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# *Financial Aspects of State Succession: The Case of Yugoslavia*

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## **Abstract**

*This paper analyses the Yugoslav case of financial state succession. The paper examines the issues raised in the succession negotiations between the five successor states of the SFRY and details the agreements reached by certain successor states with third parties including the International Monetary Fund, the World Bank and the London and Paris Clubs. The latter part of the paper distils from the SFRY succession negotiations considerations which are relevant to the shaping of the international law of state succession.*

The dramatic, foreseeable and violent disintegration of the Socialist Federal Republic of Yugoslavia (SFRY) raises many issues of international law, of which state succession is an important one. Its significance extends beyond the interest of the successor states and public international law. The legal and practical consequences of state succession are far-reaching as they affect the rights of third states and international organizations as well as private entities like commercial banks.

State succession occurs 'when there is a definitive replacement of one state by another in respect of sovereignty over a given territory in conformity with international law'.<sup>1</sup> The replacement of sovereignty raises issues of the transmission of rights and obligations. This essay focuses exclusively on state succession in so far as it affects financial rights and obligations.

Part 1 of the paper examines the negotiations between the five successor states to the SFRY regarding the apportionment of the SFRY's net assets and details the agreements reached by certain successor states directly with third parties. The second part of the paper endeavours to distil from these negotiations considerations relevant to the shaping of international law of state succession.

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<sup>1</sup> Brownlie, *Principles of Public International Law* (1995) 654.

## 1 Division of the SFRY Federal Balance Sheet

There are five successor states to the SFRY. These are Bosnia and Hercegovina (Bosnia), Croatia, the Federal Republic of Yugoslavia (Serbia and Montenegro) (FRY), Macedonia and Slovenia.

Two reasons make the SFRY case unique and interesting from an international law perspective. First, nearly all the debts, and some of the assets, have been apportioned through direct negotiations with third parties. That is, unlike the other cases of state succession, the successor states have separately reached agreements with creditors to take over their respective shares of the SFRY's debt. Secondly, international organizations, and in particular the IMF, have crucially influenced both the way in which the SFRY's net assets have been divided, as well as the nature and the scope of the succession negotiations.

### A Background to the Negotiations

Succession negotiations among the successor states were initially conducted under the auspices of the EC (Peace) Conference on Yugoslavia.<sup>2</sup> The Conference on Yugoslavia was established on 27 August 1991 by the adoption of the Declaration on Yugoslavia at the Extraordinary Ministerial Meeting in Brussels.<sup>3</sup> At the same meeting, the Arbitration Commission was established as an advisory body to opine on issues of international law which might be put to it by the Conference.<sup>4</sup>

The issue of state succession was discussed for the first time on 25 March 1992. In August 1992, the UN/EC International Conference on Yugoslavia (ICFY) replaced the Conference of Yugoslavia.<sup>5</sup> The ICFY established various working groups, including a Succession Issues Working Group. The work within the ICFY petered out in early 1995. After the conclusion of the Dayton Peace Agreement on 21 November 1995, it was decided that the ICFY Working Group on State Succession would continue its work as part of the structure for the civilian implementation of the peace settlement and that the High Representative<sup>6</sup> would be responsible for the issue of succession. In March 1996, the High Representative appointed a special negotiator for succession issues (namely, Sir Arthur Watts), essentially as a mediator, to carry out the succession negotiations.

On 25 March 1998, it seemed a breakthrough was at hand and that an agreement, albeit limited, would be reached. It appeared that Sir Arthur Watts had been successful in convincing the successor states to at least reach agreement on the succession to SFRY archives, gold in the amount of US\$600 million held at the Bank of International Settlement (BIS) and eight embassies owned by the SFRY around the world.<sup>7</sup>

<sup>2</sup> See (1992) 31 ILM 1421 *et seq.*

<sup>3</sup> Škrk, 'Slovene Views on the Succession of States' (unpublished manuscript, 1997) at 14 (largely reprinted in Mrak, *Succession of States* (1999)).

<sup>4</sup> The Opinions of the Arbitration Commission are therefore advisory in nature and are not binding upon the negotiating parties.

<sup>5</sup> See (1992) 31 ILM 1527 *et seq.*

<sup>6</sup> Initially, Mr Carl Bildt and from mid-1997 Mr Carlos Westendorp.

<sup>7</sup> *Ibid.*

Moreover, the FRY had agreed to provide the four successor states with access to records including those of the former National Bank of the SFRY. Since all the documents and records are in the FRY's possession, only it has the precise information on the nature, amount and location of the SFRY's assets as at the date of succession. Accordingly, the four successor states regard access to these records as the first step towards reaching an agreement on the apportionment of assets and liabilities. However, no sooner was agreement reached than the FRY changed its position. Consequently, negotiations collapsed.

Upon the outbreak of the conflict in Kosovo in January 1999, negotiations were unofficially suspended indefinitely.<sup>8</sup> Immediately after Milošević, the former President of the SFRY, was toppled from power in October 2000, Sir Arthur Watts called on the successor states to resume negotiations. The first meeting was held in Brussels on 18 December 2000. According to Dr Mejak, the head of Slovenia's succession team, this meeting was purely exploratory in nature.<sup>9</sup> The first meeting where substantive issues were discussed in almost two years was held in Ljubljana, Slovenia in February 2001. However, no agreement was reached. Nevertheless, issues agreed in 1998 were revisited.<sup>10</sup> Moreover, the FRY again agreed in principle to provide the four successor states access to SFRY records. However, the meeting in Ljubljana also revealed cracks in the previously unified position of the four successor states,<sup>11</sup> the most important of which was in relation to the 'key' for the apportionment of assets.

Sir Arthur Watts expects that agreements in relation to BIS assets, the SFRY's archives and the division of the eight embassies will be reached at the meeting, scheduled for early April 2001 in Brussels.<sup>12</sup> The chances of agreements being reached regarding these issues are now greater than ever before.<sup>13</sup> This is especially so as: (i) the FRY has now conceded that the SFRY has dissolved which was a key obstacle to any agreement with the four successor states; and (ii) the FRY is eager to break out of its pariah status and gain access to the international financial markets.

However, as will be shown in this paper, even if the above-mentioned agreements are reached in Brussels in April 2001, the negotiations are far from over.

## ***B Legal Framework of the Negotiations***

Initially, all successor states agreed that international law represented the legal basis for the negotiations and that the Convention on Succession of States in State Property, Archives and Debts<sup>14</sup> (the 'Convention') was a guide to the relevant principles of

<sup>8</sup> Dr Mejak, interview, June 1999. Dr Mejak is the head of the negotiating team of the Slovenian Government.

<sup>9</sup> Dr Mejak, interview, 15 January 2001.

<sup>10</sup> See the discussion above.

<sup>11</sup> For further details, see the discussion below.

<sup>12</sup> Brstovšek, 'Nov pohod dedicev' ('New Meeting of the Successors'), *Dnevnik*, 23 February 2001.

<sup>13</sup> The international community is more optimistic than the four successor states that Koštunica's assumption of power will result in the FRY changing its approach in relation to the succession negotiations and its overall policy *vis-à-vis* the four successor states.

<sup>14</sup> UN Doc. A/Conf.117/14, reproduced in (1983) 22 ILM 306.

international law.<sup>15</sup> However, by 1992 the FRY had changed its position. In an interview, Mr Mihajlović, the head of the FRY negotiating team at the time, said that he regarded the succession negotiations as purely political in nature and that the FRY therefore did not need to base its claims on either international or domestic law.<sup>16</sup> It is likely that the FRY's position has changed since Koštunica, the present President of the FRY, assumed power as he has steered the FRY generally towards a less radical position.

Notwithstanding the FRY's claim that the succession negotiations are political in nature, it is clear that the principles of customary public international law as they relate to succession represent the legal framework for the negotiations. In particular, to the extent the provisions of the Convention reflect customary international law,<sup>17</sup> they are binding on the parties. In fact, all the successor states, including, the FRY, have invoked international law rules and state practice to support their claims.

In addition, the Arbitration Commission has made several pronouncements with regard to the division of assets.<sup>18</sup> Although its opinions are not binding on the negotiating parties, they have for the most part been accepted by all, with the exception of the FRY, as a guide to the negotiations.<sup>19</sup>

### ***C Why Has Agreement Not Been Possible to Date?***

Despite several draft agreements having been submitted over the years by the successor states, by the Working Group on Succession and by the mediator, Sir Arthur Watts, no agreement has been reached to date.

Three factors complicated, and some still hinder, the negotiations. The first and foremost factor which had inhibited any agreement was the fundamental dispute between the FRY on the one hand and the four other successor states (the 'four successor states') on the other on whether the SFRY broke up through secession or was dissolved. Since the way in which the parties characterized the SFRY's break-up underlined their views on all concrete issues of succession, little progress could be made until agreement was reached in respect of this issue.<sup>20</sup> After the change of regime in Belgrade in November 2000, the FRY conceded its claim to be the sole successor of the SFRY. Thus, the main stumbling block to the negotiations has now been removed.

<sup>15</sup> Degan, 'Disagreements Over the Definition of State Property in the Process of State Succession of the Former Yugoslavia', 12 *Development and International Cooperation* (1996) 113–147; at 149. Škrk, *supra* note 3.

<sup>16</sup> Jenko, 'Bo ZRJ popustila i privolila v. delno delitev primozenja' ('Will FRY Agree to the Partial Apportionment of SFRY's Property'), *Delo*, 3 February 1998, at 3.

<sup>17</sup> For example, Crawford and Desjardins consider Articles 8, 11, 17(1)(a), 18(1)(a), 40 and 41 of the Vienna Convention as reflecting customary international law and possibly even modifying it.

<sup>18</sup> See (1993) 32 ILM 1586, at 1596.

<sup>19</sup> Certain successor states question the correctness of certain of the decisions of the Arbitration Commission, and in particular the ones which relate to the dissolution of the SFRY. For details, see section E of Part 1.

<sup>20</sup> Mejak, interview, 15 January 2001. See also Jenko, 'Cirkus in Ljubljana' ('Circus in Ljubljana'), *Delo*, 23 February 2001.

The second factor was that most assets are held by one successor state — the FRY — which had little interest in parting with them. This is still an important factor preventing agreement in respect of certain assets, and in particular the foreign currency, most of which (about US\$5 billion) has been spent by the FRY over the past decade.

Lastly, the negotiations were complicated by the fact that armed conflict attended the process of disintegration.

Although, a decade after the break-up of the SFRY, no agreement has been reached within the negotiation framework, progress has been made outside the institutional framework through direct negotiations between individual successor states and foreign creditors. Slovenia was the first to finalize agreements with all the SFRY's foreign creditors regarding its share of the debt.<sup>21</sup> Croatia, Bosnia and Macedonia have followed suit, while the FRY has just recently commenced negotiations.

#### **D *What is There to Divide?***

There is no agreement among the parties on what should be divided. A tentative inventory made by independent consultants in February 1993 estimated the net assets of the SFRY as of 31 December 1990 at US\$60 billion.<sup>22</sup> Of this, military assets represented 75 per cent,<sup>23</sup> immovable assets 3.4 per cent and financial assets 21.6 per cent.<sup>24</sup>

This paper will first look at the issues related to the date of succession, then turn to the SFRY's liabilities, followed by a discussion on the division of assets. A discussion on the apportionment of liabilities will precede that on assets for three reasons: first, unlike assets, nearly all of the SFRY's debts have been divided; secondly, the agreements reached with creditors concerning debts impacted on the way assets have been and will be apportioned; and thirdly, these agreements all presumed that the SFRY dissolved, thus undermining the FRY's claim of being the sole successor of the SFRY, a key obstacle to negotiations.

#### **E *Date of Succession***

Unlike the recent cases of dissolution of Czechoslovakia and the Soviet Union, the date of succession in the case of the SFRY is a complex and controversial issue. Pursuant to Article 11 of the Convention, the date a successor state replaces the predecessor state

<sup>21</sup> See the discussion below.

<sup>22</sup> See Working Groups on Economic Succession Issues of the International Conference, 'Single Inventory of Assets and Liabilities of the SFRY as of 31 December 1990', 28 February 1993. An estimate of US\$100 billion has been given more recently. See Brstovšek, *supra* note 12.

<sup>23</sup> Most of these have been employed by the FRY to wage wars against the other successor states or are now obsolete.

<sup>24</sup> Working Groups on Economic Succession Issues of the International Conference, 'Preliminary Report on the Valuation of the Assets and Liabilities of the Former SFRY', 28 October 1992.

in ‘responsibility for the international relations of the territory’<sup>25</sup> in question is regarded as the date of succession.

Accordingly, the date of independence is usually regarded in international law as the date of succession. However, in the case of the SFRY the existing successor states proclaimed their independence or were established on different dates. See Table 1.

**Table 1**

Slovenia:	25 June 1991 <sup>a</sup>
Croatia:	8 October 1991 <sup>b</sup>
Macedonia:	17 November 1991 <sup>c</sup>
Bosnia:	6 March 1992 <sup>d</sup>
FRY:	27 April 1992 <sup>e</sup>

Notes

<sup>a</sup> Date of the proclamation of independence. According to the Arbitration Commission, 8 October 1991, the date on which the moratorium on independence ended should be taken as the date of succession.

<sup>b</sup> Date at which the moratorium on independence ended.

<sup>c</sup> Date of the adoption of the new Constitution.

<sup>d</sup> Date on which the results of the referendum were officially announced.

<sup>e</sup> Date on which the FRY as presently constituted was established, being the date of the adoption of the new Constitution.

The determination of the date of succession raises a number of issues. There is debate on whether a precise date on which the SFRY ceased to exist can be determined or whether the SFRY disintegrated over a period of time. According to Slovenia, the date on which Slovenia and Croatia declared independence, 25 June 1991, should be regarded as the date of succession. Thereafter, the SFRY’s federal governmental structure ceased to function in accordance with the 1974 Constitution of the SFRY, as Slovenian delegates withdrew from federal institutions, the SFRY laws ceased to apply in Slovenia and the Slovenian army took control of its borders with Italy and Austria.<sup>26</sup> According to Mejak, Croatia, Bosnia and Macedonia endorse this date as the date on which the SFRY ceased to exist.<sup>27</sup>

In contrast, the Arbitration Commission seems to be of the view that the dissolution of the SFRY occurred over a period of time. In its Opinion No. 1 of 29 November 1991,

<sup>25</sup> This Article seems to reflect international law. For example, the International Law Commission considers this Article as ‘confirmed by State practice’ (see ILC Report, *ILC Yearbook*, Part 2, A/CN.4/SER.A/1981/Add.1 (Part 1) (1981) at 4).

<sup>26</sup> Some Slovenian constitutional lawyers argue that the FRY dissolved in 1990. The process of dissolution was triggered by the Slovenian and Croatian delegates leaving the Communist Party Congress in January 1990. During 1990, Serbia unofficially introduced a boycott of goods from Slovenia, and Slovenia and Croatia started preparing themselves for independence. By the end of 1990, the republics had stopped contributing to the federal budget.

<sup>27</sup> Quoted in Mali, ‘Circus Arturja Wattsa postaja resno gledalisce’ (‘Arthur Watts’ Circus is Becoming Serious Theatre’), *Vecer*, 10 March 2001.

it concluded that the SFRY 'was in the process of dissolution'.<sup>28</sup> In its Opinion of 4 July 1992, it concluded that the process of dissolution was 'now complete' and that the SFRY no longer existed. Therefore, if the two opinions are read together, they seem to suggest that the SFRY ceased to exist sometime between 25 June 1991 and 27 April 1992 but not before 29 November 1991.<sup>29</sup> This opinion implies that a staggered approach should be adopted to determine the dates of succession for the different successor states.

The adoption of a staggered approach is problematic for two reasons. First, there is considerable debate as to which dates are the actual dates of succession for the respective successor states. There is some debate whether some of the dates listed in Table 1 above are the actual dates of succession as they do not correspond well with the historical facts of the disintegration of the SFRY.<sup>30</sup> For example, 25 June 1991 was the date on which both Slovenia and Croatia declared independence. However, the moratorium on their independence ended on 8 October 1991. Therefore some, including the Arbitration Commission,<sup>31</sup> argue that the latter date should be taken as the date of their independence. On the other hand, as discussed above, Slovenia and Croatia argue that Yugoslavia ceased to exist at the latest on 25 June 1991 when both declared independence. In the case of Bosnia, the situation is further complicated by the fact that it remained a part of the unified SFRY monetary system until some months after its referendum on independence was held.

Secondly, the lack of agreement on a single date of succession will complicate the valuation of the SFRY's net assets and their apportionment since, if the above listed dates are adopted, at least five different balance sheets will have to be compiled. The 31 December 1990 has informally been agreed upon by all parties as the date at which the first accounts will be drawn and accounts made since on such date the last approved SFRY budget was drawn up.<sup>32</sup> More importantly, thereafter the four successor states had stopped contributing to the federal budget. However, according to Sir Arthur Watts, it is unlikely that this date will also be adopted as the date of the passing of assets and liabilities.<sup>33</sup> In fact, in his last draft proposal Sir Arthur Watts suggested 30 June 1991 as the date for accounts to be drawn up, that is five days after Slovenia and Croatia declared independence.

At the meeting in Ljubljana in February 2001, Slovenia reiterated Sir Arthur Watts' proposal for 30 June 1991 as the date for drawing up the SFRY's accounts. However, no agreement was reached among the parties, although it seems that

<sup>28</sup> (1993) 92 ILR 162.

<sup>29</sup> This view is not likely to be accepted by any of the four successor states, in particular Slovenia and Croatia, since the war of aggression waged by the FRY in Slovenia and Croatia occurred during this period.

<sup>30</sup> The way in which this issue is resolved is crucial to Croatia's case before the International Court of Justice against the FRY as it relates to acts of genocide committed by the FRY in Croatia during the period from August to December 1991.

<sup>31</sup> See Opinion No. 1 (1992) 31 ILM 1494.

<sup>32</sup> SFRY's accounts are held with Belgrade and were to be made available to the other four successor states under the agreement reached on 25 March 1998.

<sup>33</sup> Sir Arthur Watts, interview, 2 September 1999.

Bosnia, Croatia and Macedonia will endorse this position. However, it is likely that different succession dates will be agreed for different types of assets.

## F *Liabilities*

As of the end of 1991, the total medium-term and long-term debt of the SFRY amounted to US\$15.99 billion, of which US\$3.79 billion was unallocated<sup>34</sup> and US\$12.2 billion allocated<sup>35</sup> debt.<sup>36</sup> This money was owed to international organizations, states and commercial banks. See Table 2.

**Table 2 Estimate of the long-term debt by republics and creditors (US\$millions) as at the end of 1991**

	IMF debt	World Bank debt	Other multilateral debt	Bilateral debt	Commercial debt	Private long-term debt	Total long-term debt
Bosnia		450	100	415	643	317	1925
Croatia		169	130	660	880	325	2164
Macedonia		157	78	210	195	210	850
Slovenia		147	378	358	466	408	1765
Serbia and Montenegro		1212	272	1509	1142	1366	5501
Allocated		2135	958	3152	3200	2760	12205
Unallocated	683			1000	1000	1100	3783
<b>Total</b>	<b>683</b>	<b>2135</b>	<b>958</b>	<b>4152</b>	<b>4200</b>	<b>3860</b>	<b>15988</b>

Source: Cvikl and Mrak, 'World Bank Internal Document — Former Yugoslavia's Debt Apportionment', June 1996, at 5.

Most of the external debt has been apportioned among the successor states through direct negotiations with creditors, outside the framework of the succession negotiations. All successor states, except the FRY, have finalized or are in the process of finalizing agreements with creditors. First to be divided was the unallocated debt owed to international organizations and, in particular, to the International Monetary Fund (IMF).

### 1 *Debt to International Organizations*

As at December 1991, the SFRY owed the IMF US\$683 million of unallocated debt, and owed the World Bank US\$2.14 billion of allocated debt.<sup>37</sup>

The FRY made payments to the IMF until September 1992. It did so to strengthen its

<sup>34</sup> Unallocated or national debt is debt which is owed by the country as a whole and which therefore needs to be apportioned among the respective successor states.

<sup>35</sup> Allocated debt is either local or localized debt and is debt which was incurred either by a republic or by the federal government for the benefit of a particular republic.

<sup>36</sup> See Table 2. See also Mrak, 'Republic of Slovenia's negotiations with foreign creditors', *Bančni Vestnik* (1993) 10, at 10.

<sup>37</sup> Mrak, 'Succession of the Former Yugoslavia's External Debt: The Case of Slovenia', 12 *Development and International Cooperation* (1996) 167, at 169 (substantially reprinted in Mrak, *supra* note 3).



claim to continuity.<sup>38</sup> On 15 December 1992, the IMF held that Yugoslavia had dissolved,<sup>39</sup> proclaimed the five republics as equal successors to the SFRY's membership and divided the debts and assets among them as shown in Table 3.

**Table 3**

Bosnia	13.20 per cent
Croatia	28.49 per cent
Macedonia	5.4 per cent
Slovenia	16.39 per cent
FRY	35.52 per cent

Note

IMF Press Release No. 92/92, 15 December 1992, at 8.

The above apportionment key (known as the 'IMF key') was devised primarily using economic criteria, including the republics' contributions to the federal budget and their share in social product and export earnings of the SFRY as well as their percentage of the SFRY's population and territory. All successor states accepted the IMF key, including the FRY in August 1993.<sup>40</sup>

The IMF's decision is important for three reasons. First, it unequivocally confirmed the finding of the European Bank for Reconstruction and Development (EBRD) that the SFRY had dissolved.<sup>41</sup> Such a finding was quite controversial at the time as the secession/dissolution debate was still in full swing.<sup>42</sup> Support for the FRY's continuity claim waned after the IMF's decision.<sup>43</sup> Secondly, the IMF key set a precedent for the future apportionment of unallocated debt. Thirdly, Macedonia's and Bosnia's acceptance of the IMF's decision weakens their claim that population is the only equitable method for apportionment of assets. As the negotiations in Ljubljana have revealed, they are finding it very difficult to dispute the application of the IMF key, by analogy, to other financial assets and assets in general.<sup>44</sup>

On 25 February 1993, the World Bank followed suit and terminated the SFRY's membership on account that it had dissolved.<sup>45</sup> The World Bank granted the SFRY US\$2 billion worth of loans. These were guaranteed by the federal government, but

<sup>38</sup> Mrak, *supra* note 36, at 12.

<sup>39</sup> It should be noted that the EBRD was the first international organization to declare that the SFRY had dissolved. See EBRD, Resolution of the Board of Governors No. 30 on the Membership of Countries Previously Forming Part of Yugoslavia, 9 October 1992.

<sup>40</sup> Rant, interview, 5 February 1997. Mr Rant is a member of the Slovenia negotiating team. Mrak, *supra* note 37, at 170.

<sup>41</sup> The EBRD held in October 1992 that: (a) the SFRY 'has been dissolved and no longer exists'; and (b) 'that none of the countries resulting from the dissolution of the SFRY can be regarded as a continuation of the SFRY'. See *supra* note 39.

<sup>42</sup> See Shihata, 'Matters of State Succession in the Practice of the World Bank', 12 *Development and International Cooperation* (1996) 1, at 17 (substantially reprinted in Mrak, *supra* note 3).

<sup>43</sup> Škrk, 'Recognition of States and Its (Non-)Implication on State Succession: A Case of Successor States of the Former Yugoslavia', 12 *Development and International Cooperation* (1996) 85, at 99.

<sup>44</sup> See sections G.4 and H below for further discussion.

<sup>45</sup> World Bank Press Release No. 93/S43, 26 February 1993.

had been granted to finance specific projects in individual republics. Consequently, when apportioning the loans, the World Bank adopted the final beneficiary rule, whereby a loan is deemed to be owed by the entity which actually benefited from it, rather than by the entity which entered into the loan contract. In other words, it treated the debts as localized<sup>46</sup> (allocated) debt rather than unallocated debt owed by the SFRY as a whole, even though the SFRY was the contracting party. Accordingly, it apportioned the debts to the republics in which the specific projects were located.

The World Bank's decision is important because: (i) it confirmed the customary international law principle that localized debt passes to successor states;<sup>47</sup> and (ii) it adopted the final beneficiary rule as a mechanism for the division of allocated debt, thereby setting a precedent for the division of other such debts in the Yugoslav case.

The IMF's and the World Bank's decisions set the scene for the negotiations that followed with other countries.

## 2 *Debts to the Paris Club*

As shown in Table 2 above, the SFRY owed members of the 'Paris Club' (comprising 15 states which lent money to the SFRY) US\$4.15 billion at the end of 1991, of which 66 per cent was allocated debt and 33 per cent was unallocated debt.

Slovenia was the first to initiate and conclude negotiations with the Paris Club. A Framework Agreement was drawn up in 1993 setting out the general terms agreed between Slovenia and members of the Paris Club. Pursuant to this Agreement, Slovenia undertook to pay its portion of the unallocated debt including interest in arrears. However, being the first to make a deal with the Paris Club, it reserved the right to renegotiate the Framework Agreement if more advantageous conditions were subsequently granted to other successor states in relation to the servicing of their portions of the national (unallocated) debt owed to the Paris Club.<sup>48</sup> The Framework Agreement adopted the final beneficiary rule, previously used by the World Bank to determine Slovenia's portion of the SFRY's allocated debt, and the IMF key to determine Slovenia's share of the SFRY's unallocated debt.

This Framework Agreement was the basis upon which bilateral agreements between Slovenia and each member of the Paris Club were negotiated. In 1993, Slovenia started bilateral negotiations with the 15 members of the Paris Club. It has now concluded agreements with all of them. These agreements are not interim in nature and therefore the debts cannot subsequently be reapportioned or assigned. As such, they undermine the FRY's claim that the agreements reached on apportion-

<sup>46</sup> The difference between local debt and localized debt is that the local debt is owed pursuant to a loan agreement to which a sub-state unit (in the case of the SFRY, a republic) is a party, while a localized debt is a debt incurred by the central government for the benefit of a local project or area.

<sup>47</sup> Shaw, 'The Succession Revisited', 5 *Finnish Yearbook of International Law* (1994) 34, at 93. ILC Report, *supra* note 25. O'Connell, 'Secured and Unsecured Debts in the Law of State Successor', 28 *BYIL* (1951) 204.

<sup>48</sup> Cviki and Mrak, 'World Bank Internal Document — Former Yugoslavia's Debt Apportionment', June 1996, at 13.

ment of external debts are not final and that such debts must be internally reapportioned among the successor states.<sup>49</sup>

Croatia and Macedonia entered into similar agreements with the Paris Club in 1995. Initially, Croatia sought to have its debt written off, but failed.<sup>50</sup> Unlike Slovenia, Croatia and Macedonia have rescheduled their debts invoking external factors such as war and loss of market. Slovenia did not seek to have its debt rescheduled as it sought to reach agreement as quickly as possible. In addition, according to Mrak, it did not consider it could justify such a claim as its foreign exchange reserves were high and its debt service ratio comparatively low.<sup>51</sup>

### 3 Debt to Commercial Banks

At the end of 1993, the SFRY's outstanding debt to commercial banks under the New Financial Agreement (NFA), the Trade and Deposit Facility and other agreements amounted to US\$4.3 billion.<sup>52</sup> Most of the SFRY's commercial debt was owed to a consortium of 100 banks (known as the 'London Club') under the NFA. Accordingly, only the NFA negotiations will be detailed below.<sup>53</sup>

The NFA of 1988 was the last restructuring of a loan entered into in 1983 between 10 banks from different republics of the SFRY and the National Bank of Yugoslavia (NBY) as borrowers and a consortium of international banks as lenders. Initially, the loan was guaranteed by the SFRY.<sup>54</sup> Under the NFA, the NBY, situated in Belgrade, was the paying agent.<sup>55</sup> The NFA provided that the debt could be retired through debt for debt, debt for cash and debt for equity swaps. By mid-1993, the debt of US\$7.3 billion was reduced to 4.3 billion, mainly through the purchase of debt for cash on the secondary market.<sup>56</sup>

The NFA debt was divided internally among the republics of the SFRY. Until May 1992, all successor states were individually repaying their share of this debt. In June 1992, it had become evident that certain successor states would not be able, or were not willing, to make payments. The successor states stopped repaying the debt since such repayment would not go towards retiring their portion of the debt but instead towards retiring the total SFRY debt.<sup>57</sup>

<sup>49</sup> Rant, interview, December 1997. Although the negotiations have resumed, it is unclear whether the FRY's position regarding this point has changed.

<sup>50</sup> Mrak, *supra* note 37, at 177.

<sup>51</sup> Mrak, interview, 4 February 1997. Mr Mrak headed the Slovenian delegation in negotiations with the World Bank, the IMF, the Paris Club and the London Club.

<sup>52</sup> See Table 2 above.

<sup>53</sup> Only the key features of the NFA will be detailed.

<sup>54</sup> Law on the Republic of Slovenia's Assumption of Part of the Debt Under the New Financial Agreement of 1998 Through the Issue of Government Bonds, *Official Gazette of the Republic of Slovenia* (1996) No. 14, at 732.

<sup>55</sup> The FRY's Central Bank has invoked this as a ground for challenging the agreement reached between Slovenia and the London Club in the courts of the US and the UK in 1996. Both cases were subsequently dropped. However, the Governor of the FRY's Central Bank has recently threatened to restart these actions. Mali, *supra* note 27.

<sup>56</sup> Mrak, *supra* note 37.

<sup>57</sup> Mejak, interview, June 1999.

In 1993, after the negotiations with the Paris Club were finalized, Slovenia, as the first of the successor states, commenced negotiations with the commercial banks. The other successor states (with the exception of the FRY) followed suit. As the agreements reached by them are substantially the same as that negotiated by Slovenia, only Slovenia's agreement will be detailed below.<sup>58</sup>

Two key factors complicated Slovenia's negotiations. First, the 'joint and several liability' clause in the NFA bound all the republics in their individual capacities for the entirety of the debt. Secondly, there was evidence that a substantial amount of the debt had been purchased by the FRY on the secondary market. Therefore, any repayment of the debt would have meant that a payment would also be made to the FRY.

*(a) Joint and several liability*

Slovenia initially approached the London Club offering to pay all its allocated debt and 16.39 per cent of the unallocated debt, pursuant to the IMF key. Initially, this was rejected by the commercial banks. Invoking the 'joint and several liability' clause, the commercial banks demanded that Slovenia pay off the entire debt. Since Slovenia is the most prosperous of the former republics, the commercial banks saw it as the primary candidate for repaying the debt owing under the NFA. More importantly, they were concerned that any renegotiation of the debt would mean that the joint and several liability clause would be unenforceable against the other republics.

A year or so later, the commercial banks proposed that Slovenia pay US\$1.2 billion (28 per cent of the total debt outstanding) in return for its release from the clause.<sup>59</sup> Although unacceptable to Slovenia, since the market value of the entire SFRY's debt on the secondary market at that time was around 20 per cent of its book value, it saw this proposal as an indication of the readiness of the commercial banks to give up the joint and several liability clause and reach an agreement.<sup>60</sup>

*(b) FRY's purchase of debt*

During the negotiations with the London Club, Slovenia insisted that FRY 'connected persons', that is, the FRY entities and entities which held the NFA loan on behalf of these, should be excluded from the benefit of any agreement reached. Slovenia argued that these entities had bought up NFA debt on the secondary market at a substantial discount using foreign exchange reserves of the former SFRY to which Slovenia, as one of the successor states, has a claim. Instead of retiring the debt, such entities effectively became lenders. Since it was anticipated that Slovenia and other former republics would start servicing the debt, this would in effect mean that they would be paying for the same debt twice. Slovenia's view was accepted by the commercial banks. They undertook to declare any accounts they held on behalf of FRY connected persons and to exclude them from their claim.

<sup>58</sup> Mrak, *supra* note 37, at 180.

<sup>59</sup> Mrak, 'Republic of Slovenia's Negotiations with Foreign Creditors', *Slovenska ekonomska revija* (1993) 88, at 97.

<sup>60</sup> Mrak, interview, 4 February 1997.

An agreement was finally reached on 8 June 1995 and the transaction was formally completed when Slovenia issued bonds in the value of US\$812 million.<sup>61</sup> This represented about 15.4 per cent of the outstanding debt under the NFA or, more precisely, 18 per cent if FRY connected persons are excluded.<sup>62</sup> This figure was arrived at by first determining the allocated debt of Slovenia (US\$425 million), then using the IMF key to determine Slovenia's portion of the SFRY unallocated debt, and, lastly, calculating its share of the accrued interest.<sup>63</sup>

The agreement reached with the London Club is important as the final beneficiary rule was once again adopted in relation to the SFRY's localized debt (despite the joint and several liability clause), and the IMF key was used to apportion the unallocated state debt, thereby confirming the principles of customary public international law in respect to the apportionment of national debt.<sup>64</sup>

It can be surmised that virtually all of the SFRY's debt is now apportioned. This was achieved outside the auspices of the succession negotiations. It is unclear whether the FRY will continue to seek for the SFRY's debt to be reapportioned internally as this issue was not discussed at the recent meetings. However, the recent threat by the Governor of the FRY's Central Bank to restart legal action against Slovenia with respect to its agreement with the London Club seems to suggest that this issue may still be unsettled.

## **G State Assets**

In contrast to external debt, few assets have been divided. The key sticking points in the negotiations pertaining to assets concern: (i) what constitutes state property; (ii) whether internal financial assets should be regarded as state property; and (iii) what key should be used to divide the SFRY's net assets. Other points of disagreement in relation to, for example, the apportionment of immovable and movable assets will also be highlighted in this section.

### *1 Definition of State Property*

What constitutes state property is a major point of contention between the FRY and the other states. All parties agree that the definition of state property set out in Article 8 of the Convention applies.<sup>65</sup> The four successor states regard this definition as a rule of international law, while the FRY's view is not clear.

Article 8 of the Convention provides that state property means 'property, rights and interest which, at the date of the succession of States, were, according to the internal

<sup>61</sup> See *supra* note 54. Cvikl and Mrak, *supra* note 48, at 15.

<sup>62</sup> *Ibid.*

<sup>63</sup> Mrak, *supra* note 37, at 268.

<sup>64</sup> For further details, see section C of Part 2.

<sup>65</sup> Degan, interview, 3 February 1997. Professor Degan is a member of the Croatian negotiating team. The FRY has adopted the definition in its proposed Draft Agreement Between the FRY and the Successor States, 4 May 1993.

law of the predecessor, owned by that State'.<sup>66</sup> In other words, the Convention defines state property in terms of the municipal law of the predecessor state as at the date of succession. Although it defines the concept of state property, the Convention does not set a criterion for determining its scope. Furthermore, according to the International Law Commission (ILC), 'customary international law has not established any autonomous criteria'.<sup>67</sup> Instead, one must turn to the domestic law of the predecessor state to determine the scope of the concept of 'state property'.

The dispute between the successor states as to the scope of state property under the SFRY's domestic law is complicated by the fact that a concept of 'state ownership' did not exist under the 1974 Constitution of the SFRY (the 'Constitution'). The Constitution does not make any reference to 'state property'. Pursuant to Article 12(1), all means of production and all property of state institutions, including that of the federal army, or immovable property of diplomatic and consular missions abroad were 'socially owned'. In other words, such property was owned by the society as a whole.

(a) *FRY's position*

The FRY argues that it follows from Article 12(1) of the Constitution that nothing similar to state property existed in the SFRY and that therefore what constitutes state property can only be determined by looking at investments and loans made by the federal state authorities and other federal funds since 1945.<sup>68</sup> In other words, the FRY rejects a legal approach to defining state property in favour of an economic approach.

(b) *Position of the four successor states*

The FRY's approach to state property, which is similar to an historical benefit analysis approach, is rejected by the four successor states and the Arbitration Commission in Opinion No. 11.<sup>69</sup>

It is rejected as inappropriate on two grounds. First, the four successor states argue that a legal approach can and must be taken to define the SFRY's property. In their view, state property can be determined by reference to federal laws in force at the date of succession. Although all property was socially owned, federal authorities and institutions were by law and, in particular, the 'Law on the Rights and Obligations of Federal Authorities with Regard to Socially Owned Property',<sup>70</sup> granted the right of

<sup>66</sup> According to Shaw and O'Connell, this definition can be taken to be reflective of customary international law. For details, see Shaw, *supra* note 47, at 86; and O'Connell, *State Succession in Municipal Law and International Law*, vol. 1 (1967) at 202.

<sup>67</sup> ILC Report, *supra* note 25, at 25.

<sup>68</sup> See Article 20 of the FRY's Draft Agreement Between the FRY and the Successor States, 4 May 1993. This position was recently reiterated by Mihajlović, the head of the FRY's negotiating team, in a letter he wrote to a Serbian newspaper. See Mihajlović, 'Ozbiljnije o sukcesiji' ('Seriously About Succession'), *Vreme*, March 2001.

<sup>69</sup> Paragraph 4 states that 'the question of origin and initial financing of the property . . . is irrelevant'. See (1993) 32 ILM 1586, at 1587.

<sup>70</sup> 1990, published in SFRY Official Gazette (1990).

exclusive possession, control, management and disposal in respect of certain socially owned property listed in 28 federal laws. That is, under this law, they were granted proprietary rights and obligations which were identical to the civil and common law concepts of ownership. Thus, the concept of state property existed in the SFRY although the terminology used to coin it was different. In addition, according to Degan, under the laws of Yugoslavia the concepts of self-management and socially owned property did not extend to the following property:

- 1 property of the federal army;
- 2 immovable and movable property located abroad;
- 3 property of federal organs such as the Federal Presidency, the Federal Assembly and the Federal Council; and
- 4 the National Bank of Yugoslavia and its assets and reserves.<sup>71</sup>

Accordingly, such property was clearly the property of the federal state.

Secondly, the past investment approach is rejected as unworkable.<sup>72</sup> The Organizations of Associated Labour (OAL),<sup>73</sup> which were the recipients of some of the federal loans, had in most cases repaid them before the SFRY dissolved. Therefore, the past investment approach would have to be modified to exclude those that had been repaid. This would make the entire process of defining state property very long and burdensome. The process is further made difficult by the fact that many of the loan documents have been lost or destroyed since some of them date as far back as 1945.<sup>74</sup>

## *2 Internal Financial Assets as Part of State Property*

As part of its economic approach, the FRY has argued that internal net financial assets also form part of the SFRY's state property. In other words, it argues that the net credit position of each republic *vis-à-vis* the federal government must be determined and, in particular, the financial capital flows between the federal government on the one hand, and the republics, corporations and natural persons located in them on the other hand, must be calculated. However, it had insisted that, as the sole successor of the SFRY, it represents the federal government and that therefore, only the creditor position of the four successor states *vis-à-vis* the federal government should be determined.<sup>75</sup> Under the FRY's four to one approach, all the other republics, apart from perhaps Slovenia, would owe money to the federal government (i.e. the FRY).

Not surprisingly, the four successor states reject this approach. They do so for the following three reasons. First, they argue that such approach does not accord with

<sup>71</sup> See Republic of Croatia, 'Memorandum to the Arbitration Commission', 21 May 1993 (unpublished). For details, see Degan, *supra* note 15.

<sup>72</sup> Rant, interview, December 1997.

<sup>73</sup> The OALs were set up as legal entities and had effective control over their assets and could enter into contractual and other commercial agreements including foreign trade agreements. Shaw, *supra* note 47, at 84.

<sup>74</sup> Rant, interview, December 1997.

<sup>75</sup> It is likely that the FRY will abandon this claim now that it has conceded that it is not the sole successor of the SFRY.

international state practice as there is no precedent for defining the scope of state property by looking at the sub-state level. Moreover, the adoption of such an approach would, in accounting terms, amount to double counting. Secondly, assuming the internal assets method is adopted, then the FRY's net position *vis-à-vis* the federal government would also have to be taken into account as it is one of the successor states. In other words, a five to one approach would have to be adopted.<sup>76</sup> Lastly, they have argued that an internal financial assets approach is unnecessary and unnecessarily complex, if not impossible, to carry out. They have argued that it is simpler, and would achieve the same end result, to divide the federal balance sheet as it was drawn up for the last federal budget on 31 December 1990, i.e. by reference to net external financial assets.

It is at present unclear<sup>77</sup> which former republic would be a net creditor and which a net debtor *vis-à-vis* the federal government under the five to one approach. It is, however, quite likely that the FRY would come out a net debtor under the five to one approach. Since the FRY has now dropped its claim to be sole successor of the SFRY, it is now expected that it will drop this claim. However, Mihajlović has just recently reiterated the FRY's claim regarding this issue.<sup>78</sup>

### 3 *The FRY's Historic Claim to Certain State Property*

In addition, the FRY invokes an historical claim going back to 1918 to certain SFRY's assets. It claims that property of the Kingdoms of Serbia and Montenegro and the parts of former Austro-Hungarian monarchy as at the date of the establishment of the Kingdom of Yugoslavia in 1918 should not be included in the definition of the SFRY's property. It argues that it is the sole successor of the Kingdoms of Serbia and Montenegro and, consequently, is entitled to all the assets those Kingdoms 'contributed' to the Kingdom of Yugoslavia.

This argument is also based on its claim to the SFRY's shares in, and gold reserves held at, the BIS.<sup>79</sup> The FRY argued that: (i) the gold deposited in the BIS belonged to the Kingdom of Serbia since upon the creation of the BIS it was the Kingdom of Serbia which was allocated shares in the BIS as war reparation for the damage suffered by it in the First World War; and (ii) the FRY is the sole successor of the Kingdom of Serbia.

For the FRY to be the successor of the Kingdoms of Serbia and Montenegro, the Kingdoms of Serbia and Montenegro would have to have continued to exist as separate entities throughout the existence of, first, the Kingdom of Yugoslavia, and then the SFRY. The FRY's argument is similar to the one invoked by the Baltic states in relation to their absorption into the USSR. However, the case of the Kingdom of Serbia

<sup>76</sup> Now that the FRY has abandoned its claim to be the sole successor of the SFRY, this approach would be taken. However, it is unlikely that the FRY will continue to make a claim for the apportionment of the internal net financial assets.

<sup>77</sup> As the FRY has denied the four successor states access to relevant records, only it knows what the financial position of the SFRY was as of 30 June 1991.

<sup>78</sup> Mihajlovic, *supra* note 68.

<sup>79</sup> See Gnjatović, 'Ownership Rights of the FR of Yugoslavia in the Bank for International Settlements, Basle' (paper presented at the British Institute of International and Comparative Law Conference on Commercial Aspects of State Succession, London, 30 January 1998).



is quite different as it voluntarily entered into the Kingdom of Yugoslavia and upon the latter's formation ceased to exist.

The BIS rejected the FRY's claim as sole successor to the gold and other assets as well as to the 8,000 membership shares. It froze all of the SFRY's gold reserves and shares in the BIS pending the outcome of the succession negotiations. In 1997, it invited the central banks of Bosnia, Croatia, Macedonia and Slovenia to subscribe for a nominal number of new shares, thereby enabling them to become members of the BIS,<sup>80</sup> despite the SFRY succession question remaining unresolved. Pursuant to this interim agreement, once an agreement is reached among the successor states, the presently issued shares will be cancelled and the old SFRY shares will be apportioned using the key agreed upon by the successor states.<sup>81</sup>

It seems from the meeting in Ljubljana that the FRY has now accepted that the gold and shares in the BIS should be apportioned among the successor states, thus abandoning its 'historic' claim to BIS assets. According to Dr Mejak, the dispute between the successor states has turned to the key for the apportionment of these assets. This will be discussed in detail below in section I.1. However, it seems from the statements of the Governor of the Central Bank of the FRY that it has not abandoned its historic claim to other assets.<sup>82</sup> It is likely that in the long term the FRY will also abandon this spurious claim.

#### *4 Immovable Assets in the Territory of a Successor State*

According to Brownlie,<sup>83</sup> it is 'generally conceded' that the rule that immovable property within the territory of a successor state passes to that state both in the case of dissolution and secession 'is a principle of customary<sup>84</sup> international law'.<sup>85</sup>

All SFRY successor states seem to accept this rule as one of international law. The dispute is, however, over whether equitable compensation must be made by the FRY to the other states as a consequence of it becoming the owner of the bulk of the SFRY's immovable property. Most of the federal organs and institutions were located in Belgrade. Almost all research institutions of the federal army were situated in Serbia and a substantial number of the military installations and factories were situated in Bosnia and Serbia. Therefore, the adoption of the territorial principle without

<sup>80</sup> BIS Press Communiqué, 12 May 1997.

<sup>81</sup> At the beginning of 2000, the BIS submitted a proposal for the division of SFRY assets held at the BIS. However, its proposal was rejected by the FRY.

<sup>82</sup> Mali, *supra* note 27.

<sup>83</sup> Desjardins and Gendron share this view (see Desjardins and Gendron, 'Legal Issues Concerning the Division of Assets and Debt in State Succession: The Canada–Quebec Debate', in Desjardins and Gendron (eds), *Closing the Books* (1992) 3, at 11). Moreover, the jurisprudence of the Permanent Court of International Justice supports this position (see *Peter Pazmany University Case*, 1933 PCIJ Series A/B, No. 61, 236, at 237) as does state practice including the cases of India's, Pakistan's, Sri Lanka's and Burma's devolution settlements with the United Kingdom (see Desjardins and Gendron, *supra* note 83, at 13).

<sup>84</sup> Articles 17(1)(a) and 18(a) of the Convention also confirm this rule. To the extent it sets out different rules in the case of newly independent states, it is not regarded as codifactory.

<sup>85</sup> Brownlie, *supra* note 1, at 658.

compensation would result in an inequitable distribution of the SFRY's net assets as the FRY would receive a higher share of SFRY assets than liabilities.

Accordingly, Article 14 of the Slovenian Draft Agreement on Succession of States to the Former SFRY<sup>86</sup> provides that 'where property concerned was physically situated predominantly in one of the former republics, or its value exceeded the value of the immovable state property of the former SFRY in the other former republics, the State Party that succeeded to that property is liable to pay to the other State Parties equitable compensation'.<sup>87</sup> The four successor states argue that the rule of equitable compensation is a rule of international law and is an application of the principle of equity. To support their claim, they invoke Articles 40 and 41 of the Convention, which provide that the share of assets which will pass to successor states should be considered when apportioning debt so that the overall apportionment of net assets is equitable. The FRY rejects this and argues that the principle of equitable compensation has no basis in international law.

It is possible that at the end of the day the FRY's position by default will be accepted by the other successor states. By agreeing to a piecemeal approach to the apportionment of assets, the four successor states may find that at the end of the day the overall apportionment of assets may not be equitable. Moreover, once BIS assets are apportioned, the incentive for the FRY to reach any further agreement will be diminished since all other SFRY assets are either on its territory or are controlled by it. Therefore, the four successor states may wish at least to make any partial agreements conditional upon the subsequent agreement on the apportionment of other assets.

##### 5 *Immovable Assets Situated Abroad*

Immovable assets situated abroad encompass the diplomatic and consular missions abroad, which, but for one, are all in the FRY's hands. Their share of the total assets of the SFRY is less than 1 per cent.

In accordance with international law,<sup>88</sup> the four successor states in 1993 agreed in principle that such property should be divided equitably using the following key: Bosnia 13 per cent, Croatia 27.2 per cent, the FRY 35.3 per cent, Macedonia 8.5 per

<sup>86</sup> See Republic of Slovenia, Draft Agreement on Succession of States to the Former SFRY, April 18, 1996. The other three successor states adopted this draft according to Dr Mejak. See Mejak, interview, 4 February 1997.

<sup>87</sup> Republic of Slovenia, *supra* note 86.

<sup>88</sup> On balance, state practice and doctrine seem to support the view that, as a rule of international law, immovable assets situated abroad should be apportioned to the successor states in the case of dissolution. Furthermore, the ILC regards this rule as one of customary international law and spelled it out in Article 18(1)(b) of the Convention (see ILC Report, *supra* note 25). As evidence of state practice, see for example: (a) the case of the dissolution of the Federation of Rhodesia and Nyasaland in 1963 where a number of agreements for the devolution of property abroad were concluded under which one state was given Rhodesia House in London and the other the High Commissioner's House; and (b) the agreement of the

cent and Slovenia 16 per cent.<sup>89</sup> This key differs slightly from the IMF key, which was corrected in favour of Macedonia.<sup>90</sup>

Initially, the FRY objected to the apportionment of immovable assets situated abroad. It argued that as the continuing state it is entitled to all immovable assets abroad and invoked international law to support its claim.<sup>91</sup> However, as early as 1992, the FRY indicated that it regarded immovable assets to be subject to division.<sup>92</sup>

Now that the FRY no longer claims to be the 'sole successor' of the SFRY, the dispute between the parties is no longer about whether immovable assets situated abroad should be divided, but rather what key should be used for their division. In view of the discussions in Ljubljana in February 2001, it seems likely that the IMF key for their apportionment will be adjusted in order to address the reservations Macedonia and Bosnia have in relation to the use of the IMF key to the apportionment of BIS assets and other financial assets. Based on the discussions in Ljubljana, it seems that, although some of the four successor states do not consider the 1993 agreement binding on them, it is likely that it will be used, at least, as a starting point.

There is a real prospect that the key for their apportionment will be agreed at the next meeting in Brussels. This is because, as discussed above, the agreement on the BIS key is linked to an agreement being reached on the key for the apportionment of immovable assets held abroad. Accordingly, as the BIS has set 15 April 2001 as the 'deadline' for the apportionment of BIS assets, whereafter the BIS has said it may have to cancel the credit lines of some successor states, there is real pressure to reach an agreement in relation to both keys.

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23 March 1906 between Norway and Sweden whereby the consular premises in London were sold and the proceeds were apportioned equally (for further details, see ILC Report, *supra* note 25, at 46; and O'Connell, *supra* note 66). O'Connell and Degan support this view. For details, see O'Connell, *supra* note 66, at 207; and Degan, interview, 3 February 1997.

<sup>89</sup> See Agreement on the Distribution of the Immovable Property Administered by the Federal Secretariat of Foreign Affairs, 11 March 1993. Degan, *supra* note 15, at 142.

<sup>90</sup> See the discussion in section F.1 above.

<sup>91</sup> The rule of public international law on succession to such assets in the case of secession is still not completely settled. It is argued by some authors that the fact that no rule covering such property is spelled out in Article 17 of the Geneva Convention suggests that a different rule applies in the case of secession. Desjardins and Gendron, on the other hand, are of the view that, at present, there is no rule of customary international law on this point (see Desjardins and Gendron, *supra* note 83, at 12–13). However, the USSR case of secession, where under the initial agreement reached between Russia and the other successor states ex-USSR property abroad was to be apportioned among them on an equitable basis, is evidence of recent state practice pointing to the emergence of a rule on the division of immovable assets, which is the same as in the case of dissolution. For details of the present principles of apportionment in the case of dissolution, see *supra* note 96. The lack of a clear rule, therefore, still provides some scope for argument (although recent state practice does not support it) that in the case of secession immovable assets abroad pass to the continuing state.

<sup>92</sup> Čedić, 'Čija je imovina u inostranstvu' ('Whose Property is Abroad'), *Politika*, 1 February 1997, at 3. Mr Mihajlović, the head of the FRY succession delegation at the time, said that the FRY accepts the apportionment of these assets.

## 6 Movable Property

Financial assets represented the major share of the movable property of the SFRY and 21.6 per cent of its total assets.<sup>93</sup> The foreign exchange reserves of the NBY alone stood at US\$6 billion as at 31 December 1990.<sup>94</sup> Other assets include quotas accorded to the SFRY as a member of the BIS, the IMF and the World Bank.

According to O'Connell, in the case of dissolution, all movable property is apportioned proportionately between the successor states.<sup>95</sup> Articles 17(1)(c) and 18(1)(d) of the Convention also confirm this view as they adopt the principle of equitable apportionment in the case of movables irrespective of their location. In contrast, the law on the apportionment of movable property held abroad in the case of secession appears unsettled.<sup>96</sup>

Article 15 of the Slovenian draft proposal is a verbatim restatement of paragraphs 1(c) and (d) of Article 18 of the Convention.<sup>97</sup> It is likely that all successor states will endorse the above-mentioned principles of international law now that the FRY has conceded its claim as the sole successor of the SFRY and there is no longer any debate on whether the SFRY was a case of secession or dissolution.

A very small portion of the assets of the SFRY have already been apportioned. This was achieved through direct negotiations with international financial institutions in which those assets were held. Therefore, even before the FRY conceded its claim and despite uncertainty as to whether the same rule of international law applies to the apportionment of movable assets in the cases of secession and dissolution, in the Yugoslav case little turned on whether it was a case of secession or dissolution. The

<sup>93</sup> Republic of Slovenia, Principles and Standpoints of the Republic of Slovenia Underlying the International Legal Solution of the Succession of States Issues Between the Successor States to the Former SFRY, Draft, 27 June 1994 (unpublished) at 6.

<sup>94</sup> Most of these funds have been spent by the FRY to finance its wars in Croatia, Bosnia and Kosovo. A portion of these funds is held in accounts in Cyprus and elsewhere. Slovenia unsuccessfully sought to block accounts in Cyprus on the grounds that the funds held belonged to all the successor states. Rant, interview, December 1997.

<sup>95</sup> See O'Connell, *supra* note 66, at 204.

<sup>96</sup> Three different rules are currently being propounded. First, according to Shaw, the territorial principle governs the succession of such movables and, therefore, all movable property passes to the successor state in which it is situated (Shaw, *supra* note 47, at 90). The second set of rules is proposed by O'Connell who, in the case of movables, draws a distinction between the case of dissolution and secession. In his view, only movable assets which can be identified with immovables (O'Connell argues that such movables can be regarded as fixtures; see O'Connell, *supra* note 66, at 204) in the seceding territory pass to that successor state in the case of secession while others remain the property of the predecessor State. In the case of dissolution, on the other hand, O'Connell argues that all movable property is apportioned proportionately between the successor states (see O'Connell, *supra* note 66, at 204). Lastly, the rule in Articles 17(1)(c) and 18(1)(d) of the Convention adopts the principle of equitable apportionment in the case of movables irrespective of their location and, unlike the territorial principle, draws no distinction based on the nature of the state succession (see *supra* note 14). The practice of states does not seem to support clearly any of these propositions. Nevertheless, there have recently been cases of both secession and dissolution where financial assets held in international organizations were apportioned between states in accordance with Articles 17 and 18 of the Convention (for example, apportionment of assets held in the IMF in the cases of Syria and Czechoslovakia).

<sup>97</sup> Republic of Slovenia, *supra* note 86, at 3.

SFRY quotas in the World Bank and the IMF were apportioned among the member states using the IMF key.<sup>98</sup> The SFRY's shares in the EBRD were also so apportioned.<sup>99</sup> At present, there is some debate among the successor states on whether the IMF key should be used to apportion BIS gold and shares which represented about 1 per cent of the SFRY's total assets. As discussed in detail below, Bosnia and Macedonia argue that it should not, while Slovenia and Croatia argue that since all financial debts were so apportioned, pursuant to the principle of equity, so should financial assets.

However, most of the movable assets have yet to be apportioned, and their apportionment has never been discussed in detail at the succession negotiations. Their apportionment is complicated by the fact that they are in the hands of the FRY. In fact, the FRY has spent almost all of the above-mentioned US\$6 billion worth of foreign currency reserves of the SFRY to finance its war machine. In addition, there is evidence that the US\$5 billion worth of loans owed by the former Soviet Union and Iraq to the SFRY have been settled by Milošević in return for oil and gas supplies.<sup>100</sup> Almost all the military assets,<sup>101</sup> being 75 per cent of all SFRY assets, were under the FRY's control since 1990 and have since been destroyed or are now obsolete.

Clearly, the FRY should account to the four successor states for these assets. However, their actual division is no longer possible as they have either been spent, or in case of military assets are destroyed or obsolete. Slovenia has therefore proposed that the share of each of the four successor states should be regarded as a financial debt owed by the FRY to each of them respectively. The FRY is unlikely to favour this approach. Since the issue has not been discussed in detail, it is unclear what the final outcome will be. Unless the international community puts pressure on it, the FRY will likely seek to postpone any agreement on this point as long as possible, even indefinitely.

## **H Equity as the Principle for the Apportionment of Assets and Liabilities**

The Convention,<sup>102</sup> recent state practice and doctrine<sup>103</sup> indicate that equity is the principle of international law for the division of assets. In the Czechoslovakian and Soviet Union cases, equity was invoked to determine the division of both assets and liabilities.<sup>104</sup> This view was reiterated by the Arbitration Commission. In a number of

<sup>98</sup> See IMF Press Release No. 92/92, 15 December 1992.

<sup>99</sup> Rant, interview, December 1997.

<sup>100</sup> Mejak, interview, 15 January 2001.

<sup>101</sup> Although a substantial portion of military assets are immovables rather than movables, for simplicity this distinction has been ignored.

<sup>102</sup> See Articles 17 and 18.

<sup>103</sup> Desjardins and Gendron, *supra* note 83, at 17. Degan, 'State Succession — Especially in Respect of State Property and Debts', 4 *Finnish Yearbook of International Law* (1993) 130.

<sup>104</sup> See Czaplinski, 'Equity and Equitable Principles in the Law of State Succession', 12 *Development and International Cooperation* (1996) 29, at 42 (reprinted in Mrak, *supra* note 3).

its Opinions, it has stated that achievement of an equitable solution is one of the few well-established principles of international law applicable to state succession.<sup>105</sup>

According to the ILC, the rule of equitable apportionment is not *jus dispositivum*.<sup>106</sup> In other words, states must apportion assets equitably. The Articles of the Convention reflect this view. They are the only provisions in which the proviso of the right of the parties to agree otherwise is not included. According to Sir Arthur Watts, however, even if the ILC's view is correct, this does not imply that the parties must apply an objective standard of what is equitable.<sup>107</sup> In his view, what is agreed by the parties will be regarded by them as an equitable outcome and, therefore, little will turn on whether the rule of equitable apportionment is regarded as *jus dispositivum* or not.

The principle of equity has been invoked as the basis for apportionment in all the drafts submitted to the Working Group on Succession.<sup>108</sup> The four successor states regard this principle as a rule of customary international law.<sup>109</sup> It is not, however, clear whether the FRY considers a requirement of equitable apportionment of both assets and liabilities as a binding rule of international law. In its Draft Agreement it invoked the principle of justice as a ground for the apportionment of debts.<sup>110</sup> At the time of that draft, however, the FRY still contended that it was the sole successor to all SFRY assets. Now that it no longer makes such a claim, it is likely that the FRY will accept equity as the guiding principle in the apportionment of the SFRY's assets as well. Therefore, it is likely that the Yugoslav case will be another example of state practice supporting the proposition that equitable apportionment is a rule of the international law of state succession.

## I *Method of Division*

However, although all the successor states agree that the SFRY's assets and liabilities should be divided equitably, what amounts to an equitable division of assets and liabilities has been a major stumbling block in the succession negotiations.

International law does not lay down the criterion for equitable division. In particular, the Convention does not set out a mechanism for determining what amounts to equitable apportionment of assets, while the views of commentators vary. In defining the criterion, some writers favour economic factors such as actual and potential revenue while others favour the size of the population and territory of the successor state.<sup>111</sup> Others like Degan and O'Connell argue that no single factor will yield an equitable result<sup>112</sup> in a particular case, and believe a criterion which combines

<sup>105</sup> For example, in Opinion No. 12, para. 1; and Opinion No. 13, para. 2. See (1993) 32 ILM 1589 *et seq.*

<sup>106</sup> See ILC Report, *supra* note 25, at 46. This principle also applies to the apportionment of debt.

<sup>107</sup> Sir Arthur Watts, interview, 28 February 1997.

<sup>108</sup> See Article 9(2) of Sir Arthur Watts, 'Informal Personal Non-Paper'; the Preamble to the Slovenian Draft, Republic of Slovenia, *supra* note 86, at 1; Article 24(1) of the FRY Draft Agreement Between the FRY and the Successor States, 4 May 1993.

<sup>109</sup> Republic of Slovenia, *supra* note 86; Degan, interview, 3 February 1997; Škrk, interview, 4 February 1997. Mrs Škrk is a member of the Slovene negotiating team.

<sup>110</sup> See FRY, Draft Agreement Between the FRY and the Successor States, 4 May 1993.

<sup>111</sup> See O'Connell, *supra* note 66, at 452, for the citation of the different authorities for these propositions.

<sup>112</sup> Degan, *supra* note 15, at 145.

all of these factors must be adopted. In addition, recent state practice seems equivocal. The Czechoslovakian case seems to support the use of a single criterion, while in the USSR case a multi-factor key was devised comprising three factors: the participation of the respective republics in exports and imports of the ex-USSR, the share of the respective republics in GNP of the ex-USSR and the size of the population of such republics.<sup>113</sup>

From the nature of the discussions in Ljubljana, it is clear that this has become the most contentious issue in the negotiations. As will be seen below, it has already shaken the previously uniform position of the four successor states *vis-à-vis* the FRY.

The disagreement is two-fold: (i) which criterion should be used to devise the key; and (ii) whether one or several criteria should be used.

### 1 The Criterion

At least three alternative criteria have been submitted. The first proposal was made by the Working Group on Succession which argued that in devising a key 'due regard must be had to the relative economic and physical conditions of parties and the overall equality'.<sup>114</sup>

Croatia and Slovenia simply propose that the IMF key be adopted to apportion all assets.<sup>115</sup> The IMF key was devised using macro-economic criteria such as the economic strength of the different republics and their contribution to the federal budget.<sup>116</sup> Several arguments can be given for the adoption of this key. First, it takes into account the specific circumstances pertaining to the SFRY at the time of the break-up — the contribution of each republic to the federal budget was based on its economic strength rather than the size of its population. Secondly, it was objectively determined by a third party. Thirdly, it is arguably the fairest criterion since it incorporates a number of factors. Fourthly, it conforms with recent state practice and, in particular, to that of the former Soviet Union.

Initially, the FRY proposed that, as in the case of the dissolution of Czechoslovakia,<sup>117</sup> the size of the population was the fairest method of apportionment.<sup>118</sup> Accordingly, it argued that all assets and debts should be divided as shown in Table 4.

**Table 4**

Bosnia	17.75 per cent
Croatia	20.35 per cent

<sup>113</sup> Czaplinski, *supra* note 104. Note that this agreement was modified later on through bilateral agreements between Russia and the successor states to the USSR. Under these agreements, rights to ex-Soviet property abroad were transferred to Russia in exchange for Russia's taking over the entire USSR debt.

<sup>114</sup> Article A.1(2) of Part 2 of the 'Draft Treaty Concerning Succession to the former SFRY, Assets and Liabilities, Part 2', by the Working Group on Economic Succession Issues of the International Conference (unpublished, 1995).

<sup>115</sup> For further details, see section F.1.

<sup>116</sup> Mrak, interview, 4 February 1997; and Shihata, *supra* note 42, at 19.

<sup>117</sup> Both assets and liabilities were divided on a 2:1 basis in favour of the Czech Republic using the size of the population as the criterion of apportionment.

<sup>118</sup> See Article 24 of the FRY Draft Agreement Between the FRY and the Successor States, 4 May 1993.

Macedonia	9.09 per cent
Slovenia	8.23 per cent
FRY	44.59 per cent

Its claim rested on the principle that every citizen of the former SFRY should acquire an equal share of the assets and debts since they all worked for the common benefit.

Although it seems that the FRY has abandoned this view at least in respect of the apportionment of BIS assets, Macedonia and Bosnia have endorsed this view.<sup>119</sup> Moreover, Macedonia argues that the other successor states endorsed this criterion when they agreed in 1993 to adjust the IMF key in order to divide immovable assets held abroad.<sup>120</sup> Slovenia disagrees with Macedonia's submission and argues that the agreement on immovable assets abroad was made *ex gratia* and did not amount to an endorsement of population as the criterion for the overall division of assets and liabilities.<sup>121</sup>

Slovenia has questioned the validity of the claims of the FRY, Macedonia and Bosnia. First, it argues that the acceptance of such a criterion would lead to an inequitable result given the particularity of the SFRY case.<sup>122</sup> The citizens of the SFRY participated in the creation of the country's wealth by paying taxes to the republics and autonomous regions. A quota system of contributions to the federal budget existed. The contribution of each republic was determined on the basis of the share of its social product in the overall product of the SFRY.<sup>123</sup> Therefore, in order to respect the equality of citizens and the principle of justice, the property should be distributed according to this criterion.<sup>124</sup> Secondly, Slovenia claims that the adoption of the population criterion would be counter to the constitutionally enshrined principle of the equality of the former republics in the SFRY.

## 2 *Uniform or Piecemeal Rules*

Over the years the position of some of the successor states has changed on whether a single key or number of different keys should be used when dividing assets. Initially, the FRY argued that only one key (the one referred to in section I.1) should be used for the division of assets and liabilities.<sup>125</sup> The FRY's position has since changed. It now agrees with Slovenia and Croatia that BIS assets should be apportioned using the IMF key.<sup>126</sup> Since the key to the apportionment of other assets (excluding immovables situated abroad) had not been discussed at the meeting in Ljubljana, it is not clear

<sup>119</sup> Their objections to the use of the IMF key to apportion BIS assets at the meeting in Ljubljana in February 2001 was based on this claim.

<sup>120</sup> See the discussion in section G.4; and Škrk, *supra* note 109.

<sup>121</sup> Škrk, *supra* note 109.

<sup>122</sup> Mejak, interview, 4 February 1997.

<sup>123</sup> For example, in 1990, Slovenia, with only 8 per cent of the total Yugoslav population, produced 20 per cent of the Yugoslav GNP, produced one-third of the Yugoslav exports and contributed 20 per cent to the federal budget.

<sup>124</sup> In fact, the IMF key uses this criterion. For this reason, the IMF key is preferred by Slovenia and Croatia.

<sup>125</sup> FRY, Draft Agreement Between the FRY and the Successor States, 4 May 1993.

<sup>126</sup> Mihajlovic, *supra* note 69.



whether the FRY will continue to press for the population criterion to be used for dividing other assets. However, given that pursuant to such criterion its share of the SFRY assets would be substantially greater than pursuant to the IMF key, it is likely that it will in the future argue that different keys be used to apportion different types of assets.

The position of Slovenia and Croatia has not changed. They maintain, for the reasons set out in section I.1, their preference for the adoption of the IMF key as a uniform rule for the apportionment of all assets and liabilities.

Bosnia's position is that separate keys should be applied to different assets.<sup>127</sup> In particular, it argues that the key for the apportionment of military assets should reflect the fact that most of these were destroyed in the war and were almost entirely used by Serbia and Montenegro to wage the war on Slovenia, Croatia, Bosnia and, most recently, Kosovo. In addition, as discussed above, both Macedonia and Bosnia argue that immovables should be divided using the population criterion. As discussed in section I.1, their position with respect to BIS assets is that they should be divided using this criterion. At present, it is unclear whether they also maintain that all other financial assets should be so divided.

From the discussions in Ljubljana, it seems likely that different keys will be devised to apportion different types of assets. Certainly, Sir Arthur Watts is of this view.<sup>128</sup> At the meeting in Ljubljana, Slovenia proposed a compromise in relation to the apportionment of BIS assets and immovables situated abroad: Macedonia and Bosnia would agree to the application of the IMF key in relation to BIS assets in return for an adjustment of the IMF key, along the lines of the 1993 agreement,<sup>129</sup> in relation to immovable assets situated abroad. It is still too early to say whether this proposal will be adopted. However, in view of the BIS's 15 April 'deadline' for the parties to agree the key for BIS assets, there is some pressure for these issues to be resolved at the meeting in Brussels.

## **J Conclusion**

Although the Yugoslav state succession negotiations started in 1992, no agreement has been reached to date. However, as discussed in this paper, despite the lack of progress under the auspices of the international community, most of the debts and some assets have been apportioned directly with third parties.

Moreover, as shown in this section, the agreements reached by successor states with third parties had a substantial impact on the succession negotiations and more generally. First, the endorsement of the dissolution of the four successor states by the EBRD, the IMF, the World Bank and the Paris and London Clubs has undoubtedly been an important factor in the FRY's abandonment of its claim to be the sole successor of the SFRY. Their endorsement of the dissolution claim had an impact on

<sup>127</sup> Sir Arthur Watts, interview, 28 February 1997. See also Jenko, *supra* note 20.

<sup>128</sup> Sir Arthur Watts, interview, 28 February 1997.

<sup>129</sup> For details, see the discussion in section G.4.

how the issue of the FRY's membership in the UN and other international organizations was resolved. Following the decisions of the EBRD, the IMF and the World Bank, the Security Council held, in Resolution 777 of 19 September 1992, that 'the State formerly known as the SFRY has ceased to exist' and that the FRY 'cannot continue automatically' the membership of the former SFRY in the United Nations. Following the recommendation of the Security Council, the General Assembly in turn adopted Resolution 47/1 of September 1992 pursuant to which the FRY was prevented from participating in the work of the General Assembly. By November 2000, the FRY had lost all support for its claim to continuity. It therefore requested and was accepted as a new member of the UN as one of the successor states of the SFRY. A change in the FRY's stance on this issue has resulted in a change in its position regarding BIS gold, and is likely to result in it also abandoning its demand for the internal division of net assets as discussed in sections G.2 and G.3. This in turn will undoubtedly have an impact on the future scope and nature of the succession negotiations.

Secondly, most of the SFRY debt has been apportioned through direct negotiations with creditors, thus narrowing substantially the scope of the succession negotiations. The agreements reached with creditors are final and the debt cannot be reapportioned internally among the successor states.<sup>130</sup> Therefore, the succession negotiations will deal with the apportionment of the SFRY's assets only.

Thirdly, the adoption of the IMF key for the apportionment of the other unallocated debts and quotas, and of the final beneficiary rule for the apportionment of allocated debt, has crucially impacted on the way other debts and some assets were apportioned. Furthermore, as was evident in Ljubljana, the IMF's and the World Bank's decisions will have an impact on how BIS assets and other assets are divided in the future.

## 2 Conclusions to be Drawn from the Yugoslav Case

Although to date no agreement has been reached in the succession negotiations, some conclusions of importance to international law may nevertheless be drawn from the Yugoslav case.

### *A International Law as the Basis for Negotiation*

Hamilton argued that in succession cases 'in the end politics matters more than law'.<sup>131</sup> Although the succession agreement between the former republics of the SFRY will undoubtedly be a political compromise, this does not mean that the role of international law of state succession in the process will have been negligible. On the contrary, from the outset all parties accepted international law, and the Convention in

<sup>130</sup> For details, see section F.3.

<sup>131</sup> Hamilton, 'State Succession and Relations with Federal States', *ASIL Proceedings* (1992) 1, at 4.

particular, as the basis for negotiations.<sup>132</sup> Moreover, they have all invoked international law to support and justify their various positions and claims. Therefore, although international law may not have provided a simple and automatic solution to the dispute, it will have provided a basis for reaching a political agreement.

### **B *The Convention Reflects State Practice***

The Yugoslav case seems to strengthen the contention of numerous writers that certain provisions of the Convention, for example Articles 8, 11, 17(1)(a), 18(1)(a), 40 and 41, 'reflect State practice'<sup>133</sup> and may even codify it.<sup>134</sup> For instance, all SFRY successor states adopted the Article 8 definition of state property. In addition, they have in principle adopted the date of succession as the basis for negotiating the date for the passing of both assets and debts,<sup>135</sup> and regard the rule that immovable assets in the territory of the successor state should pass to it as a rule of international law. Moreover, the four successor states also consider the equitable division of assets and debts a rule of international law.

### **C *Greater Emphasis on Continuity of Rights and Obligations***

Debt negotiations and the decisions of the EBRD, the IMF and the World Bank affirm the principle of continuity of rights and obligations. The expansion of communications, globalization and greater interdependence between states means that it is increasingly in the interest of states to maintain the stability of their legal rights and obligations. This is best served by adopting the universal succession approach.<sup>136</sup>

Furthermore, the increased importance of international capital markets as a source of state finance has meant that, in order to establish their creditworthiness and obtain access to the financial markets, newly established states are more willing to enter into debt allocation arrangements. Therefore, greater emphasis will be given to the continuity of rights and obligations in future cases of state succession than in the past.

### **D *International Organizations are Shaping International Law***

The decisions of the EBRD, the IMF and the World Bank with regard to both the dissolution/secession issue and the apportionment key set important precedents which influenced decisions of other creditors, including states, and crucially affected, and will continue to affect, the nature and scope of the Yugoslav succession negotiations. The status of these international organizations as international lenders and expert bodies embellished their authoritative and guiding role.

The Yugoslav case is a good example of the increasingly important role international organizations are playing in shaping international law.

<sup>132</sup> See the discussion in section B of Part 1 above.

<sup>133</sup> Crawford, 'State Succession and Relations with Federal States', *ASIL Proceedings* (1992) 1, at 17.

<sup>134</sup> Desjardins and Gendron, *supra* note 83, at 5, except with regard to liabilities in the case of secession. See the discussion in *supra* note 96.

<sup>135</sup> However, as there are a number of possible succession dates, there is at present no agreement as to the actual application of this principle to the specific circumstances of the break-up of the SFRY.

<sup>136</sup> Williamson, 'State Succession and Relations with Federal States', *ASIL Proceedings* (1992) 1, at 12.

### E *Universal Succession to Debt*

The success of Croatia and Macedonia in rescheduling their debts may be seen to support Feilchenfeld's maintenance theory on the succession of debts.<sup>137</sup> Pursuant to this theory, debt passes while 'auxiliary rights', such as the maturity and timing of the repayment of the loan, do not and thus can be renegotiated. However, in the case of Croatia and Macedonia, it is unlikely that the rescheduling resulted from an application of a rule of the law of state succession. Neither state invoked international law as a basis for its proposals.<sup>138</sup> Instead, they invoked external factors such as war and loss of market to justify their claims. Therefore, it is more accurate to argue that they succeeded to the entire debt and subsequently renegotiated its terms. The rescheduling, therefore, was not carried out under the law of state succession but on the basis of the law on state responsibility. Slovenia's argument that it could not justify a rescheduling of its debt further supports the proposition that debt passes in its entirety upon succession.

As such, the Yugoslav case seems to further strengthen the rule of the universal succession to debt. It seems that over the years the law of state succession has made a full circle from universal succession to clean slate and back to universal succession.

## 3 Conclusion

The thorny issue of state succession lies in the wake of the violent break-up of the SFRY. This essay examined the ramifications of the break-up on the succession to the SFRY's financial rights and obligations.

Even though no agreement has been reached to date within the succession negotiations, certain conclusions may be drawn from the Yugoslav succession negotiations. Most importantly, the SFRY case seems to be consistent with the other recent cases of state succession and, therefore, provides additional support for the proposition that certain provisions of the Convention reflect state practice and may even codify it. Secondly, the Yugoslav case also seems to affirm the principle of universal succession to debt, as a rule of international law, as well as the principle of equity, as the guiding principle for the division of assets and debts. Lastly, the Yugoslav case is a clear example of the increasingly important role played by international organizations in shaping international law.

After suspending the negotiations indefinitely at the start of the Kosovo crisis, the international community was eager for the succession negotiations to be resumed after Milošević was overthrown, since the resolution of the succession issue was seen as the first step towards the reintegration of the FRY into the world community. Thus, immediately after Koštunica assumed power, Sir Arthur Watts called the successor states to Brussels for a preliminary meeting. The first meeting to discuss the substantive issues was held in late February 2001 in Ljubljana, Slovenia. For the first time, representatives of Montenegro were also present, although, at least officially,

<sup>137</sup> Feilchenfeld, *Public Debts and State Succession* (1931) 546 *et seq.*

<sup>138</sup> Mrak, interview, 4 February 1997.

they were regarded as being part of the FRY delegation. At this meeting, no breakthrough was made; however, the ground has been laid down for agreement to be reached (again) in relation to BIS assets, the SFRY archives and the division of certain embassies abroad. However, this first meeting of successor states in almost two years has also revealed cracks in the previously uniform position of the four successor states, in particular in relation to the apportionment key.

For the first time in a decade, there seems to be a real chance that an agreement will actually be reached. If the Brussels meeting delivers, this will mark the first step towards reaching a final agreement. However, it should be noted that the present staggered approach to the apportionment of assets primarily benefits the FRY. By agreeing to apportion BIS assets first, the four successor states will enable the FRY to get access to its share of the only financial assets it was not able to appropriate in 1990 and has not spent to date. In addition, it will get access to credit lines which it desperately needs to rebuild its economy. However, it will not have to immediately, if ever, account to the four successor states for the SFRY's assets — financial (US\$5 billion) and military (which represented 75 per cent of the total SFRY assets in 1990) — it appropriated and used to finance the wars it waged against Slovenia, Croatia and Bosnia. It can only be hoped that the four successor states will demand that its portion of BIS gold will not be paid out to the FRY but will be reapportioned among the four successor states once the division of all net assets of the SFRY is agreed. Otherwise, the FRY will have had its cake and eaten it too. The four successor states and the international community should exert pressure on the FRY to agree to such apportionment. The role of the international community in ensuring the FRY's agreement will be vital to ensuring that an equitable apportionment of the SFRY's net assets is reached.

## **Postscript**

Since this paper was written, the five successor states reached an agreement in April to apportion BIS assets using the IMF key. On 25 May, they concluded the final Agreement on the Apportionment of the Assets and Rights of the Former SFRY, the so called 'Umbrella Agreement' setting out the principles and the mechanism for the apportionment of the SFRY's existing assets. The Umbrella Agreement confirms the previously reached agreement, discussed above, that the key for the apportionment of the immovable assets situated abroad would be adjusted in return for the BIS assets being divided using the IMF key. Thus, Bosnia will receive 15 per cent, Croatia 25 per cent, FRY 37.5 per cent, Macedonia 7.5 per cent, and Slovenia 15 per cent of SFRY's immovable assets. USD 1 billion worth of SFRY's financial assets (rather than the USD 6 billion existing as of 30 June 1991) will not be divided pursuant to the IMF key. The Umbrella Agreement provides that the USD 1 billion worth of gold and foreign currency deposits will be divided so that Bosnia will receive 15 per cent, Croatia 22.5 per cent, FRY 38.5 per cent, Macedonia 7.5 per cent and Slovenia 16.5 per cent.