PREFACE

Why write a book on the question of State succession in the context of international investment law? My first international law coup de foudre was regarding issues of State succession. I did my Ph.D. thesis more than 10 years ago (from 2000 to 2006) at the Graduate Institute for International Studies, in Geneva, on the (then) obscure question of State succession to State responsibility. At the time I wrote my thesis, there were only five published articles that focused on this issue. I decided to tackle this question because I believed that the manner in which (almost) all published international law textbooks addressed the issue was unsatisfactory. Indeed, their answer to the question of whether the successor State should be held responsible for internationally wrongful acts committed by the predecessor State was invariably in the negative. At the time, I thought that the answer should be context-dependent in that the answer could not realistically always be negative in all circumstances. In any event, I believed that the question was much more complex than the two sentences which were typically devoted to the topic. It turned out that I was right. My comprehensive analysis of State practice and international and municipal case law has shown that the solution to the problem first depends on the type of succession involved. Thus, there is not one solution that will apply to all cases. The answer to the question simply cannot be the same considering that in some cases the predecessor ceases to exist (dissolution) and in others it does not (secession). Second, the solution to the problem depends on a number of factors and circumstances (including who committed the wrong, the need to avoid any unjust enrichment, etc.) that should be taken into account by a tribunal. My findings were published in a book.1 The new framework of analysis I have provided and the conclusions I reached in this book have since then been endorsed by other scholars, including former ILC Special Rapporteur James Crawford (now judge at the ICJ) in a recent book,2 the Institut de droit international in a 2015 Resolution on the matter,3 and, finally, by the preliminary work of the ILC Special Rapporteur Šturma.4

In the years that followed the publication of my book, I became more interested in another field of law: international investment law. I was very fortunate to work in Geneva (while doing my Ph.D. thesis) with one of the greatest international arbitration lawyers: Professor Pierre Lalive. At Lalive and Partners, I was given the opportunity to work on a number of investor-State arbitration cases with him, Michael Schneider and Veijo Heiskanen. In 2006, I

1  Patrick Dumberry, State Succession to International Responsibility (M. Nijhoff, 2007).
3  Institut de Droit international, State Succession in Matters of State Responsibility, 14th Commission, (Rap. M.G. Kohen), Resolution, 28 August 2015.
came back to Montreal to work at Ogilvy Renault (now known as Norton Rose Fulbright) and was again tremendously privileged to assist another giant and emblematic figure in the field of investment arbitration: Me Yves L. Fortier. Finally, I also worked with an amazing team of lawyers at Canada’s Ministry of Foreign Affairs (Trade Law Bureau) where I was involved in investor-State NAFTA Chapter 11 cases. Based on my ten years of experience working as a lawyer involved in these cases, I started focusing on investment arbitration questions when I became Professor at the University of Ottawa in 2009. I have been pursuing research in that field ever since.

Three years ago, I started exploring the impact that events of State succession could have in the context of investment arbitration. The interaction between these two distinct fields of law was a perfect mix between past and new 'loves'. I first assessed the question of State succession to BITs. I was surprised to find out that almost nothing had been written on the general question of succession to bilateral treaties. Moreover, the specific topic of succession to BITs had never been addressed by scholars. My initial reaction was to think that this was probably because the subject matter was not worthy of any analysis! Yet, I found many investment cases where the issue arose, but had been barely noticed (let alone discussed) by arbitral tribunals. The only exception was the Sanum Investments Ltd. v. Laos award, a case that only dealt with a very specific question (succession to a BIT in the context of a transfer of territory) in rather unique circumstances (the special status of Macao within China).

I also started investigating the work of the ILC on the question of succession to treaties and, I must admit, the results were very disappointing and, frankly, slightly disturbing. As further explained in this book, the conclusion reached by the ILC in the 1978 Vienna Convention that a new State (in the context of secession and dissolution) automatically succeeds to bilateral treaties which were signed by the predecessor State is illogical considering the particular nature of these instruments. Moreover, the outcome is contrary to all the work that had been conducted on the matter by the Commission itself for many years. This discovery confirmed my earlier impression that this was, after all, a topic worthy of further investigation. After writing two articles on the question in 2015, I worked as counsel to Kazakhstan in the WWM v. Kazakhstan case which (as further discussed in this book) involved State succession issues. This is when I truly discovered the complexity of the issue which had been so far unexplored by scholars.

When I started conducting research on this under-investigated ‘open field’, I must confess that I felt the same kind of enthusiasm (and sometimes anguish ...) that I first encountered when I commenced working on my Ph.D. thesis. For instance, I soon realised that nothing had been published on the question of succession to State contracts since the work of O’Connell in the 1960s and 1970s. It seems that no one had given any thought to the question whether a new State should be bound by State contracts which had been signed by the predecessor State. This was surprising given the fact that the problem was not uncommon and had often occurred...
in the past. Using both classic material\(^9\) and new research tools,\(^{10}\) I reassessed old examples of State practice and case law which had been discussed by scholars in the past in other contexts to determine whether they could be relevant to the issue of succession to contracts. I found a number of old and new examples which were indeed very pertinent to my analysis. I also examined all existing (and publically-available) arbitration cases involving succession to BITs. I found 46 publicly-known investor-State arbitration cases dealing with the issue.

This book offers the first comprehensive analysis of State succession issues arising in the context of international investment law. Specifically, this book examines two fundamental questions:

- is a successor State bound by investment treaties (including BITs) entered into by the predecessor State with other States?
- is a successor State bound by the obligations contained in State contracts (including arbitration clauses) which had been signed by the predecessor State with foreign companies before the date of succession?

The book answers the question for each type of State succession. The answer is in part based on the work of the ILC on succession to treaties and the (very limited) scholarly analysis which has been conducted in the past by authors. The analysis is for the most part based on my own investigation of State practice and the review of judicial decisions from international and domestic courts. Based on my previous work on other issues of State succession, I developed a novel comprehensive framework of analysis which takes into account a number of factors and circumstances. The solution I have put forward in this book for each type of succession is ultimately the one which I believe to be the most logical and appropriate given the specific circumstances of each situation. The questions that were at the heart of my reflection throughout this book were the following: What should be the logical solution to this specific problem; what would be a fair and just outcome to solve that problem? Another concern was to assess whether any given solution takes into account the interests of the different actors involved, that is, not only the successor State and the predecessor State (if it continues to exist), but also the other State party to a BIT or the other non-State party to a State contract. In that sense, some of the findings contained in this book should be considered as a ‘progressive development’ of rules rather than a codification of existing practice. This is particularly the case given the fact that some of the questions examined in this book have simply never been addressed by tribunals. For instance, what happens when an event leading to a State succession occurs during the arbitration proceedings? This is an important question given the fact that such changes may affect the identity of the respondent State in the proceedings. For example, in the context of the dissolution of a State, the respondent will cease to exist during the proceedings. An event of succession may also affect the home State of the claimant investor and result in changes of nationality during the proceedings.

This book aims to offer guidance to actors on how to solve issues of State succession in the field of investor-State arbitration. It will provide States, investors and arbitrators with

\(^9\) I systematically examined all cases dealing with State succession issues published in law digests, including Annual Digest of Public International Law Cases, United Nations Reports of International Arbitral Awards, International Legal Materials, International Legal Reports.

\(^{10}\) I have examined all cases dealing with State succession in databases, including Oxford Public International Law, Oxford Reports on International Law in Domestic Courts, Kluwer Arbitration Law, ITAlaw, Investor-State Law Guide, Investment Claims, etc.
indispensable (yet currently scarcely available) tools to enhance their ability to solve disputes between foreign investors and States involving the phenomenon of State succession. It should be recalled here the critical comments made by O’Connell almost 50 years ago, on the ‘practice’ of States regarding succession issues:

The truth of the matter is that this ‘practice’ is likely to consist of decisions taken by public officials who have not achieved the necessary intellectual penetration of the problem to perceive the true issues, who may be more influenced by political or other ephemeral considerations than by juristic logic, who may even be ignorant of the nature of the problem, or of its ramifications, or who may be equipped with obsolescent literature, or even no literature whatever. Some of the processes of decision-making respecting matters of State succession that have occurred in recent years can hardly be dignified as significant contributions to the elaboration of the law.11

This remark is rather crude and certainly unfair to the difficult tasks undertaken every day by thousands of civil servants and bureaucrats working in foreign and justice ministries throughout the world. Yet, the truth of the matter is that new States (but also ‘old’ ones) generally have few resources and little experience concerning complex questions of international law, such as those relative to State succession. Furthermore, these questions are generally not considered to be the priorities in the context of the process leading to independence of the new State. The goal of this book is to provide States (and also foreign investors) with guidelines to help them address succession issues in the context of investment disputes.

11 O’Connell (n 8) 117.