State Succession and Commercial Obligations BY TAI-HENG CHENG [Ardsley, New York: Transnational Publishers, 2006. xvi + 483 pp. Hardcover: US$125]

There is no doubt to this reviewer that this book is an important contribution to scholarship on state succession as well as international commercial law. In his book, Dr. Cheng provides us with a thorough examination of state practice as well as treaty practice to support his thesis that international law should do three things in the area of state succession—(1) to minimise disruptions to the international political economy, (2) facilitate cooperation between the players involved and (3) facilitate the "legitimate expectations of the territories", by which I am sure he means those of their populations too. According to him, "earlier theories" simply do not do the job, or at least not as well as they should.

Accordingly, he proposes a policy-based approach to state succession which has been identified as applying "(New Haven) methodology to a particularly vexing and unsettled area of international law". Using the *Vienna Convention on Succession of States in Respect of Treaties, 1978* (the "1978 Convention") and the *Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, 1983* (the "1983 Convention") and the commentaries to these treaties as well as contemporary state practice in the successions of Hong Kong and Macau; the former Czechoslovakia, the former Yugoslavia, the former Union of Soviet Socialist Republics and East Timor, Dr. Cheng challenges existing theories of the international law of state succession on two fronts.

First, he perceives existing theories to be unreflective of contemporary state practice. He argues that they incompletely analyse state succession and commercial obligations as they "fail to account for the full range of commercial obligations that may be questioned when succession occurs". He opines that a multitude of third party commercial interests are involved in and are affected by the state succession. More broadly, his fault with earlier succession theories is that they fail to adequately describe the law of state succession because "earlier methods do not account for the realities of international decision making". In particular, Dr. Cheng notes that actors in international decision making are not limited to states but also include international organisations, international tribunals, private corporations and even private individuals who provide professional assistance international decision makers in resolving issues of state succession.

Further, he observes that the 1978 Convention and the 1983 Convention evince a partial movement of the law of state successions with respect to commercial obligations away from existing theories. He notes that the work done in the 1983 Convention, in particular, "clarified the modern law and policy of succession and obligations but did not develop it fully". Consequently, he argues, decision makers in the examples of state succession that he provides have "selectively applied the proposals in the 1983 Convention to refine the law of succession and obligations to meet the needs of the international community".

Second, and following from the first point, he views earlier theories to be inadequate to the needs of modern international society. He argues that a new theory of state succession which takes account of the political realities of international decision making should reduce the "normative deficit of earlier succession theories by apprising trends in state succession against the global policies at stake". These global policies are identified by Dr. Cheng as the maintenance of global order and the right to self-determination.

Accordingly, Dr. Cheng derives a normative framework, from attempting to balance these two competing policies, to be applied to the law of state succession and commercial obligations. It is summarised as follows. First, illegitimate successions should be discouraged so as to pre-empt disruptions that may result from such successions. Second, international law should manage the impact of state successions on commercial arrangements regardless of whether the state succession arises from legitimate exercise of self-determination or illegitimate successions that it is unable to stop. In so doing, the benefits of preserving commercial arrangements with the costs of exploitative arrangements on any particular party should be balanced. Third, dispute prevention and dispute resolution should minimise disruptions to commercial arrangements caused by successions. Fourth, international law should influence the substantive adjustments to commercial arrangements that are reached by consensus among the decision makers in successions. Fifth, international law should discourage any behaviour that is contrary to these four policies.

More importantly, in achieving these policy objectives, five conditional factors are identified to be particularly important. First, Dr. Cheng

notes, as a game theorist explaining the repeated games would, that the density of relationships that bind global participants together in cooperative arrangements is an important factor in how state succession affects commercial obligations. The second conditioning factor is the relative power and authority of decision makers. Dr. Cheng finds that final outcomes in state succession reflect the equilibrium of this relative power and authority. Third, the contemporary law of state succession also accounts for the minimum requirements of self-determination and human rights. Fourth, Dr. Cheng notes that analysis of state successions is to be conducted with a view towards its larger geopolitical context. Fifth, Dr. Cheng finds that "strategies of decision making concerning commercial arrangements tend to be characterised by high levels of explicit agreement among decision makers and implicit collusion among some decision makers to the exclusion of other decision makers".

Three things are clear from this book. First, it serves as a useful guide to the study of state succession and commercial obligations for both scholars and practitioners alike. Dr. Cheng's review of the negotiating backdrop as well as commentary to the two *Vienna Conventions* is comprehensive as well as engaging. Further, his canvass of state practice relating to contemporary instances of state succession is equally thorough and illuminating.

Second, this book is a clear attempt to validate the New Haven school of thought in this particular field of international law. However, this distinctive New Haven flavor may invite criticism. For example, some may find that Dr. Cheng's thesis detracts from the primacy of the ceding state and the primacy of consent as the basis to modern international law. They may argue that while Dr. Cheng accurately identifies that state succession has effects beyond the ceding state which often involve or concern third parties, his emphasis on affording these third parties palpable roles in the international decision making process is neither necessarily accurately reflective of contemporary practice nor prescriptively sound. Critical legal scholars may even doubt the soundness of Dr. Cheng's fundamental proposition that international law in this area should aim to balance the two policies of global order and the maintenance of the right to self-determination. More importantly, detractors of the New Haven approach may even view Dr. Cheng's thesis, insofar as it recognises that the relative power and authority of decision makers as well as the possibility of collusion between these decision makers, serves to legitimise the exercise of hegemonic or oligarchic power upon new states through the international legal order.

Putting theoretical differences aside, there are practical effects to neglecting the primacy of the ceding state. Doing so detracts from an exposition on the causal elements of state succession. It is hard to disagree that maintenance of global order and giving effect to the right of self-determination are good global policies to work towards. However, beyond these policy objectives, state succession, through the eyes of the ceding state, reflects a resolve on the part of the population of the ceding territory to seek fundamental change in the political structure and even values of the territory. Any liberal theory of state succession must reflect this causal element of state succession. In real terms, the law of state succession must give proper effect to the causal elements behind each particular state succession so as to prevent further upheaval in the territory. Maintenance of global order is a good policy. However, any law of state succession should not neglect the importance of maintaining domestic order as well. In other words, the purpose of the law of state succession should be to prevent further succession movements by making sure that each succession is properly reflective of the political sentiment in the territory. Trading the primacy of the state for the need to find international consensus risks external pressure being placed on new and often weak regimes to strike deals or continuing commercial agreements which may be unsavoury to domestic constituents which may in turn lead to further upheaval and instability.

Accordingly, state consent remains a crucial element to the law of state succession. The problem lies in ascertaining where consent lies when a state cedes from another. It is always hard to ascertain where the political sentiment of the new state lies in a variety of commercial matters. New regimes are often ill-equipped to judge the situation and often lack the political capital to justify their decisions. Any new international law of state succession should take this into account. Sadly, Dr. Cheng's thesis does not. He identifies a multitude of actors from outside the state that influence international decision making but fails to note that there the decision making process within the state can often be multifaceted and complicated as well. To exacerbate matters, the concerns of various constituents of the domestic realm may not be apparent to the international decision makers identified by Dr. Cheng and these international decision makers may not

be sensitive to the demands of domestic constituents. International pressure to carry out commercial obligations may be the straw that breaks a new regime's back. At least, existing theories of international law which centre around the doctrine of *tabula rasa* facilitate a consensual resolution of commercial obligations by placing the prerogative onto the ceding state to enter into obligations as the regime sees fit and responsible to its domestic constituents. This takes time but time is precisely what new states need to ensure that they have sufficient internal stability to carry out its commercial obligations.

Nonetheless, this book's comprehensive survey of state and treaty practice makes it a worthwhile investment for any international law scholar or practitioner of international commercial law. To date, the 1979 Convention and the 1983 Convention remain treaties which have not been signed or ratified by many states. Dr. Cheng's book, at very least, provides us with an examination of state practice that may be used to fill the gap between the conventions on one part, and the customary international law position on the other part. Yet, most importantly, this book may prompt a broader enquiry into whether new developments in international society have made New Haven scholarship more palatable or whether New Haven scholarship has a way to go in resolving its own theoretically difficulties. It should attract interest from legal scholars of deeper and broader mien.

reviewed by JEREMY LEONG