City Research Online

City St George's, University of London

Citation: Collins, D. A. (2018). Book Review: A Guide to State Succession in International Investment Law, by Patrick Dumberry. Journal of International Banking Law and Regulation, pp. 34-35.

This is the accepted version of the paper.

This version of the publication may differ from the final published version. To cite this item please consult the publisher's version.

Permanent repository link: https://openaccess.city.ac.uk/id/eprint/20714/

Copyright and Reuse: Copyright and Moral Rights remain with the author(s) and/or copyright holders. Copies of full items can be used for personal research or study, educational, or not-for-profit purposes without prior permission or charge, unless otherwise indicated, provided that the authors, title and full bibliographic details are credited, a hyperlink and/or URL is given for the original metadata page and the content is not changed in any way. For full details of reuse please refer to City Research Online policy.

City Research Online: http://openaccess.city.ac.uk/ publications@citystgeorges.ac.uk

BOOK REVIEW: *A Guide to State Succession in International Investment Law by Patrick Dumberry* (Edward Elgar, 2018) 509 pages

by David Collins*

This extensive book on state succession in the particular sphere of international investment law from well-regarded professor at the University of Ottawa Patrick Dumberry is usefully divided into sections based on the type of investment issue in question: state succession to Bilateral Investment Treaties (BIT)s; state succession to multilateral treaties (which unfortunately neglects some of the investment-oriented material in the WTO treaties); and lastly state succession in the often-under-explored area of state contracts, which are crucial legal instruments in the commercial exploitation of natural resources by foreign firms. There is an additional section focusing on questions of state succession arising in investment arbitration proceedings concerning the above situations. The author further sub-divides the material by reference to two main types of succession: where the predecessor state ceases to exist (itself broken down into three sub-categories; and where the predecessor state continues to exist (from which there are also into three sub-categories).

Rather than present a single unified theory or over-arching argument, Dumberry instead carefully derives a series of rules reflecting these various aspects of state succession as they apply to international investment law each of which he defends by reference to extensive state practice, case law, academic commentary as well as his own expertly-informed reasoning. In that sense the book functions as a kind of restatement of the law of state succession, dispelling some of the myths about how it works in practice, many of which originate from the work of International Law Commission and in the Vienna Convention on Succession of States in Respect of Treaties. Much of the analysis is relevant to matters beyond that of international investment law (BITs, investment contracts and arbitration) reflecting the book's monumental utility to scholars of public international law generally. In some respects, this feature also reflects what is perhaps the book's only significant shortcoming – it appears at times as if international investment law as a topic of academic inquiry has been marginalized by the author in favour of tackling more fundamental controversies in the sphere of accession simpliciter, or worse that investment law has been used to glamorize a rather pedantic subject. It is entirely arguably that this background material is essential – how can the concept of succession be

* Professor of International Economic Law, City, University of London <david.collins@utoronto.ca>

effectively contextualized to international investment law without engaging with fundamental issues of state identity, territory, recognition and consent?

The central issue regarding the interaction between investment law and the law of state succession is one which the author touches upon on a few occasions, including the book's final pages, but perhaps does not quite devote as much attention as necessary. This is the question of whether BITs, as special kinds of legal instruments, provide direct rights to investors or only derivative rights. Investors are depicted at least once and with less analysis than might have been expected from a book of this rigour, as having the status of third-party beneficiaries under treaties. This gives them special rights as distinct from those commonly associated with other international legal instruments, meaning the states themselves. While this is unquestionably part of a larger controversy which drifts beyond the scope of this book, it is vital in the context of succession in international investment law because it is more strongly arguable that there should be automatic succession of obligations where an investor's private rights under a treaty depend on it. The key point here is the question of whether BITs, as well as investment contracts where the argument is perhaps easier to make, do indeed represent a special category of international obligations where the rules of succession, developed primarily in other contexts, are somehow different. To his credit, Dumberry does grapple with this issue in each chapter, but given the book's title, these issues could perhaps have featured more centrally. Still, Dumberry's focus on the fundamentals of state succession is well-justified given the lack of comprehensive scholarship on this important field. Not only has there been a dearth of academic commentary on the issue of state succession (a baffling omission given its role in history), judicial opinion on the matter is weak and often confusing. This is not only the case in the reasoning of investment tribunals, which are notorious for their superficiality in terms of legal analysis, but perhaps more problematically, even in the opinions of the International Court of Justice which are presented as often confusing and contradictory. The author's frustration with this source material, as well as the limited availability of official documents regarding states' intentions regarding their treaty obligations, is evident throughout. He concedes that the disarray may in part be explained by the highly variable and often unsettled circumstances in which succession has taken place throughout history and around the world. Dumberry turns this situation to his advantage, however, using an appealing first-person narrative to give the reader an impression of following along on his research journey, an experience with which many academic readers will no doubt be familiar. One of the inevitable drawbacks to the provision of a thorough research trail is an over-abundance of footnotes, from which this book undeniably suffers. At times it seems like close to half of the text appears at the bottom of the

page in small print. The author can be forgiven for the frequent use of direct quotes in French for which translations are not supplied.

Dumberry's discussion of many examples of state succession of various different kinds (e.g. annexation, unification, independence) are rich in detail and analysis. Far from superfluous, this in-depth treatment demonstrates state practice – crucial in establishing legal precedent in the murky landscape of international law. He draws from events throughout the world and history, including the decolonization of Africa, the dissolution of the Soviet Union, the creation of South Sudan, the separatist movement of the Province of Quebec in Canada and the topical annexation of Crimea by Russia. Highly charged and in many respects idiosyncratic, these many examples of state succession highlight an inescapable feature of international law which has particular resonance in international investment law: the inherently political nature of so many forms of governmental action. The notion that international investment tribunals, such as those constituted under the rules of ICSID, can somehow de-politicize events which are fraught with sweeping implications on civil society let alone the commercial activities of foreign companies, is simply untenable.

A Guide to State Succession in International Investment Law contributes greatly to the clouded and in many respects malformed discipline of state succession in public international law, developed over years in often politically charged circumstances where objective legal analysis may not have been feasible or possibly even of much use. It further provides a comprehensive framework of analysis for a range of succession scenarios in conjunction with persuasive and highly practical rules. At the same time, the book offers original insight into a vastly under-appreciated aspect of international investment law, certainly among the most significant and growing fields of international law in recent years. This is a considerable achievement which is deserving of much attention and credit by international scholars and jurists alike.