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
   3.1 Basic differences between the two concepts 1.18
   3.2 Relevant criteria to determine State identity 1.21
      3.2.1 Territory 1.23
      3.2.2 Government, population and a country’s name 1.24
   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
   4.1 Situations where the predecessor State ceases to exist 1.41
   4.2 Situations where the predecessor State continues to exist 1.48

1. THE ISSUES ADDRESSED IN THIS BOOK

Until recently, investment arbitration lawyers and scholars did not pay much attention to the question of the interaction between the different fields of State succession and international investment law. The same was true for specialists of State succession. While scholars in the field of State succession have spent an incredible amount of time and energy in the last decades examining the practice of States and numerous theoretical aspects regarding the question of succession to treaties in general, they have barely noticed the particularities of bilateral investment treaties for the promotion and protection of investments (‘BITs’). Similarly, while epic battles were fought decades ago amongst scholars on the controversial question of the survival of acquired rights, there seems to be a lack of interest in the rather basic issue of succession to State contracts. This is very surprising considering the fact that questions about the nature and effect of State contracts have been fiercely debated in international law throughout the last 30 years. More than one generation of investment arbitration specialists have analysed questions related to, for instance, the law applicable to such contracts, the effect of stabilization clauses, and even more esoteric topics such as the ‘internationalization’ of these instruments. Yet, none of the investment arbitration specialists seem to have been concerned about the fate of these contracts in the event of State succession.
Chapter 1 CONCEPTS

1.02 In sum, until very recently, both fields of law seemed to have been isolated from one another given the fact that specialists in each discipline are consistently reading different books from different shelves of the law school libraries. There was little, if any, interaction between these two areas. Such a segregation was, of course, always illusory. Thus, both fields have the same common heritage: public international law. Readers of each discipline may have used different shelves, but they were nevertheless always in the same library. Thus, it is rather uncontroversial to affirm today that the solution to specific problems in the field of investment arbitration must necessarily be found under general international law. This is due to the fact that investment arbitration is part of public international law.\(^1\) It is not a self-contained regime.\(^2\) The same is true for solutions to State succession questions which are, by definition, grounded in public international law. The aim of this book is to apply the existing rules of State succession to problems arising in the specific context of international investment law.

1.03 To the best of the present author’s knowledge, the first article to fully address the specific question of State succession to BITs was one published in 2015 by myself.\(^3\) As noted by Tams, ‘in fairness, until recently, State succession to investment treaties may not have seemed a topic worthy of detailed analysis’.\(^4\) This is indeed true since the question had not arisen in arbitration cases. In fact, to be more precise, as explained in my article, the issue of the successor State’s continuation of the treaties to which the predecessor State had been a party before the date of succession was at the heart of several cases in the context of the dissolution of Czechoslovakia. Yet, the matter was hardly addressed by tribunals (and therefore not noticed at all by investment arbitration scholars) since the respondent States in these proceedings (the new States of Slovakia and the Czech Republic) did not object to the jurisdiction of these

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2 Archer Daniels Midland Company and Tate and Lyle Ingredients Americas, Inc. v. Mexico, ICSID Case No. ARB(AF)/04/05, Award, 21 November 2007 [195].


tribunals over cases that were brought under BITs to which Czechoslovakia was a party before its break-up.

The question of State succession to BITs has since gained some attention from scholars. This is because the issue has been featured centre stage in a number of recent awards. Thus, in the Sanum v. Laos case, the tribunal addressed in its 2013 award the controversial question of whether the China-Laos BIT extended to Macao after the cession of territory in 1999. The award was later set aside by a judgment of the High Court of Singapore in 2015. That judgment was subsequently overturned by the Singapore Court of Appeal in its 2016 judgment, which held that the BIT does apply to Macao and that the tribunal had jurisdiction over the claim brought by Sanum. The Sanum v. Laos saga (examined in some detail in this book) provides the first comprehensive analysis of succession issues regarding BITs, albeit in the specific context of a cession of territory. The fact that Brigitte Stern, a specialist of both investment arbitration and State succession, was one of the arbitrators on the tribunal explains the in-depth analysis of the succession issues contained in the award. Since then, many other awards have examined complex questions of State succession. These awards are examined in this book. For instance, the WWM v. Kazakhstan case involves a Canadian investor filing a claim against Kazakhstan invoking a breach of the 1991 Canada-USSR BIT. The question at the heart of this case was whether or not Kazakhstan is bound by this BIT. In its 2015 award, the tribunal held that the Canada-USSR BIT was binding on Kazakhstan. The award is confidential. A number of arbitration claims have been recently filed by Ukrainian investors against Russia under the Ukraine-Russia BIT following the annexation of Crimea by Russia in 2014. These cases are currently pending. As examined in some detail in this book, these claims involve very complex and unprecedented questions of State succession. At the time of writing this book (May 2017), issues of State succession had arisen in no less than 46 publicly-known BIT arbitration cases. All these cases will be discussed in this book.

According to Tams, ‘investment tribunals have so far done relatively little to clarify the law of State succession: they have tended to be receivers of general

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1. THE ISSUES ADDRESSED IN THIS BOOK

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5 Sanum Investments Ltd. v. Laos, UNCITRAL, PCA Case No 2013–13, Award on Jurisdiction, 13 December 2013.
8 See, for instance, Brigitte Stern, ‘La succession d’États’ (1996) 262 Rec des Cours.
9 World Wide Minerals Ltd. and Mr. Paul A. Carroll, QC v. Kazakhstan, UNCITRAL, Award, 19 October 2015 [hereinafter ‘WWM v. Kazakhstan’].
10 Disclaimer: the present author acted as a counsel for the respondent in this case.
rules, not shaped them’. For him, ‘an area of law rather in need of clarification remains in many ways obscure: the potential of arbitral awards to consolidate and develop the law has so far not been realised’. This assessment is generally correct (although the Sanum award would be an exception). One reason why tribunals may have been reluctant thus far in examining relevant questions of succession in great detail is because the matter was largely considered to be ‘obscure’ and unsettled. The issue was, until recently, never addressed by public international law specialists. The enthusiastic specialist of investment arbitration who would have been intrepid enough to venture into the different sections of the library to closely examine books on State succession would have certainly come back disappointed and rather lost from his/her journey. He/she would have thus found very few clear-cut answers to his/her questions. For instance, any person keen on solving a problem related to State succession to a BIT would have been quite surprised to discover that the question of succession to bilateral treaties has been the object of a mere handful of publications in the last 50 years, the most famous having been published in the 1960s! Thus, while State succession scholars have (unnecessarily) ravaged many acres of forests when compulsively addressing every angle and facet of the fate of *multilateral* treaties, they have surprisingly had very little interest regarding *bilateral* instruments. This lack of interest was undoubtedly reflected in the way the ILC would end up analysing such instruments in the final phase of the adoption of the 1978 Vienna Convention on succession to treaties. Similarly, any person interested in knowing what should happen to a State contract in the event of State succession would have found it rather strange to discover that the last survey of the issue has been conducted by O’Connell in his monumental 1967 two-volume book. Thus, not a single publication (in French or English) has focused on this rather straightforward question in the last 50 years!

1.06 In sum, apart from the fact that the issue of State succession had not arisen frequently in the past, investment tribunals may have been reluctant to venture

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11 Tams (n 4) 342.
12 Ibid.
into such unknown territory without being equipped with the necessary investigation skills and the proper theoretical background. Having observed this phenomenon, Tams published a groundbreaking article in 2016 entitled ‘State Succession to Investment Treaties: Mapping The Issues’.\(^\text{17}\) He described his paper as ‘a bird’s eye account of questions of State succession that arise in relation to investment treaties’.\(^\text{18}\) He, however, added that the article was not intended to provide readers of any ‘in-depth discussion of particular problems’, but rather to ‘inform debate about a particularly tricky area of public international law now confronting investment lawyers’.\(^\text{19}\) Tams is evidently too modest with regards to what was achieved with his paper. In fact, he has offered readers much more than a mere *tour d’horizon* of the legal issues that are relevant. He has properly set the table for further analytical studies to be conducted in the future regarding this currently undeveloped area of law. I have taken up his proposal to further examine the issue. The aim of this book is indeed to offer a comprehensive guide to problems of State succession arising in the context of investment arbitration. The goal is that arbitrators and decision-makers facing complex questions of succession to BITs and State contracts will no longer need to venture into the other side of the library only to find old and (literally) dusty books on the matter. The hope is that they will be able to find some answers to their questions in this book.

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?

I have decided to examine the question of succession to treaties and contracts because they represent the two main ways by which States can decide to give their consent to international arbitration. It should be recalled that international arbitration is founded on the principle of consent. A tribunal’s jurisdiction over a dispute is based on the consent to arbitration given by both the claimant (almost always an investor) and the respondent (almost always the host State). The host State’s consent can be found in three different ways. First, consent can be found in a direct agreement between the investor and the host State (a so-called ‘State contract’). Second, consent may be found in a...

\(^{17}\) Tams (n 4) 314–43.
\(^{18}\) Ibid., 316.
\(^{19}\) Ibid.
provision of the host State’s domestic legislation. While in the former situation, the host State consents to arbitration with one specific investor, in the latter case, consent is given more broadly to any foreign investor (of any nationality) admitted into the country. Third, a host State’s consent to arbitration can be found in a provision contained in a treaty entered into by that State and the ‘home’ State of the investor. Treaties for the promotion and protection of investments typically contain a dispute settlement clause whereby each State consents in advance to arbitration for claims submitted by any national of the other State party that fulfil certain requirements under the treaty.

2. THE STRUCTURE OF THIS BOOK

1.09 The rest of Part A examines the important distinction between situations of State succession and those of State ‘identity’ where the international legal personality of a State is unaffected by an event of succession. I will also differentiate the different types of State succession (unification of State; dissolution of State; incorporation of State; secession; Newly Independent States; and cession/transfer of territory).

1.10 Part B investigates the question of whether or not a successor State is bound by the BITs entered into by the predecessor State with other States. While State succession scholars have in the last 30 years comprehensively addressed the fate of multilateral treaties, they have surprisingly had very little interest regarding bilateral instruments (in general).

1.11 Chapter 3 begins by analysing the practice of States (both successor States and other States parties to BITs) regarding the continuation of the predecessor State’s BITs after the date of succession. This chapter will demonstrate that it is not uncommon for States to reach an agreement as to whether or not a BIT, which was entered into by the predecessor State, should continue to apply after the date of succession. In this situation, the controversial question as to whether a new State automatically succeeds to prior BITs does not arise since the States have themselves decided the fate of these treaties. Also, there are many situations where there is a tacit agreement between the States for the
continuation of a specific BIT. Some of the questions examined in Chapter 4 include the form of a unilateral declaration and its effect on the new State making it. It is then necessary to analyse the response given by the ‘other State party’ to any such declaration and the relevant criteria to determine whether consent can be inferred from the silence and passivity of that State.

Chapter 5 examines the question of what happens to a BIT of the predecessor State when the States concerned have not agreed (expressly or tacitly) on its continuation. In doing so, it is essential to analyse the different solutions that were adopted under the 1978 Vienna Convention on Succession of States in Respect of Treaties for each specific type of State succession. Specifically, I will critically examine the solution adopted under the Convention for secession and dissolution of States. I will argue that it is incoherent for the ILC to apply, on one hand, the solution of automatic continuity for bilateral treaties in the context of secession and dissolution of States, while adopting, on the other hand, the solution of tabula rasa for Newly Independent States. I will further argue that, in any event, it is plainly unjustifiable to apply the principle of automatic continuity to bilateral treaties given the particular nature of these instruments. In my view, bilateral treaties do not automatically continue to be in force as of the date of succession unless both States concerned have explicitly (or tacitly) agreed to such a continuation. This basic solution should apply to all new States rather than exclusively to those emerging from the process of decolonization. In fact, this is the solution that new States have adopted to resolve issues of succession to bilateral treaties in the context of the break-up of several States after the end of the Cold War.

The last section of Chapter 6 provides a critical analysis of all existing investment arbitration case law involving BITs in the context of State succession. In addition to the Sanum case mentioned above, I will examine all cases in the context of the dissolutions of Czechoslovakia and Yugoslavia as well as the break-up of the USSR. I will also examine a number of complex legal issues relevant to the field of international investment law arising from the annexation of Crimea by Russia and, specifically, a number of pending arbitration cases.

Part C examines the question of whether the successor State is automatically bound by the multilateral treaties to which the predecessor State was a party at the date of succession. In doing so, it is necessary to analyse the situation of succession to the ICSID Convention, which is an example of a special category of treaties creating international organizations. In this section, it will be shown that there is no automatic succession to the membership of an international organization and that, accordingly, the practice of new States has
Chapter 1 CONCEPTS

been to adhere to the organization (and become party to the Convention) via a formal application.

1.15 Part D focuses on the question of succession to State contracts (i.e., contracts concluded between foreign investors and States). The question being addressed is whether a successor State is bound by the obligations contained in a contract (which includes an arbitration clause) that had been signed by the predecessor State with a foreign company before the date of succession.

1.16 In order to answer this question, it is important to address the more general question of whether the successor State must respect the ‘acquired rights’ of foreign investors existing before the date of succession. Based on my analysis of this question, I will argue that the successor State can modify a State contract after the date of succession, but that it must do so by respecting a number of principles of international law, including providing proper compensation to an investor. Yet, in my view, the matter is more complex than that. Based on two observations mentioned in passing by O’Connell in his book, I propose a new framework of analysis concerning the question of succession to State contracts. I will show, on the one hand, that the solution to this problem will depend on the type of succession that is involved. 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). Unquestionably, the fact that in some instances no new State emerges (cession, integration) also has an impact on the outcome of the survival of the contracts. Based on this first comprehensive analysis (in the last 50 years) of relevant State practice and decisions of international and domestic courts, I will determine in Chapter 13 whether the solution of succession or that of non-succession should prevail for each type of State succession. Chapter 14 will demonstrate, on the one hand, that the solution to the problem of succession to State contracts depends on a number of factors and circumstances, which should be taken into account by a tribunal. I will examine the following four different factors that may have an impact on whether or not a successor State should be bound by a State contract signed by the predecessor State before the date of succession:

- The position taken by the successor State (after the date of succession) regarding the issue of succession to contracts;
- The existence of a ‘territorial nexus’ between a contract and the successor State;
3. DISTINGUISHING BETWEEN SITUATIONS OF STATE SUCCESSION AND STATE IDENTITY

- Whether the contract was signed by an organ of a territorial unit of the predecessor State that has a structural continuity with the successor State;
- The need to avoid any unjust enrichment.

Finally, this book will explore (in Part E) a number of specific issues that may arise when the State succession occurs during the arbitration proceedings. Such changes may thus 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. As such, the present author will examine the approach tribunals should undertake towards such dramatic changes.

3. DISTINGUISHING BETWEEN SITUATIONS OF STATE SUCCESSION AND STATE IDENTITY

The present study deals with the subject of ‘State succession’. It should be noted that the term ‘State succession’ is somewhat misleading.\(^{21}\) In the context of the present book, the term makes reference to ‘the replacement of one State by another in the responsibility for the international relations of territory’. This is the definition of ‘succession of States’ that was adopted in the past by the ILC in different instruments dealing with the issue.\(^{22}\) The same definition was also adopted by the Institut in its Resolutions in 2001 and in 2015. Importantly, the term ‘State succession’ should not be understood as meaning that the successor State ‘becomes invested with all the juridical consequences


\(^{23}\) Institut de Droit international, State Succession in Matters of State Responsibility, 14th Commission, (Rap. M.G. Kohen), Resolution, 28 August 2015, Art. 1 [hereinafter ‘IDI, State Succession to Responsibility, Resolution, 2015’].
of its predecessor’s acts’. These two distinct concepts should not be confused. Stern refers to the latter meaning as one of ‘succession in fact’ rather than one of ‘succession in law’ (which is the topic discussed in this book).

1.19 Situations of State succession need to be clearly distinguished from other situations where there is a continuity of State. Thus, a State may be affected by important changes, but its legal identity can nevertheless remain intact. One example is a change of government, which is not to be considered as an example of succession. The present study does not deal with cases where the State remains identical and where no question or debate arises as to the continuity of its rights and obligations.

1.20 This section will first establish some fundamental distinctions between the phenomenon of State identity and State succession (Section 3.1.). The following section will examine the criteria which have been put forward to determine whether a particular situation falls into the former or the latter category (Section 3.2.).

3.1 Basic differences between the two concepts

1.21 To assess any question related to State identity, one must examine the characteristics of an entity at two different moments in time: before and after...
the events taking place at a certain date. In other words, it must be examined whether the State is to be considered the same State before and after the events that led to the territorial transformation. When the two entities, examined at two different moments, are considered as being ‘identical’, this means that there is a ‘continuing’ international legal personality. In other words, because there is an ‘identity’ of State (i.e., that it is the same State), it follows that there is a ‘continuity’ of that State’s international personality. When this is the case, no issue of succession arises. In practical terms, State identity means that this entity continues having the same rights and obligations.

Yet, it should be added that qualifying two entities as being ‘identical’ at two different points in time is, of course, a legal fiction. The State that exists after the events is necessarily not perfectly ‘identical’ to the one that existed prior to the territorial changes. Thus, the very question of continuity arises because some doubt may exist as to whether two entities are in fact truly identical. In other words, no question of continuity arises when a State’s borders have not been altered in the slightest. For example, no one is doubting or questioning whether there is State identity between France in 2010 and France in 2012: it is clearly the same State. The relevant question to be asked is therefore not whether two entities are ‘identical’ per se, but rather whether they can be considered as the ‘same’ State (having the same international legal personality) despite substantial changes to its territory, name, and government. As explained by Stern, ‘Cette situation évoque irrésistiblement deux amis d’enfance qui se revoient après cinquante ans de séparation et déclarent: “Tu n’as pas changé, tu es toujours le même!” Identité essentielle, au-delà des changements existentiels’. In other words, a State may very well remain the same in its ‘essence’ while at the same time having also changed in terms of its secondary characteristics. This question is further examined in the next section.

3. DISTINGUISHING BETWEEN SITUATIONS OF STATE SUCCESSION AND STATE IDENTITY

31 This section is a modified and updated version of one previously published article: P. Dumberry, ‘Is Turkey the “Continuing” State of the Ottoman Empire under International Law?’ (2012) 59(2) Netherlands ILR 235–62.
33 Marek (n 29) 6 (‘there can obviously be no continuity without identity’).
34 Zimmermann, ‘Continuity of States’ (n 28) [6].
36 Oktem, ibid., 567.
37 Stern (n 8) 40.
Chapter 1 CONCEPTS

3.2 Relevant criteria to determine State identity

1.23 There are no formal criteria under international law that help categorically distinguish cases of continuity from those of discontinuity.38 This section examines the most important criteria that have been proposed in doctrine to determine whether there is State identity: territory (Section 3.2.1), government (Section 3.2.2), population and a country’s name (Section 3.2.3), the concept of the essential portion of a State (Section 3.2.4), and recognition (Section 3.2.5).39

3.2.1 Territory

1.24 Different theories regarding the concept of ‘territory’ under international law have been put forward by various writers. According to the ‘space theory’ (Raumtheorie), the territory is considered as the very body of a State, as constituting its essence.40 Under this theory, a State would simply disappear as a result of any loss of its territory.41 This theory is not well adapted to explain cases where the State lost only part of its territory. In the words of Delbez, ‘Si le territoire est un élément constitutif, une qualité substantielle de l’État, les cessions territoriales sont impossibles comme destructrice de l’État lui-même’.42 The modern interpretation of the element of territory in international law is represented by the ‘competence theory’, according to which the


Le problème est qu’il n’existe pas de critère objectif pour statuer sur cette identité juridique. Il est simplement possible de mentionner plusieurs indices de continuité entre deux États: l’identité de dirigeants, l’identité de langue officielle, l’identité de nom, l’identité de capitale, l’identité de drapeau, la proportion de territoire et de population de l’État prédécesseur retrouvée chez l’État successeur, la prépondérance dans l’administration du prédécesseur de fonctionnaires de la nationalité du successeur, la formation de l’État prédécesseur à partir de l’État successeur, la volonté de l’État successeur, l’accord des autres États successeurs, etc. Aucun indice ou aucune combinaison de ces indices ne permet cependant d’aboutir à un mécanisme objectif de jugement de continuité.

39 It should be added that the temporary belligerent occupation by a State over the territory of another does not have any impact on the latter’s identity which remains intact: International Law Association (ILA), ‘Rapport Préalinaire: succession d’États en matière de traités’, Committee on Aspects of the Law of State Succession, 1996, 658 [hereinafter ‘ILA, Rapport Préalinaire’, 1996].

40 C.V. Fricker, Gebiet und Gebietshoheit (Tübingen, 1901). H. Lauterpacht, ‘Règles générales du droit de la paix’, (1937-IV) 62 Rec des cours 318–19, describing this theory in the following terms: ‘le territoire n’est pas la propriété de l’État, mais est l’État lui-même, de même que les individus, loin d’avoir la propriété de leur corps, forment avec ce dernier un tout inséparable et ne sont pas concevables sans lui.’


territory is where the State exercises its competence (its sovereign power), which in turn is where it draws its ‘territorial sovereignty’ (a title) over a given territory.43

All writers agree that a State does not necessarily lose its international legal personality as a result of a change to its territory.44 It is clear that territorial losses, per se, do not affect a State’s identity.45 This principle has been (perhaps surprisingly) qualified by one writer as ‘custom’.46 The existence of the legal personality of a State can uniquely be affected where the loss of territory is total.47 This is, for instance, what happened to Poland in 1775 when it ceased to exist due to its territorial division among Austria, Prussia, and Russia. On the other hand, a limited loss of territory does not affect a State’s identity.48 An illustration of this is that France did not cease to exist when the territory of Alsace-Lorraine was ceded to Germany in 1871. The same conclusion applies to the identity of Germany when the same territory was ceded back to France in 1918.

3. DISTINGUISHING BETWEEN SITUATIONS OF STATE SUCCESSION AND STATE IDENTITY

Si le territoire appartient vraiment à l’essence même de l’État, une modification du territoire de l’État, résultant par exemple de cessions territoriales, constituerait également une modification de la nature de l’État lui-même. L’État perdrait, au fond, son identité par suite de tout changement du territoire. Si le territoire est réellement un élément important de l’essence de la personnalité étatique, on ne peut pas bien se représenter que l’État puisse se séparer en principe de parties de son territoire, c’est-à-dire de parties de son essentiel! A moins que l’on admette une ‘mutation du corps de l’État’ analogue à l’amputation d’un membre du corps humain;

Lauterpacht (n 40) 319: ‘On remarquera qu’il est plus facile pour un État de se défaire d’une partie de son territoire sans péril, et parfois avec avantages, que pour un individu, de se défaire de son corps.’

44 Schoenborn (n 42) 119: ‘une autorité ne subit aucun changement dans sa nature propre et particulière lorsque sa compétence locale est étendue ou restreinte’; Delbez (n 42) 718: ‘La modification territoriale aura bien entendu pour effet de déplacer les bornes de la compétence étatique, le sol national se trouvant agrandi ou restreint. Mais l’autorité de l’État ne se trouvera pas, par cela même, atteinte dans sa nature. Aucun changement ne sera apporté dans l’identité de l’État. Il est clair en effet qu’une autorité ne subit aucune modification dans sa nature lorsque sa compétence territoriale est étendue ou restreinte.’


46 Cansacchi (n 29) 25.
47 Marek (n 29) 23–4; Kunz (n 45) 72; Cansacchi (n 29) 25.
48 Some authors have argued that a significant or ‘very considerable’ loss of territory could lead to a conclusion of non-identity. See: Marek (n 29) 23–4: for a review of doctrine; E.J. Castren, ‘Aspects récents de la succession d’États’, (1951-1) 78 Rec. des cours 393: speaking of ‘perte de territoire assez importante’. The obvious objection to this theory is, of course, to determine exactly when a loss of territory is considerable enough to jeopardize identity.
Chapter 1 CONCEPTS

1.26 The present author has specifically examined elsewhere the question of identity between the Ottoman Empire and Turkey.49 By some accounts, between 1878 and 1918 the Ottoman Empire lost some 85 per cent of its territory,50 which constitutes a significant loss of territory.51 As explained by Judge Kreca in his dissenting opinion in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case, a diminution of territory, even a substantial one, does not in itself affect the legal personality of a State.52 In fact, Judge Kreca, as well as other experts,53 gave the example of Turkey as an illustration. In the *Ottoman Debt Arbitration* case, the tribunal recognized that ‘in international law, the Turkish Republic was deemed to continue the international personality of the former Turkish Empire’ despite having sustained significant territorial losses.54 In sum, Turkey is the same State as the Ottoman Empire, only with a much smaller territory.55

3.2.2 Government, population and a country’s name

1.27 One generally accepted principle of international law is that a change of government does not in itself amount to the creation of a new State.56 This remains the case even when it arises as a result of a revolution or a *coup d’État*.57 State succession issues simply do not arise in such situations: the new government is bound by all of international obligations of its predecessor.58 A classic example is that of France, which had radically changed regimes many times over the course of the last three centuries.59 Another illustration is that

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49 Dumberry (n 31) 235–62.
51 In fact, it is generally recognized that the identity of a State is not affected even when the territory lost is substantially greater than the remaining territory, such as in the case of Turkey: Crawford, *The Creation of States* (n 45) 673; K.G. Bühler, *State Succession and Membership in International Organizations: Legal Theories versus Political Pragmatism* (Kluwer 2001) 15; Ziemele (n 29) 216; Kunz (n 45) 72; Cansacchi (n 29) 25.
53 See, for instance, Kunz (n 45) 72.
54 *Affaire de la dette publique ottomane*, 18 April 1925, in (1948) 1 UNRIAA 529 at 573.
55 Ziemele (n 29) 215; Marek (n 29) 40; Crawford, *The Creation of States* (n 45) 676; Czaplinski (n 32) 376.
56 Marek (n 29) 24ff; Czaplinski (n 32) 378; Stern (n 8) 71; Crawford, *The Creation of States* (n 45) 678; Kunz (n 45) 73; ILA, *Rapport Préliminaire*, 1996 (n 39) 658; J.B. Moore, *Digest of International Law*, Vol I (GPO 1906) 249; Fiedler (n 45) 807; Castren (n 48) 395; C. Rousseau, *Droit international public* (Sirey 1953) 264; Degan (n 45) 297; Tams (n 4) 319–20.
57 Kunz (n 45) 73; Czaplinski (n 32) 378; Marek (n 29) 25.
58 One question, which has been the object of some controversy in doctrine, is the issue of whether in some situations a new government should not be bound by so-called ‘odious debts’.
3. DISTINGUISHING BETWEEN SITUATIONS OF STATE SUCCESSION AND STATE IDENTITY

of the 1979 Revolution in Iran which, although radical its effect may have been on all levels of Iranian society, did not alter Iran’s continuous international legal personality as a State.\textsuperscript{60} Similarly, the 1917 Revolution in Russia was considered as a mere change in government rather than the creation of a new State.

It is also clear that changes in population, such as increases/decreases, emigration/immigration, do not affect the identity of a State.\textsuperscript{61} Only the (rather hypothetical) situation of a \textit{total} loss of population could lead to the extinction of a State.\textsuperscript{62} As a matter of illustration, by some accounts, the Ottoman Empire lost some 75 per cent of its population between the years 1878 and 1918.\textsuperscript{63} Again, this is no doubt a significant loss of population, but it does not, in itself, constitute proof of discontinuity.\textsuperscript{64}

The continuity of a State as an international person notwithstanding changes of the kind mentioned may be illustrated by the history of France, which has over the centuries retained its identity although it acquired, lost and regained parts of its territory, changed its dynasty, was a kingdom, a republic, an empire, again a kingdom, again a republic, again an empire, and is now once more a republic. All its international rights and duties as an international person continued in spite of these important changes. Even such loss of territory as occasions the reduction of a major power to a lesser status does not affect the state as an international person.

\textsuperscript{60} The United States of America v. The Islamic Republic of Iran, Award, IUSCT Case No. B36 (574-B36-2), 3 December 1996 [53]-[54]:

Iran does not assert that its situation is one of State succession. It does not deny that it is subject to rights and liable to obligations of the former regime, as shown by the fact that it has brought to this Tribunal numerous claims arising between the former regime and the United States (…). Iran argues, however, that the debt based on the 1948 Contract was a debt personal to the former regime that should be considered non-transferable by analogy and that this position is supported by the principle of non-transferability of odious debts, which it asserts also is recognized in the field of State succession. The Tribunal does not take any stance in the doctrinal debate on the concept of ‘odious debts’ in international law. In any event, the Tribunal will limit itself to stating that the said concept belongs to the realm of the law of State succession. That law does not find application to the events in Iran. The revolutionary changes in Iran fall under the heading of State continuity, not State succession. This statement does not exclude a realist approach that recognizes that in practice the border between the concepts of continuity and succession is not always rigid. However, without denying the legal complexities which characterize the revolutionary and post-revolutionary situation in Iran or, for that matter, in some other countries, it has to be emphasized that in this Case we do not deal with an instance of State succession. In spite of the change in head of State and the system of government in 1979, Iran remained the same subject of international law as before the Islamic Revolution. For when a Government is removed through a revolution, the State, as an international person, remains unchanged and the new government generally assumes all the previous international rights and obligations of the State.

\textsuperscript{61} Kunz (n 45) 71; ILA, Rapport Préliminaire’, 1996 (n 39) 658; Crawford, \textit{The Creation of States} (n 45) 678; Czaplinski (n 32) 378; Marek (n 29) 48, 128.

\textsuperscript{62} Kunz (n 45) 72.

\textsuperscript{63} Akcam (n 50) 11.

\textsuperscript{64} Dumberry (n 31) 235–62.
Finally, changes to the name of a State are clearly not decisive to determine questions of identity. It is true, however, that the fact that a State keeps its name despite changes to its territory may be considered as an element of continuity insofar as it shows (to some extent) its willingness to maintain its original international legal personality. But the reverse is not true. Based on the fact that a State adopts a new name, in the context of territorial transformation, it simply cannot be automatically deduced that this is indeed a new State.

In sum, changes related to the territory of a State, its government, its population and even its name do not affect, per se, its identity under international law. The question then becomes: what is actually relevant to the determination of identity issues? This question is addressed in the next subsection.

3.2.3 The concept of the ‘essential portion’ of a State

There is one crucial criterion that has been used by some writers to decide issues of identity in the context of considerable losses of territory. Writers have looked at whether what is left of a State’s territory following a significant reduction in its size is the core, or the nucleus of the State that existed prior to...
3. DISTINGUISHING BETWEEN SITUATIONS OF STATE SUCCESSION AND STATE IDENTITY

its disintegration. In other words, they assess whether what remains of a territory after a radical change can be considered as the ‘essential portion’ of the territory of the ‘old’ State.\(^70\) Stern, for instance, refers to the ‘noyau irréductible de l’État’.\(^71\) She explains that, ‘Cette analyse se fonde sur la distinction entre l’essence et l’existence, et considère que chaque État possède une sorte de matrice fondamentale qui le rend irréductible à tout autre’ and that ‘[t]ant que ce noyau persiste à travers les différents avatars de l’État, celui-ci doit être considéré comme restant identique à lui-même’.\(^72\)

The reference to this ‘essential portion’ of territory is central to any conclusion about State identity. It certainly helps to explain why other States have recognized Russia’s claims to being the continuous State of the former USSR. Thus, for many reasons, Russia can be considered as the nucleus of its predecessor, the USSR.\(^73\) Interestingly enough, the Federal Republic of Yugoslavia (FRY)’s claim of continuity, which ultimately failed, was also essentially based on the argument that it constituted the nucleus of ex-Yugoslavia.\(^74\) It is true that in some instances, it is difficult to determine

\(^70\) W.E. Hall, \textit{A Treatise on International Law}, 8th edn (Clarendon Press 1924) 21; O. Schachter, ‘The Development of International Law through the Legal Opinions of the United Nations’, \textit{(1948) 20 British YIL 105}; Castren (n 48) 393 (for whom, one of the important indicia of continuity is the fact that ‘sa partie centrale ou sa capitale avec les régions qui l’entourent ainsi que d’autres régions de valeur historique et constituant le véritable noyau de l’État demeurent intactes’).

\(^71\) Stern (n 8) 80.

\(^72\) Ibid.

\(^73\) M. Koskenniemi and M. Lehto, ‘La succession d’États dans l’ex-URSS, en ce qui concerne particulièrement les relations avec la Finlande’, (1992) 38 AFDI 189–90, affirming that the ‘essence’ of the USSR survived in the Federation of Russia:

\begin{quote}
Il est clair – comme l’ont déclaré à plusieurs reprises les hommes politiques soviétiques – que la Russie formait l’épine dorsale de l’URSS. La Russie compte 147,4 millions d’habitants (51,7%), elle couvre environ 17,1 millions de kilomètres carrés sur un total de 22,4 (soit 76,3%), son produit national représente 60% de celui de l’URSS (92% de la production de pétrole et 74% de la production de gaz) et la proportion des revenus à l’exportation des biens produits en Russie représente 80% du total des exportations de l’Union. En d’autres termes, le noyau de la communauté humaine qu’était l’URSS survit dans la Fédération de Russie.
\end{quote}


\begin{quote}
The bases for the continuity and personality of a State are: significant portions of the territory which continues its existence; a major portion of the population; an independent government and organization of authority operating in accordance with the country’s constitution. The nucleus of Yugoslavia … was formed by Serbia and Montenegro, which invested their statehood into the State of Yugoslavia together with all their rights and obligations, international treaties and membership in international organisations … Consequently, we have all the physical and material as well as legal conditions for Yugoslavia’s uninterrupted identity and existence. This view of continuity and identity does not prejudice the possibility of the new States acquiring international recognition in accordance with international law.
\end{quote}
3.2.4 Recognition by other States

1.33 As previously mentioned, a determinant factor in resolving issues of identity is to assess whether what is left of a State’s territory following a significant reduction in its size constitutes the nucleus of the State that existed before its disintegration. Such an assessment will be made by States. First, the State affected by territorial changes will proclaim its position on the central question of identity. In doing so, the State must indicate to others how it perceived itself. Any such determination, however, cannot be left to a unilateral decision by the State concerned. Other States will have to respond by recognizing or refusing to recognize any such claim of continuity or non-continuity.

1.34 The starting point of the analysis is to mention that, as a matter of principle, a claim of identity by a reduced-size State does not need to be formally recognized by other States. This is because these States have already given such recognition in the past. This is, after all, the ‘same’ State that simply continues its existence despite territorial changes. Some authors have also

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75 Marek (n 29) 22.
76 Dumberry (n 31). See also, Oktem (n 35) 575–76; Shavarsh Torigian, The Armenian Question and International Law 2nd edn (La Verne Press 1988) 111.
77 Zimmermann and Devaney, ‘Succession to Treaties’ (n 38) 513, indicating that distinguishing between succession and continuity or identity is ‘strongly influenced by political considerations’ and adding that (at 515):

State practice, as well as the jurisprudence of the International Court of Justice, seems to suggest that, in relation to the distinction between succession and identity, what often matters most is not objective facts, such as the size of territory or population, but rather to what extent the claim to continuation of identity was generally accepted by the international community as a whole, including international organizations.

78 Mullerson (n 73) 20.
79 Marek (n 29) 129. The reason is simple. If this determination was to be left to the State concerned, it could at any time claim to be a new State in order to simply escape any obligations or to claim not to be bound by a treaty.
80 Czapinski (n 32) 379.
81 Eric Wyler, Théorie et pratique de la reconnaissance d’État: Une approche épistémologique du droit international (Bruylant 2013), 108.
82 Stern (n 8) 59; Y. Milulka, ‘Article 35’ in G. Distefano, G. Gaggioli and A. Hêche (eds), La Convention de Vienne de 1978 sur la succession d’États en matière de traités: Commentaire article par article et études thématiques (Bruylant 2015) 1219.
maintained that, in any event, recognition should not be a decisive factor because it is ultimately based on subjective political factors rather than objective ones.\footnote{Marek (n 29) 149: To sum up: recognition, as a test of State identity and continuity must be rejected, since: a) it fails to provide a reliable test on account of its inherent relativity, b) it withdraws the question of the continued existence of a State from the realm of objective norms and makes it dependent upon the will of third States and c) for this reason may place the very continuity of a State in jeopardy. This rejection is equivalent to a rejection of the constitutive in favour of the declaratory theory or recognition.} This is no doubt true. However, the problem is that international law lacks any undisputed objective criteria which can unequivocally determine questions of identity of State. This is why recognition remains of pivotal importance to decide issues of identity and continuity.\footnote{Czaplinski (n 32) 379, 392.} As noted by Tams, ‘the proper legal assessment’ of any issue of identity/continuity ‘is the result of a lengthy process of claim and contestation, in which historical narratives, perceptions of legitimacy, and the views of key players play an important role’.\footnote{Tams (n 4) 319.}

Recognition remains essential because, as noted by one writer, it ‘has the important function to overcome uncertainties as to whether or not, in the eyes of the international community, in a case of dissolution the predecessor State continues to exist’.\footnote{Bühler (n 51) 16.} Thus, recognition will ultimately be the decisive factor to determine issues of identity in cases of ambiguities.\footnote{Ibid., 17. Marek (n 29) 160, who generally rejects recognition as a relevant criterion, nevertheless admits that in ‘doubtful cases’ recognition should be considered as \textit{prima facie} evidence, provided that it was granted in accordance with principles of international law (rather than based on political factors).} For instance, it will evidently play an important role in situations where substantial territorial changes occurred.\footnote{Crawford, \textit{The Creation of States} (n 45) 670 (‘where there are substantial changes in the entity concerned, continuity may depend upon recognition’); I. Brownlie, \textit{Principles of Public International Law}, 4th edn (Clarendon Press 1990) 674.} Recent State practice has shown that third-party States will assess any claim of continuity to determine whether to give it any effect.\footnote{Stern (n 8) 60, 66–7; Czaplinski (n 32) 379; Tams (n 4) 319.} This is especially the case where a claim of continuity is controversial or has been contested by other States.\footnote{Vahlas (n 38) 854–5.} The following paragraphs briefly examine two recent examples of State practice to illustrate this point.

The first example is that of the FRY. As a result of the different declarations of independence by Croatia, Slovenia, Macedonia, and Bosnia and Herzegovina in 1991–92, what remained of the former Socialist Federal Republic of Yugoslavia (SFRY) were the two former Republics of Serbia and Montenegro.

\subsection*{1.35 Distinguishing between situations of State succession and State identity}

\subsection*{1.36 The first example is that of the FRY. As a result of the different declarations of independence by Croatia, Slovenia, Macedonia, and Bosnia and Herzegovina in 1991–92, what remained of the former Socialist Federal Republic of Yugoslavia (SFRY) were the two former Republics of Serbia and Montenegro.}
Chapter 1 CONCEPTS

In April 1992, both Republics reorganized the old federation in the form of the smaller two-member federation now called the ‘FRY’. The new Constitution proclaimed it to be the ‘continuator’ of the former SFRY. Other former Republics strongly opposed such a claim by the FRY. The majority of States, the UN Security Council and the UN General Assembly, as well as the Badinter Commission, refused to recognize the FRY such a status. It was ultimately the third-party States’ firm policy of non-recognition that proved to be the decisive factor in blocking the FRY’s claim of continuity to have any practical effectiveness. In fact, the FRY ultimately changed its position after the political changes that occurred in 2000; wherein it no longer asserted to be the ‘continuator’ of the former SFRY.

1.37 The second example is the agreement among the former Republics of the USSR (with the exception of the three Baltic States and Georgia), that Russia would be considered as the ‘continuator’ of the international legal personality of the USSR in international organizations and in particular at the UN Security Council. This decision was largely accepted by other States in the international community. Thus, although a claim of continuity by Russia should not logically have required any ‘recognition’ by third-party States, it

97 Vahlas (n 38) 854–5.
98 The FRY was officially admitted (as a new State) to the United Nations on 1 November 2000: UN GA Res. 55/12.
3. DISTINGUISHING BETWEEN SITUATIONS OF STATE SUCCESSION AND STATE IDENTITY

remains that many States have nevertheless felt the need to notify Russia of their positions on the matter.101

These two examples show the importance of third-party States’ recognition when it comes to deciding the fate of controversial and contested claims of continuity.102 Recognition also seems to have been the main factor considered by the ICJ when deciding contested issues of State identity.103

These two examples also illustrate that politics play a significant role in these matters. Non-legal reasons are the primary explanation why other States accepted Russia’s claim to continuity, while denying the FRY’s claim.104 As mentioned by Stern, it is common for States to justify their positions with respect to controversial issues of identity and State succession based on objective criteria, while the true motives may have been based on economical and political factors.105 Generally, third-party States will favour continuity over discontinuity.106 One reason is that they seek to preserve their legal relations (contracts, treaties, etc.) with the already existing State. Another motive is that they want the State’s financial obligations to remain undisturbed despite any territorial modifications.

101 These statements are discussed in Stern (n 8) 60–63.
102 Stern (n 8) 85: ‘Sera un État continuateur, l’État reconnu comme tel par l’acceptation générale de la communauté internationale. C’est dire que l’opinion juris de la communauté internationale est l’élément déterminant.’ See also: Tams (n 4) 319.
104 Stern (n 8) 78–9:
Si l’on compare ainsi l’éclatement de l’URSS et celui de la Yougoslavie, il n’y a guère de différences objectives dans le processus de dislocation de l’État préexistant. Simplement, les nécessités stratégiques et géopolitiques dans le cas de la Russie, et les prises de position éthiques et juridiques dans le cas de la RFY engagée dans une politique de ‘nettoyage ethnique’ en Bosnie-Herzégovine, ont conduit la communauté internationale à analyser différemment les deux processus sécessions des différentes républiques de l’URSS ayant laissé subsister la Russie en tant qu’État continuateur; dissolution de la FSFY faisant théoriquement naître des États successeurs tous placés sur le même plan par rapport à l’ancien État.
105 Stern (n 8) 8–3:
Tout se passe un peu ‘à l’envers’ des apparences: il semble bien que la qualification ne soit qu’une conséquence de la préférence des États pour telles ou telles conséquences juridiques. En d’autres termes, ce n’est pas parce qu’un État est continuateur ou successeur que l’on en tirera certaines conséquences juridiques; c’est parce que les États souhaitent certaines conséquences juridiques qu’ils qualifient une situation de succession ou de continuation. … Les facteurs objectifs, situés en amont peuvent cependant être – et sont souvent – invoqués comme arguments à l’appui d’une solution dont la raison d’être est située en aval, dans le résultat à atteindre. Autrement dit, les États peuvent se fonder sur la présence ou l’absence des facteurs objectifs précédemment mentionnés, mais en réalité ils obéiront le plus souvent à des considérations politiques (emphasis in the original).
106 Cansacchi (n 29) 34–5.
Chapter 1 CONCEPTS

1.40 As examined by the present writer elsewhere,\(^{107}\) post-1923 Turkey is a prime illustration of a situation involving a substantial modification of territory coupled with a controversial claim of discontinuity. Turkey claimed to be a new State in 1923. One of the many reasons explaining why it took this position had to do with the fate of the Ottoman Empire’s financial obligations. In the context of the Ottoman Public Debt case (1925), Turkey argued that because it was a new State it should not be held responsible for the entire debt of the defunct Ottoman Empire. Rather, Turkey was willing to accept only a portion of it just like all the other new States that emerged from the collapse of the Empire.\(^{108}\) Other States rejected Turkey’s claim of discontinuity and did not recognize it as a ‘new’ State.\(^{109}\) One (very practical) reason was to ensure that Turkey’s responsibility for the Ottoman Empire’s financial obligations would remain intact after its defeat in 1918.\(^{110}\) In any event, the position that Turkey is the continuing State of the Ottoman Empire was reflected in several provisions of the Lausanne Treaty\(^ {111}\) and subsequently endorsed by arbitral tribunals.\(^ {112}\)

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107 Dumberry (n 31).
109 Oktém (n 35) 577; Cansacchi (n 29) 32; Udina (n 26) 688.
110 Degan (n 45) 304; Cansacchi (n 29) 35; Zamuner (n 108) 225.
111 Treaty of Peace of Lausanne, signed on 24 July 1923, in: UKTS 1923, No. 16 (Cmd. 1929); 28 LNTS 11; (1924) 18 AJIL, Supp., 4, see Arts 1, 30, 46, 58, 60, 65, 99, 240, 241. See, analysis in: Zamuner (n 108) 224–7; Cansacchi (n 29) 32.
112 Affaire de la dette publique ottomane (n 54) 573: ‘À l’égard de la D.P.O., [Dette publique ottomane, Ottoman public debt] la situation juridique de la Turquie n’est nullement identique à celle des autres États intéressés. En droit international, la République turque doit être considérée comme continuant la personnalité de l’Empire Ottoman’. Another relevant case is Sentence arbitrale en date des 24/27 juillet 1956 rendue par le Tribunal d’arbitrage constitué en vertu du Compromis signé à Paris le 15 juillet 1932 entre la France et la Grèce, 12 UNRIAA 155, also in (1956) 23 ILR, 1956 [hereinafter ‘Lighthouse Arbitration case’]. Under Claim no. 12-a, France was seeking damages against Greece (as successor State) for acts committed by the authorities of the Ottoman Empire on the island of Crete. The arbitral tribunal ultimately ruled that the Ottoman authorities had not committed any wrongful act. It added that had the Ottoman Empire committed such an act, Greece could nevertheless not be held liable since Turkey would be liable for its ‘own’ acts committed before the loss of a substantial portion of its territory. The tribunal therefore explicitly recognized that Turkey was the continuing State of the Ottoman Empire. See also: Rosellius and Company of Bremen in Germany (plaintiff) v. (1) Dr. Ch. F. Karsten, Advocate of Huizen in Holland (defendant); (2) The Turkish Republic at Angora (intervener), District Court of Amsterdam, 1925, in (1925–1926) Annual Digest no. 26.

Although Turkey was no longer an Empire but a Republic and its size had been considerably curtailed after the Great War by loss of territory, yet it could not be considered that the Republic was not the successor of the Empire. The remaining part, which was the main portion of the country, was the...
Having examined the distinction between State succession and identity, the next section will analyse the different types of succession.

4. CLASSIFICATION OF THE DIFFERENT TYPES OF STATE SUCCESSION

It is essential to establish a classification of the different types of succession of States and to define them. Scholars have highlighted the importance of making such distinction. The two Vienna Conventions on State succession distinguish four basic types of succession: (a) cession and transfer of part of the territory of one State to another State; (b) separation of a part of the State’s territory; (c) unification of States; and (d) succession in the context of decolonization (Newly Independent States). As noted by Rapporteur Kohen in his Final Report in the context of the Institut’s work on State Succession in Matters of State Responsibility, the classification adopted by the Vienna Conventions ‘does not fully or accurately depict the different hypotheses of State succession’. For instance, the 1978 Vienna Convention does not distinguish between separation and dissolution, providing for the same rule in both cases.

The present author has adopted elsewhere a different typology comprised of six types of State succession. As further explained in the next paragraphs, they can be grouped in two broad categories.

The first essential distinction between different types of succession of States concerns the consequences that an event may have on the predecessor State(s). There are cases where the predecessor State will continue to exist following the event affecting its territorial integrity. On the contrary, in other cases the

continuation of the state which, under another form of government and larger in size, had formed Turkey, and it had retained all its rights and duties except such as were attached to the lost territories.

See, Dumberry (n 31).

See, for instance: Malcolm N. Shaw, International Law 4th edn (CUP 1997) 676–7; Kay Hailbronner, ‘Legal Aspects of the Unification of the Two German States’, (1991) 2(1) EJIL 33; D.P. O’Connell, ‘Recent Problems of State Succession in Relation to New States’, (1970–II) 130 Rec. des Cours 164. Contra: Jenning and Watts (n 59) 209, for whom these different types of succession of States are not ‘terms of art with them carrying clearly established legal consequences’.

Vienna Convention on Succession of States in Respect of Treaties (n 15); Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (n 22).


Art. 34, Vienna Convention on Succession of States in Respect of Treaties (n 15).

Patrick Dumberry, State Succession to International Responsibility (Martinus Nijhoff 2007). See also, a similar categorization used by Zimmermann and Devaney, ‘Succession to Treaties’ (n 38) 319.
predecessor State will *cease to exist*. This distinction is recognized in doctrine;\textsuperscript{118} it can be referred to as ‘partial’ or ‘total’ State succession.\textsuperscript{119} As further explained below, not all cases of succession lead to the creation of a new State(s).\textsuperscript{120}

4.1 Situations where the predecessor State ceases to exist

1.44 In the event that the predecessor State *ceases to exist* following an event affecting its territorial integrity, there are *three* different scenarios that need to be differentiated (which will be analysed separately in this study).

1.45 First, the extinction of the predecessor State may result in the creation of *one* new State. This is the case of a *unification* of States, whereby at least *two* existing States will merge to form a new State. In such a case, the predecessor States will cease to exist to create an entirely new entity, the successor State. Older examples include the merger of Egypt and Syria to form the United Arab Republic (1958), and the merger of Tanganyika and Zanzibar to form Tanzania (1964). The most recent case of unification is that of Yemen in 1990. In 2002, Serbia and Montenegro decided to form a ‘union of the States’ (Montenegro later seceded in 2006).\textsuperscript{121} This so-called ‘union of States’ differs from more classical unification cases.\textsuperscript{122}

1.46 Secondly, the extinction of the predecessor State may result in the creation of *many* new States on its original territory. This is the case in the *dissolution* of a State. Recent examples of dissolution are those of Czechoslovakia and Yugoslavia. The specific case of the USSR is controversial and will be further discussed below.\textsuperscript{123}

1.47 Thirdly, the extinction of the predecessor State sometimes results not in the creation of a new State but in the *enlargement* of the territory of an *existing*...
4. CLASSIFICATION OF THE DIFFERENT TYPES OF STATE SUCCESSION

State. This is the case of incorporation (or ‘integration’, ‘absorption’) of a State where the territory of a State (the successor State) is enlarged as a result of the integration of the entirety of the territory of the predecessor State. The most recent example of an incorporation of State is in 1990 when the German Democratic Republic ceased to exist as an independent State and its territory, comprising five Länder, was integrated into the already existing Federal Republic of Germany.

4.2 Situations where the predecessor State continues to exist

In cases where the predecessor State continues to exist following an event affecting its territorial integrity, there are three different scenarios that also need to be differentiated.

First, the event affecting the territorial integrity of the predecessor State may result in the creation of a new State. This is the case of secession, where a new State emerges from the break-up of an already existing State that nevertheless continues its existence after the loss of part of its territory. The term ‘continuing’ State is often used by scholars when referring to the predecessor State in the situation just described. It should be noted, however, that in the Genocide Case (Bosnia-Herzegovina v. Serbia-Montenegro), the ICJ has used the term ‘continuator’ State instead. There is also some controversy as to the proper terminology that should be used to make reference to this phenomenon and whether the term ‘separation’ should be used instead of ‘secession’. For example, the work of the ILC used the term ‘separation’. For some writers, the term ‘secession’ should be reserved more specifically to describe instances where the removal of one part of the territory is made without the consent of the predecessor State. However, as valid as such distinctions may be, the term

124 Dumberry (n 117) 16–17.
126 Some writers use the term ‘separation’ in the context of a unitary State and ‘secession’ for federal States. For instance: Jacques Brosard and Daniel Turp, L’accession à la souveraineté et le cas du Québec, (2nd ed. PUM 1995) 94; Daniel Turp, Le droit de choisir: Essais sur le droit du Québec à disposer de lui-même/ The Right to Choose: Essays on Québec’s Right of Self-Determination, (Thémis 2001) 22.
127 Both the Vienna Convention on Succession of States in Respect of Treaties (n 15) (at Art. 34) and the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (n 22) (Art. 17), use the term ‘separation’. This is also the case of the Draft Articles on Nationality of Natural Persons (n 22).
128 See: Marcelo G. Kohen, ‘Le problème des frontières en cas de dissolution et de séparation d’États: quelles alternatives?’, in Olivier Corten, Barbara Dekourt, Pierre Klein and Nicolas Levrat (eds), Démembrement d’États et délimitations territoriales: L’état possidetis en question(s) (Bruxylant 1999) 368–9; Marcelo G. Kohen, ‘Introduction’, in Marcelo G. Kohen (ed), Secession: International Law Perspectives (CUP 2006) 2–3; Crawford, The Creation of States (n 45) 247; James Crawford, ‘State Practice and International Law in
Chapter 1 CONCEPTS

'secession' will be used in this book in its general sense to refer to cases where a new State is created while the predecessor State continues to exist. Recent cases of secession include those of Montenegro and South Sudan.

1.50 Secondly, there is another type of succession of States that is similar to cases of secession insofar as the events affecting the territorial integrity of the predecessor State result in the creation of a new State while the predecessor State continues to exist. This is the case with 'Newly Independent States' in the context of decolonization. It is generally admitted that the territory of a colony should not be considered as part of the territory of the colonial State administrating it.129 In that sense, a Newly Independent State is a new State that cannot be said to have 'seceded' from the colonial power to the extent that its territory was never formally a part of it.130 There is some controversy in doctrine as to whether Newly Independent States should be at all be viewed as a distinct type of succession of States.131 Supporters of the distinction rely on the specific circumstances of the decolonization and the fact that different rules of State succession apply to these States in order for them to freely exercise their right to self-determination and to break the vicious circle of economic domination.132 The work of the ILC on State succession has recognized the specificity of this category of State succession.133 Both Vienna Conventions on matters of State succession have thus adopted different rules...
applicable to Newly Independent States to adequately manage this distinction. However, the ILC Draft Articles on Nationality in relation to State Succession does not. The recent work of the Institut on State succession also adopted a specific regime for Newly Independent States in the context of decolonization. In his Final Report, Rapporteur Kohen explained three reasons why he considered it ‘indispensable’ to include Newly Independent States as a specific category of State succession of its own:

First, as some cases mentioned at the beginning of this report show, there can still be cases of emergence of new States that could fall within the realm of the category of newly independent States, as defined in the 1978 and 1983 Conventions. Second, as a recent judicial decision in the United Kingdom demonstrates, problems relating to the commission of internationally wrongful acts during colonial times and the question of responsibility of the predecessor or the successor States may emerge even long after the acts have occurred. Hence, cases of State succession giving rise to the emergence of a newly independent State that occurred in the past may have still kept open situations concerning international responsibility. Third, as for treaties, archives, debts and property, the subject matter of the consequences of internationally wrongful acts committed before the date of State succession also appeals for a specific treatment of succession with regards to States having been dependent territories before coming into existence. Given the particular territorial status prior to independence, the cases of newly independent States cannot be assimilated to those of the separation of a State, whether by agreement or not.

Thirdly, the event affecting the territorial integrity of the predecessor State may sometimes result not in the creation of a new State but in the enlargement of the territory of an existing State. This is the case of a cession or transfer of territory from one existing State to another existing State. Although the term ‘cession’ is occasionally used in doctrine to include the concept of a ‘transfer’, in this study, the term ‘cession’ will be used only to refer to cases where the

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134 Thus, Art. 16 of the Vienna Convention on Succession of States in Respect of Treaties (n 15) indicates that treaties entered into by the predecessor State are not binding on a Newly Independent State, while other new States emerging from a dissolution of State or separation/secession are bound by such treaties (Art. 34). Art. 38 of the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (n 22) indicates that, in principle, and without any agreement to the contrary, debts of the predecessor State do not pass to the Newly Independent State. A different regime applies to cases of unification of States (where debts pass to the successor State, Art. 39) and cases of separation and dissolution of State (where an ‘equitable share’ of the predecessor State’s debts pass to the new State(s), Arts 40 and 41).

135 Draft Articles on Nationality of Natural Persons (n 22) at 41, [1] and [3] (dealing with Art. 26). The Commentary to the Articles recognizes the theoretical distinction between Newly Independent States and ‘separation of part or parts of the territory’ (i.e., secession). However, it also indicates that the ‘substantive rules’ established for cases of secession (i.e., Arts 24–26) would be applicable mutatis mutandis to any remaining cases of decolonization in the future. Therefore, no separate section was included in the Draft Articles to deal specifically with Newly Independent States.

136 IDI, State Succession to Responsibility, Resolution, 2015 (n 24), Art. 16.


138 Shaw (n 113) 688.
Chapter 1 CONCEPTS

territorial change is made pursuant to a treaty to which the predecessor State is a party. On the contrary, a ‘transfer’ of territory will apply to situations where there is no agreement between the predecessor State and the successor State.\footnote{O. Dorr, ‘Cession’, in Max Planck Encyclopedia of Public International Law (OUP, online edn, 2006) [1, 8].} Despite this semantic distinction having been explained, both cases of cession and transfer of territory will be analysed in this study as a single type of succession of States. This type of territorial transformation is somewhat different compared to other mechanisms of State succession insofar as it results in neither the extinction of a State nor in the creation of a new State.\footnote{There is one main difference between cases of ‘cession’ of territory and cases of ‘incorporation’. Cases of cession of territory only deal with part of a territory of a State which passes to another State, while cases of incorporation involve the whole territory of the State which is integrated into another State. Another difference is that in the context of cession of territory, the predecessor State is not extinguished as a result of the loss of part of its territory.} Nevertheless, it remains a distinct type of State succession.\footnote{This is emphasized by Stern (n 8) 105; Dorr (n 139) [1].} This conclusion was reached by the ILC in its analysis on matters of State succession,\footnote{Article 15 of the Vienna Convention on Succession of States in Respect of Treaties (n 15) does not use the concept of ‘cession’ but refers instead to the situation ‘[w]hen part of the territory of a State, or when any territory for the international relations of which a State is responsible, not being part of the territory of that State, becomes part of the territory of another State’. See also: Art. 14, Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (n 22); Art. 20, Draft Articles on Nationality (n 22).} as well as in the recent work of the Institut\footnote{IDI, State Succession to Responsibility, Resolution, 2015 (n 24), Art. 11.} A classic example of cession of territory is that of Alsace-Lorraine from Germany to France in 1919.\footnote{Another famous older example is that of the transfer of Alaska from Russia to the USA in 1867. See other examples in: Dorr (n 139) [6].} Two more recent examples that will be examined in detail below, are the transfers of Hong Kong from Great Britain to China (1997) and that of Macao from Portugal to China (1999).\footnote{See, Chapter 3, Section 6.5.}

1.52 In sum, the relevant State practice and international case law will be examined separately for the following six different types of succession of States (corresponding to the same typology recently adopted by the Institut\footnote{IDI, State Succession to Responsibility, Resolution, 2015 (n 24). See also, the work of Stern (n 8) 113, providing a survey of different typologies used in doctrine. See also: Annie Gruber, Le droit international de la succession d’États (Bruylant 1986) 17–18.}):

- unification of State;
- dissolution of State;
- incorporation of State;
- secession;
- newly independent States; and
- cession and transfer of territory.