

# International Legal Issues for a Unified Korea: Protection of Third Party Rights Under Pre- Existing Bilateral Treaties

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# OUTLINE

- ▶ Law of State Succession
- ▶ Legal Foundation/Sources of International Law
- ▶ Application to a Unified Korea

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# LAW OF STATE SUCCESSION - Terms

## 1978 Vienna Convention on Succession of States in Respect of Treaties (“VCSST”)

- ▶ **State Succession** - “the replacement of one State by another in the responsibility for the international relations of territory”, *Article 2(b)*
- ▶ **Predecessor State** – “the State which has been replaced by another State on the occurrence of a succession of States”, *Article 2(c)*
- ▶ **Successor State** – “the State which has replaced another State on the occurrence of a succession of States”, *Article 2(d)*

# LAW OF STATE SUCCESSION – Historical Background

## “Waves Of Succession”

- ▶ **“First Wave”** – Era of decolonization (1950-74)
- ▶ **“Second Wave”** – Era of desovietization (1990-96)
- ▶ **“Third Wave”(?)** – 21<sup>st</sup> century state succession

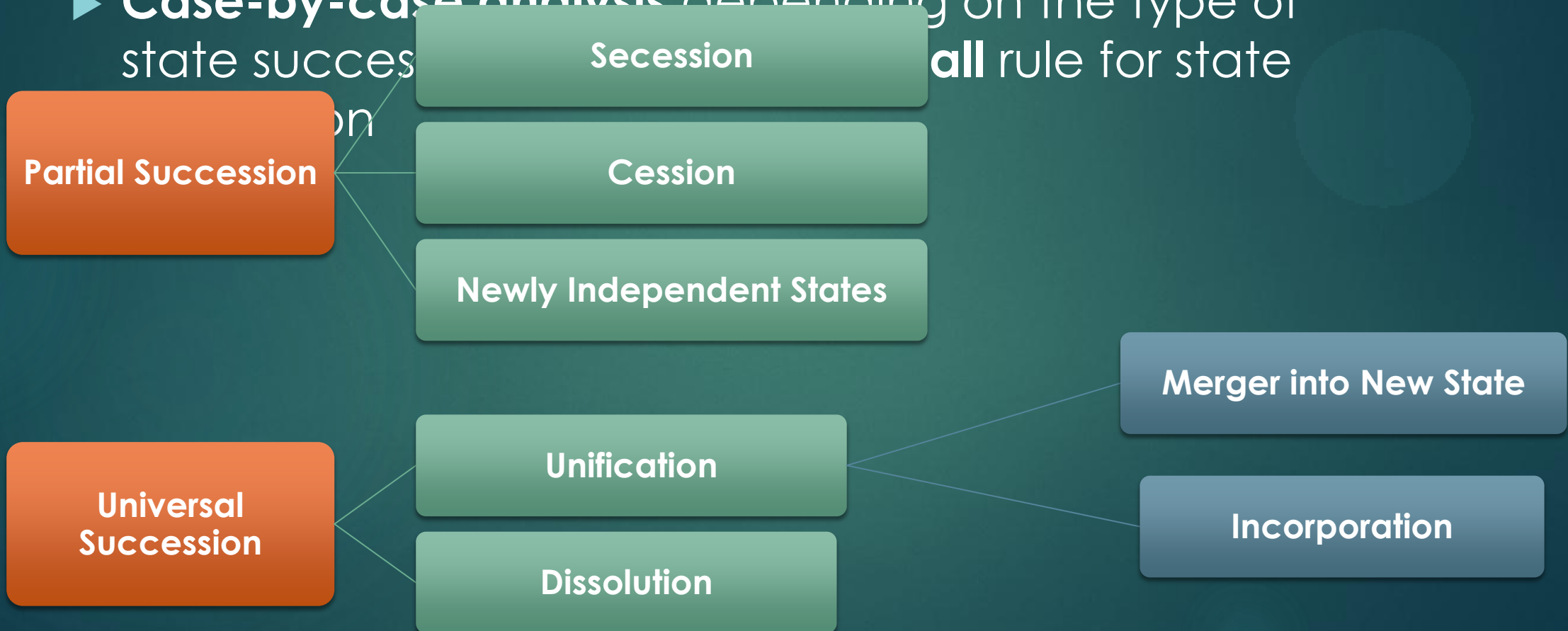
# LAW OF STATE SUCCESSION – Current Status

## ► Codification Efforts by the ILC

Topics/Issues	Title	Status
Treaties	Vienna Convention on Succession of States in Respect of Treaties	DoA: 23 Aug 1978 EIF: 6 Nov 1996
State Property, Archives, and Debts	Vienna Convention on Succession of States in Respect of State Property, Archives, and Debts	DoA: 8 Apr 1983 EIF: <i>Not yet in force</i>
Nationality	Nationality of Natural Persons in relation to the Succession of States	Draft Articles with commentaries – December 1999
State Responsibility	Succession of States in Respect of State Responsibility	<i>Work in Progress</i> – first report in 2017

# LAW OF STATE SUCCESSION – Types of State Succession

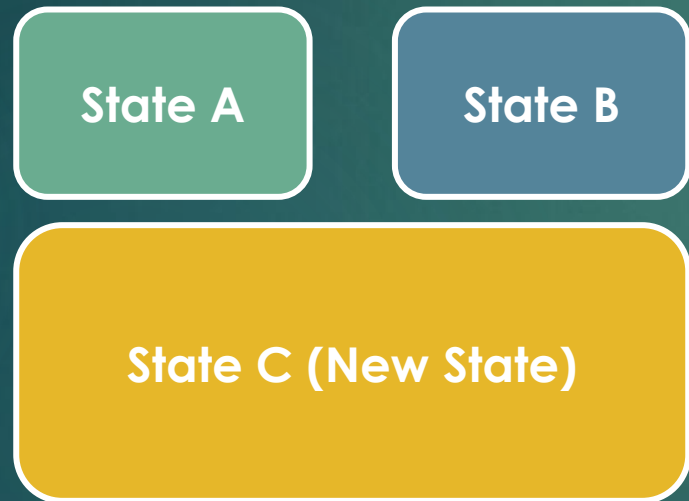
- ▶ **Case-by-case analysis** depending on the type of state succession  
▶ **no general rule for state succession**



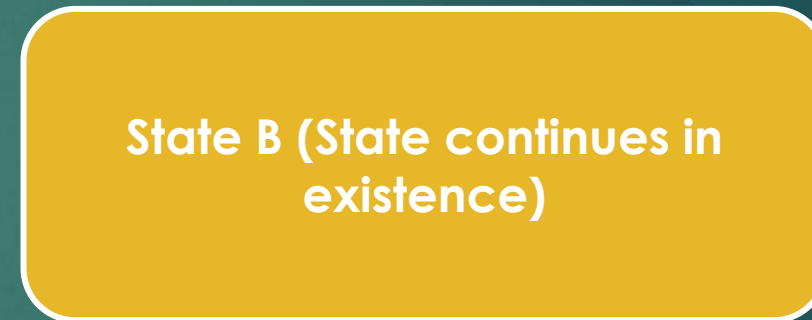


# LAW OF STATE SUCCESSION – Types of State Succession

## Merger Into New State



## Incorporation



# OUTLINE

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# LEGAL FOUNDATION - Sources of International Law

## ▶ Article 38(1), Statute of the International Court of Justice

“The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. **international conventions**, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. **international custom**, as evidence of a general practice accepted as law;
- c. the **general principles of law** recognized by civilized nations;
- d. subject to the provisions of Article 59, **judicial decisions** and the **teachings of the most highly qualified publicists** of the various nations, as subsidiary means for the determination of rules of law.”

# LEGAL FOUNDATION – International Conventions/Treaties

- ▶ 1978 Vienna Convention on Succession of States in Respect of Treaties
  - ▶ Not applicable as a whole (applicable in part)



# LEGAL FOUNDATION – Customary International Law

- ▶ “those rules of international law that derive from and reflect a general practice accepted as law”

(Second Report on Identification of CIL, ILC)

- ▶ **Two Elements:**

- ▶ General practice (objective element)
- ▶ Acceptance as law – *opinio juris* (subjective element)

# LEGAL FOUNDATION – Customary International Law

- ▶ **Two Elements:**

- ▶ **General practice** (objective element) - What

- ▶ Attributable to a State

- ▶ Consistency

- ▶ Time

- ▶ **Acceptance as law** (subjective element) – Why?

# LEGAL FOUNDATION – Customary International Law

## ▶ Two Elements:

▶ **General practice** (objective element) - What

▶ **Acceptance as law** (subjective element) – Why?

▶ “A belief that the practice is permitted or required as a matter of legal right or obligation”

*(Hall, Principles of International Law, 2016)*

▶ Not practice out of “courtesy, good-neighborliness, political expedience...convenience or tradition”

# LEGAL FOUNDATION – Customary International Law

- ▶ **Customary Rules for All Types of State Succession**
  - ▶ Border Treaties
  - ▶ Localized Treaties
  - ▶ Political Treaties
- ▶ **State Practice for Succession by Unification**
  - ▶ Merger of States
  - ▶ Incorporation



# BORDER TREATIES

“The weight of the evidence of State practice and of legal opinion in favour of the view that in principle a boundary settlement is unaffected by the occurrence of a succession of States is strong and powerfully reinforced by the decision of the United Nations Conference on the Law of Treaties to except from the fundamental change of circumstances rule a treaty which establishes a boundary”

ILC Commentary on Succession of States in Respect of Treaties (1974)

# BORDER TREATIES

“A succession of States does not as such affect:  
(a) A boundary established by a treaty; or  
(b) Obligations and rights established by a treaty and relating to the regime of a boundary”

Art. 11, Vienna Convention on Succession of States in respect of Treaties (1978)

# OTHER DISPOSITIVE TREATIES (LOCALIZED TREATIES)

- Dealing with treaties based on the territory of a State or treaties creating purely local obligations
  - Treaties relating to transport, fisheries, and hunting (¶15)
  - Treaties providing for freedom of navigation in particular international rivers or waterways (¶11)
  - Treaties concerning water rights or navigation on rivers (¶36)

*Waldock, Fifth Report on Succession in Respect of Treaties (1972)*

# OTHER DISPOSITIVE TREATIES (LOCALIZED TREATIES)

A succession of States does not as such affect:

- (a) obligations relating to the use of any territory, or to restrictions upon its use, established by a treaty for the benefit of any territory of a foreign State and considered as attaching to the territories in question;
- (b) rights established by a treaty for the benefit of any territory and relating to the use, or to restrictions upon the use, of any territory of a foreign State and considered as attaching to the territories in question.

Art. 12(1), 1978 VCSST

# OTHER DISPOSITIVE TREATIES (LOCALIZED TREATIES)

“The Court considers that Article 12 [of the 1978 Vienna Convention on Succession of States in Respect of Treaties] reflects a rule of customary international law; it notes that neither of the parties disputed this.”

ICJ, *Gabčíkovo-Nagymaros Project* (1997)

# POLITICAL TREATIES

“Alliances and treaties of friendship, treaties forming a political union and treaties establishing a system of economic integration are such embodiments of genuine political treaties...any treaty which is indissolubly linked to the particular political structure of a state, bound to its peculiar political and economic order.”

*Oeter, German Unification and State Succession (1991)*

# POLITICAL TREATIES

“No succession takes place with regard to rights and duties of the extinct state arising from its purely political treaties. Thus treaties of alliance or of arbitration or of neutrality or of any other political nature fall to the ground with the extinction of the state which concluded them...as regards treaties of commerce, extradition and the like made by the extinct state, it is controversial whether they remain valid...because such treaties, although they are non-political in a sense, possess some prominent political features.”

Jennings & Watts, *Oppenheim's International Law* (2008)

# LEGAL FOUNDATION – Customary International Law

- ▶ Customary Rules for All Types of State Succession
- ▶ State Practice for Succession by Unification
  - ▶ Merger of States
  - ▶ Incorporation



# MERGER OF STATES

- ▶ For cases of mergers, CIL already exists.
- ▶ **Rule:** The pre-existing treaties of the predecessor State (1) continue in force within their respective territories and (2) may be terminated by a later treaty entered by the successor State.
- ▶ **Evidenced by state practice:** United Arab Republic (1958) and United Republic of Tanzania (1964)

# MERGER OF STATES – State Practice

- ▶ **Part 1: Continue Pre-existing treaty Relations within Respective Regions**
  - ▶ **Constant and uniform practice**
    - ▶ **UAR** – Article 69 of its Provisional Constitution – “provided for the continuance in force of all the pre-union treaties of both Egypt and Syria within the limits of the particular region”
    - ▶ **Tanzania** – Note to the UN Secretary General “all international treaties and agreements in force...remain in force within the regional limits”
  - ▶ ***Opinio Juris***
    - ▶ Evidence through the declarations made by the federations and unions

# MERGER OF STATES – State Practice

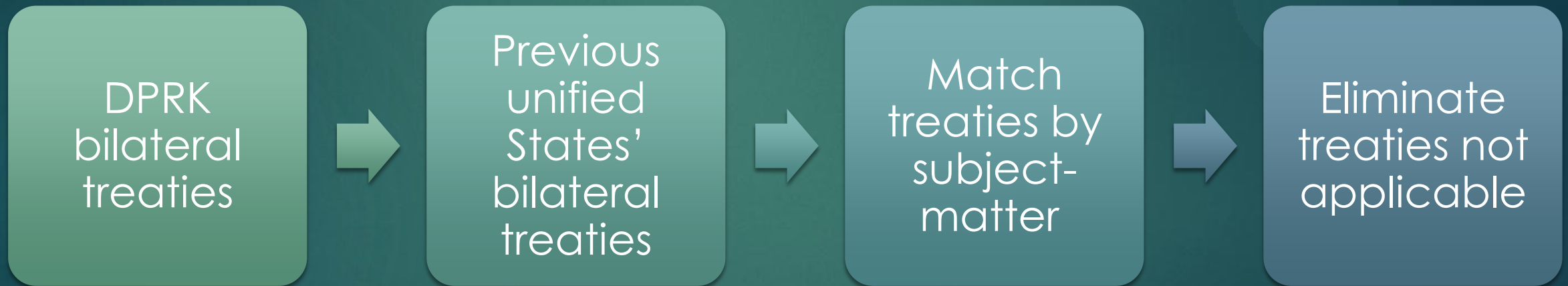
- ▶ **Part 2: Pre-Existing Treaties may be Superseded with a Later Treaty**
  - ▶ **Constant and uniform practice**
    - ▶ **UAR** – Syria had bilateral trade agreements with third States (China, Czechoslovakia, GDR, Hungary); Egypt had bilateral trade agreements with third States (China, Czechoslovakia, GDR, Greece, the US, USSR, and Hungary) – **superseded by new trade agreements between the UAR and the third States**
    - ▶ **Tanzania** – bilateral agreements continued in force, unless incompatible with the “constitutional position” of the United Republic
  - ▶ ***Opinio Juris***
    - ▶ Evidenced by the treaties themselves
    - ▶ Article 59 of the VCLT – “A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter...”

# INCORPORATION

- ▶ No CIL yet existing
- ▶ Only by state practice – Germany and Vietnam (those States that unified through “incorporation”)
- ▶ Do these practices meet the elements of CIL?

# WHY ONLY GERMANY?

## ► Methodology



# BILATERAL TREATIES OF DPRK

Treaties
Promotion and Reciprocal Protection of Investments
Visa Exemption for Diplomatic and Service Passport Holders
Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income
Scientific and Technological Cooperation
Trade Agreement
Consular Convention
Treaty on Friendship and Cooperation (Co-operation)
Treaty concerning the Mutual Provision of Legal Assistance in Civil, Family and Criminal Cases
Air Transport Agreement
Agreement Concerning Co-Operation in the Field of Tourism
Agreement Concerning Co-Operation in Matters of Health
Agreement on Cultural Co-Operation

Treaties
Convention on the Establishment of Diplomatic Relations and the Exchange of Diplomatic Representatives
Treaty of Trade and Navigation
Agreement Concerning the Exchange of Postal Correspondence and Postal Parcels
Arrangement Concerning Telegraph and Telephone Services
Convention Regulating the Citizenship of Persons Having Dual Citizenship
On Maritime Merchant Shipping
Bilateral Co-Operation in the Field of Sport and Recreation
Agreement on Educational and Cultural Cooperation
Agreement on Mutual Travel of Citizens
Cooperation in the Fields of Culture, Education, Science and Sports

# BILATERAL TREATIES OF GDR

Treaties
Promotion and Reciprocal Protection of Investments
<b>Visa Exemption for Diplomatic and Service Passport Holders</b>
<b>Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income</b>
<b>Scientific and Technological Cooperation</b>
<b>Trade Agreement</b>
<b>Consular Convention</b>
<b>Treaty on Friendship and Cooperation (Co-operation)</b>
<b>Treaty concerning the Mutual Provision of Legal Assistance in Civil, Family and Criminal Cases</b>
<b>Air Transport Agreement</b>
<b>Agreement Concerning Co-Operation in the Field of Tourism</b>
<b>Agreement Concerning Co-Operation in Matters of Health</b>
<b>Agreement on Cultural Co-Operation</b>

Treaties
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Convention Regulating the Citizenship of Persons Having Dual Citizenship
<b>On Maritime Merchant Shipping</b>
Bilateral Co-Operation in the Field of Sport and Recreation
<b>Agreement on Educational and Cultural Cooperation</b>
Agreement on Mutual Travel of Citizens
Cooperation in the Fields of Culture, Education, Science and Sports

# GERMANY – THE UNIFICATION TREATY

## Article 11 - TREATIES OF THE FEDERAL REPUBLIC OF GERMANY

The Contracting Parties proceed on the understanding that international treaties and agreements to which the Federal Republic of Germany is a contracting party, including treaties establishing membership of international organizations or institutions, shall retain their validity and that the rights and obligations arising therefrom, with the exception of the treaties named in Annex I, shall also relate to the territory specified in Article 3 of this Treaty. Where adjustments become necessary in individual cases, the all-German Government shall consult with the respective contracting parties.



# GERMANY – THE UNIFICATION TREATY

## Article 12(1) - TREATIES OF THE GERMAN DEMOCRATIC REPUBLIC

The Contracting Parties are agreed that, in connection with the establishment of German unity, international treaties of the German Democratic Republic shall be discussed with the contracting parties concerned with a view to regulating or confirming their continued application, adjustment or expiry, taking into account protection of confidence, the interests of the states concerned, the treaty obligations of the Federal Republic of Germany as well as the principles of a free, democratic basic order governed by the rule of law, and respecting the competence of the European Communities.

# Germany – Trade Agreements

- ▶ Ceased to continue in force
- ▶ Reasons:
  - ▶ (1) Both FRG and third States are members of GATT
  - ▶ (2) FRG – member of the EEC
- ▶ Same subject-matter treaties

# Germany – Avoidance of Double Taxation & Prevention of Fiscal Activities Agreements

- ▶ Ceased to continue in force
- ▶ Same subject matter

# Rules Derived

## ▶ From CIL

- ▶ No treaty succession for political treaties
- ▶ Automatic treaty succession for border and localized treaties
- ▶ With merger of States – pre-existing treaties continue in force within their respective territories unless superseded by a later treaty

# Rules Derived

- ▶ **From Germany state practice - model**
  - ▶ Successor State's treaties continue in force, extending to the territory of the predecessor State
  - ▶ Predecessor State's treaties, except for those already determined by CIL, are subject to consultations and negotiations by the Contracting parties

# LEGAL FOUNDATION – General Principles of Law

- ▶ **Definition:** “Principles of law that are common to the major legal systems of the world”

(Hall, *Principles of International Law*, 2016)

- ▶ “gap-filling” role

# PACTA SUNT SERVANDA

- ▶ “Agreements must be kept”
- ▶ **Article 26 of the VCLT**
  - ▶ “every treaty **in force** is binding upon the parties to it and must be performed by them in **good faith**”
- ▶ **In Force**
  - ▶ Deals with treaties that are in force + those treaties that have been signed, but yet ratified
- ▶ **Good Faith**
  - ▶ Contracting Parties “must comply with the obligations and responsibility agreed upon”

# REBUS SIC STANTIBUS

- ▶ “Things thus standing”
- ▶ **Article 62 of the VCLT**
  - ▶ A fundamental change of circumstances which has occurred...**may not be invoked** as a ground for termination or withdrawal unless:
    - ▶ (1) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty
    - ▶ (2) the effect of the change is radically to transform the extend of obligations still to be performed under the treaty



# *Pact Tertiis*

- ▶ “Agreements (do not harm) third parties”
- ▶ **Article 34 of the VCLT**
  - ▶ “A treaty does not create either obligations or rights for a third State without its consent”
- ▶ With treaties regarding rights or obligations of third States, the third States’ consent are required

# OUTLINE

- ▶ Thesis Overview
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# Application to a Unified Korea

- ▶ Border Treaties
- ▶ Political Treaties
- ▶ Bilateral Treaties – China BITs (Example)

# Border Treaties

- ▶ All border treaties, the 1962 Sino-DPRK border treaty and the 1985 Russia-DPRK border treaty, continue in force
- ▶ Whether these treaties are valid is a different question – dealing with the validity of the treaty from when it first entered into force and regarding the history of the treaty-making

# Political Treaties

- ▶ All political treaties cease to exist, such as Treaty on Friendship and Co-operation with:
  - ▶ Mongolia (1986)
  - ▶ Romania (1975)

# Example – Investment Treaty with China

ROK-China BIT (2007)	DPRK-China BIT (2005)
<p>Investments -</p> <ul style="list-style-type: none"><li>(a) Movable and immovable property as well as any other property rights in rem such as mortgages, <b>liens</b>, pledges, <b>usufruct and similar rights</b></li><li>(b) Shares, stocks, <b>bonds...business enterprises or joint venture</b></li><li>(c) ...</li><li>(d) IP rights, including copyrights, trade marks, patents, <b>industrial designs</b>, technical processes, known-how, <b>trade secrets</b>, and trade names, and goodwill</li><li><b>(e) Any right</b> conferred by law or under contract and <b>any licenses and permits</b> pursuant to law, including the right to search for, extract, cultivate, or exploit natural resources</li></ul>	<p>Investments –</p> <ul style="list-style-type: none"><li>(a) Movable and immovable property and other property rights such as mortgages and pledges;</li><li>(b) Shares, stocks, debentures and any other kinds of participation in companies</li><li>(c) ...</li><li>(d) IP rights, in particular copyrights, patents, trade marks, trade names, technical process, know-how, and good-will</li><li>(e) Business concessions conferred by law or under contract permitted by law, including concessions to search for, cultivate, extract or exploit natural resources</li></ul>
<p>Right to submit investment dispute to an international arbitration, ICSID, under the Convention on the Settlement of Disputes between States and Nationals of Other States</p>	<p>No right to submit investment dispute to an international tribunal – only ad hoc arbitral tribunal</p>

# Conclusion – Effect on Third Party's Rights

- ▶ Under CIL
  - ▶ Rights under border treaties and localized treaties – remain unaffected
  - ▶ Rights under political treaties – extinguish upon succession
- ▶ Under general principles of law,
  - ▶ Assurance of good faith by a Unified Korea – no unilateral decision
  - ▶ Unification itself cannot be legal basis for termination or withdrawal
  - ▶ A unification treaty cannot create any obligations or rights of third States
- ▶ Entitled the right to consultation and negotiation with a Unified Korea regarding its pre-existing treaties

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# Thank you!

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