


# **STATE SUCCESSION and COMMERCIAL OBLIGATIONS**



Tai-Heng Cheng

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# State Succession and Commercial Obligations

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*To Mom and Dad*

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## FOREWORD

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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 nascent 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  
Yale Law School  
New Haven, Connecticut  
December 21, 2005

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## ACKNOWLEDGMENTS

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Only rarely can an individual claim sole credit for the occurrence of a succession. More frequently, different decision makers within and outside of a state shred the myths that shroud its territorial community in statehood. During or after this destruction, that territorial community reorganizes itself. Actors within that community and external decision makers signal and respond until a new global understanding is reached about the reorganized community. When that happens, succession is complete.

The creation of this book has been similar to the occurrence of a succession, albeit on a modest scale. I was a participant, but certainly not the sole decision maker, in the publication of this book. Different decision makers provided me with insights and other forms of assistance to dispel existing myths about the law of state succession. These other decision makers also signaled and responded to me until, finally, I was able to organize the data on recent successions and attain a new understanding of state succession and commercial obligations. I am grateful to each of these decision makers, and mention as many of them as possible within the constraints of space.

W. Michael Reisman has been a transforming force. Over half a decade, he has, with patience and wisdom, guided me through complexities of international law. Professor Reisman has elevated my scholarship and clarified my roles in the legal profession and in society.

The faculty and staff at Yale Law School, at which I prepared my J.S.D. thesis on the topic of this book, have helped me in large and small ways. Lea Brilmayer and Ruth Wedgwood were readers on my doctoral committee. James J. Silk was a voice of humanity as I encountered lonely areas of international law. The international law librarians, Daniel Wade and Mark Engsberg, as well as their staff, provided invaluable assistance by obtaining obscure, but important, documents.



The partners of Simpson Thacher & Bartlett LLP allowed me time (sometimes late at night, but not always) to prepare my manuscript for publication. Additionally, I am appreciative of the following partners, associates and staff for their advice, assistance and friendship: Francis L. Huck; John J. Kenney; Kerry Konrad; Joseph M. McLaughlin; Robert H. Smit; Mariya S. Treisman, Christopher J. Lucht; Natalia Martín; Elisabeth Bassin; Maria Didomenico; Nicolai Boros; Alice Bruckenstein; Boyd Hagen; Daniel Szelag; and Michael Wulff. I am especially indebted to librarians Peggy Martin and Penny Frank for making documents cited in this book appear miraculously on my desk overnight.

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I am also thankful to friends who have each provided critical support. Whitmore Gray offered wise counsel. Zachariah Victor provided invaluable comments on the draft manuscript.

Finally, I am deeply grateful to my parents, who put up with my petulance through childhood and gave me space to be my own person, and who continue to support my aspirations unfailingly.

When the outcomes of a succession fail to promote the relevant global policies, one decision maker can occasionally be identified as the culprit for such a failure. Likewise, responsibility for any errors and omissions in this book is mine alone.

Tai-Heng Cheng  
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New York, New York  
June 1, 2006

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## LIST OF ABBREVIATIONS

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1978	
Convention	Vienna Convention on Succession of States in Respect of Treaties of 1978
1983	
Convention	Vienna Convention on Succession of States in Respect of State Property, Archives and Debts of 1983
ASEAN	Association of Southeast Asian Nations
bn.	billion
CIS	Commonwealth of Independent States
CSFR	Czech and Slovak Federal Republic
EC	European Community
ECCY	European Community Conference on Yugoslavia
ECHR	European Court of Human Rights
ECJ	European Court of Justice
EU	European Union
FRG	Federal Republic of Germany
FRY	Federal Republic of Yugoslavia
G.A. Res.	U.N. General Assembly Resolution
GATT	General Agreement on Tariffs and Trade
GDR	German Democratic Republic
ICFY	International Conference on Former Yugoslavia
ICJ	International Court of Justice
ILC	International Law Commission
IMF	International Monetary Fund
INTERFET	International Force for East Timor
MAC	“Material Adverse Change” clause
MAE	“Material Adverse Effect” clause
mn.	million
MOP	Macau Pataca (monetary unit of Macau)
MOU	Memorandum of Understanding
NATO	North Atlantic Treaty Organization

NBY	National Bank of Yugoslavia
NFA	New Financing Agreement
NGO	nongovernmental organization
PRC	People's Republic of China
Rub.	Ruble
SAR	Special Administrative Region
S.C. Res.	U.N. Security Council Resolution
SDRs	Special Drawing Rights
SFRY	Socialist Federal Republic of Yugoslavia
SWAPO	South West Africa Provisional Authority
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
U.K.	United Kingdom of Great Britain and Northern Ireland
U.N.	United Nations
UNMIK	U.N. Mission in Kosovo
UNTAET	U.N. Transitional Administration in East Timor
VEB	<i>Vneshekonobank</i> (Soviet Bank of Foreign Trade)

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# PART I

## A NEW APPROACH

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