

BOOK REVIEWS

A Guide to State Succession in International Investment Law, Patrick Dumberry. 1st edn. Cheltenham, UK; Northampton, MA, USA: Edward Elgar Publishing 2018. 552 pp. GBP 135. ISBN 978-1788116602.

State succession and international investment law might until recently have seemed rather discrete sub-areas of public international law with little interaction between themselves.¹ However, a number of recent arbitral decisions show that issues of state succession actually arise in investment disputes with some regularity.² Can Kazakhstan be sued by Canadian investors based on the Canada-USSR Bilateral Investment Treaty (BIT)?³ Do Chinese BITs protect investors from Macao even if they have been concluded before the territory's handover to China?⁴ And can Russia be held liable for the breach of protection standards in its BITs vis-à-vis investors in Crimea?⁵ These are only some of the questions that investment tribunals have had to deal with over the last few years – and the answers to which are not always straightforward.

Patrick Dumberry, a Professor of law at the University of Ottawa with a long-standing interest in the topic,⁶ has set out to provide a detailed analysis of State Succession in International Investment Law in a new monograph. The two main questions he seeks to address are whether a successor state is 'bound by investment treaties ... entered into by the predecessor State with other States' and whether it is '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.'⁷ Prof. Dumberry analyses these issues for different

¹ P. Dumberry, *A Guide to State Succession in International Investment Law* (Elgar International Investment Law 2018), para. 1.02.

² According to Professor Dumberry's count, 'at the time of writing (May 2017), the issue of State succession had arisen in no less than 46 publicly known [BIT arbitration] cases', *ibid.*, para. 6.02.

³ See *World Wide Minerals v. Kazakhstan*, UNCITRAL, Decision on Jurisdiction of 19 Oct. 2015; *Gold Pool Ltd. Partnership v. Kazakhstan*, UNCITRAL, PCA Case No. 2016-23.

⁴ See *Sanum Investments Ltd. v. Laos*, UNCITRAL, PCA Case No. 2013-13, Award on Jurisdiction of 13 Dec. 2013.

⁵ See e.g. *Everest Estate et al. v. Russian Federation*, UNCITRAL, PCA Case No. 2015-36, Decision on Jurisdiction of 20 Mar. 2017.

⁶ See P. Dumberry, *State Succession to International Responsibility* (Nijhoff 2007); P. Dumberry, *An Uncharted Question of State Succession: Are New States Automatically Bound by the BITs Concluded by Predecessor States Before Independence?*, 6(1) J. Int'l Disp. Settlement 74 et seq (2015).

⁷ Dumberry, *supra* n. 1, at xv.

scenarios of state succession based on a comprehensive review of relevant state practice and legal authorities. Taking the 1978 Vienna Convention on Succession of States in respect of Treaties (the 'Convention') as a mere starting point, he adopts a typology that distinguishes between 'six different types' of state succession: unification (several states merge to form a new state); dissolution (a state is extinct and several new states are formed on its territory); incorporation (a state completely absorbs another state, integrating its territory); secession (a new state emerges from another state, while the latter continues to exist); newly independent states (a new state emerges in the context of decolonization); and transfer of territory (which results neither in the extinction of a state nor in the formation of a new one).⁸ This classification forms the basis for the analysis throughout the book.

The first half of the study addresses the question of whether a successor state is bound by BITs entered into by a predecessor state. Prof. Dumberry offers a critical analysis of the solutions suggested by the Convention in this regard,⁹ disagreeing in particular with the principle of 'automatic succession' in situations of secession and dissolution adopted under the Convention's Article 34.¹⁰ After reviewing state practice in the context of the break-ups of Czechoslovakia, Yugoslavia, and the USSR, Prof. Dumberry finds that, while 'a number of new successor States ... seem to have adopted a general position in favour of continuity regarding bilateral treaties,' the 'practice of other States in response' has been 'anything but coherent.'¹¹ He favours a '*tabula rasa* solution' in these situations, arguing that BITs should 'not automatically continue to be in force ... unless both States have explicitly (or tacitly) agreed to such a continuation.'¹²

Prof. Dumberry also reviews the various BIT cases that have arisen from state successions, specifically the three previously mentioned break-up situations, the transfer of the territory of Macao to China and the Russian annexation of Crimea.¹³ He devotes particular attention to this last event, which he considers 'a case of illegal annexation of territory,' and argues convincingly that the rules for transfer of territory under the Convention cannot apply in this regard.¹⁴ More controversially, he takes the view that 'extending Russian BITs to the territory of Crimea would amount to ... give legal effect to an unlawful action'¹⁵ and submits that foreign investors can therefore 'no longer benefit from any BIT protection in that territory.' While admitting that such an outcome is 'not ideal' and

⁸ *Ibid.*, paras 1.44 et seq.

⁹ *Ibid.*, paras 5.01 et seq.

¹⁰ *Ibid.*, paras 5.33, 5.85.

¹¹ *Ibid.*, para. 5.87.

¹² *Ibid.*, para. 1.12.

¹³ *Ibid.*, paras 6.01 et seq.

¹⁴ *Ibid.*, para. 6.109.

¹⁵ *Ibid.*, para. 6.200.

acknowledging that tribunals in several arbitrations brought by Ukrainian investors under the Russia-Ukraine BIT have taken a more 'pragmatic approach,'¹⁶ he defends such a solution as 'the price to pay for fundamental norms of international law to have any meaning in the realm of investor-State arbitration.'¹⁷

Prof. Dumberry then moves on to addressing state succession to multilateral treaties. Here again, he disagrees with the Convention principle of automatic succession for cases of secession and dissolution,¹⁸ considering it 'premature to discuss the emergence of any customary rule' of automatic succession in these contexts.¹⁹ He suggests that a new state should 'confirm' its succession to a multilateral treaty by notifying the depository of its willingness to be a party.²⁰ In the interim, as long as the new state has not expressed a position on the matter, 'there should be a presumption that the treaty continues to apply.'²¹

Addressing the special category of treaties creating international organizations, Prof. Dumberry notes that (unification scenarios apart) new states typically cannot become members by way of succession, but have to go through the organization's admission process instead.²² Specifically with regard to ICSID, he points out that 'there is no automatic succession to the membership' and that a new state will have to 'apply to become a member of the Centre and a party to the Convention.'²³

The second half of the book primarily deals with the question of succession to state contracts. Here, Prof. Dumberry notes a consensus in principle to the effect that the rights and obligations under state contracts are not transferred from one state to another in succession scenarios.²⁴ This notwithstanding, he argues that a successor state should not be 'entirely free to modify or annul rights' contained in a state contract, but that he must observe international minimum requirements regarding an investor's acquired rights.²⁵ This leads Prof. Dumberry to conclude that successor states should be bound by state contracts in some circumstances.²⁶ Based on a review of relevant state practice and the decisions of courts and tribunals, he proposes 'four different factors' that should be taken into account in this regard, namely the position of the successor state with regard to the succession to contracts; the existence of a 'nexus' between the relevant contract and the territory of the successor state; whether the relevant contract was signed by an

¹⁶ See e.g. *Everest Estate et al. v. Russian Federation*, *supra* n. 5.

¹⁷ Dumberry, *supra* n. 1, para. 6.202.

¹⁸ *Ibid.*, para. 7.06.

¹⁹ *Ibid.*, para. 7.08.

²⁰ *Ibid.*, para. 7.09.

²¹ *Ibid.*

²² *Ibid.*, paras 9.05 et seq.

²³ *Ibid.*, para. 9.10.

²⁴ *Ibid.*, para. 12.08.

²⁵ *Ibid.*, paras 10.10 et seq., 12.08.

²⁶ *Ibid.*, paras 12.12 et seq.

organ of a territorial unit of the predecessor state that has a 'structural continuity' with the successor state; and whether there is a need to avoid the latter's unjust enrichment.²⁷

A last part is dedicated to the impact of state successions on pending arbitration proceedings, distinguishing between successions affecting a respondent state and successions affecting the home state of an investor. With regard to the former, Prof. Dumberry suggests that instances of incorporation or unification are 'unlikely to be fatal regarding the continuation of proceedings.'²⁸ At the same time, it seems clear that in cases of secession, dissolution, or transfer of territory, a tribunal does not have the power to replace a predecessor state with its successor.²⁹ Finally, with regard to successions relating to the home state of an investor, Prof. Dumberry rejects the imposition of a 'continuous nationality' rule,³⁰ arguing convincingly that changes of nationality after the filing of the request for arbitration cannot be relevant.³¹

In sum, Prof. Dumberry's treatise addresses a broad range of issues that might arise out of state successions in investment disputes in a comprehensive and comprehensible manner. One does not need to agree with all of his conclusions to appreciate the well-reasoned analysis and wealth of references to state practice and legal authorities, which will make this book indispensable reading for any arbitration practitioner dealing with this complex and contentious matter. The next case raising questions of state succession is bound to arise before too long.

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²⁷ *Ibid.*, para. 14.06.

²⁸ *Ibid.*, paras 15.07–15.08.

²⁹ *Ibid.*, paras 15.11, 15.13–15.14.

³⁰ For the existence of such a rule see *Loewen Group, Inc. & Raymond Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award of 26 June 2003, para. 225.

³¹ Dumberry, *supra* n. 1, paras 16.22, 16.24, 16.27 et seq.