *tacit agreement* between these States for the continued application of a specific BIT. Therefore, there are many instances where a successor State will (expressly or tacitly) agree to be bound by a BIT to which the predecessor State was a party. Whenever this is the case, the successor State will obviously be responsible *for its own* breach of the treaty with regard to facts having occurred after its independence.

It may be alleged by the foreign investor in investment arbitration proceedings that breaches of BIT obligations had been committed *before* the date of succession. The question arises whether the successor State bears the consequences of the illegal conduct of its predecessor State if the matter has not been settled before its independence. This is the second question examined in Section III. Thus, what are the consequences for a successor State that has agreed to be bound by the obligations contained in a BIT concluded by its predecessor State regarding breaches of that treaty which were committed *before* the date of succession by the latter State? Should the successor State bear the consequences of a treaty breach committed by the predecessor State? To take a simple illustration, if there is evidence that both Croatia and France have (expressly or tacitly) agreed that the France–SFRY BIT is in force

[20] Patrick Dumberry, 'State Succession to BITs: Analysis of Case Law in the Context of Dissolution and Secession' (2018) 34(1) Arb Int 445–62.

[21] Another possible scenario which has, to the best of our knowledge, not occurred in investor-State arbitration proceedings is that of an alleged violation of an investor's rights by the predecessor State prior to the date of succession where no reparation has been paid. On this question of 'unliquidated' claims, see Patrick Dumberry, *State Succession to International Responsibility* (Nijhoff 2007) 211–14.

[22] The situation is different for cases involving the Russian Federation because it is *not* a 'new' State, but rather the 'continuing State' of the USSR. The situation is also different in the context of the cession of Macao to China, since it does not involve the creation of a new State.

[23] The article will only examine succession to bilateral treaties. On multilateral treaties, see Patrick Dumberry, 'State Succession to Multilateral Investment Treaties and the ICSID Convention' (2018) 3 European Invest Law & Arb Rev 3–19

between them, does it follow that Croatia should bear the consequences of any treaty breach committed *by SFRY before* its break-up against a French investor?

II. IS A NEW STATE BOUND BY THE BITS TO WHICH THE PREDECESSOR STATE WAS A PARTY?

In this section, we will first examine the issue of State succession to bilateral treaties (Subsection A), which will then be followed by a specific analysis of BITs (Subsection B).

A. *State Succession to Bilateral Treaties*

Article 34 of the 1978 Vienna Convention[24] outlines the regime applicable to cases of separation and dissolution. This provision applies to *both* bilateral and multilateral treaties. Article 34 provides for the application of the principle of *automatic* succession whereby the successor State is *ipso facto* bound by the bilateral treaties entered into by the predecessor State, unless otherwise agreed by the States concerned.[25] The question as to whether Article 34 represents a rule of customary international law has been discussed by many scholars regarding *multilateral* treaties.[26] While some authors do *not* generally condemn the application of the principle of continuity of treaties for instances of *dissolution* insofar as it corresponds to State practice, they reject that claim regarding separation.[27] A majority of scholars believe that Article 34 does *not* reflect custom as far as *bilateral* treaties are concerned.[28]

One fundamental feature of bilateral treaties is their *reciprocal* nature. Thus, International Law Commission (ILC) Special Rapporteur Waldock explained during his work on the drafting of articles on State succession in relation to treaties that 'the very object of most bilateral treaties is to regulate the mutual rights and obligations of the parties by reference essentially to their own particular relations and interests'.[29] While multilateral treaties are entered into by States to safeguard the *general* interests of the international community (ie all States), the same cannot be said about bilateral treaties. These treaties are concluded to preserve the *specific* interests of the two parties involved.[30] Special Rapporteur Waldock also noted that the 'personal equation'

[24] Vienna Convention on Succession of States in Respect of Treaties (n 10).

[25] In other words, the rule of automatic succession applies by default, unless the successor State and the other party to the treaty have agreed otherwise. Another exception is when the automatic application of the treaty to the successor State would be 'incompatible with the object and purpose of the treaty or would radically change the conditions for its operation'. It should be added that art 35 of the 1978 Vienna Convention provides that a treaty in force will continue to be binding on the continuator State on what remains of its territory after a secession.

[26] See the recent analysis of Václav Mikulka, 'Article 34' in Giovanni Distefano, Gloria Gaggioli and Aymeric Hêche (eds), *La Convention de Vienne de 1978 sur la succession d'États en matière de traités: Commentaire article par article et études thématiques* (Bruylant 2015) 1153.

[27] The question is examined in Patrick Dumberry and 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' (2013) 13 Baltic YIL 27–65.

[28] Jan Klabbers, Martti Koskenniemi and Andreas Zimmermann (eds), *Pilot Project on Documentation Concerning State Practice Relating to State Succession and Recognition* (Council of Europe 1999) 116; Raúl Pereira Fleury, 'State Succession and BITs: Challenges for Investment Arbitration' (2016) 27 Am Rev Int'l Arb 456–57; Tams (n 18) 334.

[29] ILC, 'Report of the International Law Commission on the Work of Its Twenty-Sixth Session' (6 May–26 July 1974) A/9610/Rev1, in (1974) II(1)YILC (hereafter 'ILC Report, Twenty-Sixth Session, 1974') 237.

[30] Zidane Meriboute, *La codification de la succession d'États aux traités: décolonisation, sécession, unification* (PUF 1984) 79.

(meaning the very identity of the contracting party) 'necessarily plays a more dominant role in bilateral treaty relations'.[31] As a result, for Waldock, 'it is not possible automatically to infer from a State's previous acceptance of a bilateral treaty as applicable in respect of a territory [as] its willingness to do so after a succession in relation to a wholly new sovereign of the territory'.[32] Waldock concluded that 'succession in respect of bilateral treaties has an essentially voluntary character', and consequently, 'their continuance in force after independence is a matter of agreement, express or tacit' between the two States.[33] If one follows this approach, a successor State therefore does not have the *right* to become party to a bilateral treaty without the consent of the other party to the treaty.[34]

While the ILC adopted the 'clean slate' principle for bilateral treaties regarding 'Newly Independent States',[35] one of the authors of this contribution has argued elsewhere[36] that there is no reason why this solution should not also be applied in the context of separation and dissolution. Thus, the basic proposition that 'succession in respect of bilateral treaties has an essentially voluntary character'[37] should presumably apply to *all types* of State succession, not only to Newly Independent States.

State practice does not follow the rule of automatic succession regarding bilateral treaties. As Stern noted, the practice of States has varied with respect to bilateral treaties: while some have adopted the position of *tabula rasa*, others have favoured continuity.[38] Even those successor States (for instance, in the context of the dissolution of Czechoslovakia) which have adopted a general position in favour of succession regarding bilateral treaties,[39] have in practice started negotiations with other States to determine the actual status of these treaties. Overall, the general conclusion reached by the International Law Association (ILA) in 2008 about State practice is 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'.[40] To the best of our knowledge, apart from Sir Kenneth Keith (writing in 1967),[41] no scholar supports the existence of a principle of *automatic*

[31] ILC Report, Twenty-Sixth Session, 1974 (n 29) 237. See also Adriana Di Stefano, 'Article 24' in Distefano and others (n 26) 851–52.

[32] ILC Report, Twenty-Sixth Session, 1974 (n 29) at 237.

[33] ibid 239. See also ILC, 'Fourth Report on Succession in Respect of Treaties' prepared by the Special Rapporteur, Sir Humphrey Waldock A/CN.4/249 (24 June 1971) A/8410/Rev1, in (1971) II(1) YILC 149, para 14:

> Enough evidence has been adduced in the preceding paragraphs to establish the essentially voluntary character of succession in respect of bilateral treaties: voluntary, that is, on the part not only of the successor State but also of the other interested State. On this basis, the fundamental rule to be laid down for bilateral treaties would seem to be that their continuance in force after independence is a matter of agreement, express or tacit, between the successor State and the other interested State (the other party to the predecessor State's treaty).

[34] ILC Report, Twenty-Sixth Session, 1974 (n 29) 212. In the ILC's opinion, 'practice does not seem to support the existence of a unilateral right in a Newly Independent State to consider a bilateral treaty as continuing in force with respect to its territory after independence *regardless of the wishes of the other party to the treaty*' (ibid 238, emphasis in the original).

[35] Article 24.

[36] Patrick Dumberry, 'State Succession to Bilateral Treaties: A Few Observations on the Incoherent and Unjustifiable Solution Adopted for Secession and Dissolution of States under the 1978 Vienna Convention' (2015) 28 Leiden JIL 13–30; Dumberry, *A Guide to State Succession* (n 4) 121ff.

[37] ILC Report, Twenty-Sixth Session, 1974 (n 29) 239.

[38] Brigitte Stern, 'La succession d'États' (1996) 262 Rec des cours 314.

[39] International Law Association, *Rapport Final sur la Succession en Matière de traités*, New Delhi Conference 2002, Committee on Aspects of the Law of State Succession, 18.

[40] International Law Association, *Conclusions of the Committee on Aspects of the Law on State Succession*, Resolution No 3/2008, adopted at the 73rd Conference of the International Law Association, held in Rio de Janeiro, Brazil, 17–21 August 2008, point no 8. See also ILA, 'Rapport préliminaire sur la succession d'États en matière de traités' (Helsinki conference, 1996) 690–91.

[41] KJ Keith, 'Succession to Bilateral Treaties by Seceding States' (1967) 61(2) AJIL 545.

succession regarding *bilateral* treaties.[42] As Tams noted in one recent study, '[a]ccording to most commentators, whatever the general rule, bilateral treaties are not subject to a rule of automatic succession'.[43]

In the *Gabcíkovo–Nagymaros Project* case, the question of the customary character of Article 34 of the 1978 Vienna Convention was discussed. While Hungary considered that it does not possess a customary law character, Slovakia maintained that it reflected general international law.[44] The Court considered that it was not 'necessary for the purposes of the present case to enter into a discussion of whether or not Article 34 of the 1978 Convention reflects the state of customary international law'.[45]

B. *State Succession to BITs*

In a recent book, one of the authors of this contribution analysed the practice of States (both successor States and other States parties to BITs) regarding the continuation of the predecessor State's BITs after the date of succession.[46] Many examples were found where the parties have mutually and *expressly* agreed upon a solution regarding succession to treaties. It is not uncommon for States to reach an agreement as to whether or not a BIT, which was entered into by the predecessor State, should continue to apply after the date of succession. States generally do so through a process of diplomatic exchange of notes, consultation and negotiation.

The question of the type of evidence necessary to show the existence of an agreement through an exchange of diplomatic notes was important to the (confidential) award in the *Deripaska v Montenegro* case.[47] It has been reported that the Tribunal examined a first note sent by Montenegro to Russia shortly following its independence indicating, inter alia, that it 'shall observe . . . all treaties and provisions of international agreements'.[48] The Tribunal would have also analysed a second note sent by Montenegro, which stated that Montenegro was the successor to the Serbia and Montenegro State Union regarding international agreements, and confirmed Montenegro's 'readiness to observe all treaties and agreements' effective between Russia and the State Union.[49] In response, Russia mentioned that it was 'taking into consideration' Montenegro's statement. The Tribunal apparently qualified this answer as a 'non-committal response' by Russia and concluded that Russia did not

[42] Writers rejecting such a rule include: Di Stefano (n 31); Stern (n 38) 315–16; Gerhard Hafner and Gregor Novak, 'State Succession in Respect of Treaties' in Duncan B Hollis (ed), '*The Oxford Guide to Treaties* (OUP 2012) 414; Alexandro Kolliopoulos, 'Article 9' in Distefano and others (n 26) 301–02, 307ff; Alexandre Genest, 'Sudan Bilateral Investment Treaties and South Sudan: Musings on State Succession to Bilateral Treaties in the Wake of Yugoslavia's Breakup' (2014) 3 TDM 9-12; PK Menon, 'The Newly Independent States and Succession in Respect of Treaties' (1990) 18 Korean JCL 156; Vladimir-Djuro Degan, 'La succession d'États en matière de traités et les États nouveaux (issus de l'ex-Yougoslavie)' (1996) 42 AFDI 226; André Goncalves Pereira, *La succession d'États en matière de traités* (Pedone 1969) 149; Okon Udokang, *Succession of the New States to International Treaties* (Oceana 1972) 501; Karl Zemanek, 'State Succession after Decolonization' (1965–III) 116 Rec des cours 238; Philippe Cahier, 'Quelques aspects de la Convention de 1978 sur la succession d'États en matière de traités' in Bernard Dutoit and Etienne Grisel (eds), *Mélanges Georges Perrin* (Payot 1984) 72; Meriboute (n 30) 74; MK Yasseen, 'La Convention de Vienne sur la Succession d'Etats en matière de Traités' (1978) 24 AFDI 105; 108; Pierre-Emmanuel Dupont, 'Foreign Investment and the Status of Kosovo in International Law' (2009) 10 J World Invest & Trade 23.

[43] Tams (n 18) 327, see also at 344.

[44] *Case Concerning the Gabcíkovo–Nagymaros Project* (*Hungary v Slovakia*), Judgment of 25 September 1997, ICJ Reports 1997, 3, at paras 119–21.

[45] ibid para 123.

[46] Dumberry, *A Guide to State Succession* (n 4) 43ff.

[47] *Deripaska v Montenegro* (n 17).

[48] *Investment Arbitration Reporter* (n 17).

[49] ibid.

expressly agree to treaty continuity with Montenegro. The article from *Investment Arbitration Reporter* added that 'the tribunal acknowledged that a succession agreement could be concluded through an exchange of diplomatic notes—a recognized mechanism of expressing a state's intent to be bound by a treaty', but that 'this required such notes to reflect convincingly that the states so agreed, without any additional steps'.[50] The article concluded that 'in this instance, the tribunal did not think that the exchange of notes reflected such mutual consent; "at best", there had been an offer by Montenegro of global continuity, which had not been accepted by Russia'.[51]

There are also many situations where there may be a *tacit agreement* between the States concerned for the continuation of a specific BIT.[52] What is crucial is the existence of enough evidence (from statements or State conduct) of this implicit agreement. The question of tacit consent was central to the *WWM* award.[53] The case involved a Canadian investor who filed a claim against Kazakhstan invoking a breach of the 1991 Canada–USSR BIT. The question at the heart of this case was whether or not Kazakhstan is bound by this BIT as one of the successor States to the USSR. Importantly, Canada and Kazakhstan did not formally agree that the BIT was in force between them. Canada submitted a 'Non-disputing party submission' in the context of the proceedings whereby it affirmed that it considered the BIT to be binding on Kazakhstan. The Tribunal rendered an award that remains confidential, where it held that it had jurisdiction over the dispute under the Canada–USSR BIT.[54] The Tribunal, therefore, considered the BIT to be binding on Kazakhstan based on the conduct of both Canada and the new State.[55] Interestingly, a more recent award reached the opposite conclusion that the same BIT was not in force between the parties.[56]

But what happens to a BIT of the predecessor State when the States concerned have *not* agreed on its continued application after the date of the State succession? The question then becomes whether there exists any principle of *automatic* succession to BITs whereby the successor State is de facto bound by such instruments. Given the particular nature and characteristics of bilateral treaties mentioned above, there is ground to consider that BITs should continue to apply when there is consent of both concerned parties. The few scholars who have taken a position on the specific issue of BITs have all rejected the existence of any rule of automatic succession.[57] We have found no international tribunal that has adopted the principle of automatic succession to BITs.[58] It

[50] ibid.
[51] ibid.
[52] The question of tacit consent is examined in Dumberry, *A Guide to State Succession* (n 4) 72ff.
[53] *WWM v Kazakhstan* (n 15). Disclaimer: one of the authors (Dumberry) was one of the counsel for Kazakhstan in these proceedings.
[54] Luke Eric Peterson, 'In a Dramatic Holding, UNCITRAL tribunal finds that Kazakhstan is Bound by terms of Former USSR BIT with Canada' *Investment Arbitration Reporter* (28 January 2016).
[55] ibid.
[56] *Gold Pool Limited Partnership v Kazakhstan* (n 15). The award is confidential. See IA Reporter, 'Kazakhstan Fends off Claims by Canadian Gold Miner, as Tribunal Finds It Is Not a Successor to USSR BIT' 4 August 2020.
[57] Patrick Dumberry, 'An Uncharted Question of State Succession: Are New States Automatically Bound by the BITs Concluded by Predecessor States Before Independence?' (2015) 6(1) J Int Dispute Settlement 74–96; Genest (n 42) 2, 11; Justin A Fraterman, 'Secession, State Succession and International Arbitration' (paper, SSRN, 2013) 17, 25; Andreas Zimmermann and James Devaney 'State Succession in Treaties' *Max Planck Encyclopedia of Public International Law* (OUP 2020) paras 19–20; James G Devaney, 'What Happens Next? The Law of State Succession' GCILS Working Paper No 6, November 2020, 13; Pereira Fleury (n 28) 457. The same conclusion is reached by Tams (n 18) 334, who however presents arguments (at 335–36) which could be invoked in favour of continuity of BITs.
[58] As explained in Dumberry, *A Guide to State Succession* (n 4) 145ff, in several cases in the context of the dissolution of Czechoslovakia, investment tribunals have simply refrained from explaining why a new State should be considered to be bound by obligations arising from a treaty entered into by the predecessor State. The reason why they have failed to conduct any enquiry into the issue is simply because the respondent States did not challenge their jurisdiction on this

has been reported that the Tribunal in the (confidential) *Deripaska v Montenegro* award concluded that there was 'simply no state practice or opinio juris in existence to support a principle of automatic succession for bilateral investment treaties'.[59]

A tribunal that clearly adopted an approach requiring the consent of the successor State and the other party to the BIT is the *EURAM v Slovak Republic* award. The case involved a claim brought forward by an Austrian claimant against Slovakia under the Austria–Czechoslovakia BIT.[60] The Tribunal first made the following general comment regarding the relevant succession issue:

> The BIT under which the present proceedings have been brought was concluded on 15 October 1990 between the Federal Republic of Austria and the Czech and Slovak Federal Republic. It entered into force on 1 October 1991. The Czech and Slovak Federal Republic was dissolved and Slovakia became an independent State on 1 January 1993. The Parties agree that the BIT became binding on the Slovak Republic by succession. The Respondent maintains that the BIT became binding on the Slovak Republic with effect from 1 January 1995.[61]

With regards to Slovakia's argument that the Vienna Convention on the Law of Treaties (VCLT) did not apply to the BIT, the Tribunal referred to that State's pleadings concerning the question of the moment when the BIT became binding.[62] In this context, the Tribunal made a number of remarks. First, it noted that the 'exchange of diplomatic notes in the framework of the process of State succession' (which took place in 1995 between Austria and Slovakia) 'can be considered as equivalent to a ratification by the successor State'.[63] This is rather a confusing statement, since ratification has *ex nunc* effects, while State succession operates from the date of the creation of the new State. The Tribunal went on, stating that:

> [O]nce Slovakia became an independent successor State, *it could not be bound by the BIT*, notwithstanding the fact that its predecessor State had signed and ratified the BIT, *until it had taken the steps necessary to succeed to the BIT*. Only once it had taken those steps could it be regarded as having concluded the BIT.[64]

The Tribunal then referred to the position that Austria took in the proceedings on this question.[65] In conclusion, the Tribunal explained that 'the BIT would not have

point. For that reason, the tribunals did not deem it necessary to address the issue of State succession. Tams (n 18) 331 has adopted the same position on this point.

[59] See *Investment Arbitration Reporter* (n 17), quoting from *Deripaska v Montenegro* (n 17).

[60] *European American Investment Bank AG (EURAM) v Slovakia*, Award on Jurisdiction (22 October 2012) paras 79, 81.

[61] ibid para 40.

[62] ibid para 77:

> The Treaty was concluded on October 15, 1990 and entered into force in the relations of Austria and Czechoslovakia on October 1, 1991. The Slovak Republic emerged as a successor sovereign State on January 1, 1993. The applicability of the Treaty by way of state succession was confirmed by an exchange of diplomatic notes on 4 August and 25 November 1994, entering into force on January 1, 1995.

[63] ibid para 79.

[64] ibid (emphasis added).

[65] ibid para 80: 'This conclusion is confirmed by information given by Austria in its submission, which explains that, as regards the BIT an Exchange of Diplomatic Notes took place in 1994, and the BIT entered into force between Austria and the Slovak Republic in 1995, after the entry into force of the VCLT'; 'The Agreement between the Republic of Austria and the Czech and Slovak Federative Republic on the Promotion and Protection of Investments was signed on 15 October 1990 and entered into force on 1 October 1991 (. . .). Following the dissolution of the Czech and Slovak Federative Republic, Austria and the newly independent Slovakia jointly identified the BIT, among other treaties, to be in force and applicable between them by means of an Exchange of Diplomatic Notes (see Federal Law Gazette No 1046/1994). Moreover, the Exchange of Diplomatic Notes also amended the BIT, so as to insert the designations "Slovak Republic" and "Slovak" into the text of the Agreement as appropriate'.

become applicable between Austria and the Respondent had it not been for the Exchange of Notes'.[66] The Tribunal unambiguously held that there is no automatic succession to BITs. Both the successor State and the other State party must take 'steps necessary to succeed to the BIT'.[67]

Once there is evidence that the new State is bound by the BIT to which the predecessor State was a party, a second question arises. It is the matter linked to State responsibility from breaches of obligations contained in the BIT committed before the date of State succession. This question is now examined in Section III.

III. DOES A NEW STATE TAKE OVER THE CONSEQUENCES OF INTERNATIONALLY WRONGFUL ACTS COMMITTED BEFORE THE DATE OF SUCCESSION IN BREACH OF A BIT?

To the best of our knowledge, no investment award has ever dealt with this question. All cases mentioned above involve wrongful acts which have been committed by the successor State *after* its independence.

In the following sections, we will examine this question of State succession to the consequences arising from international responsibility under general international law.

A. *The Topic of State Succession and State Responsibility Has Long Been Neglected*

For decades, the interaction between the fields of State succession and State responsibility sparked little interest in the literature. Thus, until the book published in 2007 by one of the authors of this contribution,[68] only five articles had focused on the issue.[69] Since then a number of other articles have addressed this question.[70] The Tribunal in the 1956 *Lighthouse Arbitration* case noted that 'the question of the transmission of responsibility in the event of a territorial change presents all the difficulties of a matter which has not yet sufficiently developed to permit solutions which are both certain and applicable equally in all possible cases'.[71] Judge Xue in her Declaration in the *Croatia Genocide*

[66] ibid para 81. It added that 'The Tribunal therefore concludes that the BIT cannot be considered to have been concluded by the Respondent until, at the earliest, the date of the Exchange of Notes in 1994'.

[67] ibid para 79.

[68] Dumberry, *State Succession to International Responsibility* (n 21).

[69] Cecil Hurst, 'State Succession in Matters of Torts' (1924) 5 British YIL 163–78; Jean Philippe Monnier, 'La succession d'Etats en matière de responsabilité internationale' (1962) 8 AFDI 65–90; Wladyslaw Czapliński, 'State Succession and State Responsibility' (1990) 28 Canadian YIL 339–59; Michael John Volkovitsch, 'Righting Wrongs: Toward a New Theory of State Succession to Responsibility of International Delicts' (1992) 92 Columbia LR 2162–2214; Brigitte Stern, 'Responsabilité internationale et succession d'Etats' in Laurence Boissonde Chazournes and Vera Gowlland (eds), *The International Legal System in Quest of Equity and Universality, Liber Amicorum Georges Abi-Saab* (Martinus Nijhoff 2001) 327–55. Two other theses were also published on the topic: Hazem M Atlam, 'Succession d'Etats et continuité en matière de responsabilité internationale' (thesis, Université de droit, d'économie et des sciences d'Aix-Marseille 1986); Miriam Peterschmitt, 'La succession d'États et la responsabilité internationale pour fait illicite' (Mémoire de DES, Université de Genève/Institut Universitaire de hautes études internationales 2001).

[70] Václav Mikulka, 'State Succession and Responsibility' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 291–96; Václav Mikulka, 'Succession of States in Respect of Rights of an Injured State' ibid 965–67; Marcelo G Kohen, 'Succession of States in the Field of International Responsibility: the Case for Codification' in Marcelo G Kohen, Robert Kolb and Djacoba Liva Tehindrazanarivelo (eds), *Perspectives of International Law in the 21st Century. Liber amicorum Professor Christian Dominicé in Honour of His 80th Birthday* (Martinus Nijhoff 2011) 161–74; Pavel Šturma, 'State Succession in Respect of International Responsibility' (2016) 48 George Washington ILR 653–78.

[71] *Sentence arbitrale en date des 24/27 juillet 1956 rendue par le Tribunal d'arbitrage constitué en vertu du Compromis signé à Paris le 15 juillet 1932 entre la France et la Grèce*, Award of 24/27 July 1956, in 12 UNRIAA 155; (1956) 23 ILR 91.

Convention case also noted that 'little can be found about State succession to responsibility in the field of general international law',[72] adding that 'rules of State responsibility in the event of succession remain to be developed'.[73]

Until very recently, no attempt at codifying this question was pursued by the work of the ILC neither in the area of State responsibility nor that of State succession.[74] In the context of the elaboration of the final ILC Articles on State responsibility, the last Special Rapporteur, Professor James Crawford, highlighted the difficulties and uncertainties surrounding the question: '[i]t is unclear whether a new State succeeds to any State responsibility of the predecessor State with respect to its territory'.[75] Since then two important codification efforts have been conducted in recent years. The Institut de Droit international adopted a Resolution on State succession and State responsibility (hereafter, the 'IDI Resolution') in 2015.[76] The authors of this contribution have recently published a book providing an article-by-article commentary to the Resolution.[77] In May 2017, the ILC decided to place the topic of 'Succession of States in respect of State responsibility' on its current programme of work and appointed Professor Pavel Šturma as Special Rapporteur.[78] At the time of writing, ILC Special Rapporteur Šturma had issued three Reports which largely follow the choices made by the IDI Resolution.[79]

B. *There Is No State Practice or Case Law in Support of Any Rule of Automatic Succession for Treaty Violations*

Very few writers have addressed the specific issue at the heart of this chapter. It has been argued by Stern that whenever a successor State becomes party to a treaty by way of succession, there is an automatic transmission of the international obligations arising from prior treaty violations committed by the predecessor State before the date of succession.[80] However, in a detailed study, one of the authors of this article came to the conclusion that there is simply no State practice or case law in support of such a principle of automatic succession for treaty violations.[81] In fact, we have only

[72] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, Judgment of 3 February 2015, ICJ Rep 2015, Declaration of Judge Xue, para 22.

[73] ibid para 23.

[74] The 1978 Vienna Convention (n 24) contains a clause (art 39) that explicitly removed the question from the ambit of the treaty. See also art 5 of the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (n 12).

[75] ILC, 'Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the International Law Commission at Its Fifty-Third Session (2001)', Report of the ILC on the Work of Its Fifty-third Session. Official Records of the General Assembly, Fifty-sixth Session, Supplement No 10 (A/56/10), 119, para 3 (2001) II(2) *Yearbook ILC*, 30. It should be added that in his subsequent book, James Crawford, *State Responsibility: The General Part* (CUP 2013) 447ff, he analysed the issue thoroughly.

[76] IDI, State Succession to Responsibility, Resolution, 2015 (n 12).

[77] Marcelo G Kohen and Patrick Dumberry, *The Institute of International Law's Resolution on State Succession and State Responsibility: Introduction, Text and Commentaries* (CUP 2019).

[78] See also ILC, 'Report of the International Law Commission, Official Records of the General Assembly, Seventy-first session' Supplement No 10 (A/71/10), recommendation of the Working-Group on the long-term programme of work, Annex B: 'Succession of States in respect of State responsibility', syllabus by Pavel Šturma.

[79] ILC Special Rapporteur, First Report, 2017 (n 10); ILC, Second report on succession of States in respect of State responsibility, by Pavel Šturma, Special Rapporteur, 70th session, 2018, A/CN.4/719, 6 April 2018; ILC, Third report on succession of States in respect of State responsibility, by Pavel Šturma, Special Rapporteur, 75th session, 2019, A/CN.4/731, 2 May 2019.

[80] Stern (n 69) 344–48, stating the existence of a 'principle de transmission en même temps que le traité de la responsabilité née de la violation de ce traité'.

[81] Patrick Dumberry, 'La succession d'Etats en matière de responsabilité internationale et ses liens avec la responsabilité des Etats en matière de traités' in Distefano and others (n 26) 1601ff. See also Dumberry, *State Succession to International Responsibility* (n 21) 290ff.

found one very old case that could possibly be read as supporting this principle, to some extent.[82]

Stern refers to the *Case Concerning the Gabčíkovo–Nagymaros Project*, arguing that the Court adopted the principle of succession for responsibility arising out of a treaty violation.[83] In this case, Slovakia considered itself the sole successor of the Czech and Slovak Federal Republic rights and obligations stemming from the 1977 Treaty, which includes those emerging in the field of international responsibility. The other Party to the Treaty, for its part, accepted such succession in the *Compromis* by which the case was referred to the ICJ. Furthermore, the Gabčíkovo Project was located on the territory of Slovakia, and the Court considered that the 1977 Treaty created a territorial regime for which the solution of Article 12 of the 1978 Vienna Convention on succession of States in respect of treaties was applicable. All these elements allow us to consider the existence of a specific circumstance in which the succession to rights and obligations arising from the commission of a prior internationally wrongful act may occur.[84]

Another potentially relevant case is *Bijelic v Montenegro and Serbia*, decided by the European Court of Human Rights, which held that the European Convention of Human Rights remained in force over the territory of Montenegro at all times from the date of independence.[85] The case involved three Serb nationals who started proceedings in 2005 to 2006 against the Union State of Serbia–Montenegro. The case, therefore, involved wrongs which were committed *before* Montenegro's independence. After Montenegro became a new State in June 2006, the Court asked the question: 'Which State, Montenegro or Serbia, could be held responsible for the impugned inaction of the authorities between 2 March 2004 and 5 June 2006?'[86] Serbia adopted a clear position denying any responsibility based, inter alia, on the ground that the local autonomous authorities of Montenegro were competent regarding the application of the European Convention on its territory prior to its independence and that Serbia, therefore, could not be held responsible for such wrongs.[87] The Court explained that while the response by Montenegro was much more ambiguous,[88] it essentially agreed with Serbia's statement. Montenegro considered that it should be responsible for any breaches of the Convention which was committed on its territory *before* its independence because of its autonomous status. This is in line with the exception to the non-succession rule contained in Article 12 of the IDI Resolution concerning the separation of parts of a State. The exception applies when a direct link exists between the consequences of the wrongful act and the territory or the population of the successor State or States, and when the author of that

[82] This is the *Mechanic* case, briefly examined in John Bassett Moore, *A Digest of International Law*, vol V (GPO 1906) 342–43. Large extracts of the case can be found in John Bassett Moore, *History and Digest of the International Arbitrations to which the United States Has Been a Party*, vol III (GPO 1898) at 3221–27. The example is examined in Dumberry (n 81) 1589ff.

[83] Stern (n 69) 344, stating that 'le principe de la succession pour la responsabilité résultant de la violation d'un traité a été appliqué [by the Court], pour ainsi dire sans le moindre débat'.

[84] *Case Concerning the Gabcíkovo–Nagymaros Project* (n 44) 3, at paras 2 and 123–24. For the solution envisaged by the IDI State Succession to Responsibility Resolution in this kind of situations, see Section III.C.(iii) of this article.

[85] ECtHR, *Bijelic v Montenegro and Serbia*, App 11890/05, 28 April 2009, see at para 69.

[86] ibid para 61.

[87] ibid para 62.

[88] ibid para 63: 'The Montenegrin Government support[ed] the remarks presented to the Court, by the Serbian Government "relating to the issue of [. . .] [succession as regards] [. . .] the enforcement of the judgment [. . .] [in question]"'.

act was an organ of a territorial unit of the predecessor State that has later become an organ of the successor State.[89]

While some writers have argued that the decision supports the existence of a principle of automatic succession to human rights treaties and to responsibility for their breaches,[90] the conclusion reached by the Court can be explained by the fact that Montenegro had *agreed* during the proceedings to take over any responsibility arising from wrongful acts which had been committed *before* the date of succession.[91]

Finally, it should be added that one of the arguments put forward by Croatia in the *Croatia Genocide Convention* case before the ICJ was based on this proposition: 'Croatia argues that the FRY, by the declaration of 27 April 1992 already discussed, indicated not only that it was succeeding to the treaty obligations of the SFRY, but also that it succeeded to the responsibility incurred by the SFRY for the violation of those treaty obligations'.[92] The Court did not take a position on this specific argument.

C. *The General Rules on State Succession to International Responsibility Set Out in the IDI Resolution Should Apply*

In our view, the origin of the obligation breached (whether it is a treaty breach or a violation of a customary rule) is not significant in itself.[93] There is no reason why a different and specific regime should exist only for *treaty* violation. We believe that the solutions set out in the IDI Resolution should apply. In the following paragraphs, we will briefly examine the basic principles which were adopted by the IDI Resolution and assess how they could be used to solve problems of State succession for treaty violations. In the following sections, we will first examine the general principles applicable for all types of succession (Subsection (i)), which will be followed by an analysis of specific rules which apply to instances of separation and dissolution (Subsections (ii) and (iii)).

(i) *General principles applicable for all types of succession*

As a matter of principle, the starting point of the IDI Resolution is to reject the strict and automatic principle of *non-succession* to rights and obligations arising from State responsibility for internationally wrongful acts.[94] Yet, that does not mean that the IDI Resolution supports the opposite principle in favour of the *automatic* transfer of the consequences of responsibility to the successor State. As noted by the Tribunal in the *Lighthouse Arbitration* case, 'It is no less unjustifiable to admit the principle of transmission as a general rule than to deny it. It is rather and essentially a question of a kind the answer to which depends on a multitude of concrete factors.'[95] Whether or not there should be any succession to the

[89] IDI, State Succession in matters to State Responsibility, Resolution, 2015 (n 12), art 12, paras 2 and 3. See Kohen and Dumberry (n 77) 102–05.
[90] Benjamin E Brockman-Hawe, 'Succession, the Obligation to Repair and Human Rights; The European Court of Human Rights Judgment in the Case of Bijelic v. Montenegro and Serbia' (2010) 59(3) ICLQ 853–54.
[91] Dumberry (n 81) 1601ff.
[92] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (n 72) para 107.
[93] Kohen and Dumberry (n 77) 20.
[94] ibid 9ff.
[95] *Lighthouse Arbitration* case (n 71) at 91.

obligations arising from the commission of a wrongful act simply cannot be decided in the abstract without taking into account several circumstances.[96] This approach has been endorsed by ILC Special Rapporteur in his reports.[97]

The Resolution's basic position is that different categories of succession may be subject to specific solutions.[98] Clearly, the solution adopted for one specific type of succession may not be appropriate for other instances of succession.[99] For instance, the fact that the predecessor State continues to exist after the date of succession in some instances of State succession (such as separation) has important consequences with respect to the determination of whether there is any succession to obligations. Thus, Article 4(2) provides the general rule that the predecessor State, when it continues to exists after the date of succession, should remain responsible for *its own* internationally wrongful acts committed before that date and bears the obligation to repair.[100] Yet, the Resolution also contains a number of exceptional circumstances where a *different solution* should apply and when the obligations arising from an internationally wrongful act—but not responsibility for the commission of that act—should, in fact, pass to the successor State.[101] Article 4(2) indicates that the injured State or actor may indeed request reparation from the *successor* State. Whether or not this is possible will depend on a number of different factors and circumstances (which are further examined below).

Another basic principle is that a successor State is always free to *unilaterally accept* to take over the obligations arising from an internationally wrongful act committed by the predecessor State against another State.[102] This is a general principle widely accepted by scholars.[103] We have identified several examples of State practice and case law involving a successor State accepting to take over the consequences of responsibility.[104] Yet, a unilateral act alone is not sufficient for the successor State to automatically take over such obligations towards the injured State.[105] Thus, a unilateral statement made by a new State cannot create rights and obligations for other States by itself.[106] The injured party must be given the possibility to accept or reject the solution unilaterally adopted by the successor State regarding the devolution of obligations.[107] The Resolution also deals with devolution agreements concluded between the predecessor State and the successor State which typically provide for the devolution to the latter of obligations arising from wrongful acts committed before the date of succession by the former.[108]

[96] IDI, State Succession to Responsibility, Resolution, 2015 (n 12). The Resolution also deals with the question the succession to the *rights* arising from the commission of wrongful acts committed by another State *against* the predecessor State. We will not further examine this situation given that it is not relevant in the context of the present discussion dealing with wrongful acts committed *by* the predecessor State.

[97] ILC Special Rapporteur, First Report, 2017 (n 10) para 36; ILC Special Rapporteur, Second Report, 2018 (n 79) para 16.

[98] The same position is adopted by ILC Special Rapporteur, First Report, 2017 (n 10) para 84.

[99] *Lighthouse Arbitration* case (n 71) at 91: 'It is impossible to formulate a general, identical solution for every imaginable hypothesis of territorial succession, and any attempt to formulate such a solution must necessarily fail in view of the extreme diversity of cases of this kind.'

[100] Kohen and Dumberry (n 77) 32ff. The same principle is also expressed in specific provisions dealing with transfer of territory (art 11(1)), separation (art 12(2)), and Newly Independent States (art 16(1)).

[101] The same approach is also adopted in ILC Special Rapporteur, Second Report, 2018 (n 79) para 48.

[102] IDI, State Succession to Responsibility, Resolution, 2015 (n 12), art 6(3)(4), examined in Kohen and Dumberry (n 77) 47ff.

[103] ibid.

[104] ibid 48ff.

[105] IDI, State Succession to Responsibility, Resolution, 2015 (n 12), art 6(3). ibid 50ff.

[106] Vienna Convention (n 10) art 9(1).

[107] Kohen and Dumberry (n 77) 50ff.

[108] IDI, State Succession to Responsibility, Resolution, 2015 (n 12), art 6(1)(2). Kohen and Dumberry (n 77) 37ff.

Chapter III of the Resolution examines the different solutions to the question of succession to the consequences of international responsibility which should prevail for different types of succession of States. We will briefly examine the solutions for separation and dissolution. This is because investment cases dealing with State succession issues have almost always involved these two types of succession. Before doing so, it should be mentioned that under Article 3, the different principles (and exceptions) set out under Chapter III only apply in the event that the relevant parties[109] have not themselves agreed to any other specific solution.[110]

(ii) *Separation*

Article 12 deals with 'separation of parts of a State'. Article 12(1) sets out the general solution of non-succession which should prevail: the obligations arising from an internationally wrongful act committed by the predecessor State do *not* pass to the successor State when a part of its territory separates to form a new State.[111] This is because the predecessor State continues to exist following the separation of part(s) of its territory, and should remain responsible for acts which took place before the date of succession.[112] This general solution is supported by State practice and case law,[113] as well as by scholars, including the ILC Special Rapporteur.[114]

There is one exception, mentioned in Article 12(3), to the general principle of non-succession.[115] It concerns the specific situation when the author of a wrongful act was an 'organ of the territorial unit of the predecessor State that has later become an organ of the successor State'.[116] When this is the case, the successor State should take over obligations arising from internationally wrongful acts committed before its independence in so far as the acts were committed by an autonomous government, or by any clearly identifiable other political entity, with which the new State has an organic and structural continuity.[117] One recent example (mentioned above) where the solution set out in Article 12(3) was applied is the case of *Bijelic v Montenegro*.[118] Article 12(4) also envisages the possibility that, in some circumstances, the obligations arising from a wrongful act can be assumed by both the predecessor State and the successor State.[119]

Finally, Article 12(6) deals with the specific situation when a wrongful act is committed before the date of succession not by the predecessor State, but by an 'insurrectional or other movement' which succeeds in establishing *a new State*.

[109] On the issue of who these 'parties' are, see Kohen and Dumberry (n 77) 30ff.

[110] IDI, State Succession to Responsibility, Resolution, 2015 (n 12). See art 3, discussed in Kohen and Dumberry (n 77) 29ff.

[111] The provision also envisages the possibility that more than one part of a State separates from the predecessor State leading to the creation of *several* new States.

[112] IDI, State Succession to Responsibility, Resolution, 2015 (n 12), arts 4 and 5.

[113] Kohen and Dumberry (n 77) 92ff.

[114] ILC Special Rapporteur, First Report, 2017 (n 10) para 17; ILC Special Rapporteur, Second Report, 2018 (n 79) paras 46, 77, 80. See Draft Article 7(1).

[115] There is another exception (at art 12(2)) dealing with the question of succession to *rights* arising from the commission of a wrongful act. This exception is however not relevant to the question examined here.

[116] This solution is also followed by the ILC Special Rapporteur, Second Report, 2018 (n 79) paras 94ff. See Draft Article 7(2).

[117] Kohen and Dumberry (n 77) 102ff.

[118] ibid 103ff.

[119] One circumstance would be when there is a 'direct link' between the consequences of a wrongful act and the territory or the population of the successor State. See analysis in Kohen and Dumberry (n 77) 101–02, 105.

Whenever a new State is created as a result of the action of such a movement, the act shall be considered as that of the new State under international law.[120]

(iii) *Dissolution of State*

Dissolution of State involves a predecessor State which ceases to exist and parts of its territory forms two or more new successor States. Article 15(1) establishes the solution of succession, ie that the obligations arising from the commission of an internationally wrongful act by the predecessor State pass to the successor State(s).[121] This solution is supported by State practice and by scholars.[122] This provision is in accordance with one of the most fundamental principles guiding the Resolution: the need to avoid situations where the consequences of internationally wrongful acts simply disappear as a result of the extinction of the predecessor State. The application of the principle of non-succession in the context of dissolution would indeed result in the injured party being left with no debtor to provide compensation for the damage it suffered.

The next question pertains to which of the different successor States should be the holder of the obligations after the date of succession.[123] Article 15(1) indicates that such obligations will pass to 'one, several or all the successor States' depending on the circumstances referred to in Article 15(3).[124] Two factors are considered relevant under Article 15(3). The first one is the existence of a 'direct link' between the consequences of an internationally wrongful act committed by the predecessor State and the territory or the population of one of the successor States.[125] The second relevant factor is when the author of the internationally wrongful act was an organ of the predecessor State that later became an organ of the successor State.[126] A number of examples of State practice and case law support both solutions.[127] Yet, succession is not automatic under Article 15(3); these are just 'relevant factors' to be considered for the distribution of obligations among the successor States. Finally, under Article 7, whenever it is not possible to identify a single successor based on the application of Article 15, all successor States will assume the obligations in an equitable manner.[128] Article 7(2) establishes what criteria must be taken into consideration in order to determine an equitable apportionment of the obligations among the successor States. The non-exhaustive list of criteria includes the following:

- whether there exists 'any special connections' between one or more successor States 'with the act giving rise to international responsibility';
- 'the size of the territory and of the population';

[120] See ibid 106ff, explaining that the solution is based on art 10(1) of the ILC Articles on State Responsibility and providing several examples of State practice supporting this rule (ibid 109ff). Draft Article 7(4) proposed by the ILC Special Rapporteur is to the same effect: ILC Special Rapporteur, Second Report, 2018 (n 79) paras 107ff.

[121] The same general approach has been adopted by the ILC Special Rapporteur, Second Report, 2018 (n 79) paras 147, 167, 185. See Draft Article 11(1).

[122] See examples in Kohen and Dumberry (n 77) 121–22.

[123] See also ILC Special Rapporteur, Second Report, 2018 (n 79) para 185.

[124] Again, the subsidiary character of the solutions mentioned in arts 15(2) and 15(3) should be highlighted. Thus, these solutions should prevail only insofar as the successor States have not themselves specifically agreed to a different solution (art 3). One example is the *Agreement on Succession Issues* entered into between the successor States to the SFRY on 29 June 2001, 2262 UNTS 251; (2002) 41 ILM 1–39. It should be added that art 15(2) is not relevant in the context of the present discussion insofar as it concerns the situation of an internationally wrongful act committed *against* the predecessor State.

[125] See analysis in Kohen and Dumberry (n 77) 123–26.

[126] ibid 126ff.

[127] ibid.

[128] ibid 53ff.

- 'the respective contributions to the gross domestic product of the States concerned at the date of succession'; and
- the 'need to avoid unjust enrichment'.

The basic logic behind Article 7(2) is the simple fact that (apart from the existence of any 'special connection' between one successor State and the wrongful act), the allocation of rights and obligations between the different successor States should be proportionate to their overall weight and relative importance just before the date of succession when they were still part of the predecessor State. The relevant elements mentioned under Article 7(2) for such a determination are the size of the territory and the population and the respective contributions to the gross domestic product of the States concerned at the date of the succession.

IV. CONCLUSION

The adoption of the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) has had a great impact on the interpretation and application of international investment law, notably with regard to the attribution of these kinds of acts to the State, the existence of a breach to an international obligation, and the existence of circumstances precluding wrongfulness, or the lack thereof. The ARSIWA did not address the issue of State succession to treaties, which was the subject of the 1978 Vienna Convention. The ARSIWA also refrained from addressing the question of State succession to the consequences arising from the commission of internationally wrongful acts. The applicability of these Articles in situations of State succession essentially rests on the consequences to a State in terms of international responsibility *after* the date of succession. Yet, some situations in which internationally wrongful acts were committed *before* the date of succession were, in fact, addressed by the Articles. These situations are the following: (i) internationally wrongful acts committed by an 'insurrectional movement' (or other 'movement') leading to the subsequent creation of a new State (Article 10(2)); and (ii) internationally wrongful acts having a continuing character occurring both before and after the date of succession (Article 14(2)).

Until recently, there existed a gap concerning the consequences of internationally wrongful acts committed *before* the date of the State succession. The recent works of the Institut de Droit international and, subsequently, that of the ILC have filled this gap.