

State Succession and Commercial Obligations

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FOREWORD

Successions occur within a state but become international legal problems when they affect governments and individuals in other states. As long as major state actors cultivated a Mercantilist economic policy, the external private commercial effects of radical transformations of personnel, decision structure or myth system within a state were likely to be confined to few other states. Successions had limited foreign impacts.

Mercantilism had its day. The first great era of globalization, at the end of the 19th and beginning of the 20th centuries, concluded with a series of major revolutions that introduced new types of command economies and radically new notions of the relation between private property (and, in particular, foreign-owned private property) and the state. Succession controversies abounded. The second half of the 20th century witnessed the dissolution of the major Western empires and the emergence to independence of many formerly colonized lands. Succession controversies multiplied. The 20th century closed with another era of globalization, which coincided, this time, with a series of massive counterrevolutions. Among other things, they reversed the by-then discredited command economy model, replacing it with various approximations of liberal capitalism. There were more succession controversies.

Given the international economy's progression from interdependence to globalization, the impacts of successions on private commercial relations promise to be even greater. And in contrast to the comparatively restricted disruptions experienced during the Mercantilist era, future successions will be disruptive in a polymorphous sense. The velocity of political change within nation-states is quickening. So the international community may expect more and more disjunctive changes in the political structures and political economies of many states. The effects of each succession are likely to have increasing impacts for the rest of the interna-

tional community. Should authentically Islamic forms of economic organization be installed in a renascent Caliphate in the *dar al Islam*, the worldwide effects on private economic relations could prove incalculable.

It is this dynamic area that Tai-Heng Cheng addresses, and, thanks to him, international law, at long last, has a useful, practical and intellectually fascinating book about the important subject of state and governmental succession. Dr. Cheng is not deterred by the absence of "bright line" rules in this area. Lawyers are deeply involved in successions, and it is precisely because of the absence of rules that a different conceptual approach is required. Until now, scholarship in this area has been marked more by metaphysical abstraction and logical derivation than by empirical examination of actual decision trends. And the focus has been, for the most part, on governments, despite the fact that most of the effects of succession are visited on individual and corporate private actors. Dr. Cheng has done yeoman work in correcting the focus. He creates a new framework for analyzing these phenomena and provides a set of tools for governments, their advisors and international decision makers for grappling with the many problems presented by succession.

Dr. Cheng focuses on the great bulk of the succession iceberg: the disruption in the innumerable transnational commercial relationships caused by a change in decision structure or national myth. After clearing away the debris of prior theories, he identifies the critical actors in the succession process and then reviews, in rich detail, the collective international efforts in the two Vienna Conventions to clarify and prescribe policy with respect to succession. But the heart of this book is a set of studies of recent cases of succession, their impacts on extant commercial relationships and the international legal efforts to ameliorate them.

Like the best of the younger generation of scholars, Dr. Cheng does not confine himself to a recitation and analysis of past decisions, as challenging and important a task as that might be. He is also concerned with appraising the decision trends he assembles in terms of a set of international goals that he sets out early in his study. The

combination of a rich contextual framework, clarification of policy goals and detailed trend analyses, all informed by policy appraisal, will make this work the indispensable handbook for all who grapple with the increasingly common phenomenon of succession.

W. Michael Reisman
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PART I
A NEW APPROACH

CHAPTER 1

CONCEPTUALIZING THE LAW OF SUCCESSION

The story of state succession and commercial obligations is a story about globalization. As producers and consumers, we depend on each other to supply and demand goods, services and capital. Because of this worldwide interdependence, we are part of a common enterprise to manage the effects of state succession on international commercial arrangements. We share an interest in preventing state succession from disrupting international arrangements that allow us to cooperate with each other. We also share an interest in ensuring that whenever succession occurs, each participant in global commerce survives as a viable entity. The risks and costs of financial contagion and regional instabilities should a state, financial institution or large multinational corporation become insolvent are high. Consequently, in a succession, international decision makers tend to act in concert to protect commercial cooperation and to prevent the economic destruction of any participant. Such global decision making took place in recent successions—the Soviet Union, Yugoslavia, Czechoslovakia, Hong Kong, Macau and East Timor—and is likely to be repeated in future successions.

Succession occurs when a state fundamentally changes its structures of power and authority, and an authoritative international response is needed to manage disruptions to international arrangements that may result from that change. In the last two decades, several fundamental changes in the structures of power and authority of states have disrupted international commercial obligations and required an international response, such as the dissolution of the Socialist Federal Republic of Yugoslavia (the SFRY) in the 1990s and the “regime change” in the Republic of Iraq in 2003.

The question of how succession affects commercial obligations is, however, not new. For centuries, states have dissolved, unified,

annexed each other and changed their internal power structures in other fundamental ways. For as long as these reorganizations have occurred, lawyers and statesmen have tried to determine whether and to whom preexisting commercial obligations should pass.¹

Despite numerous efforts to describe the law of succession, the impact of succession on commercial obligations remains ambiguous in theory and practice. Specialists in international law often distinguish between state and government succession. In the former, the international legal personality of a state is altered or destroyed, and the rules of state succession are triggered. In the latter, the internal political structure of a state changes, but the international legal personality does not, and so the rules of state succession do not apply. In contrast to this historical distinction between government and state succession, jurists disagree about whether a predecessor state's obligations bind its successor state, or whether a successor state begins its legal life with a *tabula rasa* (clean slate).

A new approach to state succession is needed to address the issues of international law and policy that contemporary successions raise. In the context of international commercial arrangements, the distinction between state and government succession does not adequately meet the needs of the global political economy. In both state and government successions, states, creditors and other interested parties may demand that obligors and other parties take responsibility for preexisting commercial obligations, or they may demand that obligations be terminated. International law should not draw doctrinal distinctions between state and government succession in response to claims that commercial arrangements survive or are terminated by succession. It should instead adjust these commercial arrangements to promote global order and development. Because the global policies concerning commercial obligations are equally applicable to state and government successions, the contemporary legal theory of succession and commercial obligations presented in this book applies to

¹ See ARISTOTLE'S POLITICS 162 (text of Bekker, W.E. Bolland trans., Longmans, Green & Co., 1877) (discussing the termination of contracts and other obligations when certain types of succession occur).

both types of succession. Accordingly, the term “state succession” refers to the succession of both states and governments.²

Prior succession theories prescribe that international commercial obligations either pass entirely from the predecessor to the successor state or do not pass at all. These theories do not promote global order and development. They also do not account for the realities of geopolitics and international commerce. Recent instances of state succession show that parties affected by succession, such as creditors, global corporations, multinational organizations and states, tend to modify commercial relationships pragmatically, rather than adhere to doctrinal prescriptions about the termination or continuity of individual obligations. These decision makers tend to terminate obligations that are obsolete, and preserve commercial relationships that are still relevant. These decision makers also tend to modify commercial arrangements requiring adjustment to reap the benefits of cooperation.

To address the needs of global commerce and account for present-day geopolitics, this book proposes eight key propositions as a foundation of a legal theory of state succession and commercial obligations:

- (1) The impact of state succession on commercial obligations is controlled by law, which refers to the entire international decision-making process and not merely to prescribed rules.³

² See *infra* at Chapter 2, Section 1 (arguing that a contemporary theory of state succession should include government successions).

³ In this book, the terms “law of state succession” and “legal theory of state succession” refer to the entire international decision-making process concerning state succession. Cf., Oscar Schachter, *The Nature and Process of Legal Development in International Society*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY DOCTRINE AND THEORY* 43, 51 (R. St. J. Macdonald & Douglas M. Johnston eds., 1989) [*hereinafter* *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW*] (“[I]nternational law is a product of the interplay of power and interest conditioned by material conditions and perceptions of need and aspirations.”).

- (2) In addition to creditors, predecessor states and successor states, a plethora of third-party decision makers are involved in the adjustment of commercial obligations following succession. These adjustments affect global participants.
- (3) Continuity no longer refers simply to the *continuity of specific obligations* but rather to the overall *continuity of cooperation*, in which commercial obligations are tools for cooperation that can be strengthened, adjusted or replaced to promote cooperation according to the individual circumstances of each succession.
- (4) The density of relationships in contemporary international life has created a strong tendency toward continuity.
- (5) In spite of the costs of rupture, discontinuity of obligations may occur when decision makers face domestic or international pressure to terminate obligations that are grossly unfair.
- (6) There is increasing implied and explicit cooperation and coordination among decision makers whose interests are aligned towards continuity or discontinuity.
- (7) Although law increasingly controls successions, it still has limited authority and power over very powerful decision makers, such as hegemonic states and colluding blocs.
- (8) Law needs to carefully control powerful decision makers to support the relevant policies of international law.

1. THE RECURRENCE OF STATE SUCCESSIONS

States are essentially populations of individuals in defined territories, each banded together with varying degrees of commitment to a common cause or identity and compliance with a governing elite.⁴ Strong centripetal forces hold states together: the authority and power of the ruling elite; the genuine desire by nationals to enjoy the privileges and protections arising from their membership of their

⁴ See Convention on Rights and Duties of States 1933, art. 1, 49 Stat. 3097; see also Bengt Bröms, *Subjects: Entitlements in the International Legal System*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW*, *supra* note 3, at 1, 3 (discussing criteria for statehood).

state; and the deployment of values by other states and international organizations to keep states together to stabilize regional and global military, economic and diplomatic dynamics.

From time to time, centrifugal forces overcome the forces that hold states together, resulting in succession. Examples range from the dissolution of the Roman Empire to the independence of East Timor. In the 20th century alone, there were several waves of successions, including the break-up of the Austro-Hungarian and Turkish empires in the 1920s, decolonizations in Africa and Asia from the 1950s–80s and the dissolutions in Eastern Europe in the 1990s.

Political vectors are usually necessary to create overwhelming centrifugal forces. When an instance of succession occurs in isolation, the centrifugal forces may be contained between the predecessor and successor states. For example, Hong Kong was transferred from the United Kingdom of Great Britain and Northern Ireland to the People's Republic of China (the PRC) in 1997 when a century-old agreement leasing the New Territories in Hong Kong to the United Kingdom expired.

For a wave of successions to occur, wider political forces are usually needed to create tectonic shifts in global order. The dissolution of the Austro-Hungarian Empire in the 1920s was brought about by a major shift in the global power balance following the First World War. In the 1950s–70s, colonies around the world acquired independence from their colonial rulers, which had been weakened by the Second World War. The break-up of Eastern European states occurred in the 1990s at the end of the Cold War, when tensions balancing Eastern and Western spheres of influence snapped, unleashing decades of pent-up centrifugal forces.

State successions will continue to occur because there are strong centrifugal forces in the world. In the developed North, there are secessionist movements in Quebec, Northern Ireland and Chechnya. In the less developed South, Aceh, Tibet, Palestine and other communities may gain independence in the future. There are minority groupings that barely tolerate each other even within some secessionist

movements, as evinced by the conflicts among the Serbs and Croats and Kosovars in the Federal Republic of Yugoslavia (the FRY), and the infighting between the Christian and Muslim Eritreans as they battled Ethiopians. The seeds of new secessionist movements are incubated in such conflicts.

The United States of America is likely to be involved in future successions. The United States can and does deploy its vast resources to manage regional instabilities and conflicts within states, such as its long-standing intervention in the Palestinian-Israeli question. If the United States anticipates that regional instability would support its foreign policies, it may reduce its control over these regions, for example, by withdrawing its naval fleet or by reducing foreign aid. Such a strategy could unleash centrifugal forces. The United States may also intervene directly, such as when it sponsored a "linkage-regime" involving the United States, the Republic of Angola, the Republic of South Africa and the Republic of Cuba to create an independent Republic of Namibia.⁵ In extreme cases, the United States may invade another state to overthrow its government and establish a new government, such as the U.S.-engineered "regime change" in the Republic of Iraq and the Islamic Republic of Afghanistan in the early years of this century. Finally, there is the possibility of tectonic geopolitical change. Should the hegemonic power of the United State dissipate quickly, another wave of successions may be triggered.

2. THE IMPACT OF STATE SUCCESSIONS

Successions will continue to occur. Each succession can have profound global consequences. Previously, the impact of a state succession on commercial obligations was regarded as an issue involving only the predecessor state's creditors, the predecessor state and its successor states. Today, states, organizations and even individuals are woven together tightly in legal, economic, military and diplomatic arrangements. Owing to this dense global fabric, succession in regard to commercial obligations has a huge impact on ever-widening rings of participants.

⁵ See Sushma Soni, *Regimes for Namibia's Independence: A Comparative Study*, 29 COLUM. J. TRANSNAT'L L. 563, 565, 595-607 (1991).

When succession occurs, direct participants in commercial arrangements often face profound economic consequences. Direct participants often view succession to commercial obligations as a zero-sum conflict, in which the pursuit of one party's self-interest entails a cost to another party. If debtors assume fewer commercial obligations, the budgets of creditor institutions and states could be affected. Conversely, if creditors are able to enforce their commercial obligations against the predecessor and/or successor states, the debtor states can face problems relating to balance of payments and exchange rates. The SFRY successions discussed in Chapter 8 illustrate this perceived zero-sum conflict. Following the dissolution of the SFRY, the International Monetary Fund (the IMF) insisted that the SFRY's entire unallocated debt to the IMF be borne by the SFRY's successor states according to an IMF key.⁶ The successor states spent years negotiating changes to the key because every additional percentage point allocated to one state translated into a percentage point reduction in the debts of the other four states.

Although each direct participant has an interest in making the others responsible for the debts of the predecessor state, participants are so interdependent that they often distribute debt burdens to avoid debilitating any one party. The dissolution of the Union of Soviet Socialist Republics discussed in Chapter 9 illustrates such interdependence. In 1998, the Russian Federation's default on its assumed Soviet debts disrupted world markets and caused several U.S. banks to suffer large losses on their foreign operations.⁷ In February 2000, to avoid the huge impact on creditor banks of another default by Russia on its \$31.8 bn. Soviet debt, the London Club of commercial banks provided a 35-percent write-off and a 30-year rescheduling program with a seven-year grace period.⁸

⁶ See International Monetary Fund, Press Release No. 92/92, Dec. 15, 1992.

⁷ See William Bassett & Mark Carlson, *Profits and Balance Sheet Developments at U.S. Commercial Banks*, FED. RES. BULL., June 2002, at 259, 276 (noting impact of 1998 Russian debt default on banks).

⁸ See John Hardt, *Russia's Paris Club Debt: U.S. Interests*, Congressional Research Service Report for Congress, July 18, 2000, Doc. No. RS20636 (dis-

Direct participants may be especially affected by successions if the distribution of the predecessor state's debts is linked to its assets. In a state succession, the predecessor state's assets need to be apportioned among the successor and predecessor states. These assets include various forms of financial capital, diplomatic properties around the world, military installations and equipment and even contractual or treaty rights enforceable against third parties. The final division of assets can have a significant impact on the states involved in succession. In some cases, asset allocation can determine a successor state's military capabilities and, consequently, its international power. This geopolitical consideration underlay Russia's persistent claim over the Soviet arsenal and Ukraine's counterclaim over part of the Black Sea fleet. In other cases, asset allocation can provide significant economic gain. This economic consideration was one of the reasons that the SFRY successor states clamored for years over the SFRY's overseas financial assets.

In addition to having an economic and geopolitical impact on direct participants, the relationship between state succession and commercial obligations also affects regional geopolitical balances. Chapter 5 examines how the succession of East Timor from the Republic of Indonesia in 2003, and its period of transitional administration under the United Nations, altered the geopolitical balance in Southeast Asia. For decades, the Commonwealth of Australia had been wary of Indonesia—a large neighboring militarized state with a predominantly Muslim population—but nonetheless pursued a pragmatic program of economic cooperation. Australia ignored the human rights abuses in East Timor in the 1980s in order to secure a treaty with Indonesia to exploit oil in the Timor Gap. With East Timor's succession, the validity of the treaty could have been called into question. By renegotiating the treaty with the U.N. Transitional Administration in East Timor (UNTAET) and then the government of the Democratic Republic of Timor-Leste, Australia secured the continuity of its lucrative commercial arrangements. Significantly,

cussing, *inter alia*, debt relief that the London Club provided to Russia); Dow Jones, London Club, *Russia Confirms Debt Deal Reached*, Feb. 11, 2000; Reuters, *Russia Sees Various Options for Paris Club—Kasyanov*, Feb. 19, 2000.

Australia's and Timor-Leste's continuity of commercial arrangements entwined them economically and diplomatically and had some impact on geopolitical dynamics in Southeast Asia.

A state succession can also have a global geopolitical impact. Participants involved in state succession do not view commercial obligations in isolation but as part of a whole package of values to be reallocated among creditors, the predecessor and successor states and other participants. The final distribution of this package of values can affect the geopolitical power of the various participants. Other states, corporations and organizations around the world often then realign their relationships in response to the subtle, or in some cases impressive, shifts in the balance of power.

For example, Russia accepted responsibility for the entire Soviet debt to give it a stronger claim over the entire Soviet military arsenal. Other successor states and third-party decision makers eventually accepted Russia's claim. By linking assets to obligations, Russia protected its nuclear capabilities, which makes Russia an important decision maker inside and outside the U.N. Security Council. When the United States was planning to invade Afghanistan, U.S. President Bush had to ask Russian President Putin to exert his influence over the other successor states of the Soviet Union in order to secure a U.S. coalition in Eastern Europe.⁹ Russia's control over the Soviet nuclear arsenal has also helped to limit the proliferation of numerous small nuclear successor states and preserve the current nuclear balance.

Like the geopolitical impact of state successions in relation to commercial obligations, the financial impact of state successions extends swiftly from the inner ring of participants to the outermost ring of states, corporations and individuals around the world. The international financial system has expanded to virtually all parts of the globe. Developed and developing states are inextricably connected by their lending and borrowing, capital investments, concessions and other commercial arrangements. In 2001, U.S. banks'

⁹ See BOB WOODARD, *BUSH AT WAR* 118–19 (2002).

foreign exposure relative to their capital was no less than 70.44 percent, comprising 54.06 percent in Latin America, 4.29 percent in Eastern Europe and 12.09 percent in Indonesia, Korea, Malaysia, Philippines and Thailand.¹⁰ The global financial exposure of creditors is mirrored by large external debts of states. In 2001, Russia's total external debt was almost \$149 bn., of which \$61 bn. was Soviet debt.¹¹

Global participants are so connected financially that any adjustments to commercial arrangements following a succession may have worldwide financial repercussions. Once the direct participants have modified their commercial arrangements *inter se*, their subsidiaries and branch offices in other states may respond by realigning their regional financial strategies. These changing strategies may have an impact on the trade relationships between the direct participants and their subsidiaries, as well as on a global web of suppliers and consumers. Eventually, individual employees, independent contractors and their dependents may be affected by the changes wrought by a state succession. The Latin American debt crisis in the 1980s and the Asia debt crisis in the late 1990s illustrate how financial contagion can spread rapidly and uncontrollably beyond the region of origin and can have real effects on individuals globally.

The global commercial impact of a state succession is closely related to its financial impact. Commercial obligations are basic building blocks of complex legal arrangements for managing the flow of goods, services and capital to and from the territories in which succession has taken place. The continued responsibility of obligors for these obligations enables commercial parties to continue to engage in business with debtors. If commercial obligations were invariably terminated by state succession, commerce would grind to a halt, thereby affecting economies and balance sheets of all commercial parties. Following Timor-Leste's independence, similar considerations gave Australia and Timor-Leste strong incentives

¹⁰ See Bassett & Carlson, *supra* note 7 at 277.

¹¹ See Central Bank of the Russian Federation, External Debt of the Russian Federation in 1998–2002, *available at* http://www.cbr.ru/eng/statistics/credit_statistics/print.asp?file=debt_98_e_hm (last visited Apr. 29, 2005).

to generally preserve the legal arrangements concerning the Timor Gap. Only through these arrangements could Australia and Timor-Leste lower the investment risks for private oil companies to entice them to explore and drill in the Timor Gap.

The willingness and ability of participants in succession to swiftly enter into sophisticated legal arrangements to facilitate trade also sends important signals to credit rating agencies, investors and other corporations about the risks of investing in the successor or predecessor state. During Hong Kong's transition from U.K. to Chinese rule in 1997, which is discussed in detail in Chapter 6, this need to preserve investor confidence provided a strong impetus to the U.K. governing administration, the Chinese central government and Hong Kong's commercial partners to conclude agreements that protected Hong Kong's trade arrangements against disruption.

3. EARLIER THEORIES

International law should manage state successions to minimize disruptions to the political economy, facilitate greater cooperation among participants and support the legitimate aspirations of territories that undergo succession. Earlier theories of state succession do not adequately support these goals. They are too narrow and do not account for current realities. These theories, ranging from the *tabula rasa* (clean-slate) theory at one end to the universal succession theory at the other, reflected the legal *Zeitgeist* of their eras. As the international political economy has progressed, these theories have become obsolete.

The universal succession theory has roots in antiquity. Roman law dictated that the *heres*, or appointed successors, acquire the aggregate of rights and liabilities of the predecessor.¹² According to Feilchenfeld, in medieval times conquerors were burdened with the obligations of the conquered land under a similar principle of inheritance, although the conqueror was not bound in the case of

¹² See HEBERT JOLOWICZ, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 128 (1952) (discussing Roman law of intestacy); see also ERNST FEILCHENFELD, PUBLIC DEBTS AND STATE SUCCESSION 17 (1931) (discussing the lack of clear rules on succession to debts in Roman times).

partial annexation.¹³ Subsequently, during the classical period of international law, Grotius likened states to international persons. Applying the Roman law of persons, Grotius argued that the successor state, like the Roman heir, inherited the entire rights and obligations of its predecessor.¹⁴ The followers of Grotius, such as Heffter, Bluntschli, Halleck and Hall, adopted the classical position that all obligations are inherited together with the rights of the predecessor.¹⁵

Almost 100 years ago at Oxford University, Keith argued that the classical theory of continuity is flawed. According to Keith, the successor state does not succeed to the personality of the predecessor state. If the successor state is not the heir to the personality of the predecessor, the successor state should not inherit all the rights and duties of the predecessor by analogy to Roman inheritance laws.¹⁶ Keith, however, misunderstands Grotius. Grotius does not rely on the crude logic that the successor state succeeds to the personality of the predecessor state. Rather, Grotius reasons that the Prince acts on behalf of the state. Obligations are owed by the state and not the Prince personally, and are therefore not affected by changes in the rulers of the state. New rulers are bound by these obligations as heads of state.¹⁷ In a similar fashion, Pufendorf argues that rulers derive their authority over the state from a social contract with its people, and successor states, as rulers of these people, must accept

¹³ FEILCHENFELD, *id.* at 20–24.

¹⁴ HUGO GROTIUS, II DE JURE BELLI AC PACIS, ch. ix., §§ 8, 12 (1625), translated in HUGO GROTIUS, OF THE RIGHTS OF WAR AND PEACE 221–22, 229–30 (J. Morice trans., 1715); but see *id.* at Book III, ch. viii § 1, at 139 (arguing for an exception for invasions and proposing that the conquering state, while inheriting all the rights of the predecessor, should not be bound to discharge the obligations of the predecessor, except by choice); see also FEILCHENFELD, *supra* note 12, at 25–29 (discussing Grotius' theory).

¹⁵ See ARTHUR KEITH, THE THEORY OF STATE SUCCESSION 2–3 (1907) (discussing classical universal succession theories).

¹⁶ *Id.* at 3.

¹⁷ See GROTIUS *supra* note 14 at Book II, ch. ix., § 8, at 221–22.

the contract in its entirety, including state obligations that bind their rulers as heads of state.¹⁸

Although Keith does not articulate his criticism perfectly, his thesis can be modified to more accurately capture the fatal flaw in the classical theory of universal succession. Grotius and Pufendorf fail to distinguish between state and government succession. Once this distinction gained currency in the mid-19th century,¹⁹ it became clear that the classical theory of universal succession should only apply to government succession and not to state succession.

Huber avoids the flaw of earlier universal succession theories by explaining universal succession as the successor stepping into the rights and obligations of the predecessor as its own, rather than inheriting these rights and obligations. In state succession, the organic elements of a state reorganize themselves, but the metaphysical state, the *jura*, continues to exist. The successor state steps into the obligations attached to the *jura*.²⁰ Gabba proposed a similar theory, sometimes called the “organic substitution theory,” in which the state has both a political and social personality. A state’s political personality is destroyed by succession along with its political burdens. However, the state’s social personality continues, along with its social burdens, for which the successor state continues to be responsible.²¹ In another variant of the universal succession the-

¹⁸ II SAMUEL PUFENDORF, *DE JURE NATURALE ET GENTIUM LIBRI OCTO* 1345–1346 (C.H. Oldfather & W.A. Oldfather trans., Clarendon Press, 1934); see also FEILCHENFELD, *supra* note 12 at 30–34.

¹⁹ See, e.g., JOHAAN CASPAR BLUNTSCHLI, *DAS MODERNE VÖLKERRECHT DER CIVILISIRTEN STATEN ALS RECHSTBUCH DARGESTELLT* 81 (1868).

²⁰ See HERBERT WILKINSON, *THE AMERICAN DOCTRINE OF STATE SUCCESSION* 14 (1934) (discussing a key passage from Huber); 1 DANIEL PATRICK O’CONNELL, *STATE SUCCESSION IN MUNICIPAL AND INTERNATIONAL LAW* 12–13 (1967) (discussing Huber’s theory); KEITH, *supra* note 15 at 3 (discussing Huber’s theory that states succeed to rights and obligations on their own); 1 JOHN WESTLAKE, *INTERNATIONAL LAW* 69 (1913) (translating a key passage from Huber).

²¹ CARLO FRANCO GABBA, *QUESTIONI DI DIRITTO CIVILE STUDIATE* 375–392 (2d ed. 1885); see also 1 O’CONNELL, *supra* note 20 at 11 & n.3 (discussing Gabba’s theory); KEITH, *supra* note 15 at 4 (discussing the same).

ory, Feilchenfeld proposed a “rule of maintenance,” in which the debts of the predecessor continue to bind the successor state, although the auxiliary rights, such as the date of maturity of the loan, do not.²²

These early universal succession theories are unpersuasive. Even accepting the distinction between the social or metaphysical state and the political state, the political elite of the successor state might still challenge the claim that obligations attached to the social or metaphysical state continue to exist. These universal theories do not address this question of political acceptance, or propose rational reasons that demand political acceptance of obligations that purport to bind the social or metaphysical state.²³

By the 19th century, some jurists rejected universal succession in favor of an opposite approach. Under these jurists’ *tabula rasa* approach, obligations did not pass to the successor state.²⁴ Keith argued that successor states are new legal personalities and are not *ipso jure* bound by the obligations of the predecessor state, although for reasons of expediency, in some instances, the successor may opt to be bound.²⁵ Gareis, Cavalieri, Foncherini, Strupp, Zorn and Schonborn developed similar clean-slate theories. These clean-slate theories assert that because all law flows from the expression of the will of the rulers, the successor state, by freeing itself from the will of the predecessor, also frees itself from the obligations created by the predecessor. The successor state is a distinct sovereign personality, which appropriates territory from the predecessor without taking the rights and obligations of the predecessor.²⁶

²² FEILCHENFELD, *supra* note 12, at 546–70.

²³ Cf., KEITH, *supra* note 15, at 4 (“Why should the political personality recognize an obligation to which, *ex hypothesi*, it is indifferent?”).

²⁴ Mathew Craven, *The Problems of State Succession and the Identity of States under International Law*, 9 EUR. J. INT’L L. 142, 148 (1998) (“The ‘clean slate’ thesis, by contrast, appears to have emerged in the late nineteenth century as a result of the influence of voluntarist or imperative approaches to law (the *Willenstheorie*).”).

²⁵ KEITH, *supra* note 15, at 58–77.

²⁶ See KARL GAREIS, INSTITUTIONEN DES VÖLKERRECHTS 61 (1888); see also WILLIAM

In the 20th century, socialists constructed their version of the clean-slate theory, arguing that when a state undergoes revolution from a capitalist or monarchic system to a communist or socialist system, the state is no longer bound by the obligations of the predecessor. Makonnen, however, rejected the socialist theory. He argued that the socialist theory could apply to government succession but not state succession because the socialist governments of the Soviet Union, Cuba and the PRC merely effected a change in the political structures of their states.²⁷ Makonnen's contention, however, did not address the socialist argument that the obligations of the predecessor government do not bind a socialist successor government pursuant to the principle that treaty obligations must not manifestly violate a fundamental rule of a treaty party's internal law.²⁸

Since the Second World War, new theories have been proposed. Although these theories are essentially variants of either the universal succession or clean-slate theories, they are grounded less in the conceptual nature of states, and more in the sociopolitical interests of the jurists who advanced these theories. In the mid-20th century, O'Connell asserted that successor states must respect acquired rights, including the rights arising from economic concessions and financial debts. O'Connell theorized that acquired rights do not depend on the continuity of personality or transmission of obligations, but are imposed under international law, and may be supported by the constitutional law of the successor state created at the time of decolonization.²⁹ He supported his approach by referring to

HALL, *A TREATISE ON INTERNATIONAL LAW* 93–95 (7th ed., Clarendon Press, 1917) (discussing 19th century clean-slate theories); YILMA MAKONNEN, *THE NYERERE DOCTRINE* 20–21 (1984) (discussing 19th century clean-slate theories); 1 O'CONNELL, *supra* note 20, at 15 & n.3 (discussing Zorn's theory); FEILCHENFELD, *supra* note 12, at 406, 408–09, n.63 (discussing the theories of Zorn and Garies).

²⁷ MAKONNEN, *supra* note 26, at 22–26.

²⁸ See Natalia Vasilevna Zakharova, *State as Subjects of International Law and Social Revolution (Some Problems of Succession)*, *SOVIET Y.B. INT'L L.* 164, 165–66 (1960); see also Vienna Convention on the Law of Treaties 1969, art. 46, 1155 U.N.T.S. 331.

²⁹ 1 O'CONNELL, *supra* note 20, at 238–39, 369–70.

“evident moral and sociological pressures [that] emphasize the need for continuity and the avoidance of disruption.”³⁰

At the other end of the spectrum from O’Connell’s continuity theory, the Nyerere doctrine was declared in 1961 in the context of Tanzania’s independence from the British Empire and was subsequently widely adopted by other East African states. This Nyerere doctrine is a clean-slate doctrine. All obligations that existed prior to independence lapse upon succession, although the newly independent state may opt to renew any of the lapsed obligations by exercising its legally autonomous choice.³¹ The Nyerere doctrine had a few variants. The most popular formula allowed the successor states to opt into preexisting obligations for an interim period of their choice (typically one to four years), after which the obligations would no longer be respected unless they had been explicitly renewed by the successor state and the parties holding the corresponding rights.³²

From the 1990s to the present time, there has been a proliferation of positivistic theses that have analyzed state practice in post-Cold War successions. This positivistic methodology is not new. The renowned positivist Hans Kelsen argued in the mid-20th century that international law imposes on new states obligations that are of the same nature as the obligations owed by the predecessor state.³³ In 1954, Castrén argued that customary laws regarding succession bind successor states.³⁴ Conceptual theorists such as Keith, even

³⁰ *Id.* at 34.

³¹ See MAKONNEN, *supra* note 26 at 53–73; Yilma Makonnen, *Namibia: Its International Status and the Issue of Succession of States*, 3 LESTHO L.J. 183, 198–203 (1987) (discussing the Nyerere doctrine).

³² See *e.g.*, *Molefi v. Principal Legal Adviser*, [1971] A.C. 182 (Eng. Privy Council 1971) (holding that a letter from Lesotho Prime Minister to the U.N. Secretary-General consenting to apply treaties to Lesotho for 24 months from independence bound Lesotho to its treaty obligations in accordance with the terms of the letter).

³³ HANS KELSEN, *PRINCIPLES OF INTERNATIONAL LAW* 417 (R. Tucker ed., 2d ed. 1967).

³⁴ Erik Castrén, *On State Succession in Practice and Theory*, in 24 ACTA SCHADINAVICA JURIS GENTIUM 55, 56 (1954).

when writing in the tradition of analytic jurisprudence, also relied heavily on empirical data of state practice to support their theories.³⁵

The positivistic theses from the 1990s developed Castrén's and Kelsen's theses by proposing more detailed prescriptions. Williams and Harris argued that the principle *pacta sunt servanda* (treaties in force bind parties to the treaty) was confirmed with respect to debt obligations by the successor states of the SFRY and the Czech and Slovak Federal Republic (the CSFR). These successor states accepted responsibility for the debts of their predecessor states.³⁶ Williams and Harris' claim is flawed. None of the successor states to the SFRY or the CSFR was the continuation of its predecessor state, which had completely dissolved.³⁷ The principle that treaties in force bind the parties to them is inapplicable to successor states in cases of complete dissolution because the successor states are distinct legal personalities from their predecessor states. These successor states cannot have consented to a treaty prior to their existence and, under the principle *pacta sunt servanda*, should not become parties to the treaties of their predecessor states upon succession. The succession of the successor states of the SFRY and the CSFR to the debts of their predecessor states cannot be said to be a confirmation of the principle *pacta sunt servanda*.

Stahn more accurately points out that the Agreement on Succession Issues Between the Five Successor States of the Former State of Yugoslavia of 2001 reflects the legal trend towards continuity of rights and obligations.³⁸ Stanič, however, goes too far. Based on the SFRY successions, she writes "it seems that over the years the law of state succession has made a full circle from universal succession to

³⁵ See, e.g., KEITH, *supra* note 15, at 60–77.

³⁶ Paul Williams & Jennifer Harris, *State Succession to Debts and Assets: The Modern Law and Policy*, 42 HARV. INT'L L.J. 355, 408–10 (2001).

³⁷ *Id.* at 414–16.

³⁸ Carsten Stahn, *The Agreement on Succession Issues of the Former Socialist Federal Republic of Yugoslavia*, 96 AM. J. INT'L L. 379, 382 (2002) (arguing that the SFRY succession reflects a trend towards "strong and nondiscriminatory protection of private property and acquired rights").

clean slate and back to universal succession.”³⁹ The proposition that universal succession is now an international legal rule to be applied to all cases of succession fails to recognize that the circumstances in the dissolution of the SFRY may well be different from the circumstances in future successions. Further, Chapter 8 appraises the SFRY successions in detail and shows that, while there was a strong trend towards the continuity of international cooperation, this trend did not lead to universal succession of all obligations.

All the succession theories reviewed here incompletely analyze state succession and commercial obligations. These theories fail to account for the full range of commercial obligations that may be questioned when succession occurs, and the universe of participants that may be involved in and affected by the consequent adjustments to commercial arrangements. Jurists such as Keith, Wilkinson and O’Connell regarded the problem of succession and commercial obligations as a dispute among creditors and the predecessor and successor states.⁴⁰ This parochial view does not account for the impact of succession in relation to commercial obligations on global participants, who are indirectly, but nonetheless inextricably, linked to succession disputes.

Even though the theories from the 1970s and 1980s have cast half an eye on a wider range of participants, these theories are still too narrow. Makonnen and Nyerere considered that state succession affects not only the newly independent state, but the individuals, families and corporations in the successor states. Makonnen and Nyerere did not, however, include in their analysis the impact of state succession on other participants, including the individuals and corporations connected with the predecessor state’s commercial arrangements.⁴¹ More

³⁹ Ana Stanič, *Financial Aspects of State Succession: The Case of Yugoslavia*, 12 *EUR. J. INT’L L.* 751, 778 (2001).

⁴⁰ See I O’CONNELL, *supra* note 20, at 237 et seq.; KEITH, *supra* note 15, at 58–101; WILKINSON, *supra* note 20, at 37–51, 71–96.

⁴¹ See MAKONNEN, *supra* note 26, at 53–60 (discussing state succession and financial obligations as an issue between creditors and the predecessor and successor states); YILMA MAKONNEN, *INTERNATIONAL LAW AND THE NEW STATES OF AFRICA* 341–439 (1983) (discussing the same).

recently, analyses of post-Cold War successions have acknowledged the role of third-party participants, such as the IMF, but have not completely explained their roles in international decisions.⁴² These recent analyses have neither appraised fully the global disruptions to commercial arrangements that state successions cause nor described adequately how state succession law manages these disruptions.

The state succession theories reviewed here are also not persuasive because they describe the outcomes of successions inaccurately. As Michael Hoeflich observed wryly: “the persuasiveness of any particular theory of state succession . . . is relatively unimportant if this theory does not find practical application.”⁴³ The conceptual theories up to the early 20th century were generally based on metaphysical propositions, not state practice. Of the 20th-century theories, Keith’s clean-slate theory was subsequently contradicted by many instances of continuity of obligations following the two wars. The Treaty of Versailles concluded after the First World War incorporated the general principle that the successor states to Germany would undertake to pay a portion of German debt.⁴⁴ Following the Second World War, British India was partitioned into the Republic of India and the Islamic Republic of Pakistan. India remained solely responsible for the central debt of British India, while Pakistan became indebted to India for its share of this debt, determined in proportion to the assets it received.⁴⁵

The U.N. member states at the U.N. Conference on Succession of States in Respect of Treaties and the Vienna Convention on Succession of States in Respect of Treaties of 1978, which are discussed in detail in Chapter 3, rejected O’Connell’s theory that oblig-

⁴² See, e.g., Williams & Harris, *supra* note 36, at 414–17; Stanič, *supra* note 39, at 777.

⁴³ Michael Hoeflich, *Through a Glass Darkly: Reflections on the History of the International Law on Public Debt in Connection with State Succession*, 1982 U. ILL. L. REV. 39, 47.

⁴⁴ See 1 O’CONNELL, *supra* note 20, at 400.

⁴⁵ See *id.* at 404.

ations should be preserved by devolution agreements. Likewise, in the 1970s, the newly-independent East African states rejected O'Connell's continuity theory in favor of the discontinuity of commercial obligations under the Nyerere Doctrine.

Then, in the 1990s, the successor states of the CSFR accepted the debts of the CSFR, contrary to the Nyerere Doctrine. Hong Kong and Macau also confirmed countless commercial treaties without any regard for this doctrine.

Earlier succession theories do not adequately describe the law of state succession because earlier legal methods do not account for the realities of international decision making. In state succession, attempts to prescribe doctrinal rules that purport to exert authority over the participants to whom the rules are addressed are almost certainly doomed to failure. Fabri has lamented that "it is possible to speak of the absence of law to the extent that no rules may be identified."⁴⁶ Terrett has similarly observed: "State succession is a vexatious area of international law and one in which there exists little incontrovertible practice or custom."⁴⁷

⁴⁶ Helene Ruiz Fabri, *The Place of Law and Legal Documents in Regulating the Pan-European Situation*, in DISSOLUTION, CONTINUATION AND SUCCESSION IN EASTERN EUROPE 171, 177 (B. Stern ed., 1989).

⁴⁷ STEVE TERRETT, THE DISSOLUTION OF YUGOSLAVIA AND THE BADINTER ARBITRATION COMMISSION 243 (2000); Stefan Oeter, *State Succession and the Struggle Over Equity*, 38 GERMAN Y.B. INT'L L. 73, 73-75 (1995); Malcolm Shaw, *State Succession Revisited*, 5 FINNISH Y.B. INT'L L. 34, 92 (1994) (stating that succession to public debt "is an area of particular uncertainty and doubt has been expressed as to whether there is a rule of succession"); Hoelfich, *supra* note 43, at 70 ("The rule of law may be recognized as an ideal, but is not yet wholly a reality."); Ottoman Debt Arbitration, 1 R.I.A.A. 531, 573 (Arb. 1925) ("*Il n'est pas possible, malgré les précédents déjà existants, de dire que la Puissance cessionnaire d'un territoire est, de plein droit, tenue d'une part correspondante de la dette publique de l'Etat dont il faisait partie jusqu'alors.*") ["It is not possible, despite preexistent precedents, to say that the succeeding power of a territory is, by right, responsible for a corresponding part of the public debt of the State of which it was hitherto party."]; Franco-Ethiopian Railway Company Claim, 24 I.L.R. 602, 629 (Arb. 1957) ("As regards the teachings of writers and of international practice in matters of succession to State debts in the case of territorial changes, they are consistent[.]").

In many state successions, intense political and social upheavals, such as in the break-up of the SFRY and the violent struggle for independence in East Timor, destroy the legal structure of the predecessor state. The governing elite who are reorganized in the successor state may not recognize the predecessor's legal arrangements. In such instances, creditors and other interested parties are drawn into succession negotiations with the successor state. The endless permutations of negotiated succession settlements demonstrate that state practice is inconsistent. Depending on the parties' relative geopolitical strengths and interdependencies, the new equilibrium of rights and obligations may be slightly or vastly different from the predecessor state's obligations. Furthermore, positivists may reject negotiated settlements as evidence of *opinio juris* because such settlements result from political expediency,⁴⁸ or because such settlements are too context-specific to have universal application.⁴⁹

In the minority of successions that are achieved without social disruptions or violent political change, such as Hong Kong's restoration from the United Kingdom to the PRC or the dissolution of CSFR, the preexisting legal infrastructure may remain intact. These situations further confound attempts to extrapolate general rules on succession and commercial obligations. The governing elite of the predecessor and successor states tend to protect the predecessor's international legal arrangements in order to minimize the disruptive effects of discontinuity. The outcomes in such smooth transitions are, accordingly, different from successions that occur through radical change.

In light of the lack of uniform state practice and *opinio juris*, any positivistic rule of state succession is likely to be so broad or vague that it can be easily reinterpreted and manipulated by participants in state succession to advance their interests. The Badinter Commission,

⁴⁸ See Daniel Patrick O'Connell, *State Succession in Relation to New States*, 130 RECUEIL DES COURS 95, 118 (1970) ("[T]he mistake must not be made of equating diplomatic procedures and administrative arrangements with rules of law.").

⁴⁹ See *id.* at 102.

which was set up by the European Community to give legal advice on the SFRY's dissolution, found difficulty in articulating clear positivistic rules, apart from norms requiring parties to achieve settlements by consensus and requiring outcomes to be equitable.⁵⁰ These rules were so broad that successions to commercial obligations continued to be negotiated for almost another decade after its opinions were handed down.

The empirical inaccuracy of earlier theories raises questions regarding the *Reapolitik* underpinning these theories. It is at least interesting to note that Keith's dissertation at Oxford University advocating the clean-slate theory was published at a time when Great Britain was still an empire that had annexed numerous territories and states, and was accordingly the successor state to these invaded states. Barely a decade before the dissertation was written, Britain had invaded the South African Republic, spawning the often-cited *West Rand Central Gold Mining* case, in which succession to obligations in instances of annexation was categorically denied by the English courts.⁵¹

By the time of O'Connell's important work, also at Oxford University, Great Britain was a crumbling empire facing rampant decolonization in Asia and Africa. It may be more than mere coincidence that O'Connell was a strong advocate for continuity of obligations, in which the newly independent states would be responsible for the debts incurred by Whitehall, thereby encouraging creditors to look to the new governments rather than the United Kingdom for repayment.

Makonnen, perhaps one of post-colonial Africa's most important

⁵⁰ See Conference for Peace in Yugoslavia, Arbitration Commission, *Opinion No. 9*, ¶ 4 (July 4, 1992), in 2 THE INTERNATIONAL CONFERENCE ON THE FORMER YUGOSLAVIA, OFFICIAL PAPERS, 1287 (B.G. Ramcharan ed., 1997), reprinted in 31 I.L.M. 1523 (1992).

⁵¹ *West Rand Central Gold Mining Co. v. Rex*, [1905] 2 K.B. 391, 402 (Eng. Ct. App.) (holding that "the proposition that by international law the conquering country is bound to fulfil the obligation of the conquered" "upon principle . . . cannot be sustained.").

jurists in the field of succession was highly critical of O'Connell's approach.⁵² Makonnen, unsurprisingly, makes self-determination his overriding policy goal, and, on this basis, argues strongly in favor of the Nyerere clean-slate doctrine in cases of decolonization.⁵³

Hardly any attention was paid to the Nyerere doctrine by the creditor states and institutions, which exerted considerable influence in the negotiations following the dissolutions of the Soviet Union, the SFRY and the CSFR. No mention of the Nyerere doctrine or any other clean-slate theory was made by the Badinter Commission, which was comprised entirely of Western European members with the exception of Jose Maria Ruda, the former Argentinean President of the International Court of Justice (the ICJ). These members were designated by the Council of Ministers of the European Community (EC), the President of the ICJ and the President of the European Court of Human Rights. The eventual settlement was brokered by Arthur Watts, an English barrister who had been appointed as the Special Negotiator by the International Conference on Former Yugoslavia. This settlement agreement resulted in universal succession to the SFRY's debts by its successors, which was in the interests of the European and American creditor states and institutions.

Cynics or realists accordingly have ample material to argue that behind the thin veil of objectivity, juristic works are directed by political agendas. Appointments to decision-making positions, such as a member of an arbitration commission or a special negotiator, are political. Jurists are often selected at least in part because, based on their scholarship, they can be relied upon to support the perspectives of those who appoint them or to produce a desired result.⁵⁴ Even those jurists who write about succession, while remaining detached from the actual succession disputes, may be knowingly or subconsciously influenced by the legal traditions and sociopolitical concerns of their countries or regions. Consequently, jurists may

⁵² MAKONNEN, *supra* note 26, at 27–33.

⁵³ *Id.* at 94–99.

⁵⁴ See OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 43 (1991) (“[I]ndividual judges are, by and large, influenced by the views of their own governments.”).

have developed succession theories that support the legal or political goals of their traditions or countries.⁵⁵

4. A POLICY-ORIENTED THEORY OF STATE SUCCESSION

A policy-oriented approach to state succession and commercial obligations overcomes the main weaknesses of earlier succession theories: their narrow scope of inquiry, descriptive inaccuracy and normative deficit.⁵⁶ A policy-oriented approach examines the entire decision-making process concerning state succession and commercial obligations to overcome the over-narrow scope of succession theories. This decision-making process includes all strategies pursued by participants and decision makers. Decision making can take place in different arenas, such as bilateral talks, multilateral conferences, arbitration tribunals, international and municipal courts and within international organizations such as the United Nations and the IMF.

A wide approach to state succession and commercial obligations is necessary to describe state succession law accurately. A broad spread of data from recent successions should be analyzed to identify conditioning factors. Conditioning factors are factors that cause participants to behave in certain ways and to engineer certain outcomes. These conditioning factors help participants extrapolate

⁵⁵ Cf., P.K. MENON, *THE SUCCESSION OF STATES IN RESPECT TO TREATIES, STATE PROPERTY, ARCHIVES, AND DEBTS* vi (1991) (“[M]ost of the important textbooks and reference works in the field are written by Western jurists, who are essentially expounding legal principles from their own country’s point of view.”); Hoeflich, *supra* note 43, at 47–60 (arguing that 19th century succession theories supported imperialist states).

⁵⁶ For discussions on the policy-oriented approach in international law, see generally Myres S. McDougal, Harold Lasswell & Michael Reisman, *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL EDUC. 253 (1966–67); Harold Lasswell & Myres McDougal, *Jurisprudence in Policy-Oriented Perspective*, 19 U. FLA. L. REV. 486 (1966–67); William Morison, *Myre S. McDougal and Twentieth-Century Jurisprudence: A Comparative Essay*, in *TOWARD WORLD ORDER AND HUMAN DIGNITY* 3 (M. Reisman & B. Weston eds., 1979); Rosalyn Higgins, *Integrations of Authority and Control: Trends in the Literature of International Law and International Relations*, in *id.* at 79; Siegfried Wiessner & Andrew Willard, *Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict*, 93 AM. J. INT’L L. 316 (1999).

trends in state succession in order to anticipate and influence outcomes in future successions.

A policy-oriented approach to state succession also reduces the normative deficit of earlier succession theories by appraising trends in state succession against the global policies at stake. These underlying goals in international law balance the needs of global communities and participants. The global policies in state succession harmonize two competing values. The first value is global order. At a minimum, state successions should not be allowed to damage the international system because the transaction and opportunity costs of rebuilding the infrastructure are simply too high. Beyond preserving minimum levels of international cooperation, the law of state succession should encourage the formation of cooperative arrangements. Greater interdependence among participants should allow global resources to be used more efficiently and lower the likelihood of any participant acting destructively, whether economically or militarily, towards other participants.⁵⁷

In theory, order can be promoted by preventing successions entirely to preserve the status quo of commercial arrangements. In reality, however, law often has insufficient authority or power to diffuse the overwhelming centrifugal forces that cause state successions. When law has insufficient authority to fully manage the consequences of preventing succession, successions may be allowed to proceed. For example, the separation of Cold War spheres of influence prevented many states from effectively opposing the Soviet Union's illegal occupation of the Baltic States. The dangers of instabilities from trying to shift the East-West balance of power aggressively outweighed any injustice to the Baltic States. Similarly, in the 1980s, there was no real push by the international community to reject Indonesia's unlawful occupation of East Timor because some states were cultivating Indonesia as a "pro-Western" bulwark against communism in Southeast Asia.⁵⁸

⁵⁷ Cf., *Homburg Houtimport BV v. Agrosin Private Ltd. (The Starsin)*, [2003] All E.R. 785, ¶ 57 (Eng. House of Lords) (*per* Lord Steyn) ("Legal policy favors the furtherance of international trade.").

⁵⁸ See *infra* Chapter 5.

When international law is unable to prevent a state succession, the international community often accepts the *de facto* situation. This pragmatic approach allows decision makers to manage the consequences that flow from the succession. Order can be reestablished among the affected territories, and the successor state can be integrated into the global system to the benefit of all participants. States and organizations may accept long-term belligerent occupation without formally acquiescing to such occupation through *de facto* rather than *de jure* recognition of the successor state. By distinguishing between *de facto* and *de jure* recognition, participants are able to sustain rhetorical objections to the occupation, while in fact permitting the successor state to be at least partially reintegrated into the international system; such as through the conclusion of treaties extending over the occupied territory.⁵⁹ In exchange for *de facto* recognition, the international community demands that the successor state accept the majority of the obligations of membership in the international system, including respecting customary norms and treaty obligations. *De facto* recognition, if granted carefully, can support global order by readjusting the relationships among participants to the new geopolitical realities following succession.

The second fundamental value in relation to state succession and commercial obligations is self-determination. Self-determination in its broadest sense refers to the right of communities to “freely determine, without external interference, their political status and freely pursue their economic, social and cultural development[.]”⁶⁰ Successions that result from a territorial community’s free determination of its political status in international law, such as the decolonization of a territory to become a newly independent state or the consensual unification of two states, are generally proper exercises of the right to self-determination that should be supported.

⁵⁹ Cf., Ian Brownlie, *Recognition in Theory and Practice*, in THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW 107, 116 (“‘*De facto*’ recognition would often connote a fairly high degree of political acceptance *with legal implications*, in spite of the provisionality implied in the phrase.”) (emphasis in original).

⁶⁰ G.A. Res. 52/119, pmb. (Dec. 12, 1997), U.N. Doc. A/RES/52/119; see also G.A. Res. 2625(XXV), pmb. (Oct. 24, 1970), U.N. Doc. A/RES/2625(XXV) (stating that “the principle of equal rights and self-determination of peoples constitutes a significant contribution to contemporary international law”).

At a minimum, the international community permits and assists the fulfillment of self-determination in such successions by granting *de jure* recognition. Through *de jure* recognition, the international community accepts the successor state into the international system.⁶¹ The successor state consequently draws legal benefits from membership in the international system, such as the capacity to enter into treaties, the inviolability of its borders, and protection against unwarranted acts of aggression by other states. The international community can do more to promote self-determination in state successions. Ideally, the international community should help successor states achieve sustainable development, which is the best proof of the fulfillment of self-determination in its most complete sense and which should in the long run reinforce global order.

However, in state successions, promoting self-determination can increase global disorder. Some commercial obligations that existed prior to succession, such as unserviceable debt burdens, may not suit the needs of the successor community or may hinder their development. Although terminating such obligations can support a successor state's development, allowing a successor state to emerge from succession without commercial obligations diminishes global order because many commercial obligations are part of complex international arrangements that allow global participants to cooperate with each other.⁶²

In relation to state succession and commercial obligations, five policies harmonize the apparent conflicts between the fundamental values of global order and self-determination. These enumerated policies begin with high-level policies and become progressively more specific. *First*, illegitimate successions should be discouraged to preempt disruptions that may result from such successions. Iraq's invasion of the State of Kuwait in the 1990s was one such purported succession where the invading state did not have a valid basis for succession. The international community properly rejected Iraq's suc-

⁶¹ *Cf.*, Brownlie, *supra* note 59, at 116 (explaining that *de jure* recognition "tends to mean without reservation and on a definitive basis").

⁶² *Cf.*, 1 O'CONNELL, *supra* note 20, at 34–35 ("The problem is to give expression in normative form to a reconciliation of two competitive pressures, that of stability in the international and internal orders, and that of adjustment of legal relationships to the social and economic effects of change.").

cession claim. Powerful decision makers, such as the United States and the U.N. Security Council, aligned their strategic interests with the policies of international law. The authority of the Security Council's Chapter VII resolutions and of the customary rules on the use of force merged effectively with the power of U.S. military to reject Iraq's succession claim. In other instances, international law may not be able to stop or correct illegitimate successions immediately, such as during the Republic of South Africa's control of Namibia for over half of the 20th century. In such situations, several decades of careful negotiations may be needed to restore minimum order and human rights.⁶⁸

Second, if a succession occurs either because that succession is a legitimate exercise of the right to self-determination, or because international law is powerless to stop that succession even though it is illegitimate, international law should manage the impact of that succession on commercial arrangements. The preservation of commercial obligations for the benefit of all participants should be balanced carefully against the costs of exploitative arrangements on a particular participant. Debilitating burdens will harm the subject of those burdens and other connected participants that are mutually reliant on the demand and supply of goods, capital and labor.

Third, dispute prevention and resolution mechanisms should minimize the disruptions to commercial arrangements caused by successions. These procedural mechanisms are necessary because there are hardly any bright-line substantive rules redistributing commercial obligations on succession. International law should provide mechanisms for participants to adjust by consensus their commercial relationships prior to the occurrence of the succession. Before a succession takes place, participants should be expected to negotiate in bilateral or multilateral forums, with or without third-party mediation, to reach agreement on the disposition of commercial obligations.

⁶⁸ See Soni, *supra* note 5, at 569–70 (describing history of South Africa's control over Namibia).

Mechanisms to reach agreement prior to succession are more likely to be effective in consensual successions. Consensual successions are successions that occur with the consent of all states involved in the successions. In nonconsensual successions (i.e., successions that occur without the consent of all states involved), the fundamental disagreement over whether the succession should take place tends to preclude presuccession agreements on the adjustment of commercial obligations. Under such circumstances, participants may seek to adjust their relationships only after succession. Legal mechanisms should allow such postsuccession adjustments to new geopolitical and economic conditions to be made peacefully, swiftly and with finality. These mechanisms include international conferences, bilateral talks and other international forums for decision making.

In extreme cases, participants may be unable or unwilling to reach consensus on the adjustment of commercial obligations in spite of the large benefits of cooperation. Larger geopolitical pressures may militate against resolution, or the proclivities of particular decision makers may prevent resolution. In such situations, international law should compel participants to accept a final solution in regard to commercial obligations. This situation may be achieved through an overriding combination of power and authority by certain decision makers such as the IMF, municipal and international courts and tribunals, international organizations and pacific groupings of states. When this policy of resolving succession disputes is effective, the goods and services that form the subject matter of a succession dispute will generally be released back into global markets, and investors and creditors will be encouraged to return to the affected territories.

Fourth, although there are no bright-line rules concerning the distribution of commercial obligations on succession, international law should influence the substantive adjustments to commercial arrangements that are reached by consensus among decision makers in successions. This policy of influencing substantive adjustments rejects the binary choice between the continuity or discontinuity of all obligations. Continuity does not always support cooperation, and rupture does not always weaken minimum order. Preserving obliga-

tions that no longer serve the interests of the participants can impede growth and development. Conversely, terminating obsolete obligations and forging new obligations may promote global order and the sustainable development of all participants.

This policy of controlling substantive adjustments favors a contextual approach. Obligations that continue to promote growth, development and cooperation among participants should be preserved. Obligations that do not account for postsuccession realities should be adjusted so that they can once again promote global order and development. Obligations that are wholly obsolete should be terminated. New obligations should be forged to seize opportunities for further cooperation. The overriding policy goal is the continuity of cooperation, and not continuity of obligations *per se*.

Fifth, behavior that is contrary to the previous four policies should be discouraged and corrected. International law can restrain errant participants through responses by powerful decision makers. The United States may communicate its intention to respond with diplomatic or economic reprisals, such as by threatening to impose sanctions on an errant state. There can also be a coordinated response by a group of participants, such as when the Security Council calls upon its member states to impose sanctions, or when the European Union urges its member states to support tariff arrangements. In addition to explicit cooperation, decision makers in different arenas may coordinate their strategies implicitly, such as when courts in different states refuse to exercise jurisdiction over succession disputes, thereby forcing litigants to return to international succession negotiations.

Just as participants can cooperate to restrain errant participants, participants can collude to undermine international law's policies. To minimize abuses of collusive power, international law should subject collective decision making to minimum standards of accountability towards global policies. Because of the enormous potential for collusive power to cause systemic damage to the international infrastructure, international law must develop an effective response to collective power, such as by counterbalancing collective power

with other powerful decision makers, and by consolidating expectations about how collective power should be used.

The policy of correcting deviations from community policies of state succession includes restitution to parties that are harmed by such deviations. The injured parties should be restored, to the fullest extent possible, to the position that they were in before the injury, and should be reintegrated into cooperative and beneficial relationships with other participants. At the systemic level, damage to the international infrastructure must be repaired, such as by replacing destructive commercial arrangements with relationships that reinforce minimum order.

This book identifies state succession trends and appraises them against the community policies of state succession law in four parts. Part I argues that the traditional approaches to state succession and commercial obligations have limited practical relevance today. By comparison, this book's approach is a more pragmatic and attractive solution to the problems relating to state succession and commercial obligations. Chapter 2 argues that the traditional territorial and personal definitions of state succession are obsolete and should be replaced by a broader concept of succession which includes "regime change." Chapter 2 also argues that commercial obligations are not limited to state debt, and include all obligations that are part of international commercial arrangements.

Part II reviews the modern law and policy on state succession and commercial obligations. Chapter 3 examines the Vienna Convention on Succession of States in Respect of Treaties of 1978 and Chapter 4 examines the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts of 1983. These chapters dissect the discussions of the International Law Commission and at the U.N. conferences leading to the adoption of the two conventions to reveal the modern policies underlying commercial adjustments that accompany state successions.

Part III examines the contemporary practice of state succession in relation to commercial obligations. Chapters 5 to 9 discuss the

contemporary successions in connection with East Timor, Hong Kong and Macau, the CSFR, the SFRY and the Soviet Union, respectively. These contemporary successions reveal that the continuity of commercial cooperation, not the continuity of commercial obligations *per se*, is paramount.

In the contemporary period, there have been other successions, including the independence of the Republic of Namibia in 1990, the association of German Democratic Republic with the Federal Republic of Germany in 1990, the unification of North and South Yemen, the independence of the State of Eritrea from the Federal Democratic Republic of Ethiopia in 1993 and the succession of Walvis Bay to Namibia in 1994. This book's five case studies have been selected as representative successions. Within the contemporary period, these five case studies are separated in time, ranging from the breakup of the Soviet Union in 1991 to the independence of Timor-Leste in 2003. These successions are also spread out geographically, ranging from the successions in Europe (SFRY, CSFR and Soviet Union) to the successions in Asia (East Timor and Hong Kong and Macau). Further, the successions have been chosen to allow comparison. This book contrasts consensual successions (Hong Kong and Macau and CSFR) against nonconsensual successions (SFRY and Soviet Union). In addition, successions involving intense third-party intervention (East Timor and SFRY) are contrasted against successions with moderate third-party intervention (Hong Kong and Macau and Soviet Union).

Under this book's broadened definition of state succession, several other relevant instances of fundamental changes in the power and authority structures of a state have occurred recently, such as the regime changes in Iraq and Afghanistan. It is, however, premature to analyze these successions when global participants are still adjusting commercial arrangements in response to these successions. This book was substantially completed before the first Iraqi elections following the U.S. invasion of Iraq, and as of September 30, 2005, the decision-making process concerning Iraq and its commercial arrangements was still ongoing. At some time in the future, after decision makers affected by the succession of Iraq have fully

adjusted their commercial arrangements and an international equilibrium has been restored, the succession in Iraq will be an important test case of the theory of state succession and commercial obligations presented in this book.

Part IV presents a policy review of the law of state succession and commercial obligations. It draws together Parts I to III by identifying key trends and conditioning factors. This book concludes by assessing these trends and factors against global policies and submitting recommendations for the further development of the law of state succession and commercial obligations.