BETWEEN SUCCESSION AND SOVEREIGNTY: THE FATE OF BILATERAL INVESTMENT TREATIES WHEN STATES BREAK APART

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ABSTRACT

The proliferation of state fragmentation, through secession, dissolution and separation, has generated a persistently unresolved question in public international law. What happens to bilateral investment treaties ["**BITs**"] when the state that concluded them ceases to exist in its original form? Despite a rich body of treaty practice and investment arbitration awards, the law governing succession to BITs remains deeply contested. Neither the 1978 Vienna Convention on Succession of States in Respect of Treaties ["**VCSST**"] nor customary international law provides a definitive and universally accepted answer. The result is a legal landscape in which successor states, foreign investors and arbitral tribunals must navigate competing doctrines such as that of automatic succession, the clean slate rule and various intermediate frameworks of tacit consent. The problem still remains as there is no settled answer to which doctrine applies conclusively.

This paper investigates this central legal question that under what conditions, and through what mechanisms, does a bilateral investment treaty concluded by a predecessor state bind a successor state arising from secession? The analysis here is twofold. First, that there is no settled customary rule of automatic succession to bilateral treaties and that the tabula rasa principle, despite being politically disfavoured in investment treaty practice, retains greater doctrinal coherence for bilateral instruments than is commonly acknowledged. Second, and more constructively, that the absence of an automatic rule does not produce a legal vacuum, rather, a sufficiently developed framework of tacit consent, the critical date doctrine and the protection of vested investor rights collectively provides tribunals with adequate tools to resolve succession disputes.

The paper proceeds in four parts. Part I surveys the foundational doctrinal framework, examining the VCSST, the Vienna Convention on the Law of Treaties ["**VCLT**"], and the competing schools of thought that have emerged. Part II analyses the arbitral jurisprudence on BIT succession arising from the dissolution of Czechoslovakia, the break-up of the former Soviet

Union, and the fragmentation of the former Yugoslavia, drawing out the doctrinal patterns that emerge from these episodes. Part III addresses the role of tacit consent and state conduct such as diplomatic notes, the treatment of sister treaties, state silence, and official communications as mechanisms through which succession may be established without express agreement. Part IV examines the intersection of succession law with the protection of vested investor rights, the critical date doctrine and the argument that commercial stability in international investment relations provides an independent basis for treaty continuity. The paper concludes that the most defensible approach is neither automaticity nor clean slate, but a contextualised presumption of continuity that should be rebuttable by clear, pre-dispute evidence of a successor state's contrary intent.

Keywords: VCSST, succession, critical date doctrine, acquired rights.

PART I: THE DOCTRINAL FRAMEWORK - COMPETING RULES OF TREATY SUCCESSION

I.1 The VCSST and its limitations

State succession is broadly defined and understood as the definitive replacement of one state by another in respect of sovereignty over a given territory.[1] It has generated one of the most debated and vexed areas of public international law.[2] It's definition is hotly debated and discussed across scholars.[3] The question of what happens to existing treaty relationships upon such a replacement is addressed in the 1978 Vienna Convention on Succession of States in Respect of Treaties ["**VCSST**"].[4] However, the problem for a fixed answer to succession of treaties still remains, as the VCSST has attracted only limited ratification and has been widely criticised as a failed exercise in codification.[5] It has been regarded as an instrument that reflects progressive development rather than the consolidation of existing custom.[6]

[1] James Crawford, Brownlie's Principles of Public International Law (8th edn, OUP 2012) 423.
[2] Vassillis Pergantis, The Paradigm of State Consent in the Law of Treaties: Challenges and Perspectives (Edward Elgar Publishing 2017) 215.
[3] Oscar Schachter, State Succession: The Once and Future Law, 33 Virginia Journal of International Law 253, 253 (1993).
[4] Vienna Convention on Succession of States in Respect of Treaties (adopted 23 August 1978, entered into force 6 November 1996) (VCSST), Art 2(1)(b).
[5] Arman Sarvarian, Codifying the Law of State Succession: A Futile Endeavour?, European Journal of International Law, Volume 27, Issue 3, August 2016, Pages 789-812.
[6] ILC, Report of the International Law Commission on the Work of its Twenty-Sixth Session, 6 May to 26 July 1974, A/9610/Rev.1, in (1974) II Yearbook International Law Commission (Part One) 212, 237-39; R Szafarz, Vienna Convention on Succession of States in Respect of Treaties: A General Analysis (1979-80) 10 Polish Yearbook International Law 77, 107-8.

The main provision that governs automatic succession for treaties is Article 34 of the VCSST.[7] It establishes a general rule of continuity for successor states arising from the separation of parts of a state.[8] On its face, Article 34 appears to mandate automatic succession wherein treaties of the predecessor state remain in force for the successor state with respect to the territory concerned. However, this apparently straightforward rule has been subjected to sustained critique.[9] The International Law Commission ["**ILC**"] itself acknowledged in the drafting history of VCSST that the inclusion of continuity as the general rule was not a codification of consistent state practice but a deliberate choice to preserve stability in conventional relations.[10] This is thus an exercise in progressive development that remained ahead of the practice it purported to reflect.[11]

The VCSST's limitations are particularly problematic in relation to bilateral treaties. Unlike multilateral instruments, bilateral treaties are defined by the specificity of the relationship they create.[12] The identity of both contracting parties is integral to the substance of the bargain struck.[13] As Special Rapporteur Waldock observed in the ILC's Fourth Report, the "personal equation", meaning the identity of the contracting party, necessarily plays a more dominant role in bilateral treaty relations than in multilateral ones.[14] This observation has been observed as prevalent in the recent episodes of succession.[15] From the dissolution of Czechoslovakia to the fragmentation of Yugoslavia and the secession of new states in the twenty-first century, state practice has consistently demonstrated that bilateral treaty relations are resolved through negotiation rather than automatic inheritance.[16] The International Law Association ["**ILA**"], in

[7] Vienna Convention on Succession of States in Respect of Treaties ["**VCSST**"] art. 34, August 23, 1978, 1946 U.N.T.S. 3.
[8] *Ibid*.
[9] Aymeric Hêche, State Succession in Respect of Treaties and Notifications: A Bottleneck Approach, Journal of Sharia & Law (2019).
[10] International Law Commission, Draft Articles on Succession of States in Respect of Treaties, with Commentaries, in Report of the International Law Commission on the Work of Its Twenty-Sixth Session, U.N. GAOR, 29th Session, Supp. No. 10, at 174, U.N. Doc. A/9610/Rev.1 (1974).
[11] ILC Report, Fourth Report on State Succession (1971), 148; ILC Fourth Report, Twenty-Sixth Session (1974) 212, 237-39.
[12] Draft Articles on Succession of States in Respect of Treaties with Commentaries, (1974) 2 YearBook International Law Commission 174, U.N. Doc. A/CN.4/SER.A/1974/Add.1 (Part 1).
[13] Christopher R. Drahozal, Parties and Affected Others: Signatories and Nonsignatories to International Arbitration Agreements, in Cambridge Compendium of International Commercial and Investment Arbitration 283 (Stefan Kröll, Andrea K. Bjorklund & Franco Ferrari eds., 2023).
[14] ILC Report, Fourth Report, 1971, 148; ILC Report, Twenty-Sixth Session, 1974, 237.
[15] Stanimir A. Alexandrov, The Baby Boom of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as Investors And Jurisdiction Ratione Temporis, 4 LAW & Practic International CTS. & Tribunals 19 (March 2005).
[16] 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, 28 Leiden Journal International Law 13, 18-26 (2015).

its 2008 Resolution on aspects of state succession law, recorded this reality plainly by stating 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.[17]

A further structural difficulty with the VCSST is its limited participation.[18] The Convention has attracted fewer than twenty-three ratifications and has not been joined by many of the states most frequently implicated in succession disputes in the post-Cold War era.[19] Where neither the predecessor state nor its successor, nor the relevant third-state treaty partner, is party to the VCSST, the Convention has no direct application.[20] Tribunals must then turn to customary international law where currently no settled rule yet exists.

I.2 The Tabula Rasa rule and the personal equation of Bilateral Treaties

The tabula rasa, or the clean slate principle, holds that a new state begins its existence free of the treaty encumbrances of its predecessor. The clean slate rule is considered as the default rule in certain circumstances of succession, depending on what type of succession it is.[21] This principle has deep roots in the decolonisation context, where it served to protect newly independent states from being bound by agreements they had played no part in negotiating.[22]

A primary question occurs when there is succession based on secession. Secession happens when the successor state emerges from within the predecessor state rather than from a dependent colonial territory.[23] The question of whether clean slate or automatic succession applies to secession is more contested, but a significant body of scholarly opinion and state practice support the application of the clean slate principle.[24]

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[17] International Law Association, Conclusions of the Committee on Aspects of the Law on State Succession, Resolution No 3/2008, adopted at the 73rd Conference, Rio de Janeiro, 17-21 August 2008, point 8.
[18] Paul R. Williams, The Treaty Obligations of the Successor States of the Former Soviet Union, Yugoslavia, and Czechoslovakia: Do They Continue In Force?, 23 Denver Journal International Law & Policy 1, 8 (1994).
[19] Malcolm N Shaw, International Law (6th edn, CUP 2008) 689-90; Ian Brownlie, Principles of Public International Law (5th edn, Clarendon 1998) 663-4.
[20] Sari T. Korman, The 1978 Vienna Convention on Succession of States in Respect of Treaties: An Inadequate Response to the Issue of State Succession, 16 SUFFOLK Transnational Law Review 185 (1992).
[21] Patrick Juillard, The Foreign Debt of the Former Soviet Union: Succession or Continuation?, In Dissolution, Continuation and Succession in Eastern Europe, pp. 67-86.
[22] Patrick Dumberry, State Succession to International Responsibility (Brill 2007) 78-82; Brigitte Stern, La succession d'États (1996) 262 314; see also Szafarz (n 6) 104-5.
[23] Kenneth J. Keith, Succession to Bilateral Treaties by Seceding States, 61 Amsterdam Journal International Law 521 (1967).
[24] ILC, Fourth Report on State Succession (1971), 146; see also James Crawford, State Responsibility (CUP 2013) 252-53.

The doctrinal case for the clean slate rule in the context of bilateral treaties rests primarily on the logic of consensualism.[25] Article 35 of the VCLT provides that a bilateral treaty does not become a treaty between the successor state and the original treaty partner unless the former agrees that the treaty should continue to apply.[26] This formulation makes successor consent the operative condition of treaty continuity.[27] The ILC's commentary makes the point explicitly by state that unlike multilateral treaties, in bilateral cases there is no automatic carryover as a successor state can only inherit obligations it expressly agrees to do so.[28] If such a treaty is continued, then the resulting legal relationship is not a continuation of the original treaty but a new and distinct bilateral arrangement between the successor and the third-state party.[29]

The "personal equation" argument reinforces this conclusion. The premise of a bilateral investment treaty is a mutual, reciprocally negotiated allocation of rights and obligations between two specific sovereigns.[30] From the mere fact that State A has entered into a treaty with State B, it cannot automatically be inferred that State A would have entered into the same treaty with State C which is a wholly new sovereign that did not exist at the time of the original negotiations, whose economic characteristics, legal infrastructure and political commitments may differ materially from those of its predecessor.[31] Bilateral treaty negotiations necessarily lead to different outcomes when conducted between different principals, and the attempt to carry forward a predecessor's bargain without the consent of the third-state party denies that party the opportunity to assess whether the successor merits the same treatment.

State practice from the post-1991 era provides support for this analysis. Practice of the former Soviet Republics' approach to the USSR's treaty portfolio reveal that only a minority of those republics considered themselves bound by even a fraction of the USSR's bilateral investment treaties, and that most followed what has been described as a "clean slate mindset" in practice, regardless of the rhetorical commitment to continuity expressed in instruments such as the

[25] J.W. Yackee, Pacta sunt servanda and state promises to foreign investors before bilateral investment treaties: Myth and reality, Fordham International Law Journal, 32 (2008) p.1550.
[26] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, ["**VCLT**"] art. 35.
[27] Vienna Convention on the Law of Treaties: A Commentary (Oliver Dörr & Kirsten Schmalenbach editions, 2d edition, Springer 2018).
[28] Draft Articles on the Law of Treaties with Commentaries, (1966) 2 YearBook International Law Commission 187, U.N. Doc. A/CN.4/SER.A/1966/Add.1.
[29] 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, 28 Leiden Journal International Law 13 (2015).
[30] Sai Srijan Neti, Navigating the Capacity Conundrum: Unraveling State Succession's Impact on Investor-State Dispute Settlement, 6 Indian Arbitration Law Review 76 (2024).
[31] ILC Report, Fourth Report, 1971, 148; ILC Report, Twenty-Sixth Session, 1974, 237.

Alma-Ata Declaration.[32] There is inconsistency of practice wherein some states acceding to predecessor treaties by formal notification and others concluding new replacement instruments, and others simply proceeding as though the predecessor's treaties had ceased to exist. This is itself evidence against the emergence of a customary rule of automatic succession.[33]

I.3 Continuity Doctrines and the role of consent

Despite the strength of the tabula rasa argument for bilateral treaties, the case for some form of continuity framework has attracted equally serious attention. The appeal of continuity is fundamentally practical because in most instances of state succession, both the successor state and the affected third-state parties will have strong incentives to maintain existing commercial arrangements.[34] Accepting the overall continuity of commercial arrangements is the only realistic option in many succession scenarios.[35] The disruptive consequences of treating a successor state as starting from a clean slate in respect of every bilateral agreement, with all the uncertainty, renegotiation costs and temporary protection gaps that would entail, are real and should not be minimised.

However, the most defensible form of continuity doctrine is not one grounded in automatic operation but in party consent. This consent can be either express or tacit.[36] This approach holds that the fate of a bilateral treaty post-succession is ultimately determined by the intentions of both the successor state and the third-state treaty partner.[37] This is to be assessed by reference to the full range of available evidence which includes things like formal notes, diplomatic exchanges, conduct, silence in the face of succession declarations and the broader context of the relationship between the two states.[38] On this view, the clean slate rule is the default but it is a rebuttable default rule and in many cases the evidence of tacit consent will be sufficient to rebut it.

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[32] Akbar Rasulov, Revisiting State Succession to Humanitarian Treaties: Is There a Case for Automaticity? (2003) 14(1) European Journal of International Law 141, 163.
[33] ILA, Rapport Final sur la Succession en Matière de traités, New Delhi Conference 2002, 18; Dumberry (n 16) 78.
[34] Tai-Heng Cheng, STATE SUCCESSION AND COMMERCIAL OBLIGATIONS (2006) pg. 3.
[35] Tai-Heng Cheng, State Succession and Commercial Obligations (2006) 4.
[36] Patrick Dumberry, An Uncharted Question of State Succession: Are New States Automatically Bound by the BITs Concluded by Predecessor States Before Independence?, 6 Journal on International Dispute Settlement 74 (2015).
[37] Qerim Qerimi & Suzana Krasniqi, Theories and Practice of State Succession to Bilateral Treaties: The Recent Experience of Kosovo, 14 German Law Journal 1639 (2013).
[38] Christian J Tams, State Succession to Investment Treaties: Mapping the Issues (2016) 31 ICSID Review 314, 331.

Crucially, however, the rebuttal must be bilateral. This means that it requires not merely that the successor state wishes to continue the treaty but that the third-state party accepts, or can be taken to have accepted through silence or conduct, that the treaty should bind the new sovereign.[39] This bilateral consent requirement distinguishes the tacit consent framework from the purely unilateral act of a successor state declaring itself bound, which as the jurisprudence discussed in Part III will demonstrate is necessary for the establishment of treaty continuity.

PART II: ARBITRAL JURISPRUDENCE - LEARNING FROM EPISODES OF FRAGMENTATION

II.1 The Dissolution of Czechoslovakia

The dissolution of the Czech and Slovak Federal Republic ["**CSFR**"] on 1 January 1993 provides the richest source of treaty succession practice in the modern investment arbitration context.[40] At the time of its dissolution, Czechoslovakia was bound by approximately two thousand bilateral treaties, including sixteen bilateral investment treaties with major capital-exporting states.[41] Both successor states, that is the Czech Republic and the Slovak Republic, declared general positions of continuity.[42] Therefore, when applying the predecessors BITs, the tribunals did not go into the specific question of treaty continuity as such, rather they just noted that there is a general acceptance of the previous treaties to be applied on the successor states.[43]

However, what is particularly interesting is what happened next. Despite the general declaration of continuity, the Czech Republic did not proceed on the assumption that its predecessor's BITs automatically bound it. Rather, it engaged in treaty-specific negotiations with each of its counterpart states, concluding formal exchanges of notes or diplomatic agreements in fourteen of sixteen cases that explicitly identified the prior CSFR treaties as

[39] Danae Azaria, State Silence as Acceptance: A Presumption and an Exception, 94 British Yearbook. International Law (2024).
[40] Sai Srijan Neti, Navigating the Capacity Conundrum: Unraveling State Succession's Impact on Investor-State Dispute Settlement, 6 Indian Arbitration Law Review 76 (2024) pg. 84.
[41] James G. Devaney, What Happens Next? The Law of State Succession, GCILS Working Paper No. 6 (Nov. 2020).
[42] ILA, Rapport Final, New Delhi 2002, 9; Constitutional Law No 4/1993, Czech Republic's National Council, 15 December 1992, art 5.
[43] 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; Hicee BV v Slovak Republic, UNCITRAL, PCA Case No 2009-11, Partial Award (23 May 2011) para 3.

remaining in force.[44] The very fact that such bilateral confirmations were sought and given is a powerful evidence that the parties did not consider the old BITs to have continued to apply automatically without their explicit consent.[45]

The investment arbitration record from the post-Czechoslovakia period reinforces this reading. In a series of cases involving investments made under CSFR-era BITs, arbitral tribunals consistently noted the continuation of those treaties. There is brevity in terms of their treatment as typically no more than a single sentence was given by the tribunals. They only recorded that succession was not in dispute.[46] This reflects the fact that in those cases express bilateral confirmation had already been given. The cases therefore do not support a rule of automatic succession, rather, they only illustrate what treaty continuation looks like when it is properly established.[47]

The decision of the UNCITRAL tribunal in the case concerning the European American Investment Bank against the Slovak Republic is the most analytically significant ruling from this episode.[48] This is precisely because it arose in circumstances where the required bilateral exchange had taken place.[49] The tribunal's reasoning made explicit what was implicit in the earlier cases. It said that Slovakia, upon becoming an independent successor state, could not be bound by the predecessor's BIT until it had taken the steps necessary to succeed to it.[50] The exchange of diplomatic notes with Austria in 1994 which jointly identified the 1990 Austria-CSFR BIT as remaining in force and which amended the treaty text to insert the designations "Slovak Republic" and "Slovak" was the operative legal act that brought the treaty into force for Slovakia. Without that exchange, the BIT would not have applied.[51]

This conclusion has significant implications. It establishes that, even in a context marked by a general political commitment to treaty continuity and by the application of the VCSST, bilateral investment treaties do not continue automatically but rather they have always seen a

[44] Tams (n 38) 330.
[45] *Ibid*.
[46] CME Czech Republic BV v Czech Republic, UNCITRAL, Partial Award (13 September 2001) para 3.
[47] Eastern Sugar BV (Netherlands) v Czech Republic, SCC Case No 088/2004, Partial Award, 27 March 2007, para 5.
[48] 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.
[49] Marcelo G. Kohen & Patrick Dumberry, The Institute of International Law's Resolution on State Succession and State Responsibility: Introduction, Text and Commentaries (2019).
[50] European American Investment Bank AG (EURAM) v Slovak Republic, UNCITRAL, Award on Jurisdiction, 22 October 2012, para. 40.
[51] *Ibid*.

requirement of a specific act of succession, whether formal or through conduct. This also has to be sufficiently clear to demonstrate mutual intent. The Czechoslovakia precedent thus supports the tacit consent framework while simultaneously confirming that continuity is not self-executing.

II.2 The Break-up of the Soviet Union

The dissolution of the USSR presents a more complex picture, partly because it involved a larger number of successor states, a broader array of treaty relationships and a starker division between the continuing state which was the Russian Federation itself and the genuinely new successor states.

In respect of the Russian Federation's position as the continuing state of the USSR, the jurisprudence is clear and consistent. All arbitral proceedings in which a claimant sought to invoke a BIT concluded by the USSR against Russia have held that Russia, as the continuing state, remains bound by those treaties.[52] The reasoning in the first of these awards is characteristic in the sense that it focused on Russia's Ministry of Foreign Affairs issued a note to the heads of diplomatic missions in Moscow in the autumn of 1992 stating that the Russian Federation would continue to exercise the rights and honour the obligations arising from international treaties signed by the Soviet Union, and the tribunal treated that communication as sufficient to establish continuity of the relevant BIT.[53] The position of a continuing state is doctrinally distinct from that of a successor state proper, and the application of predecessor treaties to the Russian Federation does not require the same bilateral consent analysis.[54]

The position of the other former Soviet Republics is far more contested. The Alma-Ata Declaration of 1991, in which the members of the newly established Commonwealth of Independent States affirmed their general desire to undertake the international obligations on them under treaties entered into by the former USSR, was initially presented as a broad commitment to treaty continuity.[55] However, the conduct of the successor republics in practice was anything but uniform. Only six of the eleven Soviet Republics considered themselves

[52] 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 International Dispute Settlement 506-33.
[53] Mr Franz Sedelmayer v Russian Federation, SCC, Award, 7 July 1998, para 17.
[54] Marja Lehto, Succession of State in the Former Soviet Union (1993) 4 Finnish Yearbook of International Law 194, 197, 212.
[55] Alma-Ata Declaration, Dec. 21, 1991, reprinted in Informatsionny Vestnik "Sodruzhestv", No. 1 (1992).

bound by even a fraction of the USSR's BITs.[56] Several states that had initially affirmed the Alma-Ata Declaration subsequently deviated from it in their treaty practice.[57]

The discussion on this topic in the case of *World Wide Minerals Ltd v Republic of Kazakhstan* becomes important here. This is an UNCITRAL arbitration concerning a Canadian investor's claim against Kazakhstan, decided in 2019. The tribunal concluded that Kazakhstan was bound by the USSR-Canada bilateral investment protection agreement, not on the basis of any rule of automatic succession, but on the basis of a series of state acts that collectively evidenced tacit consent.[58] Among the relevant factors were Kazakhstan's participation in the Alma-Ata Declaration, its application of the USSR-Canada tax treaty until unilateral termination in 1996 and the express reference to earlier USSR-Canada treaties in the preamble of a 1997 bilateral trade agreement between the two states.[59] Critically, the Canadian government itself submitted a communication supporting the conclusion that Kazakhstan was bound by the agreement, providing the bilateral dimension that a purely unilateral succession claim would have lacked.[60]

The Kazakhstan award is important for what it establishes and for what it does not. It demonstrates that circumstantial evidence of tacit consent when accumulated across multiple treaty relationships, diplomatic instruments and state representations can be sufficient to bind a successor state to a predecessor's BIT. However, it does not establish any general rule of automaticity. The award is the product of an unusually dense evidentiary record that pointed consistently in one direction. The outcome might well have been different in a case involving a less consistent or more ambiguous pattern of state conduct.

A major contradictory award that goes against this exact reasoning of the tribunal, is the *Gold Pool* case, wherein under similar scenario of continuation of as BIT on Kazakhstan, the tribunal came to an opposite conclusion.[61]

[56] Rasulov (n 32) 163.
[57] Dumberry (n 16) 78.
[58] Clàudia Baró Huelmo, Is Kazakhstan a State Successor to the USSR? A Perspective from Investment Treaty Arbitration, in Matthias Scherer (ed), ASA Bulletin, (© Association Suisse de l'Arbitrage; Kluwer Law International 2018, Volume 36, Issue 2), pp. 295 - 313
[59] World Wide Minerals Ltd v Republic of Kazakhstan, UNCITRAL Arbitration (II), Award, 29 January 2019
[60] Clàudia Baró Huelmo, Is Kazakhstan a State Successor to the USSR? A Perspective from Investment Treaty Arbitration, (2018), 36, ASA Bulletin, Issue 2, pp. 295-313.
[61] Gold Pool Ltd Partnership v Republic of Kazakhstan, PCA Case No 2016-23, Award (30 July 2020).

II.3 The Fragmentation of the Former Yugoslavia

The successive fragmentations of the former Yugoslavia provide a complex picture. It started from the dissolution of the Socialist Federal Republic and went through the breakup of the Federal Republic of Yugoslavia to the independence of Montenegro in 2006 and Kosovo in 2008.[62] These have generated the most recent and analytically significant line of investment arbitration decisions on BIT succession.[63] It has culminated in the award in the *Deripaska v. Montenegro* case which represents the most thorough tribunal treatment of the doctrinal issues to date.[64]

The earlier cases arising from the dissolution of the SFRY present a varied picture. In some instances, successor states concluded new bilateral investment treaties that expressly terminated and replaced older instruments.[65] This indicates that the parties believed the older instruments remained in existence until formally superseded and can be seen as an implicit endorsement of continuity.[66] In others, limited information is available and the basis on which old BITs continued to be treated as applicable remains unclear.[67] The observation of a court in the European Community context that Sweden had failed to eliminate incompatibilities in investment agreements concluded with the former SFRY does not itself identify which successor state was then bound by those agreements, and underscores the interpretive difficulties that arise when succession practice is informal and poorly documented.[68]

The 2006 UNCITRAL partial award in proceedings involving the Greek investor Mytilineos against Serbia also deals with this question.[69] This case is the *Mytilineos Holdings SA v State Union of Serbia & Montenegro and Republic of Serbia* case. The tribunal's finding that the 1997 Greece-Yugoslavia BIT remained in force with Serbia rested on Serbia's position as the continuing state of the Federal Republic of Yugoslavia and its 2006 Note Verbale declaring succession to all FR Yugoslavia treaties, combined with Greece's failure to object to that

[62] Patrick Dumberry, A Guide to State Succession in International Investment Law (Edward Elgar Publishing 2018), pg. 125-161.
[63] MNSS BV v Montenegro ICSID Case No ARB(AF)/12/8.
[64] Oleg Vladimirovich Deripaska v. State of Montenegro, PCA Case No. 2017-07, Final Award (Oct. 15, 2019).
[65] Tams (n 38) 329.
[66] *Ibid*.
[67] Williams Paul R., The Treaty Obligations of the Successor States of the Former Soviet Union, Yogoslavia, and Czechoslovakia: Do They Continue in Force, 23 Denver Journal of International Law& Policy 1 (1994).
[68] European Court of Justice, Commission v Kingdom of Sweden, Case C-249/06, 3 March 2009; Tams (n 38) 329.
[69] Mytilineos Holdings SA v State Union of Serbia & Montenegro and Republic of Serbia, UNCITRAL, Partial Award on Jurisdiction, 8 September 2006, paras. 159, 172-73.

declaration.[70] The case thus reflects the distinct position of a continuing state rather than a genuinely new successor state and its precedential value for secession-based succession is accordingly limited.

The *Deripaska v. Montenegro* award, issued by a PCA tribunal in 2019, is a different matter entirely.[71] Montenegro emerged as an independent state following the dissolution of the State Union of Serbia and Montenegro in June 2006, a genuine secession that did not benefit from the legal continuity doctrine. The claimant sought to invoke the 1995 Russia-Yugoslavia BIT as continued into force for the Montenegro-Russia relationship. The tribunal declined jurisdiction, and did so in terms that constitute the most sophisticated judicial analysis of bilateral treaty succession in the investment arbitration context.[72]

The tribunal's reasoning proceeded in three stages. First, it held that there is no rule of automatic succession to bilateral treaties under customary international law. This does not make any assertive case for a clear practice of automatic succession to BITs having yet emerged.[73] Second, the tribunal examined the succession-related communications between Montenegro and Russia and found them insufficient to establish either express or tacit bilateral consent to the continuation of the 1995 BIT.[74] Third, the tribunal acknowledged that this conclusion was not without normative consequences for Montenegro's position in the international legal order and thus it was recognising the legitimacy of the period of uncertainty that follows independence but declined to treat that uncertainty as equivalent to an established treaty relationship.

II. 4 Kosovo's Stance

The Kosovo experience is particularly instructive because Kosovo attempted to secure treaty continuity through a unilateral declaration of succession followed by bilateral confirmation from treaty partners.[75] In its 2008 Declaration of Independence, Kosovo expressly undertook the international obligations arising from treaties concluded by the former Socialist Federal Republic of Yugoslavia ["**SFRY**"] and by the United Nations Interim Administration Mission

[70] *Ibid*.

[71] Deripaska v Montenegro (n 64).
[72] Deripaska v Montenegro (n 64) para 290.
[73] Deripaska v Montenegro (n 64) para 281.
[74] Deripaska v Montenegro (n 64) paras 289-294, 310-332.
[75] Qerim Qerimi & Suzana Krasniqi, Theories and Practice of State Succession to Bilateral Treaties: The Recent Experience of Kosovo, 14 German Law Journal 1639 (2013).

in Kosovo ["**UNMIK**"].[76] Kosovo further declared that it would be legally bound by these commitments and invited other States to rely upon them.[77] The legal significance of this undertaking was analysed through the lens of the ICJ's decision in *Nuclear Tests (Australia v France)* and *New Zealand v France)*,[78] which recognised that public unilateral declarations made with an intention to be bound may create legal obligations under international law.[79] The Kosovo position therefore represented an attempt to create continuity not through an automatic rule of succession, but through an express assumption of treaty obligations accompanied by a public commitment to honour them.

Rather than treating predecessor treaties as automatically applicable, Kosovo approached individual States and negotiated treaty-specific arrangements confirming continuity.[80] By 2011, Kosovo had concluded exchanges of notes on treaty succession with several States including Austria, Belgium, the Czech Republic, Finland, Germany and the United Kingdom.[81] These instruments typically recorded the mutual understanding that treaties previously concluded with the SFRY would remain in force in relations with Kosovo.[82] This practice is important because it demonstrates that, notwithstanding Kosovo's unilateral declaration, treaty continuity was ultimately secured through bilateral consent.[83] The process therefore resembles the pattern identified in the Czechoslovakia and Kazakhstan cases, where succession depended upon subsequent conduct evidencing mutual acceptance rather than any self-executing rule of continuity.

The Kosovo experience also provides a useful contrast between different categories of predecessor treaties. Kosovo expressly assumed obligations arising from treaties concluded by the SFRY and agreements entered into on its behalf by UNMIK. However, the position regarding treaties concluded by the Federal Republic of Yugoslavia ["**FRY**"] after the breakup

[76] Kosovo Declaration of Independence, Feb. 17, 2008, available at http://www.assembly kosova.org/?cid=2,128,1635.
[77] Kosovo Declaration of Independence (n 76) para 9.
[78] Nuclear Tests (Australia v. France), I.C.J. Reports 1974, at 253, para 43.
[79] Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974, at 457, para 46.
[80] Decree for Ratification of the International Agreements, Exchange of Notes, Republic of Kosovo-Republic of Austria, 2011, available at http://gazetazyrtare.rks-gov.net/Documents/Marr.Ks Austri%20(shkembimi%20i%20notave)(anglisht).pdf.
[81] Decree for Ratification of the Agreements, Exchange of Notes, Republic of Kosovo-Kingdom of Belgium, Feb. available at http://gazetazyrtare.rks-gov.net/Documents/Marrveshja%20Ks Bg%20(anglisht)%20(009).pdf.
[82] Decree for Ratification of the Agreements, Exchange of Notes, Republic of Kosovo-Republic of Finland, Sept. available at http://gazetazyrtare.rks-gov.net/Documents/Marr.%20Ks Finland%20(shkembimi%20i%20notave)%20DMN-19%20(anglisht).pdf.
[83] Tai-Heng Cheng, Why New States Accept Old Obligations?, 2011 University of Illinois Law Review 1, 12 (2011).

of the SFRY remained far more uncertain. Kosovo's Declaration of Independence did not expressly assume FRY treaties, and UNMIK had consistently maintained that agreements concluded by the FRY or Serbia and Montenegro after 10 June 1999 were not automatically applicable to Kosovo. Such treaties could become applicable only through a separate bilateral arrangement. This distinction further weakens any claim that state practice supports automatic succession to bilateral treaties and instead points toward a model based upon specific manifestations of consent.

Perhaps the most significant lesson from Kosovo is that even where a successor State unequivocally declares its intention to continue predecessor treaty obligations, other States have generally insisted on some form of confirmation before accepting treaty continuity.[84] States such as the United States and the United Kingdom expressly relied upon Kosovo's general declaration when establishing treaty relations, but they did so through diplomatic exchanges and subsequent agreements rather than by assuming that continuity arose automatically.[85]

II.5 The analysis of international obligations of South Sudan

The creation of South Sudan in 2011 offers another recent example of the complexities associated with state succession. South Sudan emerged following decades of conflict between northern and southern Sudan and a negotiated peace process culminating in the Comprehensive Peace Agreement ["**CPA**"] of 2005 between the Government of Sudan and the Sudan People's Liberation Movement or Army.[86] The CPA established the legal and political framework for a referendum on self-determination and ultimately paved the way for the secession of South Sudan as an independent State.[87] Importantly, the agreement also addressed territorial and boundary-related issues that would continue to govern relations between the two States after independence.

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[84] Decree for Ratification of the Agreements, Exchange of Notes, Republic of Kosovo-Czech Republic, Mar. 30, 2011, http://gazetazyrtare.rks-gov.net/Documents/Marreveshja%20Ks-Ceki%20(anglisht).pdf.

[85] Decree for Ratification of the Agreements listed in the Exchange of Notes between the Republic of Kosovo and the United Kingdom, available at http://gazetazyrtare.rks-gov.net/Documents/Marrveshja%20Ks Mbretrine%20e%20Bashkuar%20(028)%20(anglisht).pdf; Letter from the President of the United States to the President of Kosovo (Feb. 18, 2008), available at http://georgewbush-whitehouse.archives.gov/news/releases/2008/02/20080218-3.html.

[86] Comprehensive Peace Agreement between the Government of the Republic of Sudan and the Sudan People's Liberation Movement/Sudan People's Liberation Army (2005).

[87] A 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.

The South Sudan experience is significant because it illustrates one of the few areas in which continuity of certain agreements following state succession is relatively uncontroversial. International law has long recognised that territorial and boundary arrangements are generally unaffected by changes in sovereignty.[88] Accordingly, the legal framework governing the separation of South Sudan proceeded on the basis that boundary arrangements would survive the emergence of the new State. The secession therefore demonstrates the distinction between territorial settlements, which are ordinarily preserved, and other categories of treaties whose continued applicability often remains uncertain following succession.

At the same time, the South Sudan process did not produce a comprehensive settlement concerning the succession of all treaty obligations previously binding upon Sudan. While the CPA and related arrangements provided considerable detail regarding political transition, governance structures and territorial questions, they offered little guidance on the broader issue of succession to bilateral treaties. The example therefore highlights a recurring feature of modern succession practice: whereas territorial obligations tend to survive the creation of a new State with little controversy, the continued operation of other treaty regimes frequently depends upon subsequent conduct, agreement, or recognition by the States concerned.

PART III: TACIT CONSENT, STATE CONDUCT AND THE EVIDENTIARY THRESHOLD

III.1 General Declarations and their legal weight: Twilight period and beyond

Perhaps the most contested evidentiary question in bilateral treaty succession is the legal weight to be accorded to general declarations of continuity. These are statements by a newly independent state that it will honour the treaty obligations of its predecessor. These general statements are not treaty-specific and not directed to particular counterpart states.

At one end of the spectrum, the International Court of Justice's ["**ICJ**"] judgment in the proceedings concerning the application of the Genocide Convention, in the case involving Croatia and Serbia, treated a fairly general declaration of succession as a valid basis for binding the new Yugoslav state to the multilateral Genocide Convention.[89] However, the ICJ's

[88] Andreas Zimmermann, State Succession in Treaties, in Max Planck Encyclopedia of Public International Law, pg. 21-23 (2006).
[89] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia), Judgment, ICJ Reports 2008, p 412, para 99.

reasoning rested not on the declaration alone but on the totality of the circumstances. This included a formal Note from the Permanent Mission of Yugoslavia to the UN Secretary-General that affirmed the state's intention to continue fulfilling the rights and obligations of the SFRY. The judgment cannot be read as authority for the proposition that a general declaration, standing alone, suffices to bind a new state to all of its predecessor's bilateral treaties.

The Deripaska tribunal confronted this question directly and reached a clear conclusion. Montenegro's various declarations of succession, made in June 2006, were characterised as "broad unilateral statements of political will" that were "not alluding to any particular treaties nor directed to any particular treaty counter-parties".[90] The tribunal held that such declarations could not constitute a legal undertaking to be bound to all prior bilateral treaties. A unilateral statement of intent, however clearly expressed, cannot by itself create a binding bilateral treaty relationship. What it can do is set in train a period of legal consequence during which the reactions of other states to the declaration become legally significant. This has been defined by the tribunal as the "twilight period".[91]

The twilight period concept is analytically valuable because it explains why general declarations are not legally irrelevant even when they are insufficient on their own.[92] A successor state's general note of succession places the third-state treaty partners on notice that their conduct and silence may be scrutinised as potential evidence of tacit acceptance.[93] A third-state party that fails to object to a succession declaration, and that continues to conduct itself as though the treaty applies, may find that its silence and subsequent practice are treated as constituting tacit acceptance.[94] The legal consequence of the declaration flows not from the declaration itself but from the bilateral pattern of conduct that follows.[95]

This framework is consistent with the general understanding on unilateral declarations as

[90] Deripaska v Montenegro (n 64) para 294.

[91] Patrick Dumberry, Deripaska v Montenegro: The Alpha and Omega of State Succession to BITs, 16 J. International Dispute Settlement (2025) pg. 7; Deripaska v Montenegro (n 64) para 295-296.

[92] Raphael Ren, Vanishing Treaty Claims: Investors Trapped in a Temporal Twilight Zone, 38 ICSID Review Foreign Investment Law Journal 140 (2023).

[93] I. C. MacGibbon, The Scope of Acquiescence in International Law, 31 British Year Book of International Law 143 (1954).

[94] Simon Batifort & Andrew Larkin, The Meaning of Silence in Investment Treaties, 38 ICSID Review Foreign Investment Law Journal 322 (2023).

[95] Sean D. Murphy, Temporal Issues Relating to BIT Dispute Resolution, 37 ICSID Review Foreign Investment Law Journal 51 (2022).

sources of legal obligation, which establishes that a unilateral declaration entails obligations for the formulating state only if stated in clear and specific terms and that obligations resulting from such a declaration must be interpreted restrictively in cases of doubt.[96] Applied to succession declarations, this suggests that a specific and clearly worded declaration directed at a particular treaty partner carries more weight than a general statement of political intent. Even the former cannot create a binding bilateral obligation without some reciprocal indication from the addressee state.

III.2 Sister Treaties, Government websites and conduct-based inference

A second and related evidentiary question concerns the weight to be accorded to a successor state's conduct in respect of treaties other than the BIT in issue. Where a successor state has applied sister treaties such as trade agreements, tax conventions, mutual assistance instruments which were concluded by its predecessor with the same third-state party, can that conduct be treated as evidence that the BIT also continues to apply?

The argument in favour of drawing such an inference is intuitive. If a state acts consistently with the continuation of a broad range of its predecessor's treaty obligations, it seems artificial to insist that one particular treaty, that is the BIT would occupy a special position and requires additional and specific confirmation. This argument has some support in the jurisprudential literature and in domestic court practice, where informal statements or conduct have occasionally been treated as evidence of presumed consent wherein sometimes simple inertia upgraded as continuity.[97]

However, the Deripaska tribunal firmly rejected this reasoning in the context before it. Having established that Montenegro had apparently conducted itself as though three Russia-FRY treaties, a free trade agreement, a road transport agreement and a double taxation treaty, continued to apply, the tribunal held that this conduct says absolutely nothing about any continuation of all other treaties, including the BIT in question. [98] The implications, structure and conditions of bilateral treaties differ significantly from one instrument to another. A trade agreement imposes lighter, less individualised obligations than a bilateral investment treaty. A

[96] Nuclear Tests (Australia v France), Judgment, ICJ Reports 1974, p 25; Nuclear Tests (New Zealand v France), Judgment, ICJ Reports 1974, p 457.
[97] R v Director of Public Prosecutions, ex parte Schwartz (Jamaica), 73 ILR 45 (1987); Tams (n 38) 327.
[98] Deripaska v Montenegro (n 64) para 331, referring to the 2000 Agreement on Free Trade, the 1998 Agreement on International Road Transport, and the 1995 Double Taxation Agreement.

double taxation convention operates in a different legal and regulatory domain entirely. Acceptance of one category of treaty cannot be read as acceptance of all others, particularly given that BITs expose states to mandatory arbitration and the risk of substantial financial awards. The consequences qualitatively different from those flowing from most other bilateral instruments.[99]

This reasoning has important implications for the evaluation of successor state conduct more broadly. A successor state that applies sister treaties and adopts domestic legislation acknowledging inherited obligations in general terms or maintains its predecessor's investment protection framework in domestic law does not thereby commit itself to the full range of treaty-based international obligations. Each treaty must be assessed individually, and the specific weight of the BIT as an instrument of potentially far-reaching sovereign consequence justifies a higher threshold of consent.

A distinct but related evidential category concerns official government publications and treaty registries. The clear weight of authority is that a state's unilateral website entry constitutes information provision and not an exercise of consent.[100] National legislation broadly declaring the continuation of predecessor treaties similarly governs domestic application rather than the international treaty relationship. It cannot substitute for a bilateral exchange of consent.[101] The persuasive value of such materials as corroborating evidence of a general attitude towards treaty continuity may be limited and contextual.[102]

The approach adopted in *Gold Pool JV Ltd v Republic of Kazakhstan* further underscores the limited evidentiary value of unilateral materials in questions of treaty succession. In this, the English Commercial Court was reviewing the decision given by an arbitral tribunal stating the continuation of a predecessor BIT. The Court drew a sharp distinction between evidence reflecting the view of a single State and communications capable of establishing a consensus between treaty partners. At the outset of its analysis, the Court held that an uncommunicated opinion or understanding held by either State was "irrelevant" to determining whether succession had occurred because the inquiry concerned the existence of a consensus *ad idem*

[99] Deripaska v Montenegro (n 64) para 332; ILA Resolution No 3/2008, point 8.
[100] Mention a few examples
[101] CME Czech Republic BV & Raiffeisen Zentralbank Österreich AG v Czech Republic, ICSID AF Case No ARB/10/1, Decision on Jurisdiction, 14 December 2012, para 210.
[102] Arman Sarvarian, Codifying the Law of State Succession: A Futile Endeavour?, 27 European Journal International Law 789 (2016).

between the parties rather than the internal views of one government.[103] The Court therefore confined its analysis to facts that were either communicated *inter partes* or constituted public acts intended for the consumption of the other State.[104] Thus, in this case when there was a 1998 statement by Canada's Minister for International Trade asserting that the agreement in question (Canada-USSR Foreign Investment Protection Agreement) did not apply to Kazakhstan, it was dismissed as no more than the expression of a view and therefore of little assistance in determining the legal effect of the earlier bilateral arrangements.[105] Justice Andrew J Baker held that subsequent opinions expressed by officials and commentators could not displace the meaning of the primary materials evidencing agreement between the parties.[106] Ultimately, the Court criticised the arbitral tribunal for having been distracted by a substantial body of irrelevant material including uncommunicated views internal to Canada or Kazakhstan.[107]

This becomes important when deciding whether updating continuation of certain BITs on a country's official administrative public website constitutes a sufficient enough communication of continuation of that BIT. For example, following the independence of South Sudan, the German Government's treaty database listed the Germany-Sudan BIT as applying to South Sudan notwithstanding the absence of any publicly available succession agreement between the two States. Such entries undoubtedly provide evidence of how a particular State understands its treaty relations. However, they remain unilateral statements of position.

Moreover, other factors of consideration include inclusion of that treaty in the UNCTAD list of treaties. Whether inclusion of a predecessor's BIT in the UNCTAD list of treaties will amount to acceptance of continuation? It can act as one of the elements supporting the continuation of treaty, but cannot be conclusive. UNCTAD functions as a repository of treaty information rather than an institution empowered to determine the existence of treaty relations.[108] A treaty's appearance in the database may therefore constitute evidence of how States or other sources have characterized its status, but it cannot substitute for the bilateral

[103] Gold Pool JV Ltd v Republic of Kazakhstan [2021] EWHC 3422 (Comm).
[104] Gold Pool (n 103), paras. 15-18, 85-87.
[105] Gold Pool (n 103), para16
[106] Gold Pool (n 103), paras 17-18.
[107] Gold Pool (n 103), para 112.
[108] United Nations Conference on Trade and Development (UNCTAD), Investment Policy Hub, International Investment Agreements Navigator, https://investmentpolicy.unctad.org/international-investment-agreements (last visited June 7, 2026).

consent required to establish continuity of a bilateral treaty relationship.

Moreover, another factor of consideration may be the inclusion or non-inclusion of a treaty in the United Nations Treaty Series ["**UNTS**"]. Article 102 of the U.N. Charter provides that every treaty and international agreement entered into by a U.N. Member State shall be registered with and published by the U.N. Secretariat.[109] While not determinative, the presence or absence of a treaty in the UNTS may nevertheless form part of the broader factual matrix relevant to assessing treaty continuity.

III.3 The Critical Date Doctrine and its application to succession disputes

The critical date doctrine states that jurisdiction in international adjudication is assessed as at the date on which proceedings are instituted and that subsequent events cannot affect the jurisdictional basis of a tribunal.[110] It has particular importance in the context of BIT succession disputes. Because succession issues frequently remain unresolved or ambiguous for extended periods following independence, the precise moment at which the legal position crystallises for jurisdictional purposes can be dispositive.[111]

The established principle is that jurisdiction is determined in the light of the situation as it exists on the date the proceedings are instituted and events taking place after that date have no bearing on the jurisdictional inquiry.[112] The practical consequence is that a party cannot improve its position by procuring or generating evidentiary materials after the critical date.[113]

The Singapore Court of Appeal's treatment of this doctrine in the *Sanum Investments* proceedings is the leading judicial analysis from the investment arbitration context.[114] The Court distinguished between post-critical date evidence that is inadmissible as a means of improving a party's position and pre-critical date evidence to which post-critical date materials

[109] Charter of the United Nations, June 26, 1945, 59 Stat. 1031, 1 U.N.T.S. XVI, art. 102.
[110] Mahdev Mohan & Siraj Shaik Aziz, Construing a Treaty against State Parties' Expressed Intentions?: Sanum Investments Ltd v Government of the Lao People's Democratic Republic (2016) 5 SLR 536, 30 SACLJ 384 (March 2018).
[111] Sanum Investments Ltd. v. Government of the Lao People's Democratic Republic, (2016) SGCA 57, para 64 (Ct. App. Singapore).
[112] Arrest Warrant of 11 April 2000 (DRC v Belgium) [2002] ICJ Rep 3, para 26; Right of Passage over Indian Territory (Portugal v India) (Preliminary Objections) [1957] ICJ Rep 125, 142; Compañía de Aguas del Aconquija SA v Argentine Republic (I), ICSID Case No ARB/97/3, Decision on Jurisdiction, 14 November 2005, para 61.
[113] Maja D. Stanivukovic, The Critical Date for the Assessment fo the Investor's Nationality, 57 ZBORNIK RADOVA 39 (2023).
[114] Sanum Investments Ltd. v. Government of the Lao People's Democratic Republic, (2016) SGCA 57, para 64 (Ct. App. Singapore).

may add corroborative weight. This is provided that evidentiary continuity and consistency can be established.[115] The Court emphasised that giving effect to post-critical date diplomatic notes as a "subsequent agreement" capable of retroactively altering the treaty's scope would amount to a retroactive amendment of the treaty.[116] This is an impermissible outcome that would allow states to use ex post facto communications to deny jurisdiction that existed at the time proceedings commenced.[117]

This analysis has important implications for succession disputes. A successor state that issues a diplomatic note after the filing of a request for arbitration, denying that it is bound by the relevant BIT, cannot thereby defeat jurisdiction established at the date of institution. The opposite is equally true. A claimant cannot rely on post-critical date communications to establish treaty coverage that was not clearly established when the proceedings commenced. The evidentiary record must be assessed as of the critical date, with post-critical date materials serving only to confirm what was already apparent.

Applied to the question of succession by conduct, this framework requires a coherent analytical approach. The tribunal must assess whether, as at the critical date, the cumulative effect of all available pre-dispute evidence such as the diplomatic exchanges, conduct in respect of related treaties, official publications, silence in the face of succession declarations and the general trajectory of the bilateral relationship established that both the successor state and the third-state party treated the BIT as continuing to apply. A consistent pattern of conduct pointing in one direction which is also supported by at least some positive indication of mutual intent will generally satisfy the threshold.

PART IV: VESTED RIGHTS, COMMERCIAL STABILITY AND A FRAMEWORK FOR THE FUTURE

IV.1 Investor rights as Acquired rights - A case for continuity

The dimensions of the question of treaty continuity in the previous sections are primarily at the level of the inter-state treaty relationship. However, there is a further dimension to the succession problem that has attracted increasing attention. This is the position of foreign

[115] Sanum (n 111), para 108.
[116] John Shijian Mo, *The Dilemma of Applying Bilateral Investment Treaties of China to Hong Kong and Macao: Challenge Raised by Sanum Investments to China*, 33 ICSID Review Foreign Investment Law Journal 125 (2018).
[117] Sanum (n 111), paras 99-115.

investors who made their investments in reliance on the protection of a BIT that subsequently became subject to a succession dispute. If the BIT ceases to apply upon succession, do the substantive rights that investors acquired under that instrument such as rights to fair and equitable treatment, protection against expropriation and freedom to repatriate capital also cease to apply?

Here the concept of "acquired" rights comes into picture.[118] This states that there are certain rights that are vested with individuals under international law, wherein a minimum standard has to be observed to give individuals those rights.[119] The concept of "vested" or "acquired" rights occupies a prominent place in traditional debates about state succession.[120] There are strong arguments for treating investor rights under BITs as falling within this category.[121] When it comes to acquired rights such as those that might also include commercial contracts, various forms of investment rights and concession agreements, the question that arises is that whether investors are can expect the newly successor state to respect or replicate the property, regulatory and investment regime that was in place when the predecessor state was there?

The principle is recognised by the Permanent Court of International Justice in the *Upper Silesia* case wherein it stated that that private rights duly acquired under the law in force at the time cannot be unilaterally withdrawn and survive legal transitions and this includes changes of sovereignty.[122] Applied to investment treaty rights, the argument runs that a foreign investor who commits capital and expertise to a host state in reliance on BIT protections acquires, at the moment of investment, a vested right to the continuation of those protections. This right is not extinguished by the mere fact that the host state subsequently undergoes territorial fragmentation.[123]

The concept of acquired rights has been applied most prominently in the context of retroactive treaty modification stating that states cannot deprive investors of their right to arbitration under

[118] ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, VOL. III, p. 408-9.
[119] M. Orellana, International Law on Investment: the Minimum Standard of Treatment, 1 Transnational Dispute Management (July 2004).
[120] Andreas Zimmerman, State Succession in Other Matters than Treaties, Max Planck Encyclopedia of Public International Law (2006) .
[121] Sebastian Kiefer, Chapter V: The Doctrine of Acquired Rights in Cases of State Succession: Status, Content, Value, Limits and Potential, in Continuity in Times of Change: Acquired Rights and State Succession 463 (2023)
[122] Certain German Interests in Polish Upper Silesia (Germany v Poland), PCIJ Series A No 7, Judgment, 25 August 1925, p 42.
[123] Sanum Investments Limited v Lao People's Democratic Republic, PCA Case No 2013-13, Award on Jurisdiction, 13 December 2013, para 246.

a long-standing BIT mid-way through a proceeding by issuing interpretive declarations that effectively amount to treaty amendment.[124] The underlying logic of these decisions maps naturally onto the succession context.[125] A successor state that invites foreign investment and also benefits from the commercial activities of established investors and then claims that the BIT protecting those investors never applied to it is engaging in conduct that is difficult to reconcile with fundamental principles of legal certainty and legitimate expectation.[126]

The vested rights argument also draws support from the broader literature on investor rights as direct international rights rather than derivative state interests. An increasingly influential line of scholarship, and a growing strand of investment arbitration jurisprudence, treats the rights conferred on investors under BITs as belonging to investors themselves and are enforceable directly against the host state without the intermediation of the investor's home state, and not subject to extinction by acts of the home state or by changes in the treaty framework at the inter-state level.[127]

The vested rights framework does have limits and it is important to be clear about what it establishes and what it does not. It does not provide a freestanding basis for treaty continuity independent of the inter-state consent analysis. A successor state that unambiguously, and before the critical date, communicates its unwillingness to be bound by the predecessor's BIT has not created a vested right in investors who had not yet invested and the argument is weaker even for those who had. What the framework does is provide an additional basis which is supplementary to the tacit consent analysis for tribunals to give effect to the reasonable expectations of established investors in circumstances where the consent picture is ambiguous.[128] Where the evidence is genuinely inconclusive, the principle that vested investor rights should not be extinguished without clear successor state consent provides a tie-breaking consideration in favour of jurisdiction.

[124] AMF Aircraft leasing Meier & Fischer GmbH & Co KG v Czech Republic, PCA Case No 2017-15, Final Award, 11 May 2020, para 338; Eskosol SpA in liquidazione v Italian Republic, ICSID Case No ARB/15/50, para 226.
[125] Justin A. Fraterman, Secession, State Succession and International Arbitration (Mar. 7, 2013).
[126] Tams (n 38) 331.
[127] Corn Products International, Inc v. United Mexican States, ICSID Case No ARB(AF)/04/1, Decision on Responsibility, 15 January 2008, para 167; Occidental Exploration & Production Company v. Ecuador (2005) EWCA Civ 1116, paras. 17-18. *See also* August Reinisch and Sebastián Mansour Fallah, Acquired or Vested Rights (2022) ICSID Review 114-15.
[128] Raul Pereira Fleury, State Succession and BITs: Challenges for Investment Arbitration (2016) 27 Amsterdam Review International Arbitration 451.

IV.2 Survival Clauses and their interaction with succession

Most modern bilateral investment treaties contain "survival" or "sunset" clauses.[129] These are provisions specifying that, in the event of termination of the treaty, the protections afforded to investments made prior to termination will continue to apply for a defined period, typically ten to twenty years.[130] The interaction between these clauses and the law of state succession raises questions that have not yet been fully resolved in the jurisprudential or scholarly literature.

The primary doctrinal function of survival clauses is to protect investors from the consequences of deliberate treaty termination by the contracting parties. Their legislative purpose is to provide investors with protection against sudden changes in policy and investment environment and to ensure the stability of investment protection and legal certainty.[131] On this basis, arbitral tribunals have held that survival clauses remain effective even when a treaty is mutually terminated by the contracting parties. The legitimate interests of third-party investors cannot be defeated by an inter-state agreement to which they were not party.[132]

The application of this principle to the succession context is more complex. If a BIT concludes that it does not bind the successor state either because no evidence of tacit consent exists or because the successor state affirmatively disclaimed succession before the critical date, the survival clause of the predecessor's BIT has no apparent subject matter. There is no treaty in force from which it can protect investors. The situation is analytically different from the mutual termination cases where a treaty indisputably existed and was then deliberately ended.

The more interesting case arises where a tribunal concludes that the predecessor's BIT did, by tacit consent or conduct, continue to apply to the successor state for some period following independence, but that the successor state subsequently and unilaterally sought to terminate that application. In that scenario, the survival clause would operate to preserve investor protections for its stipulated duration. Such termination does not extinguish survival clause

[129] Kenneth J. Keith, Succession to Bilateral Treaties by Seceding States, 7 Victoria Univ. Wellington Law Review Paper 155 (2017).
[130] Zhe Wang, Survival Clause under the International Investment Treaty Reform: Challenge and Response, 14 Beijing Law Review1878 (December 2023) pg. 1879.
[131] Impresa Grassetto SpA v Republic of Slovenia (ICSID arbitration); Eastern Sugar BV (Netherlands) v Czech Republic, SCC Case No 088/2004, Partial Award, 27 March 2007.
[132] Marco Gavazzi & Stefano Gavazzi v. Romania, ICSID Case No. ARB/12/25, Decision on Jurisdiction, Admissibility and Liability, (April 21, 2015); Walter Bau AG (In Liquidation) v. Kingdom of Thailand, UNCITRAL Arb., Award,(July 1, 2009).

protections which continue to operate for their stipulated period.[133]

IV.3 The Human Rights analogy and its limits

A further argument that has been advanced in favour of automatic or near-automatic treaty continuity in the succession context is drawn from the law of human rights treaty succession.[134] The UN Human Rights Committee has taken the position that human rights treaty obligations are not capable of being defeated by changes of sovereignty. Once a state has been accorded the protection of a human rights instrument, that protection devolves with territory and continues to belong to them, notwithstanding State succession.[135] If the same logic applied to bilateral investment treaties, the case for continuity would be substantially strengthened.[136]

The analogy has evident appeal but faces serious difficulties that should not be minimised. The characteristics of human rights treaties differ from those of bilateral investment treaties in several material respects. Human rights treaties typically operate *erga omnes* that is their obligations run to the international community as a whole rather than to specific bilateral partners. This multilateral character is precisely what grounds the argument that they should continue despite changes of sovereignty affecting one of the parties. BITs, by contrast, are bilateral instruments providing reciprocal protection only to investors of the two specific contracting states. The "personal equation" of bilateral treaty relations as discussed in the earlier parts militates against the extension of human rights succession logic to this context.[137]

Second, human rights treaties have traditionally been regarded as imposing primarily restraint obligations on states. These are obligations not to interfere with established rights. Whereas bilateral investment treaties create positive procedural entitlements such as binding arbitration obligations that impose significant financial and institutional burdens on the state. The exposure that a BIT creates mandatory arbitration against sovereign states at the instance of private investors with the possibility of substantial damages awards. It has no direct parallel in the human rights treaty context. A rule of automatic succession that imported this exposure

[133] Eastern Sugar v Czech Republic (n 36); Gavazzi v. Romania (n 132).
[134] Odysseas G. Repousis & James Fry, Armed Conflict and State Succession in Investor-State Arbitration, 22 Columbia Journal of European Law 421 (Summer 2016).
[135] UN Human Rights Committee, General Comment No 26 (61) (1997) UN Doc CCPR/C/21/Rev.1/Add.8/Rev.1, para 4.
[136] Patrick Dumberry & Daniel Turp, State Succession with Respect to Multilateral Treaties in the Context of Secession: From the Principle of *Tabula Rasa* to the Emergence of a Presumption of Continuity of Treaties, 13 Baltic Yearbook of International Law 27 (2013).
[137] Tams (n 38) 335-36; Deripaska v Montenegro (n 64).

onto a new state without its consent would be an outcome qualitatively different from the extension of restraint obligations to a successor sovereign.[138]

Third, and perhaps most importantly, the human rights succession analogy proves too much. If it were accepted in full, it would support not merely tacit consent to treaty continuity but genuine automaticity. The analogy may therefore be invoked as a supplementary argument in favour of giving effect to ambiguous evidence of tacit consent or as a consideration that supports the vested rights framework described in the earlier part but it cannot displace the bilateral consent requirement that is the foundation of the law of state succession as applied to BITs.[139]

IV.4 A Proposed Framework for 2026 and beyond

State fragmentation shows no signs of abating as a feature of the international legal order. Separatist movements, federalism debates and constitutional disputes in several regions of the world maintain a live risk of further succession events in the coming years. Each such event is capable of generating investment treaty succession disputes of the kind examined in the previous sections and the absence of a settled legal framework means that both investors and states are likely to continue litigating jurisdictional questions that could be resolved by greater doctrinal clarity.

The framework proposed here draws on the analysis in the preceding Parts to articulate a set of principles that could guide arbitral tribunals, states and treaty drafters in navigating future succession disputes. The framework rests on four pillars.

The first pillar is the contextualised presumption of continuity.[140] In the absence of a clear prior communication by the successor state that it does not consider itself bound by the predecessor's BITs, there should be a rebuttable presumption that the treaty continues to apply to the successor state's territory as of the date of succession. This presumption is justified by the practical importance of maintaining stability in investment relations during the period of uncertainty that follows independence, by the protection of investor expectations legitimately

[138] Tams (n 38) 335; Deripaska v Montenegro (n 64), paras 117-24.
[139] Patrick Dumberry, The Use of the Concept on Unjust Enrichment to Resolve Issues of State Succession to International Responsibility, 39 REV. BDI 507 (2009).
[140] Patrick Dumberry, New State Responsibility for Internationally Wrongful Acts by an Insurrectional Movement, 17 European Journal International Law 605 (2006).

formed under the predecessor's treaty framework, and by the broader principle that negotiations and eventual confirmation of treaty status proceed from a baseline of presumed continuity.[141] This presumption must be rebuttable. A successor state that clearly and unambiguously communicates before the critical date, its unwillingness to be bound should be entitled to the benefit of the tabula rasa rule.

The second pillar is the bilateral consent requirement. The presumption of continuity can be fully confirmed, or lifted, only through bilateral engagement between the successor state and the third-state treaty partner.[142] A unilateral declaration by the successor state has normative significance but is not conclusive on its own. The twilight period following independence is precisely the space in which bilateral intent should be established and both states bear responsibility for clarifying their positions in that period. Third-state parties that fail to respond to succession declarations and that continue to conduct themselves as though the treaty applies cannot later disavow the tacit acceptance that their silence and conduct evidenced.

The third pillar is the specific weight of the BIT. The bilateral consent requirement applies with particular force to bilateral investment treaties precisely because of the distinctive obligations they impose such as mandatory arbitration, fair and equitable treatment standards, expropriation protections and capital transfer rights. The higher the burden imposed by the treaty on the successor state, the clearer the evidence of bilateral consent should be required to be. General declarations of willingness to continue economic treaty obligations without specific reference to BITs or investment arbitration will not normally suffice.

The fourth pillar is the vested rights backstop. Where the bilateral consent picture is genuinely ambiguous and where the evidence falls short of what would be needed to establish tacit consent under the general consent framework but nonetheless reflects a pattern of conduct consistent with treaty application. The protection of vested investor rights provides an additional, supplementary basis for resolving the ambiguity in favour of jurisdiction. This backstop should not be used to circumvent the consent analysis.

For treaty drafters, the framework suggests a practical response. Successor state clauses in BITs should explicitly address the position of newly independent successor states, specifying the

[141] ILA Resolution No 3/2008; ILA, Rapport Final, New Delhi 2002, 27.
[142] Patrick Dumberry, State Succession to BITs: Analysis of Case Law in the Context of Dissolution and Secession, 34 Arbitration International 445 (2018).

mechanism by which succession can be confirmed or disclaimed and establishing a defined period within which the successor state must communicate its position. The proliferation of modern treaty practice provides adequate vehicles for institutionalising these provisions and the investment treaty community would benefit from greater attention to succession scenarios in treaty design.

CONCLUSION

The question of bilateral investment treaty succession in the context of state fragmentation has generated a body of law that is rich in detail but uncertain in its ultimate contours. The central tensions between automaticity and consent, continuity and clean slate, investor protection and sovereign autonomy have not been resolved and are unlikely to be fully resolved by any single arbitral award or scholarly contribution. What this paper has attempted to demonstrate is that the competing doctrines are not equally defensible and that a coherent framework can be constructed from the available materials.

The tabula rasa rule reflects the deeper logic of bilateral treaty law. The identity of the contracting parties matters that treaty negotiations produce outcomes specific to the particular relationship they govern and that a new sovereign cannot be treated as identical to its predecessor. This logic applies with particular force to bilateral investment treaties which impose obligations of a different order from most other bilateral instruments and which can expose states to open-ended arbitral liability. No customary rule of automatic succession to such treaties has emerged, and the weight of state practice and scholarly opinion confirms that the ILC's inclusion of continuity in the VCSST was a choice of progressive development rather than codification.[143]

At the same time, the clean slate rule as an absolute default would produce outcomes that are difficult to defend in the investment treaty context. The legitimate expectations of foreign investors who made their investments in reliance on an established treaty framework, the practical importance of stability in commercial treaty relations and the strong normative weight of the vested rights principle all counsel against treating succession as automatically extinguishing treaty-based protections that were well-established at the time of investment.

[143] Mitchell Spence, Groups of Companies and Subject-Matter Jurisdiction in Investor-State Arbitration: Investment Unveiled?, 7 Victoria University Wellington Law Review Paper 79 (2017).

The resolution of this tension lies in the tacit consent framework. Where a coherent pattern of state conduct, bilateral communications and mutual treatment of the investment relationship points to a shared understanding that the BIT applies to the successor state, tribunals should give effect to that understanding. Where the evidence is genuinely inconclusive, the presumption of continuity, rebuttable, bilateral in character and subject to the full operation of the critical date doctrine provides a principled default that serves the stability interests of the international investment order without indefinitely deferring to the preferences of states that seek to benefit from established investment relationships while disclaiming the obligations that underpin them.

The question that the next generation of fragmentation-driven succession disputes will require tribunals to answer is not whether automatic succession exists, it plainly does not. But how much evidence of bilateral intent is sufficient, and how the critical date doctrine should be applied to evaluate conduct-based claims that accumulated over years before a dispute crystallised. This paper has proposed answers to those questions that are grounded in the existing jurisprudence and consistent with the foundational principles of international law. Their ultimate validation lies in the willingness of tribunals to engage with them.