EXTENDED CONTENTS

Preface xiii
Acknowledgments xvii
List of abbreviations xviii
Table of cases xxiii
Table of treaties and legislation xxxii

PART A  GENERAL INTRODUCTION

1 Concepts
   1. THE ISSUES ADDRESSED IN THIS BOOK 1.01
   2. THE STRUCTURE OF THIS BOOK 1.09
   3. DISTINGUISHING BETWEEN SITUATIONS OF STATE SUCCESSION AND STATE IDENTITY 1.18
      3.1 Basic differences between the two concepts 1.21
      3.2 Relevant criteria to determine State identity 1.23
         3.2.1 Territory 1.24
         3.2.2 Government, population and a country’s name 1.27
         3.2.3 The concept of the ‘essential portion’ of a State 1.31
         3.2.4 Recognition by other States 1.33
   4. CLASSIFICATION OF THE DIFFERENT TYPES OF STATE SUCCESSION 1.41
      4.1 Situations where the predecessor State ceases to exist 1.44
      4.2 Situations where the predecessor State continues to exist 1.48

PART B  STATE SUCCESSION TO BILATERAL INVESTMENT TREATIES

2 Introduction
   1. THE CONTROVERSIAL ISSUE OF STATE SUCCESSION TO TREATIES 2.01
   2. OVERVIEW OF QUESTIONS ADDRESSED IN THIS PART 2.09

3 State practice regarding the continuation of predecessor States’ BITs
   1. INTRODUCTORY REMARKS 3.02
   2. ANALYSIS OF THE PRACTICE OF SUCCESSOR STATES 3.05
      2.1 The practice of the FRY and Serbia-Montenegro regarding SFRY’s BITs 3.05
      2.2 The practice of the Czech Republic regarding Czechoslovakia’s BITs 3.10
      2.3 The practice of Kosovo regarding Serbia’s BITs 3.14
      2.4 The practice of new States in the context of the break-up of the USSR 3.16
      2.5 The practice of Montenegro regarding Serbia-Montenegro’s BITs 3.29
   3. ANALYSIS OF THE PRACTICE OF OTHER STATES PARTIES TO BITS 3.35
      3.1 The practice of France regarding the France-SFYR BIT 3.35
      3.2 The practice of the Netherlands regarding the Netherlands-SFYR BIT 3.37
   4. CONCLUSION 3.43
4 Different forms of consent by States for the continuation of BITs
1. EXPRESS CONSENT
2. INFERRED OR TACIT CONSENT
2.1 Statements
2.1.1 Unilateral declarations
2.1.1.1 Introduction
2.1.1.2 The required form of a declaration and its effect on the State making it
2.1.1.3 The response given by the ‘other State party’ following a declaration
2.1.1.4 Relevant criteria to determine whether consent can be inferred from the silence and passivity of the ‘other State party’
2.1.2 Devolution agreements
2.1.2.1 The nature and effect of devolution agreements
2.1.2.2 One illustration: different instruments adopted in the context of the break-up of the USSR
2.2 Conduct of the parties

5 Critical analysis of the solutions adopted by the Vienna Convention
INTRODUCTION
1. OVERVIEW OF THE SOLUTIONS ADOPTED FOR DIFFERENT TYPES OF SUCCESSION
1.1 Transfer of territory
1.1.1 The ‘moving treaty frontier’ rule
1.1.2 The interaction between Article 15 and Article 29 VCLT
1.1.3 Exceptions to the application of the MFT rule
1.2 Incorporation of State
1.3 Unification of States
1.4 Newly Independent States
1.5 Secession and dissolution of States
1.5.1 First phase of the ILC work
1.5.2 Second phase of the ILC work
1.5.3 Third phase of the ILC work
2. THE APPLICATION OF THE PRINCIPLE OF CONTINUITY TO CASES OF SECESSION AND DISSOLUTION OF STATES IS INCOHERENT AND UNJUSTIFIABLE
2.1 The principle of tabula rasa was adopted in the case of multilateral treaties to protect Newly Independent States’ right to self-determination
2.2 The principle of tabula rasa was adopted for bilateral treaties of Newly Independent States based on the requirement that both States must consent to the continuation of a treaty
2.2.1 No right to become party to a treaty in the absence of a legal nexus with the territory
2.2.2 The importance of the ‘personal equation’
2.2.3 Treaty relationship between the parties concerned is not triangular
2.2.4 Distinguishing State practice favouring continuity
2.3 Both logics and the history of the drafting of the Convention support the proposition that the tabula rasa principle should apply to cases of secession and dissolution
2.3.1 Waldock’s first four reports (1969–71)
2.3.2 ILC’s adoption of the Draft Articles (1972)
2.4 Can a State claim the benefit of the rebus sic stantibus exception mentioned at Article 34(2)(b) to prevent the continuous application of a treaty?
2.5 Concluding remarks regarding secession and dissolution of States

6 BIT arbitration cases involving State succession issues
1. INTRODUCTION
2. THE DISSOLUTION OF CZECHOSLOVAKIA
2.1 The silence of some tribunals and the limited analysis of others
2.2 A number of tribunals have correctly addressed the issue
3. THE BREAK-UP OF THE USSR 6.28
4. THE DISSOLUTION OF YUGOSLAVIA 6.33
4.1 Mytilineos v. The State Union of Serbia & Montenegro and Republic of Serbia 6.36
4.2 Other cases 6.41
5. THE CESSION OF HONG KONG AND MACAO TO CHINA 6.44
5.1 Overview of State practice 6.44
5.2 Critical analysis of the Sanum v. Laos case 6.48
5.2.1 Introduction 6.48
5.2.2 The UNCITRAL award 6.52
5.2.2.1 Preliminary observations 6.53
5.2.2.2 Analysis of the exceptions under Article 15 VCST 6.55
5.2.2.3 Analysis of the exceptions under Article 29 VCLT 6.58
5.2.3 Judgment of the Singapore High Court 6.61
5.2.3.1 The judgment’s silence regarding the question of the investor’s nationality 6.62
5.2.3.2 The exceptions under Articles 29 VCLT and 15 VCST and the exchange of letters between Laos and China 6.64
5.2.3.3 The admission of the letters as evidence, the critical date and the issue of retroactivity 6.68
5.2.3.4 Other evidence confirming that the BIT did not apply to Macao 6.71
5.2.4 Judgment of the Singapore Court of Appeal 6.73
5.2.4.1 Interaction between Articles 15 VCST and 29 VCLT and their exceptions 6.74
5.2.4.2 Context, object and purpose of the BIT 6.77
5.2.4.3 The exchange of letters and the question of their admissibility after the critical date 6.86
5.2.5 Conclusion 6.91
6. THE ANNEXATION OF CRIMEA BY RUSSIA 6.99
6.1 The sequence of events 6.100
6.2 Overview of relevant international law issues arising from the annexation of Crimea 6.108
6.2.1 The importance of the legal qualification of the Crimean crisis as a type of succession 6.108
6.2.2. The absence of a right to self-determination 6.110
6.2.3 The controversial existence of a ‘remedial’ right to secession and its inapplicability to the situation of Crimea 6.112
6.2.4 The illegal use of force by Russia 6.114
6.2.5 States have the obligation not to recognize the annexation or to give any effect to Crimea’s change of status 6.117
6.2.6 The provisions of the Vienna Convention do not apply to the case of the annexation of Crimea 6.121
6.2.7 Crimea is still part of the territory of Ukraine and is under Russian occupation 6.126
6.3 Legal issues arising from the annexation of Crimea in the field of international investment law 6.129
6.3.1 The effect of the annexation on State contracts 6.130
6.3.1.1 The status of corporations under international law and investment arbitration 6.132
6.3.1.2 The potential scope of the obligation for corporations not to recognize a situation resulting from an illegal annexation 6.138
6.3.2 The effect of the annexation on investment treaties 6.144
6.3.2.1 The application in Crimea of BITs to which Ukraine was a party 6.145
6.3.2.2 Arbitration claims filed by Ukrainian investors against Russia under the Ukraine-Russia BIT 6.173
6.3.2.3 Conclusion: Should a ‘pragmatic’ approach be adopted instead? 6.197
6.3.2.4 The possibility of State-to-State arbitration 6.204
PART C  STATE SUCCESSION TO MULTILATERAL TREATIES

Introduction

7 The continuity principle adopted under the Vienna Convention for secession and dissolution

8 One (hypothetical) illustration of succession to multilateral treaties: the case of NAFTA and Quebec’s secession

9 State succession to the ICSID Convention

- THE SPECIAL CATEGORY OF TREATIES CREATING INTERNATIONAL ORGANIZATIONS 9.02
- THERE IS GENERALLY NO SUCCESSION TO THE MEMBERSHIP OF AN INTERNATIONAL ORGANIZATION 9.04
- THE PRACTICE OF STATES REGARDING SUCCESSION TO INTERNATIONAL ORGANIZATIONS 9.06
- THERE IS NO AUTOMATIC SUCCESSION TO THE ICSID CONVENTION 9.10

PART D  STATE SUCCESSION TO STATE CONTRACTS

Introduction

10 State succession to acquired rights under contracts

INTRODUCTION 10.01
- A SUCCESSOR STATE’S SOVEREIGNTY DERIVES FROM INTERNATIONAL LAW, WHICH MAY IMPOSE RIGHTS AND OBLIGATIONS UPON IT 10.03
- THE LEGAL ORDER OF THE PREDECESSOR STATE DOES NOT SUDDENLY DISAPPEAR AS A RESULT OF A CHANGE OF SOVEREIGNTY AND PRIVATE RIGHTS REMAIN UNAFFECTED 10.07
- THE SUCCESSOR STATE CAN MODIFY ACQUIRED RIGHTS, BUT MUST DO SO BY RESPECTING PRINCIPLES OF INTERNATIONAL LAW 10.10

11 The concept of State contracts and its unique characteristics

12 Modification of State contracts by the successor State

- THE THEORY DEVELOPED BY O’CONNELL 12.03
- PROPOSAL OF A NEW FRAMEWORK OF ANALYSIS ON THE MATTER 12.08

13 Succession to State contracts depends on what types of succession is involved

- SECESSION 13.03
  1.1 The continuator State remains bound by contracts 13.04
  1.1.1 Russian Federation v. Pied-Rich BV 13.05
  1.1.2 Republic of Serbia v. ImageSat International 13.07
  1.2. The new State is generally not bound by contracts, however, certain situations may require otherwise 13.13
- TRANSFER OF TERRITORY 13.17
  2.1 The successor State is bound by contracts 13.18
  2.2 Third States whose nationals had been affected by a transfer have adopted the succession principle 13.20
2.3 Successor States and their domestic courts have adopted the succession principle 13.24
2.4 The limited relevance of some decisions by international courts and arbitral tribunals dealing with the matter 13.29
  2.4.1 Questions relating to Settlers of German Origin in Poland (PCIJ, 1923) 13.30
  2.4.2 Mavrommatis Palestine Concessions (PCIJ, 1925) 13.33
  2.4.3 Lighthouse case (PCIJ, 1934) and Lighthouse in Crete and Samos case (PCIJ, 1937) 13.36
  2.4.4 The Lighthouse Arbitration case (French-Greek Arbitral Tribunal, 1956) 13.43
  2.4.5 Affaire des Forêts du Rhodope Central (1933) 13.50
3. DISSOLUTION OF STATE 13.53
  3.1 While new States are generally not bound by contracts, there are situations where succession should prevail 13.54
  3.2 Analysis of State practice 13.57
4. UNIFICATION AND INCORPORATION OF STATES 13.63
  4.1 The successor State is bound by contracts 13.64
  4.2 State practice and decisions by courts and tribunals support the succession principle 13.67
5. NEWLY INDEPENDENT STATES 13.75
  5.1 Generally, new States are not bound by contracts, but there may be some exceptions 13.76
  5.2 State Practice is ambiguous 13.86
6. ANNEXATION OF STATES IN THE CONTEXT OF COLONIZATION 13.94
  6.1 Colonial successor States have rejected succession to contracts 13.95
  6.2 State practice supports the principle of non-succession 13.98

14 Succession to State contracts depends on whether a number of factors and circumstances are involved
  1. The position taken by the successor State regarding the issue of succession to contracts 14.07
  2. The existence of a ‘territorial nexus’ between a contract and the successor State 14.11
     2.1 Overview of the solutions adopted in the context of succession to State responsibility, property and State debts 14.13
     2.2 Concrete application of these solutions to the issue of succession to State contracts 14.25
  3. Contracts signed by an organ of a territorial unit of the predecessor State which has a structural continuity with the successor State 14.28
     3.1 The solution adopted in the context of succession to State responsibility 14.30
     3.2 Concrete application of this solution to the issue of succession to State contracts 14.35
  4. The need to avoid unjust enrichment 14.41
     4.1 The concept of unjust enrichment 14.42
     4.2 Unjust enrichment is a general principle of law 14.48
     4.3 The application of the principle to resolve State succession issues in general 14.54
        4.3.1 Judicial decisions 14.54
        4.3.2 Scholarship 14.60
     4.4 The application of the principle in the context of succession to State contacts 14.64

PART E SPECIFIC PROBLEMS ARISING WHEN STATE SUCCESSION OCCURS DURING ARBITRATION PROCEEDINGS

Introduction

15 Succession affecting the respondent State
  1. A TRIBUNAL SHOULD CONTINUE TO HAVE JURISDICTION OVER A CASE DESPITE THE CHANGES AFFECTING THE RESPONDENT STATE DURING THE PROCEEDINGS 15.02
EXTENDED CONTENTS

2. THE PRACTICAL CONSEQUENCES OF CHANGES AFFECTING THE RESPONDENT STATE ARE DIFFERENT DEPENDING ON THE TYPE OF SUCCESSION INVOLVED 15.06
   2.1 Incorporation and unification of States 15.06
   2.2 Secession 15.09
   2.3 Dissolution of States 15.12
   2.4 Transfer of territory 15.14
   2.5 One illustration in the different context of commercial arbitration: the Société des Grands Travaux de Marseille case 15.17
      2.5.1 Introduction 15.17
      2.5.2 The facts of the case 15.20
      2.5.3 The arbitrator’s procedural order 15.24
      2.5.4 Annulment proceedings before Swiss courts 15.29

16 Succession affecting the home State of the claimant investor and resulting in changes of nationality
   INTRODUCTION 16.01
   1. OUTLINE OF THE BASIC RULES REGARDING ACQUISITION/LOSS OF NATIONALITY IN THE CONTEXT OF STATE SUCCESSION 16.03
      1.1 Individuals 16.04
      1.2 Legal persons 16.10
   2. A TRIBUNAL SHOULD CONTINUE TO HAVE JURISDICTION OVER A CASE DESPITE A CLAIMANT CHANGING NATIONALITY AFTER THE COMMENCEMENT OF THE PROCEEDINGS 16.19
      2.1 The situation under BITs in general 16.20
      2.2 The specific criteria under the ICSID Convention 16.23
      2.3 The controversial question of the application of the rule of continuous nationality 16.27
         2.3.1 The origin of the controversy: the Loewen case 16.28
         2.3.2 The existence of the rule is contested in the context of diplomatic protection 16.37
         2.3.3 The rule does not apply in the context of diplomatic protection when changes of nationality are involuntary, such as in situations of State succession 16.42
         2.3.4 The rule does not apply in the context of investment arbitration 16.49

PART F GENERAL CONCLUSION

17 General conclusion 457

Bibliography 462
Index 493