

Public International Law

Chapter Eight

State Succession

Adigrat University, 2016
School of Law
Mussie M. (LL.B, LL.M)

Introduction

- The term 'state succession' is used to describe that branch of int'l law which deals with the legal consequences of a change of sovereignty over territory.
- When one state acquires territory from another, which of the rights and obligations of the 'predecessor state' pass to the 'successor state'?
- What happens to existing bilateral and multilateral treaties, to membership of int'l organizations, to international claims, to the nationality of the affected persons, to public and private property, to contractual rights, to national archives and to the national debt?
- This problem is complicated because it can arise in several different forms. A state may lose part of its territory, or it may lose all of it. Similarly, the loss of territory may result in the enlargement of one or more existing states, or it may result in the creation of one or more new states.

Introduction

- This area become important, in the wake of decolonization, dissolution, unification and secession of states—Germany and Yemeni Unification, Dissolution of Yugoslavia and Soviet Union, and Secession of Eritrea from Ethiopia, East Timor from Indonesia and the recent disputed Crimean case.
- We have two relevant treaties to state succession:
- The 1978 Vienna Convention on State Succession in Respect of Treaties, was entered into force on 6 November 1996 following the ratification of 22 states, including Ethiopia, Egypt, Bosnia, Croatia, Czech Republic, Iraq, Estonia, Ukraine and Tunisia.
- The 1978 Vienna Convention on State Succession in Respect of State Property, Archives and Debts

- Treaties which deal with rights over territory, succession to rights and obligations always occurs.
- Such treaties 'run with the land' and are unaffected by changes of sovereignty over the territory.
- If a treaty delimits a boundary between two states, and if the territory on one side of the boundary is acquired by a third state, the third state is bound by the boundary treaty.
- The rule of automatic succession to boundary treaties is part of a wider principle that a state acquiring territory automatically succeeds to the boundaries of that territory, whether the boundaries are fixed by a treaty or whether

Treaties dealing with rights over territory

- One consequence of this rule is that newly independent states inherited boundaries drawn by the former colonial powers;
- African States, for example, inherited the Colonial Boundary Treaties, despite the colonial boundaries were often unnatural, disregarding ethnic divisions and cutting through areas which form a natural economic unit.
- In 1964, the OAU adopted a resolution which declared that 'all member states pledge themselves to respect the borders existing on their achievement of national independence'.
- This resolution reflects the so-called uti possidetis principle, which originally developed in South America in connection with the independence of states from Spanish and Portuguese rule to protect territorial integrity under the existing former administrative boundaries.
- Ex, ICJ Decision on Border Dispute Mali vs. Burkina Faso

Other types of treaties

- With respect to other types of treaties, the rules vary according to the nature of the territorial change which has occurred.—Secession, Unification or Dissolution.

The principle of ‘moving treaty boundaries’

- When a state loses territory, it loses its rights and obligations under treaties, in so far as those treaties used to apply to the lost territory.
- Example, Ethiopia lost its rights and obligations with respect to the Red Sea, when Eritrea seceded from it.
- When an existing state acquires territory, it does not succeed to the predecessor state's treaties; but its own treaties normally become applicable to that territory.
- For instance, there are many decisions by French and Belgian courts holding that French treaties applied to Alsace and Lorraine after they were ceded to France in 1919. This rule is codified by Article 15 of the 1978 Vienna Convention.
- The 1955 Eritrean Federation with Ethiopia had similar effect.

Other types of treaties

- The above rules are reflected in the so-called principle of 'moving treaty boundaries' which is thought to apply in the case when an existing state transfers sovereignty over a part of its territory to another state.
- It means that the treaties concluded by the predecessor state are no longer applicable to that territory, while the treaties of the successor state automatically apply to it.
- This rule of the law of state succession reflects the law of treaties and knows only an exception if the application of a particular treaty to a certain territory is incompatible with the object and purpose of the treaty.
- The rule, however, is controversial because it may be too restrictive to deal with cases in which one state is completely extinguished by fusion with another state, a view particularly advanced by Germany in the discussions on the 1978 Convention with the possible eventual reunification of the two German states in mind.

Other types of treaties

Decolonization and New States

- As regards new states which have come into being through decolonization, the 1978 Vienna Convention lays down the following rules:
 - 1) A new state can succeed to a multilateral treaty, to which the predecessor state was a party, by notifying the depositary that it regards itself as succeeding to the treaty.
- There are some exceptions to this rule; for instance, a new state cannot succeed to a multilateral treaty if that would be incompatible with the intentions of the parties to the treaty. A new state is under no obligation to succeed to a multilateral treaty if it does not want to do so.
- 1) A new state succeeds to a bilateral treaty, which the predecessor state made with another state, only if that other state and the new state both agree.
- However, agreement can be inferred from conduct; for instance, if both sides claim rights, or grant rights to one another, on the basis of the treaty, they will be estopped from denying that succession has occurred. Such implied

Other types of treaties

- These rules apply only if the new state was formerly a dependent territory (for example, a colony) of the predecessor state.
- A new state formed by secession from the metropolitan (that is, non-‘colonial’) territory of the predecessor state, or by the disintegration of the predecessor state’s metropolitan territory into two or more new states, succeeds automatically to most of the predecessor state’s treaties.
- When a new state is formed by the merger of two or more existing states, treaties made by the predecessor states continue to apply to the territory to which they applied before the merger, subject to certain exceptions.

Other types of treaties

- Under Articles 17 and 24 of the 1978, a new state is under no obligation to succeed to a treaty if it does not want to do so;
- It can start life with a 'clean slate'.
- The 'clean slate' doctrine was well established in customary international law before 1945.
- Developments after 1945 cast some doubt on the 'clean slate' doctrine, because some of the states which became independent after 1945 seemed to accept that they succeeded automatically to treaties made by their predecessor states.
- However, it is submitted that this practice of automatic succession was insufficient to destroy the 'clean slate' doctrine.→→→ continue

Other types of treaties

Because:

- 1) Only some of the states which became independent after 1945 followed this practice, while others followed the 'clean slate' doctrine;
 - 2) Some of the states which followed the practice of automatic succession applied it to only some of the treaties made by their predecessors, and not to others;
 - 3) The states which followed the practice of automatic succession appear to have done so because they found it convenient, not because they considered themselves obliged to do so.
- By reaffirming the 'clean slate' doctrine

Secession—Baltic states

The Baltic states (Estonia, Latvia and Lithuania) that had been annexed by the Soviet Union in 1940 declared their independence in 1990 and 1991. A number of states recognized their independence, including the Soviet Union on 6 September 1991, and they were admitted to the United Nations. Whether the Baltic states may be regarded as new independent states in the sense of the 1978 Convention is unclear because the Convention fails to provide a definition of 'dependent territories'. States take different positions on whether the Baltic States should be recognized as new states following their independence from the Soviet Union, as well as on the issue of whether this is a case of the 'dismemberment' of a state or a case of 'secession'. The Baltic states themselves do not regard themselves as successor states to the USSR and have refused to be bound by any doctrine of treaty succession to bilateral or multilateral treaties concluded by the former Soviet Union.

Recent practice

Dismemberment—Yugoslavia

- The case of Yugoslavia is also a complex one. The independence declared by Slovenia and Croatia on 25 June 1991 (the implementation of these declarations was later postponed until 8 October 1991) as the first units of former Yugoslavia, was recognized by the European Union and a number of other states in January 1992, followed by the recognition of Bosnia Herzegovina on 7 April 1992. On 27 April 1992, Serbia and Montenegro set up the Federal Republic of Yugoslavia with the explicit claim of continuing the former Socialist Federal Republic of Yugoslavia. On 1 May 1992, the European Union expressed its willingness to recognize Macedonia as an independent state under a name acceptable to all parties (thereby taking into consideration the objections raised by Greece)

Recent practice

- Soon thereafter, on 22 May 1992, the new republics of Slovenia, Bosnia-Herzegovina and Croatia were admitted as members of the UN. The SC, however, denied the claim of the Federal Republic of Yugoslavia (Serbia and Montenegro) to automatically succeed to the membership of former Yugoslavia and required it to make a new application for admission because former Yugoslavia had ceased to exist. Much of the following dispute in New York had to do with the right of whom to raise which flag in front of the UN building. The same negative attitude towards Serbia's and Montenegro's claim to continuity was adopted by the Arbitration Commission set up within the framework of the Conference on Yugoslavia. The only major states willing to recognize the claim of the Federal Republic of Yugoslavia were Russia and China. In the GA Kenya, Swaziland, Tanzania, Zimbabwe, Zambia and Yugoslavia voted against the recommendation of the

Recent practice

Unification—Germany

The unification of Germany on 3 October 1990 is an almost unique case. The procedure adopted under Article 23 of the Constitution of the Federal Republic of Germany (West Germany) provided for the accession of the German Democratic Republic (East Germany, which ceased to exist) while retaining the identity and continuity of the Federal Republic. The alternative option under Article 146 of the Grundgesetz to adopt a new constitution was considered unfeasible—a view shared by the Commission of the European Community—because of the problems that might have arisen concerning the question of whether the united Germany would then have to be seen as a new international legal personality.

Recent practice

- From the German point of view, succession took place on the basis of the 'moving treaty boundaries' rule, although East Germany was an independent subject of international law (having a sui generis character as a state, as emphasized by the Federal Republic) and the unification involved the complete incorporation of one state into another state, instead of the transfer of a part of state territory. But the principle of 'moving treaty boundaries' was not really fully applied in the process. In practice, negotiations with all treaty partners of the former German Democratic Republic were held concerning the fate of treaties that had been concluded by East Germany.

Recent practice

- The continuation of membership in international organizations did not raise any special problems in the case of the United Nations, except for the refusal of the united Germany to pay for the outstanding contributions of East Germany to two peacekeeping operations in the Middle East (UNDOF and UNIFIL). The UN argued that Germany was liable to pay for the debts of the predecessor state to the extent that it had inherited property rights and interests. From the date of unification, in the United Nations the Federal Republic of Germany, to which the German Democratic Republic had acceded, simply acted under the designation 'Germany'.

Recent practice

- More complications became apparent in other international organizations particularly with regard to the European Community. While the Community in principle accepted the 'moving treaty boundary' rule, meaning that the territory of the Community was enlarged and the territorial scope of the application of Community law thus extended to former East Germany, it did not accept that all treaties concluded by East Germany had automatically been terminated. Moreover, the Community was in a position to argue that it had to be involved in negotiations on East German treaties, at least where exclusive competences had been transferred to Community organs. The alternative would have been a very complicated and time-consuming admission and amendment procedure concerning the European Community treaties.

International claims

- International claims for compensation for illegal acts are regarded as being intensely 'personal', and no succession occurs to the rights of the claimant state or to the obligations of the defendant state.
- The claims are unaffected by expansion or contraction of the claimant state or of the defendant state; new states commence with a 'clean slate'; and extinction of either the claimant state or the defendant state results in extinction of the claim.
- This last proposition is exemplified by Brown's claim. Brown, a US citizen, suffered a denial of justice in the South African Republic in 1895, but, before the claim was settled, the Boer War broke out and the Republic was annexed by the United Kingdom. The US presented a claim against the United Kingdom, but the arbitrator held that the United Kingdom had not succeeded to the South African Republic's liabilities for international claims.

Nationality

- It is sometimes said that a change of sovereignty over territory means that the subjects of the predecessor state, who inhabit the territory, automatically lose their old nationality and acquire the nationality of the successor state.
- But what is meant by the 'inhabitants' of a territory? Does birth on the territory suffice, or is residence to be taken as the criterion? Or are both birth and residence necessary? Or are they alternatives? If residence is taken into account, what are the critical dates or periods of time for determining whether someone is a resident?
- In practice, such problems can be regulated only by treaties or by municipal legislation. Treaties sometimes allow the individuals concerned to choose whether they want to retain their old nationality or acquire the nationality of the successor state.

Nationality

- It must be admitted, however, that much of the area is unclear. In 1993 therefore, the International Law Commission decided to include on its agenda the topic of state succession and its impact on the nationality of natural and legal persons.
- The preliminary conclusions of a working group submitted in 1995 start from the premise that, in situations resulting from state succession, every person whose nationality might be affected by the change in the international status of the territory has a right to nationality and that states have the obligation to prevent statelessness, as the most serious potential consequence of state succession.
- Other potential detrimental effects considered are dual nationality, the separation of families as a result of the attribution of different nationalities to their members, military service obligations, pensions and the right of residence.

Public property

- When a state acquires all the territory of another state, it succeeds to all the public property of that state (that is, all property belonging to the state, as distinct from property belonging to its nationals or inhabitants), wherever that property may be situated.
- On the other hand, if a state merely loses some of its territory, the successor state succeeds to much less of the predecessor's public property.
- Most of the public property situated in territory retained by the predecessor or state, or in third states, continues to belong to the predecessor state, while most of the public property situated in the transferred territory passes to the successor state.

Private property

- Private property rights do not lapse automatically when territory is transferred. If the successor state subsequently wishes to expropriate privately owned property in the territory which it has acquired, the extent of its power to do so depends on the nationality of the owner.
- If the owner has (or has acquired) the nationality of the successor state, the successor state's right to expropriate his property is unlimited under customary international law (although it may be limited by treaties on human rights).
- On the other hand, if the owner is a national of the predecessor state or of a third state, the

Private property

- Such, at any rate, are the traditional rules accepted by Western countries. Most 3rd World countries, however, reject these rules. Even when they were prepared to accept that the 'Western' rules are applicable to investments made in newly independent countries after independence, they maintained that different considerations apply to investments made before independence, at a time when those countries were unable to protect their own interests. Such investments, they argued, were often made on unequal terms and amounted to a form of colonialist exploitation. Some Western writers have tried to counter this point by suggesting that the rule requiring compensation in the event of expropriation is designed to prevent unjust enrichment, and that it is therefore logical, in certain cases, to reduce the amount of compensation payable for the act of expropriation, in order to take account of the extent to which the expropriated foreigner has unjustly enriched himself in the past.

Private property

- Unfortunately words like 'unjust enrichment' and 'exploitation' are so subjective that there are bound to be constant disputes about the application of a rule drafted in such terms; enrichment which seems just to one party will seem unjust to the other.
- And Western investors are hardly likely to make new investments in newly independent countries if they feel that those countries have enriched themselves unjustly at the expense of old investments.
- It is therefore questionable whether a relaxation of the traditional rules would really be in the long-term interests of the newly independent countries, and recent developments in foreign investment have shown that this is indeed true.

Contractual rights

- Even before the modern era of decolonization, some authorities doubted whether a successor state succeeded to the contractual obligations of the predecessor state.
- For instance, in *West Rand Central Gold Mining Co. v. The King*, the English High Court held that the Crown did not succeed to the contractual liabilities of the South African Republic after it had been annexed by the United Kingdom.
- This case has been criticized, and it was not followed by the PCIJ in the *German Settlers* case.
- It is sometimes said that the successor state cannot logically be bound by a contract to which it is not a party. But, if the alien has benefited the territory by spending money and effort in performing his contract, it is

Contractual rights

- On this analysis, the successor state's liability is probably not contractual but quasi-contractual—a term used to describe a situation where there is no contract, but where the law requires the parties to behave as if there were a contract, in order to prevent unjust enrichment.
- It does not matter much whether the successor state's liability is regarded as contractual or as quasi-contractual, because the results are the same in both cases; either the successor state must allow the alien to obtain the benefits due to him under the original contract; or
- If it wishes to deprive him of some or all of those benefits, it must compensate him for expropriating his rights.

Contractual rights

- The problem of contractual rights has arisen chiefly in connection with concessions and the national debt.
- A concession is a right granted by a state to a company or individual to operate an undertaking on special terms defined in an agreement between the state and the concessionaire;
- The undertaking usually consists of extracting oil or other minerals, or of providing a public utility (supplying gas, water, or electricity, running a canal or railway, and so on).
- The concessionaire's rights are semi-proprietorial, semi-contractual. Practice is not entirely consistent, but the better view is that a successor state must pay compensation if it revokes a concession granted by the predecessor state.

Contractual rights

- The problems which arise in connection with the national debt are more complex, and can be discussed only in outline here.
- If state A annexes the whole of state B's territory, it succeeds to the obligations which state B owed to foreign creditors in respect of state B's national debt. If state B loses only part of its territory, it is right that the successor state or states should take over part of B's debt, otherwise B, with reduced territory and economic resources, might be unable to meet its debts.
- For example, when British colonies became independent, they were made liable for the debts raised by the local colonial administration, but not for any part of the British national debt (even while they were colonies they did not contribute towards the cost of the British national debt). However, when the Irish Free State became independent in 1922, it took over part of the British national debt; otherwise independence would have relieved taxpayers in the Irish Free State of their previous responsibility for

Contractual rights

- Similarly, if state B loses all its territory as a result of being dismembered by several other states, it is only fair that responsibility for state B's debt should be split up among the successor states. The difficulty in these last two cases is deciding what proportion of the debt should be borne by each of the states concerned; in practice this problem can only be settled by treaty.
- The successor states to the former Soviet Union, for example, agreed that most of the property and the major part of the debt of the USSR were to be taken over by the Russian Federation. The other states were accorded small percentages and a remaining part was transferred to the Baltic States and Georgia.
- Finally, it should be noted that Western states refused to sign or ratify the 1978 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts mainly because it deals with succession to debts owed only to other states and not to