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GENERAL CONCLUSION

This book has provided readers with an analysis of the interaction between two fields of international law: State succession and international investment law. Two main questions were examined: the question of succession to BITs and to State contracts.¹

The first question examined in Part B was whether or not a successor State is bound by the BITs entered into by the predecessor State with other States. I began by analysing the practice of States (both successor States and other States parties to BITs) on the matter.² My investigation (and that of other writers as well) has shown that it is in fact very common for States to reach an agreement on this question. Indeed, the States concerned have either signed new BITs with each other or have expressly agreed upon the continuation of the old BIT to which the predecessor State was a party. My analysis has furthermore illustrated that there are many situations where (depending on the specific circumstances of each case) the continuation of a specific BIT can be inferred from the behaviour of the States in question or from a tacit agreement.

One central question examined in this book (and certainly the most controversial) is what happens to a BIT of the predecessor State when the States concerned have not agreed on its continuation. The starting point of my analysis was a critical assessment of the different solutions adopted under the 1978 Vienna Convention for specific types of State succession. I have argued that it is incoherent for the ILC to apply, on the 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. In any event, there are no logical reasons to apply the principle of automatic continuity to bilateral treaties given the

¹ I have also examined in Part C the question of succession to multilateral treaties. The issue has in fact not arisen in the field of investment arbitration. The question of succession to the ICSID Convention is quite straightforward and has not been the object of much controversy.

² I have also critically analysed all (publically-available) investment arbitration cases involving BITs in the context of State succession. This analysis has shown that tribunals increasingly have to decide cases involving matters of State succession, including a number of pending proceedings arising from the annexation of Crimea by Russia.
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 (the successor State and the other State party) have explicitly (or tacitly) agreed on such a continuation. This basic solution should apply to all new States rather than exclusively to those emerging from the process of decolonization.

17.04 A few words should be said here about an argument developed by Tams in his groundbreaking article. Tams believes that ‘the argument for automatic succession to bilateral treaties meets with considerable obstacles’\(^3\) and that ‘as long as these are seen as one category, and viewed as inter-party bargains of an “essentially voluntary” character, the case for automatic succession is weak’.\(^4\) However, while admitting that ‘there is force’ to the approach (adopted in the present book) which rejects that a new State is automatically bound by BITs, he nevertheless adds that ‘perhaps it does not do full justice to arguments in favour of automatic succession to BITs’.\(^5\) The argument is tentatively (in the words of Tams himself\(^6\)) laid down as follows:

If that case were made, it would need to be based on analysis that looks beyond the number of parties, and that takes issue with the characterisation of BITs as ‘essentially voluntary’ inter-State arrangements. An argument for automaticity could instead emphasise that, while concluded between States, BITs establish substantive rights of investors, which are directly enforceable in arbitral proceedings. While formally bilateral, it does indeed seem overly restrictive to view BITs merely as inter-State bargains. Yet once the focus is broadened to include the interests of foreign investors, two related arguments in favour of automaticity could be advanced.

First, treaty-based investor rights could be likened to ‘vested’ or ‘acquired’ rights, which occupied a prominent place in traditional debates about State succession — and which were claimed by many to survive instances of State succession. Applied to the present context, one could perhaps argue that foreign investors making an investment when a BIT applies should acquire the right to have that investment protected by the BIT after the State succession has taken place.

Second, pressing the point in light of recent arguments about automatic succession to particular categories of treaties, there might be room for a ‘human rights analogy’:

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\(^4\) Ibid.

\(^5\) Ibid., 335.

\(^6\) Ibid., 336:

These points are purposively put tentatively, as the debate is at an early stage — and as quite often, the parties have determined the fate of their BITs explicitly or implicitly. It must be recognised that the case argument for automatic succession to BITs is anything but straightforward. It depends on a particularly investor-friendly reading of those treaties, which — given recent backlashes against investment arbitration — may have lost some of its appeal. However, the brief sketch of potential arguments suggests that the matter is at least open to argument.
adapting a prominent dictum by the UN Human Rights Committee, one could indeed argue that, as rights under BITs ‘belong [to foreign investors] …, once [foreign investors] are accorded the protection of the rights under the [treaty], such protection devolves with territory and continues to belong to them, notwithstanding … State succession’.7

One of the most controversial questions in the field of investment arbitration is whether an investor has a ‘direct’ or a ‘derivative’ right under a BIT. The question is beyond the scope of this book. Suffice it to say that there are many reasons to favour the direct rights theory over the derivative approach.8 As noted by Douglas, ‘[t]he functional assumption underlying the investment treaty regime is clearly that the investor is bringing a cause of action based upon the vindication of its own rights rather than those of its national State’.9 Without going into further detail, it should be noted that Douglas has developed a theory slightly different from the ‘direct’ model by distinguishing between procedural and substantive rights contained in BITs.10 In essence, if one were to take the position that BITs establish direct substantive rights to investors, it is theoretically possible to envisage the existence of an argument in favour of automatic succession. The argument would be that if these substantive rights are indeed those of investors (and not those of States under the ‘derivative’ theory), they should exist notwithstanding the will of the States parties to the BIT. In other words, these rights would ‘survive’ the disintegration (and even the extinction) of one of the parties to the BIT.

In my view, the fact of the matter is that even under the strict ‘direct’ model, investors are clearly not parties to the BIT; they only receive legal protection if

7 Ibid., 335–6.
10 Douglas (n 8), 35. For him, while ‘the procedural right to assert claims against the host state in arbitration is vested directly in the investor’, the other question is whether ‘the substantive investment protection obligations are owed directly to investors that qualify as such under the investment treaty’. He supports the view that substantive investment protection obligations are not owed directly to investors:

Upon the claimant’s filing of a notice of arbitration, the claimant investor perfects the host state’s unilateral offer to arbitrate, and the two parties thus enter into a direct legal relationship in the form of an arbitration agreement. At the same time, the claimant becomes a counterparty to the host state’s obligation to submit to international arbitration for an assessment of its conduct towards the claimant’s investment on the basis of the norms of investment protection set out in the treaty. This obligation encompasses the duty of the host state to pay compensation if the international tribunal adjudges its conduct to be violative of these norms. The minimum standards of investment protection could thus be characterised as the applicable adjudicative standards for the claimant’s cause of action rather than binding obligations owed directly to the investor.
they fulfil certain conditions, such as being an ‘investor’ who makes an ‘investment’ under the definition of the scope of the BIT. Moreover, even if one adopts the ‘direct’ theory, it remains that the parties to a treaty are free to terminate the instrument according to the general rules of the law of treaties.\textsuperscript{11} It should be added, importantly, that the rights of investors are nevertheless protected under clauses in the BIT providing for a minimum period of application and the presence of a ‘survival clause’.\textsuperscript{12} Yet, importantly, these provisions provide protection to the investors in the context of the termination (unilateral by one State, or by agreement by both States\textsuperscript{13}) of the BIT. In my view, a survival clause does not apply in the extraordinary situations of State succession, such as when, for instance, one of the parties to the instrument no longer exists as a sovereign State.\textsuperscript{14} In such a case, the BIT will simply cease to have any application. The survival clause cannot have any effect in such a situation and does not offer any protection to foreign investors of the other contracting party. The survival clause cannot find application in the event that one of the parties does not itself survive the event leading to a State succession.

17.07 In sum, even if one endorses the view that investors have ‘direct’ rights under a BIT, it remains that no such rights can ‘automatically’ survive the dramatic event of a State succession affecting the very existence of one of the contracting parties. In other words, the ‘direct’ rights theory does not support the application of any principle in favor of automatic succession to BITs.

17.08 The second question examined in Part D of this book concerned State contracts: whether or not a successor State is bound by the obligations contained in a contract (which includes an arbitration clause) signed by the predecessor State with a foreign company before the date of succession. Based on my analysis of the more general issue of succession to acquired rights, I have reached the conclusion that the successor State is always free, under international law, to modify the terms of a State contract after the date of succession. Yet, any such changes must be done by respecting principles of

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\item\textsuperscript{11} Braun (n 8) 1; Tania Voon, Andrew Mitchell and James Munro, ‘Parting Ways: The Impact of Investor Rights on Mutual Termination of Investment Treaties’, (2014) 29(2) ICSID Rev 451–73.
\item\textsuperscript{12} See, J. Harrison, ‘The Life and Death of BITs: Legal Issues Concerning Survival Clauses and the Termination of Investment Treaties’ (2012) 12(6) J World Invest and Trade 933ff.
\item\textsuperscript{13} The question of the protection of investors’ rights in the context of the termination of a BIT by mutual consent of the contracting parties is examined in: Harrison, ibid., 941ff; Braun (n 8) 55ff; Voon et al. (n 11).
\item\textsuperscript{14} Harrison indicates that ‘there are situations in which a survival clause will not have its desired effect due to rules which are external to the BIT’ (ibid., 939), referring to rules and principles regarding the validity of treaties (error, fraud, corruption, coercion of a representative of a State, etc.) and jus cogens rules whereby a treaty automatically becomes void and is terminated when it conflicts with an emerging peremptory rule of international law (ibid., 940).
\end{itemize}
international law, including the MST and an obligation to provide compensation in the event of expropriation.

Even if, as a matter of principle, the successor State is not bound by State contracts, I have also argued that the matter is in fact more complex than that simple proposition would suggest. As a result, I have put forward a modest proposal for a new framework of analysis concerning the question of succession to State contracts. The issue was examined based on a first hypothesis: the solution to the problem of succession to State contracts depends on the different types of succession involved. Thus, I have shown that State practice and court decisions have applied the principle of succession for certain types of succession (cession of territory, unification and integration of States), but not for others (secession and dissolution). This book further discussed whether there should be particular circumstances where the principle of succession should apply in the context of secession (where the predecessor State continues to exist) and dissolution (where it ceases to exist). In my view, this is indeed the case based on the second hypothesis I have put forward: the solution to the question of succession to State contracts depends on a number of factors and circumstances which may exist in a given case. My assessment of State practice and court decisions shows support for the importance of such elements. Some of the most important factors that should be taken into account include the existence of a ‘territorial nexus’ between a contract and the successor State, as well as the need to avoid any unjust enrichment. These relevant elements should always be considered when determining whether the predecessor or the successor State (and in the context of dissolution, which of the new States) should be responsible for rights and obligations contained in State contracts.

Finally, I have explored a number of specific problems that may arise when the event of State succession occurs during the arbitration proceedings. For example, a succession occurring during arbitration proceedings may affect the identity of the respondent State or that of the home State of the claimant investor. The latter example would result in a change in nationality for the claimant investor. Through my analysis, I have argued that a tribunal should continue to have jurisdiction over a case in these circumstances, despite the changes affecting the respondent State or the home State of the claimant.