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State Succession to Debts and Assets: The Modern Law and Policy

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I. INTRODUCTION

In the early 1990s, the dissolution of the Soviet Union, Yugoslavia, and Czechoslovakia shook the structure of the international community. Now, at the beginning of the twenty-first century, the international community is again faced with the possible separation of Kosovo from Serbia and East Timor from Indonesia, as well as a number of other potential state breakups, including: Quebec from Canada; Northern Ireland from the United Kingdom; the Moros populated islands from the Philippines; and the possible further dissolution of Indonesia.[1] When a state dissolves, or when territorial entities of a state break away and become independent states, those states and the other members of the international community are faced with a host of legal questions concerning the continuation of the predecessor state's treaty obligations, succession to the predecessor state's membership in various international organizations, and the allocation of its debts and assets.

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1 For information regarding current seccessionist movements, see generally James Clad, *Indonesia*, *in* 1995-1996 STATE OF WORLD CONFLICT REPORT 43 (The Carter Center ed., 1996); Anthony Davis, *Islamic Guerrillas Threaten the Fragile Peace on Mindanao*, JANE'S INTELLIGENCE REV., May 1998, at 30; Roya M. Hanna, *Right to Self-Determination in In Re Secession of Quebec*, 23 MD. J. INT'L L. & TRADE 213 (1999); TIM JUDAH, KOSOVO: WAR AND REVENGE (2000); Kevin MacMillan, Comment, *Secession Perspectives and the Independence of Quebec*, 7 TUL. J. INT'L & COMP. L. 333 (1999); Colleen J. O'Loughlin, *A Peace Process Perspective: Northern Ireland and the Agreement Reached in the Multi-Party Negotiations, Belfast, April 10, 1998*, 13 N.Y. INT'L L. REV. 91 (2000); Henry J. Richardson, *A Critical Thought on Self-Determination for East Timor and Kosovo*, 14 TEMP. INT'L & COMP. L.J. 101 (2000); David Rohde, *Kosovo Seething*, FOREIGN AFF., May/June 2000 at 65; Kristen Svoboda, Comment, *No Success in Secession: 135 Years Ago the United States of America Experienced Civil War, Now Canada Grapples with the Possible Secession of Quebec*, 44 ST. LOUIS U. L.J. 747 (2000); Brian D. Vaughan, *Will God Save the Queen? Shared Authority and Sovereignty in Northern Ireland and the Case for Cross-Border Bodies*, 18 WIS. INT'L L.J. 511 (2000).

This Article addresses the legal rules governing the allocation of debts and assets among successor states, and in particular the role of the creditor states in formulating that allocation.[2] The Article also addresses the manner in which the political objectives of the various parties influence the development and application of the relevant legal rules concerning state succession to debts and assets.

Prior to the dissolution of the Soviet Union, Yugoslavia, and Czechoslovakia, the rules governing succession to debts and assets were derived from state practice and evolving customary international law based upon instances of decolonization.[3] An attempt was made to codify these principles in the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts.[4] However, the 1983 Vienna Convention is not in force.[5] Therefore, the state practice associated with the dissolutions of the Soviet Union, Yugoslavia, and Czechoslovakia significantly furthers the development of the customary international law, providing guidance for successor states and creditor states in future instances of state succession.[6]

This Article will explore the state practice and *opinio juris* associated with the allocation of debts and assets among the successor states of the former Soviet Union, Yugoslavia, and Czechoslovakia. The Article will focus on the following sets of issues:

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2. The succession to debts and assets constitutes a unique area of the international law of state succession. In other areas of state succession law, such as recognition, diplomatic relations, treaty continuity, and membership in international organizations, the successor states often react to decisions or policies adopted by other states. With succession to debts and assets, however, the successor states are called upon to take the initiative in structuring a result. As will be examined in this Article, third-party states are often reluctant to take the initiative from the successor states, but they are willing to apply pressure on the successor states to reach outcomes consistent with the third-party states' interests.

3. *See generally* DANIEL P. O'CONNELL, THE LAW OF STATE SUCCESSION (1956) (discussing the general legal principles of state succession, as illustrated by the emergence to full sovereignty of the colonial territories of several European nations).

4. Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, *opened for signature* April 18, 1983, U.N. Doc. A/CONF.117/14, 22 I.L.M. 306 (1983). [hereinafter the 1983 Vienna Convention].

5. Pursuant to a resolution of the UN General Assembly, the secretary-general convened the Convention on the Succession of States in Respect of State Property, Archives, and Debt. Despite objections from many industrialized nations, such as Canada, France, the Federal Republic of Germany, and the United States, it was adopted by majority vote on April 7, 1983, and opened for signature the following day. It remained open for signature until June 30, 1984; however, due to a lack of signatures, it has never come into force. *See* Eli Nathan, *The Vienna Convention on Succession of State Property, Archives and Debts*, *in* INTERNATIONAL LAW AT A TIME OF PERPLEXITY 489, 489-94 (Yoram Dinstein ed., 1989). The primary principle underlying the 1983 Vienna Convention is that the rights of the creditor states or entities should not be prejudiced by the dissolution of the debtor state. *See* 1983 Vienna Convention, *supra* note 4, art. 36 ("A succession of States does not as such affect the rights and obligations of creditors."). The Restatement (Third) of the Foreign Relations Law of the United States § 209(2) (1987) reflects a similar view, providing that the public debt obligations of the predecessor states are automatically assumed by the successor states.

6. The process of succession to debts and assets explored in this Article includes the assessment of liability for debts, a determination of the entitlement to assets, the allocation of shares for debts and assets, and the actual distribution of debts and assets among the successor states.

Applying new and existing norms and regimes. In seeking to structure state succession to the debts and assets of the Soviet Union, Yugoslavia, and Czechoslovakia, the three most important categories of legal norms and regimes are the rules relating to the identification of national, territorial, and identifiable debt; the principle of *pacta sunt servanda*; and the principle of equitable allocation.

It is important to understand the extent to which existing norms and regimes influenced how states distinguished between national, territorial, and identifiable debts and assets, whether states chose to apply different rules of allocation to the different forms of debt, and how these rules were modified and broadened during the course of their application. Among the most salient questions are the extent to which legally binding norms could be found in the 1983 Vienna Convention, and whether different norms applied in cases of consensual break-up (e.g., Czechoslovakia) and cases of non-consensual break-up (e.g., Yugoslavia). Also important is the issue of how disagreements between the creditor states and the debtor states were resolved. In the event of a disagreement over the interpretation of a norm, whose interpretation governed?

The second set of questions about the application of norms concerns the contract principle of *pacta sunt servanda*, which states that agreements and stipulations must be observed.[7] Here, it is important to understand how creditors sought to ensure compliance with this principle, and the extent to which creditors, as well as the successor states themselves, developed additional norms and regimes to protect their interests. Of particular concern is the legal foundation upon which these norms evolved. What, for example, is the legal basis for an assertion of joint and several liability among successor states, and by what mechanism could such liability be created and enforced? To what extent did the employment of joint and several liability actually promote a fair and effective state succession to debts and assets?

The third set of norms relates to the principle of equitable allocation. Although this principle appears to be the keystone principle for allocating debts and assets, many of the specific elements of the principle remain undefined, which inhibits the principle's full and effective application. In particular, there are questions about the definition of an "equitable proportion." Is it defined in terms of share of gross national product, natural resources, territory, population, or some combination of these? Does it refer only to equity among the successor states, or does it include the requirement of equity between the successor states and the creditor states? And, how might states allocate debt equitably when much of the debt is unidentifiable? Is it permissible to allocate such unidentifiable debt in equal proportion to the allocation of territorial debt?

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7. BLACK'S LAW DICTIONARY 1133 (7th ed. 1999).

Other questions concern the possible linkage between equitable allocation of debts and equitable allocation of assets. Is it necessary to link the allocation of debts with the allocation of assets such that a successor state's share of the assets is the same as its share of the debts, and to ensure that a successor state will not be held accountable for debt obligations as long as it does not have access to the assets of the predecessor state? Or would such an application of the equitable allocation principle unduly prejudice the rights of the creditor states? Must the creditor states consent to the allocation of the debts and assets agreed to by the successor states? May they impose an allocation of debts and assets when the successor states fail to agree?

In addition to these questions about the content of the relevant norms and regimes, there are a number of institutional issues to consider. For instance, it is important to investigate the legal basis for the jurisdiction of the European Community Arbitration Commission (the Arbitration Commission) in some of these cases, and the actual role it played in resolving disputes concerning matters of succession to debts and assets. In deciding matters before it, to what extent did the Arbitration Commission rely upon law, political interests, and principles of efficiency? Did these decisions modify or deny previous principles of law? Also, were informal regimes, such as the Committee of Legal Advisors on Public International Law (CAHDI) and the Alma Ata process, more or less effective than the more formal regimes? Did they significantly modify the law of state succession to debts and assets?

Choosing between the frameworks of continuity and dissolution. The two primary theoretical frameworks regulating state succession are those of continuity and dissolution. While the characterization of a break-up as a continuity or dissolution has critical implications for succession to membership in international organizations and important implications for succession to treaty obligations, its relevance to succession to debts and assets is relatively undetermined. It is therefore important to ascertain whether different legal rules are applicable in cases where the predecessor state has entirely dissolved (e.g., Czechoslovakia) and cases where one of the successor states claims to continue the international legal personality of the predecessor state (e.g., Soviet Union).

It is also important to understand the political and strategic interests of the successor states and interested third-party states in matters of continuity and dissolution with respect to continued membership in international organizations and the continuation of treaty obligations. Once a state is determined to be the continuity of the predecessor state, or once the predecessor state is determined to have dissolved, this categorization affects all substantive areas of state succession.

Evaluating the role of law. Given the paramount importance of political and strategic concerns during the break-up of a state, one must understand the relationship between international law and the development of a political response to state succession. While political and strategic concerns will inevitably set the fundamental approach of both the successor states and interested third parties to the break-up of a state, international law may facilitate or inhibit the achievement of those political and strategic objectives. International law may also supply the technical machinery necessary to implement agreed-upon allocations of debts and assets among the relevant parties.

Undoubtedly there will be limits on the extent to which international law may promote the peaceful and fair allocation of debts and assets in a manner consistent with the objectives of the relevant parties. An object of the inquiry must be to ascertain where these limits are the result of the undeveloped nature of the law of state succession and where they are the result of outdated or inappropriately developed law. Given that much of the law of state succession is customary international law, it is also necessary to inquire whether the break-ups of the Soviet Union, Yugoslavia, and Czechoslovakia have confirmed or modified this law. An examination of the role of law will also provide an opportunity to make recommendations for the enhancement of its role—assuming that it generally serves a constructive function in the allocation process.

To address these issues, Part II reviews the traditional law governing the succession to debts and assets. The traditional law is derived from the minimal state practice that existed prior to 1989 and from the 1983 Vienna Convention. In this Part, and throughout the Article, debts and assets are addressed separately, as they have traditionally been allocated quite differently.

Part III examines the formulation of the modern law and policy of state succession to debts and assets as applied in the case of the former Soviet Union. In the Soviet case, the successor states developed a process for negotiating an allocation of the debts and assets of the predecessor state, with the creditor states playing an influential role in the process and outcome of these negotiations. The Soviet case is particularly important in that it is the only clear case where one successor state continued the international legal personality of the predecessor state.

Part IV focuses on the former Yugoslavia. In this case, the successor states engaged in a short series of unproductive negotiations, thus requiring the creditor states themselves to allocate the debt among the successor states, while one successor state seized virtually all of the national assets. The Yugoslav case adds a particularly important dimension to the discussion of state succession, since there was no agreement among the successor states as to whether one of them could continue the international legal personality of Yugoslavia.

Part V discusses the former Czechoslovakia. Here, the successor states agreed among themselves as to the allocation of the predecessor state's debts and assets and then presented their arrangement to the creditor states for approval. Unlike the Soviet and Yugoslav break-ups, Czechoslovakia clearly followed the model of dissolution, with each of the successor states assuming equal international legal status.

Part VI analyzes how the break-ups of the Soviet Union, Yugoslavia, and Czechoslovakia confirmed, modified, and denied various aspects of the traditional law governing succession to the debts and assets of a predecessor state. This conclusion articulates the current status of the modern law governing succession to debts and assets.

II. The Traditional Law Governing Succession to Debts and Assets

Issues of state succession concerning treaty continuity and membership in international organizations have a long and detailed history in public international law.[8] However, there is scant applicable precedent regarding state succession to debts and assets. This lack of precedent is due in large part to the relatively recent development of the international financial system and various arrangements for multilateral lending. The traditional law is derived from what little state practice does exist[9] and from the 1983 Vienna Convention, which is not generally considered to be a codification of customary international law.[10] This Part will articulate the basic principles of public international law governing succession to debts and assets. It is important to note that debts and assets are addressed separately, as they are governed by different rules and in practice can be allocated quite differently.

A. *Distinctions/Definitions*

1. *National and Territorial Debts and Assets*

In analyzing state succession, the relevant debt is state debt not attributable to private individuals or entities. State debt may be defined as "any financial obligation of a predecessor state arising in conformity with international law towards another state, an international organization or any other subject of international law."[11] Within state debt, debt obligations are generally divided into three categories: national debt, territorial debt, and local debt.[12] National debt is debt contracted in the general interest by the national government of the state, such as debt utilized to pay a country's foreign exchange deficit. Territorial debt is debt contracted by the national

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8. *See generally* O'Connell, *supra* note 3; Arnold D. McNair, The Law of Treaties (1961); Okon Udokang, Succession of New States to International Treaties (1972).

9. *See* Malcolm N. Shaw, International Law 69–71 (3d ed. 1991) (describing the significance of state practice and the sources by which evidence regarding state practice can be obtained).

10. See Nathan, *supra* note 5, at 493 (stating that "a convention which has been objected to by such an unprecedentedly large number of States can hardly serve as a basis for the crystallization of norms of customary international law").

11. 1983 Vienna Convention, *supra* note 4, art. 33.

12. *See* Shaw, *supra* note 9, at 617–18. Shaw uses the term "localized debt" to refer to what we have labeled "territorial debt."

government of the state for identifiable projects in a specific region, such as debt contracted to build dams to prevent flooding in a specific territory. Local debt is debt contracted for by local government entities. Local debt is a form of territorial debt and therefore will be considered under the category of territorial debts.[13]

Assets may generally be divided into the categories of territorial assets and national assets.[14] Territorial assets, such as power plants, manufacturing enterprises and mineral deposits, are associated with the territory of a particular successor state.[15] National assets are held by the former central government, and include things such as currency accounts, federal movable property, gold reserves, and diplomatic and state property located abroad.[16]

Unlike state practice, the 1983 Vienna Convention does not draw a distinction between national and territorial debt.[17] It does address the allocation of state property among successor states. Although oriented towards physical property, the 1983 Vienna Convention defines state property as "property, rights and interests which, at the date of the succession of states, were, according to the internal law of the predecessor state, owned by that state."[18] Unlike the case of debt, it draws a distinction between the treatment of national assets and territorial assets. The 1983 Vienna Convention provides that unless the successor states otherwise agree, immovable and movable state property connected with the territory of a particular successor state shall pass to that state,[19] while movable state property not connected with the territory of a particular successor state shall pass to the successor states in equitable proportions.[20]

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13. *See id.* Other commentators have divided debt obligations into five categories: (1) Public Debts, which include both National and State Debts; (2) Local Debts; (3) Localized Debts; (4) Debts of Public Enterprises; and (5) Odious Debts. P.K. MENON, THE SUCCESSION OF STATES IN RESPECT TO TREATIES, STATE PROPERTY, ARCHIVES AND DEBTS 158–63 (1991).

14 *See* Nathan, *supra* note 5, at 101–04.

15 Territorial assets need not be physically connected to the territory of a successor state, but they must be directly and necessarily linked to the state's territory. *See* MENON, *supra* note 13, at 102–03.

16 *See* DANIEL P. O'CONNELL, STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW, INTERNAL RELATIONS 199–206 (discussing different states' determinations of what constituted state property). The nature of property subject to succession is generally defined by the municipal law of the predecessor state. *See* SHAW, *supra* note 9, at 612–13.

17. Rather than distinguishing between territorial and national debt, the 1983 Vienna Convention relies on the broad term "state debt," which it defines as "any financial obligation of a predecessor State arising in conformity with international law towards another State, an international organization or any other subject of international law." 1983 Vienna Convention, *supra* note 4, art. 33.

18 *Id.*, art. 8.

19 *See id.* art 17. For more detailed information on movable and immovable property, specifically with regard to the different types of succession, see *id.* arts. 14–18. *See also* MALCOLM M. SHAW, INTERNATIONAL LAW 702–03 (4th ed. 1997).

20. 1983 Vienna Convention, *supra* note 4, arts. 17–18. Menon describes "movable state property" as "property which is not physically linked to the territory, but which has a direct and necessary link with the territory in question. It is movable so that it can be taken out of the territory. It thus makes it easy to change control over the property." According to Menon, during the determination of whether the predecessor state or the successor state controls the property, three conditions are considered: "viability" (requiring that a territory should not be stripped of those things which are "essential for its day to day administration"); "equity" (enjoining the apportionment of property between the successor and predeces-

2. Continuity and Dissolution

State succession means "the replacement of one State by another in the responsibility for the international relations of territory" in conformity with international law.[21] In the case of continuation, one or more sub-state entities breaks away from the predecessor state[22] and forms an independent state. What remains of the predecessor state is referred to as the continuing state (or continuity of the predecessor state) and is deemed to continue the international legal personality of the predecessor states. The break-away states are referred to as successor states or newly independent states.[23] The continuing state, if one exists, usually retains a substantial portion of the predecessor state's population, territory, and resources. Beyond the implications of a determination of continuity toward the distribution of debts and assets, a determination of continuity has important implications for treaty obligations and membership in international organizations.

In the case of dissolution, the predecessor state dissolves into a number of independent states, with none of these states considered the continuing state.[24] All of the emerging states are considered successor states and are treated as equal heirs to the rights and obligations of the predecessor state. The 1983 Vienna Convention does not draw a distinction between the cases of continuation or dissolution.[25] It does distinguish between newly independent states, separation of part or parts of the territory of a state, and dissolution of a state.

B. Traditional State Practice and the 1983 Vienna Convention

1. The Principle of Pacta Sunt Servanda

State practice with regard to national debt in the circumstances of a continuation of the international legal personality of a predecessor state generally obligates the continuing state to the full amount of the predecessor state's national debt.[26] The continuing state is generally considered to be

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sor states); and "good faith" (implying that the predecessor State must not unduly exploit the mobility of the property in question so as to seriously disorganize the related territory, or to endanger state stability). MENON, *supra* note 13, at 102–03.

21. 1983 Vienna Convention, *supra* note 4, art. 2(1)(a); *see also* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 654 (4th ed. 1990); O'CONNELL, *supra* note 16, at 3.

22. 1983 Vienna Convention, *supra* note 4, art. 2(1)(b), defines the predecessor state as "the State which has been replaced by another State on the occurrence of a succession of States."

23. SHAW, *supra* note 9, at 608. The 1983 Vienna Convention, defines a newly independent state as "a successor State the territory of which, immediately before the date of the succession of States, was a dependent territory for the international relations of which the predecessor State was responsible." 1983 Vienna Convention, *supra* note 4, art. 2(1)(e).

24. SHAW, *supra* note 9, at 610–11.

25. *See id.* (finding that the 1983 Vienna Convention contains separate articles for continuity, and dissolution, but the text of each article is identical).

26. *See* SHAW, *supra* note 9, at 617–18.

obliged to the predecessor's debt under the doctrine of *pacta sunt servanda*.[27] The break-away state may be obligated to a specific share of the national debt when it reaches an agreement with the continuing state to be so bound, or when the break-away state agrees with the creditors to be obligated to a certain portion of the debt.[28]

Although there is virtually no clear state practice with regard to the assumption of debt by successor states in the case of dissolution,[29] international law would likely apply the same doctrine of *pacta sunt servanda*, which holds the individual successor states liable where a state dissolved and there is no continuing state.[30] A review of prior state practice does not indicate whether successor states should be held individually liable, jointly liable, or jointly and severally liable.[31]

In order to determine a proper allocation of the national debt among the successor states, previous successor states have in some instances apportioned debt according to the percentage of population and revenue retained by the individual successor states.[32] At times successor states utilized a commission of experts and representatives to assist in the allocation of debt.[33]

With regard to territorial debt, a general principle holds that successor states should assume liability for any debt associated with the acquisition of specific property or benefits within their territory, but little evidence exists that this principle has been widely incorporated into state practice.[34] State

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27. *See* MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 9–11 (3d ed. 1999).

28. In some early circumstances of state succession, break-away states consented to assume a portion of the national debt of the predecessor state. *See* ARTHUR BERRIEDALE KEITH, THEORY OF STATE SUCCESSION 60 (1907); *see also* BROWNLIE, *supra* note 21, at 659. For a detailed listing of successor state assumption of national debts in the period prior to and immediately following the first World War, see COLEMAN PHILLIPSON, TERMINATION OF WAR AND TREATIES OF PEACE, at 322–26 (1916).

29 O'CONNELL, *supra* note 16, at 387–94. To support the "very general principle" that all successor states are obligated to assume some portion of the debt of the predecessor state, O'Connell presents the following examples of state dissolution: the United Netherlands (1830), Union of Colombia (1829), Czechoslovakia (1939), Yugoslavia (1941), Rwanda-Burundi (1962), and the Federation of Rhodesia and Nyasaland (1963) *Id.*

30. *See id.* at 387–88.

31. For the purpose of this Article, the relevant categories of state succession are dissolution, separation, and continuity. It is useful to note, however, the five categories of state succession identified in both the 1978 Vienna Convention on the Succession of States in Respect of Treaties and the 1983 Vienna Convention: (1) Transfer of Part of the Territory of a State; (2) Newly Independent States; (3) Uniting of States, (4) Separation of Part or Parts of the Territory of a State; and (5) Dissolution of a State. MENON, *supra* note 13, at 99.

32. Daniel S. Blum discusses the four different approaches to the apportionment of debt by seceding states: (1) the per capita approach, where the percentage of debt to be paid by the seceding state is directly proportionate to the population of the seceding state; (2) the gross domestic product approach, where the debt is apportioned based upon the seceding state's percentage of the value of all goods and services produced by the ceding state's economy; (3) the historical benefits approach, where debt shares are allocated based on past benefits received; and (4) the historical tax shares approach, where the seceding state's share of the public debt is proportionate to assets transferred to the seceding state. Daniel S. Blum, *The Apportionment of Public Debt and Assets During State Secession*, 29 CASE W. RES. J. INT'L L. 263, 273–83 (1997)

33 *See* PHILLIPSON, *supra* note 28, at 324–25 (describing Sweden's appointment of debt commissioners in 1814, when Denmark ceded Norway to Sweden).

34. O'CONNELL, *supra* note 16, at 387.

practice does provide that the creditor state must consent to any agreement between the successor states allocating the debt of the predecessor state. This practice exists to prevent the successor states from allocating the debt in such a manner that it is unlikely to be repaid.[35] Similar to territorial debt, local debt is determined to be the obligation of the territory that contracted the debt. Local debt is usually the easiest debt to identify conclusively, as a local government contracted for the debt.

2. *Allocation of Assets/Property*

Prior to 1990, state practice indicates that in the case of continuity, the national property is not divided among the successor states but remains with the continuing state.[36] This principle is, however, based substantially on cases of decolonization, where the national property does not come within the sovereign jurisdiction of the successor state.[37] In the case of dissolution, O'Connell reasoned from his examination of past practice that in the case of total succession, the predecessor state loses its competence to own property, and thus the property must become the property of the successor state or cease to have an owner. Since the latter position was untenable, the property naturally devolved onto the successor states. O'Connell did not provide any analysis as to which principles would guide the allocation of the devolved assets among the successor states.[38] Most previous cases of dissolution indicate that the assets of the predecessor state were divided upon the agreement of the parties in some equitable fashion.[39] In most cases, the agreement fixed the date of distribution of the assets, with that date generally being either the date the agreement entered into force or a set period of transition.[40]

Concerning territorial assets, past state practice is settled on the principle that successor states are entitled to the movable and non-movable assets lo-

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35. *See* Urs W. Saxer, *The Transformation of the Soviet Union: From a Socialist Federation to a Commonwealth of Independent States*, 14 LOY. L.A. INT'L & COMP. L.J. 581, 693–94 (1992) (identifying potential complications of debt apportionment among the former Soviet republics).

36. SHAW, *supra* note 19, at 700–01.

37. O'CONNELL, *supra* note 16, at 207.

38. *Id.*

39. These cases include the partition of British India into India and Pakistan (1943), where assets were allocated by a devolution agreement and calculated using a complex economic formula; the dissolution of Mali Federation (1960), where assets were divided 62% for Senegal and 38% for Mali; the dissolution of the Federation of Rhodesia and Nyasaland (1963), where each of the successor states received a proportion of the assets based on their share of the federal tax revenue; and the union and subsequent separation of Singapore and Malaysia (1965), where Singapore regained the share of national property it had contributed upon the formation of the union. *Id.* at 220–32.

40. Menon identifies five options for fixing the date of transfer: (1) the date of ratification of the agreement; (2) a date set prior to ratification; (3) after a fixed period of time, or by installments; (4) over a fixed period, depending upon the fulfillment of certain conditions; and (5) a date fixed subsequent to the ratification of the agreement. MENON, *supra* note 13, at 87–88. The 1983 Vienna Convention provides that the property of the predecessor state transfers to the successor state on the date of succession. 1983 Vienna Convention, *supra* note 4, art. 35.

cated on or connected to their territory.[41] With respect to national assets, including national archives,[42] there is scant state practice as to whether or not successor states may claim a share of the national property located outside of their territory.[43]

State practice indicates that third-party states are not obliged to acknowledge the claim to assets by the successor states unless the third-party states have recognized those states as sovereign and thereby entitled to those assets. In addition, successor states frequently utilized joint commissions to supervise the allocation and distribution of assets.[44]

3. *The Determination of Equitable Allocation*

The 1983 Vienna Convention provides that in the case of the break-up of a state, unless the successor states otherwise agree, "the State debt of the predecessor State shall pass to the successor States in equitable proportions, taking into account, in particular, the property, rights and interests which pass to the successor States in relation to that State debt."[45] Although the 1983 Vienna Convention provides for the equitable allocation of debt, it does not establish criteria for calculating such an amount.[46] Similarly, although the 1983 Vienna Convention does not permit creditor states to dictate to successor states a determination of an equitable amount, it does permit creditor states to object to an allocation of debt decided upon by the debtor states which might prejudice the rights of the creditor states.[47]

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41. *See* BROWNLIE, *supra* note 21, at 658; MENON, *supra* note 13, at 102–03; Nathan, *supra* note 5, at 503; O'CONNELL, *supra* note 16, at 199–206; SHAW, *supra* note 19, at 702–03.

42. The 1983 Vienna Convention defines archives as:

> all documents of whatever date and kind, produced or received by the predecessor State in the exercise of its functions which at the date of the succession of States, belonged to the predecessor State according to its internal law and were preserved by it directly or under its control as archives for whatever purpose.

1983 Vienna Convention, *supra* note 4, art. 20. The UN Economic and Social Council has highlighted the importance of succession to archives, noting that they "provide evidence of a country's historical, cultural and economic development and provide the foundation of the national identity, but they also constitute essential title deeds supporting the citizen's claim to his rights." MENON, *supra* note 13, at 121. For a general description of the role of archives in international law, see SHAW, *supra* note 19, at 705–07.

43. *See* O'CONNELL, *supra* note 16, at 207; V.D. Degan, *Equity in Matters of State Succession*, *in* ESSAYS IN HONOUR OF WANG TIEYA 203, 206 (Ronald St. John MacDonald ed., 1994). Many commentators simply note that the division of national assets should be provided for by agreement of all the successor states *See* SHAW, *supra* note 19, at 700.

44 *See* O'CONNELL, *supra* note 16, at 211–20.

45 1983 Vienna Convention, *supra* note 4, art. 41; *see also id.* art. 40. For an analysis of the relevant provisions, see Nathan, *supra* note 5, at 507–09.

46. For an explanation of this criticism, see Stefan Oeter, *State Succession and the Struggle over Equity: Some Observations on the Laws of State Succession with Respect to State Property and Debts in Cases of Separation and Dissolution of States*, 38 GERMAN Y.B. INT'L L. 73, 92 (1995).

47 For a review of the provisions of the 1983 Vienna Convention, see Nathan, *supra* note 5, at 489; M. Streinz, *Succession of States in Assets and Liabilities—A New Regime?*, 26 GERMAN Y.B. INT'L L. 198 (1983)

This leads to the general conclusion that successor states are obligated in some manner to accept an equitable share of the national and territorial debt of the predecessor state, but that this obligation is subject to the consent of the successor states. The precise allocation of the debt may be determined by the successor states, subject to the final consent of the creditor states.

Unfortunately, the 1983 Vienna Convention does not define or provide criteria for determining what constitutes an equitable proportion of the predecessor states' assets.[48] Notably, it also does not create an obligation of third-party states to protect the assets of the predecessor state during the time of break-up or to assist the successor states in obtaining their equitable share of property located on the territory or in the accounts of the third-party states.

The above discussion leads to the conclusion that successor states are entitled to assume the moveable and non-moveable territorial assets of the predecessor state located within their territory and that they are entitled to an equitable share of the national property of the predecessor states. Public international law, however, does not provide a clear definition of what property is accurately considered national property or what criteria should be used to determine an equitable allocation of that property. Moreover, it is fairly clear that third-party states hold few obligations with respect to the assets of the predecessor state under their control, other than to respect any allocation of those assets agreed upon by the successor states.

III. Formulation of the Modern Law and Policy of Succession to Debts and Assets in the Former Soviet Union

An examination of the state practice relating to the dissolution of the Soviet Union provides an opportunity to initiate the articulation of the modern law and policy of state succession to debts and assets, and to begin the formulation of answers to many of the questions left open by previous state practice and the 1983 Vienna Convention.

In late 1989 the republics of the Soviet Union began to agitate for independence, and in the spring of 1990 the three Baltic states of Lithuania,[49] Latvia,[50] and Estonia[51] declared independence and reinstated their pre-Soviet

48. For criticism of the 1983 Vienna Convention's "equitable proportion" criterion, see MENON, *supra* note 13, at 193.

49. *See A Chronology of Gorbachev's Bid to Hold the Union Together*, WASH. POST, Dec. 13, 1991, at A40.

50. Latvia declared, on May 4, 1990, that the independent Latvia of 1920 was *de jure* still in existence and asserted the sovereignty of Latvian law over Soviet law. *See Baltic States: Independence of Lithuania, Estonia and Latvia*, 37 KEESING'S RECORD OF WORLD EVENTS 38,419 (Sept. 1991).

51. In November 1990, Estonia claimed to be a sovereign republic and reinstated five articles of its 1939 Constitution, asserting that the laws of the Soviet Union were now subject to the approval of the Estonian Supreme Soviet. *See id.*

constitutions. The other republics of the Soviet Union quickly followed with similar declarations.[52]

In the summer of 1991 the Soviet central government began the process of negotiating a Union Treaty, and in late August 1991, on the eve of the signature of the Union Treaty by Russia, Kazakhstan, and Uzbekistan, a collection of hard-line communists staged an unsuccessful coup attempt. In immediate reaction to the coup attempt, Estonia and Latvia declared full independence[53] and were quickly followed by Armenia,[54] Belarus,[55] Moldova,[56] Azerbaijan,[57] Uzbekistan,[58] Kyrgyzstan,[59] Turkmenistan,[60] and Kazakhstan.[61]

On December 8, 1991, Belarus, Russia, and Ukraine met in Minsk and formed the Commonwealth of Independent States (CIS),[62] declaring that the Soviet Union was extinct as an international legal entity,[63] with Russia subsequently declaring itself the continuity of the former Soviet Union.[64] On December 21, 1991, the members of the CIS met in Alma Ata, where all the Soviet republics except Georgia and the Baltic states became members.[65] Following the Alma Ata meeting, President Gorbachev resigned on December 25, 1991.[66]

Although the case of the former Soviet Union is not particularly useful for crystallizing a distinction between national and territorial debt or for

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52 Ukraine issued its own declaration of independence in July 1990. *See Soviet Union: Sovereignty Declarations in Ukraine and Byelorussia*, 36 KEESING'S RECORD OF WORLD EVENTS 37,617 (July 1990). The Republic of Georgia declared independence on April 9, 1991. *See Soviet Union: Georgia Independence Declaration*, 37 KEESING'S RECORD OF WORLD EVENTS 38,159 (Apr. 1991).

53. *See A Chronology of Gorbachev's Bid to Hold the Union Together*, *supra* note 49, at A40.

54 *See Soviet Union: Attempted Coup—Suspension of CPSU*, 37 KEESING'S RECORD OF WORLD EVENTS 38,368, 38,373 (Aug. 1991) (Armenia declared independence on August 23, 1991).

55. *See Belarus*, 40 KEESING'S RECORD OF WORLD EVENTS R105 (1994) (Belarus declared independence on August 24, 1991).

56. *See Soviet Union: Attempted Coup—Suspension of CPSU*, *supra* note 54, at 38,373 (Moldova declared independence on August 27, 1991).

57 *See id.* (Azerbaijan declared independence on August 30, 1991).

58 *See Uzbekistan*, 40 KEESING'S RECORD OF WORLD EVENTS R88 (1994) (Uzbekistan declared independence on August 31, 1991).

59. *See Kirgizstan*, 40 KEESING'S RECORD OF WORLD EVENTS R74 (1994) (Kyrgyzstan declared independence on August 31, 1991).

60. *See Turkmenistan*, 40 KEESING'S RECORD OF WORLD EVENTS R74 (1994) (Turkmenistan declared independence on October 27, 1991).

61. *See Kazakhstan*, 40 KEESING'S RECORD OF WORLD EVENTS R74 (Kazakhstan declared independence on December 16, 1991).

62. For background information on the CIS, see John N. Hazard, *Managing Nationalism: State, Law, and the National Question in the USSR*, *in* THE POST-SOVIET NATIONS: PERSPECTIVES ON THE DEMISE OF THE USSR 96, 130–40 (Alexander J. Motyl ed., 1992).

63 *See* Michael Dobbs, *Slavic Republics Declare Soviet Union Liquidated,* WASH. POST, Dec. 9, 1991, at A1.

64 For an interesting discussion of the legal efficacy of the subsequent decision by the international community to recognize Russia as the continuity of the former Soviet Union, see Yehuda Z. Blum, *UN Membership of the "New" Yugoslavia: Continuity or Break?*, 86 AM. J. INT'L L. 830, 832–33 (1992).

65. *See Soviet Union/CIS: End of the Soviet Union—Formation of CIS—Resignation of Gorbachev*, 37 KEESING'S RECORD OF WORLD EVENTS 38,654, 38,654 (Dec. 1991).

66 *See id.* at 38,655.

refining the definition of each category, it is highly useful for confirming the priority nature of the principle of *pacta sunt servanda*. Extraordinary efforts were undertaken by the creditor states to ensure that all of the debt obligations were met by the successor states. In particular, the creditor states insisted on joint and several liability, which in addition to reaffirming the principle of *pacta sunt servanda*, also established potential criteria for the equitable allocation of debt obligations. An additional basis for determining an equitable allocation of debt obligations may be found in the extensive efforts of the Soviet successor states to divide among themselves the obligation for servicing the debt.

With respect to the allocation of assets, the state practice discussed below indicates a strong desire among the debtor states to link the allocation of debts and assets. The creditor states, however, studiously avoided the linkage of debts and assets and in fact made no effort to intervene in the allocation of assets or even to suggest that they be allocated in an equitable or fair fashion.

A review of the state practice associated with the dissolution of the Soviet Union also provides a wealth of information as to the various institutional mechanisms that may be created to assist both in the process of allocating as well as servicing the debt obligations of the predecessor state.

Concerning the distinction between continuity and dissolution, the Soviet case study provides the relevant modern state practice. It is the only instance of a break-up where the successor states and international community readily agreed to treat one of the successor states, in this case Russia, as continuing the international legal personality of the predecessor state. Similarly, the Soviet case study provides the opportunity to draw a number of conclusions concerning the role of international law in state succession. The dissolution of the Soviet Union was of such political importance to the international community that the political interests of the successor states and the creditor states were sharply focused and articulated, and all parties aggressively relied upon what legal norms did exist to best argue their case.

A. Preliminary Agreements Concerning Succession to the Debts and Assets of the Former Soviet Union

With the pending break-up of the Soviet Union, the creditor states were concerned about ensuring that the successor states would be held accountable for the former Soviet Union's massive international debt amounting to nearly U.S.$60 billion.[67] Although the creditor states accepted that the former Soviet Union was likely to undergo a peaceful break-up, they were concerned that without international involvement there would be substantial discord among the successor states with respect to the allocation of the debts

67. *See* Leyla Boulton, *Republics Give Pledge on Soviet Debt,* FIN. TIMES, Oct. 29, 1991, at 14.

and assets of the former Soviet Union.[68] Thus, in the autumn of 1991, the creditor states conveyed to the future successor states that, in the interest of any potential recognition of their independence and future loans and assistance, they should enter into an agreement in which they would remain obligated by the debt of the former Soviet Union. The successor states, keenly aware of the need to allocate and administer the debt of the former Soviet Union, agreed to meet to discuss debt servicing.[69]

1. *Memorandum of Understanding on the Debt to Foreign Creditors of the Union of Soviet Socialist Republics and Its Successors*

Prior to the actual dissolution of the Soviet Union, twelve of the successor states, excluding the Baltic states of Lithuania, Latvia, and Estonia, met in Moscow from October 27-28, 1991 to draw up an agreement assessing liability and providing for the servicing of the former Soviet Union's debt. The republics attending the meeting intended to agree that they each would be individually liable for an appropriate share of the debt of the former Soviet Union, with the exact allocation to be determined at a future point in time. To the surprise of the republics, the creditor states attending the meeting objected to the assessment of individual liability and insisted that all twelve of the future successor states in attendance agree to be jointly and severally liable for the entire debt of the former Soviet Union. The creditor states made joint and several liability a pre-condition to the twelve republics receiving financial assistance from the Western states[70] but indicated they would be willing to consent to a deferment of principal payments of the medium and long term debt of the former Soviet Union. The creditor states made clear that rejecting joint and several liability could reduce prospects for future financial lending and assistance.[71]

Succumbing to the pressure from the creditor states, the Soviet Union as well as most of the republics signed the Memorandum of Understanding on the Debt to Foreign Creditors of the Union of Soviet Socialist Republics and Its Successors (the Memorandum),[72] which covered the entire debt of the former Soviet Union with foreign creditors. It drew no distinction between national and territorial debt, and provided that: (1) "the Parties declare

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68 *See* Oeter, *supra* note 46, at 78.

69. *See* Boulton, *supra* note 67, at 14.

70 *See id.* at 14.

71 *See Soviet Union: Military Arrangements—Economy—The Republics*, 37 KEESING'S RECORD OF WORLD EVENTS 38,537, 38,537 (Oct. 1991); Oeter, *supra* note 46, at 78.

72 This document was signed on behalf of the Soviet Union by the Chairman of the Interstate Economic Committee and by the representatives of nine successor states. Uzbekistan and Ukraine refused to sign, with Azerbaijan expressing an intent to sign in the near future. Memorandum of Understanding on the Debt to Foreign Creditors of the Union of Soviet Socialist Republics and Its Successors (Oct. 28, 1991) (on file with Harvard International Law Journal). Western officials made clear that Ukraine would suffer if it withdrew. *See* Leyla Boulton, *G7 Threat Crucial in Soviet Debt Agreement*, FIN. TIMES, Oct. 30, 1991, at 12.

themselves jointly and severally liable for the Debt, without prejudice to the original contracts"; (2) the debt would be managed and serviced by the *Vneshekonombank* (VEB or Bank for Foreign Trade) or its legal successor; (3) the parties would ensure the servicing of the debt and agree to make all the necessary foreign currency contributions to fulfill the agreements into which the debt manager entered; (4) the parties would enter into a further agreement setting forth the procedures and mechanisms for servicing the debt; (5) the parties committed to pursue policies "designed to achieve rapid economic adjustment that promotes their debt servicing capacities"; and (6) the parties would reach agreement with the Baltic states for their participation in servicing the debt on a joint and several basis.[73]

In response to an agreement signed by the International Monetary Fund (IMF) and the former Soviet Union on October 5, 1991,[74] and as part of a larger attempt to require the creditor states to cease their dealings with the former Soviet Union and thus promote the international recognition of the republics, Russia, Ukraine, Belarus, and Kazakhstan issued a joint declaration on November 18, 1991, repudiating agreements signed by the government of the Soviet Union with international financial bodies. These states declared they would accept responsibility for the debt of the former Soviet Union, but they would not accept obligations for debt contracted by the former Soviet Union after it ceased to exist.[75]

2. *Treaty on Succession with Respect to the State Foreign Debts and Assets of the Soviet Union*

Once the matter of liability was initially settled, the republics turned to the task of allocating the debts and assets of the Soviet Union. Importantly, the republics undertook such action at a time when none of them had been recognized by the United States or member states of the European Community, nor had the Soviet Union been officially declared to have dissolved. Thus, on December 4, 1991, Russia, Ukraine, Belarus, Kazakhstan, Armenia, Kyrgyzstan, Tajikistan, and Georgia signed the Treaty on Succession with Respect to the State Foreign Debt and Assets of the Soviet Union ("Treaty on Debts and Assets"), which set forth a "single aggregative index" proportionally dividing the debts and assets of the former Soviet Union among the republics, including the Baltic states.[76] The preamble to the

73. Memorandum, *supra* note 72.

74. *See IMF-World Bank: Annual Meetings*, 37 KEESING'S RECORD OF WORLD EVENTS 38,554, 38,554 (Oct. 1991). Subsequently, the G7 agreed to defer the principal owed to the Paris Club creditor states for the remainder of 1991 and the first quarter of 1992. The G7 also arranged for a $1 billion bridge loan from the Bank of International Settlements, using the Soviet gold reserve as collateral. *See* Leyla Boulton, *G7 Gives Soviet Republics Until Today to Agree on Debt*, FIN. TIMES, Nov. 19, 1991, at I3.

75. *See Soviet Union: G-7 Meeting on Debt*, 37 KEESING'S RECORD OF WORLD EVENTS 38,581, 38,582 (Nov. 1991).

76. *See* Treaty on Succession with Respect to the State Foreign Debts and Assets of the Soviet Union,

Treaty on Debts and Assets declared the parties' recognition that the successor states were at varying stages of independence, acknowledged the need to service and repay the debt of the former Soviet Union as a precondition to entry into the world economy and international financial community, recognized the inextricable connection between guaranteeing debt repayment and allocating the assets of the former Soviet Union, and noted that the principles of international law and the 1983 Vienna Convention were considered in drafting this treaty.[77]

The Treaty on Debts and Assets defined debts as "all financial commitments undertaken by the Soviet Union or by persons duly entitled by the Soviet Union with regard to another state, an international organization or any other foreign creditor." Assets were defined as the Soviet Union's "chattel and real property outside its territory, gold and foreign currency funds and U.S.S.R. resources, investments abroad, and all financial commitments to the U.S.S.R. by another state, international organization or any other foreign debtor."[78] The Treaty on Debts and Assets did not draw a distinction between national debt and territorial debt, other than noting that some of the debt associated with foodstuffs and staple consumer goods would be distributed according to each successor state's consumption of the products purchased with that debt.[79] It did, however, seem to recognize the concept of territorial assets implicitly by not including such assets in the definition of the state property of the former Soviet Union to be allocated among the successor states.

Although the Treaty on Debts and Assets was signed by only eight of the successor states, it declared the parties to be the former Soviet Union and all of the republics,[80] with the date of succession being December 1, 1991.[81] At the time of signature, Ukraine declared that it would not service its portion of the debt until a division of assets as well as debts had been reached.[82] According to the treaty, the debts and assets were divided on the basis of the single aggregative index as follows:[83]

Russia	61.34%	Signed
Ukraine	16.37%	Signed
Belarus	4.13%	Signed

Dec. 4, 1991, art. 4.

77. *Id.*, pmbl.

78. *Id.*, art. 1. The former Soviet Union's natural assets included 20% of the world's oil, 40% of its natural gas, as well as large reserves of gold, iron ore, zinc, and nickel. *See* Stephen Fidler, *Avoidable Agony*, FIN. TIMES, July 9, 1991, at 16.

79 Treaty on Succession with Respect to the State Foreign Debts and Assets of the Soviet Union, *supra* note 76, art. 3.

80. *Id.*, art. 2.

81. *Id.*, art. 6. Interestingly, however, the Treaty on Debts and Assets excluded Uzbekistan from the list of successor states, but allocated Uzbekistan a portion of the debts and assets and provided a signature block. *Id.*, arts. 2, 4, 17.

82 John Lloyd, *Partial Deal on Soviet Debt Sharing*, FIN. TIMES, Dec. 7, 1991, at 2.

83. Treaty on Debts and Assets, *supra* note 76, arts. 4, 17.

Uzbekistan	3.27%	
Kazakhstan	3.86%	Signed
Georgia	1.62%	Signed
Azerbaijan	1.64%	
Lithuania	1.41%	
Moldova	1.29%	
Latvia	1.14%	
Kyrgyzstan	.95%	Signed
Tajikistan	.82%	Signed
Armenia	.86%	Signed
Turkmenistan	.70%	
Estonia	.62%	

Although the Treaty on Debts and Assets does not explain the basis for calculating the aggregate index, other sources indicate that the division was based on demographic and macroeconomic indicators.[84]

To link the assumption of debt obligations with a share of the assets, the Treaty on Debts and Assets provided that the parties agreeing to service the debt according to the proportions set forth in the single aggregate index would be guaranteed ownership rights of their due share of the assets of the former Soviet Union—although this share was not defined by the Treaty on Debts and Assets.[85] The share of the debts and assets of those parties that did not sign the treaty were to be the subject of separate agreements between them and the parties to the Treaty on Debts and Assets.[86] According to the provisions of the treaty each party which agreed to service the debt would be responsible to the other parties for the payment of its share of the debt. Once a particular successor state had paid its share, it would be released from the obligations of the remaining former Soviet Union debt. The parties would also be entitled to enter into mutual bilateral agreements concerning the assumption of their debt by other successor states in return for

84. *See* Leyla Boulton, *Soviet Republics Join Forces on Foreign Trade*, FIN. TIMES, July 30, 1991, at 2, which indicates that the fifteen Soviet republics intended to divide up foreign debt among themselves according to their population and gross national product.

85. Treaty on Debts and Assets, *supra* note 76, art. 3. The Treaty on Debts and Assets further provided that a number of subsidiary documents and agreements would be considered integral parts of this treaty, including: the structure of the debts and assets as defined at the time of succession; a protocol on the method for determining the shares of the states in the debts and assets; an agreement on the machinery for repayment of the share of the debt corresponding to former member states of the former Soviet Union which are not parties to this treaty; an agreement on procedures for sharing the funds and gold and currency reserves of the Soviet Union and its investments and capital assets abroad; terms of reference for an interstate commission; an agreement on the machinery for the repayment and servicing of the debt obligations of the Soviet Union in foreign currencies and the timely replenishment of the insurance fund; and an agreement defining the relationship, in connection with repayment of the debt, between the parties responsible jointly for the payment of the debt and the other parties. *Id.*, art. 9.

86. *Id.*, art. 4. The Treaty on Debts and Assets also provided that it would be binding upon the departments and ministries of the Soviet Union; the allocation of assets of the former Soviet Union not covered by treaty would be done in accordance with norms of international law; and any disputes arising from this treaty could be submitted to international arbitration or international courts of law. *Id.*, arts. 10, 13, 15.

due consideration.[87] These latter two provisions provided Russia the opportunity to enter into zero-option agreements with the other successor states, whereby Russia agreed to assume the particular successor state's share of the foreign debt of the former Soviet Union, and in return Russia assumed title to that successor state's share of the former Soviet Union's assets. Entering into zero-option agreements would thereby enable Russia to accumulate the debts and assets of the former Soviet Union. These provisions could, however, be perceived by the creditor states to be inconsistent with the principle of joint and several liability, as they sought to relieve the successor states of liability without the consent of the creditor states.

Uzbekistan refused to sign the treaty. It objected to the method for debt allocation and thus refused to be obligated to a 3.27% share of the former Soviet Union's debt.[88] The Baltic states refused to participate in the negotiations or to sign the treaty on the basis that they were never legally incorporated into the former Soviet Union, and thus they were not obligated to repay any share of its debts.[89]

Soon after signing the Treaty on Debts and Assets, the successor states entered into an Agreement on the Machinery for the Repayment and Servicing of the Debt (Obligations) of the U.S.S.R. in Foreign Currencies and the Timely Replenishment of the Insurance Fund.[90] Although this agreement was designed solely to set forth the mechanisms for servicing the debt of the former Soviet Union, the agreement is important in that it provided that all the successor states would open accounts with the VEB in Moscow and that all debt servicing arrangements would be centralized through it, thus giving Russia substantial control over the management of debt servicing.

3. *Agreements of the CIS Relating to the Allocation of Debts and Assets of the Former Soviet Union*

At the time of the formation of the CIS, the issue of the allocation and actual division of the debts and assets of the former Soviet Union remained basically unresolved, despite the commitment to joint and several liability and the percentage proportions set forth in the Treaty on Debts and Assets. The primary problems faced by the successor states in effecting an actual allocation of the debts and assets were (1) Russia's almost universal physical control of the assets of the former Soviet Union; (2) the lack of agreement of Uzbekistan and the Baltics to their share of the debts and assets; (3) the er-

87 *Id*, art. 3.

88. *Id*., art. 4.

89. *See* Lucinda Love, *International Agreement Obligations After the Soviet Union's Break-up: Current United States Practice and Its Consistency with International Law*, 26 VAND. J. TRANSNAT'L L. 373, 398–403 (1993).

90 Agreement on the Machinery for the Repayment and Servicing of the Debt (the Obligations) of the U.S.S.R. in Foreign Currencies and the Timely Replenishment of the Insurance Fund, Dec. 1991 (on file with the Harvard International Law Journal).

ratic participation of Azerbaijan, Moldova, and Georgia in the allocation negotiations; (4) uncertainty as to the exact extent and nature of the debts and assets; and (5) the lack of an effective administrative mechanism to carry out the agreed-upon allocations.

In order to resolve these problems, the successor states concluded a number of agreements under the auspices of the CIS. The first agreement, signed on December 30, 1991, was the Agreement between the Heads of State of the CIS on the Property of the Former U.S.S.R. Abroad. This agreement confirmed the earlier agreements signed by the successor states and noted that the successor states agreed that each of them had the "right to an appropriate, designated fair share of the property of the former Soviet Union abroad and [would] contribute to the exercise of this right," and that an interstate commission was to formulate criteria and principles for the distribution of such property.[91] Although this interstate commission promptly met in Minsk on January 25, 1991, a number of successor states were absent. The interstate commission made little progress beyond drafting some preliminary criteria to guide the allocation of assets.[92]

All of the successor states, except Ukraine, agreed on February 8, 1992, to allow the Russian VEB to be the agent for servicing the former Soviet Union debt.[93] On February 14, 1992, all of the CIS states signed a Protocol on Preparing an Agreement on U.S.S.R. Assets and Liabilities, which instructed the national banks to prepare an interstate agreement on the division of liabilities and assets of the former Soviet Union State Bank within two weeks. However, there is no evidence that such an agreement was ever created.[94]

On March 13, 1992, the eight states that had signed the Treaty on Debts and Assets, plus Moldova, signed an Agreement on Additions to the Treaty on Succession Concerning the Foreign State Debt and Assets of the U.S.S.R.[95] This agreement: (1) confirmed the Treaty on Debts and Assets; (2) appointed Russia and Ukraine as the co-chairs of an interstate council and provided for the other members to appoint a third, rotating co-chair; (3) continued the rights of the VEB to service the debt of the former Soviet Union; (4) distributed the votes on the interstate council according to the share of the debts and assets allocated in the Treaty on Debts and Assets; (5) provided that decisions of the interstate council would be adopted by no

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91. Agreement between the Heads of State of the CIS on the Property of the Former U.S.S.R. Abroad, Dec. 30, 1991 (on file with the Harvard International Law Journal).

92. *See Commonwealth of Independent States: CIS Co-ordination Meetings*, 38 KEESING'S RECORD OF WORLD EVENTS 38,730 (Jan. 1992).

93. *See* Michael Parks, *Ukraine Perils Republics' Unity*, L.A. TIMES, Feb. 9, 1992, at A1.

94. Protocol on Preparing an Agreement on U.S.S.R. Assets and Liabilities (Feb. 14, 1992), TASS, Feb. 15, 1992, *reprinted in* Foreign Broadcast Information Service, FBIS SPECIAL MEMORANDUM: COMMONWEALTH OF INDEPENDENT STATES DOCUMENTS, FB SM 92-10006, May 8, 1992, at 65 [hereinafter FBIS SPECIAL MEMORANDUM].

95. Agreement on Additions to the Treaty on Succession Concerning the Foreign State Debt and Assets of the U.S.S.R. (Mar. 13, 1992), TASS, Mar. 14, 1992, *reprinted in* FBIS SPECIAL MEMORANDUM, *supra* note 94, at 70.

less than 80% of the voting shares; and (6) transferred the powers to prepare criteria and principles for the actual allocation of the assets from the interstate commission to the interstate council.

Uzbekistan refused to sign this agreement on the basis that it confirmed the Treaty on Debts and Assets, which Uzbekistan had not signed because of an objection to the methodology for apportioning the foreign debt of the former Soviet Union. In addition, Uzbekistan objected to the procedure for decision-making by the interstate council, since Russia, with 61.34% of the votes, could block any decision that it opposed, and on the basis that the agreement did not remove the VEB from Russian jurisdiction. Uzbekistan noted that its refusal to sign did not signify a refusal to participate in servicing the debt.[96]

On March 13, 1992, the CIS adopted a set of Rules of the Interstate Council on Supervising the Servicing of the Debt and Use of the Assets of the U.S.S.R. ("the Rules"),[97] a Protocol on Foreign Debt and Assets ("Protocol on Debts and Assets"),[98] and an Agreement on the Former U.S.S.R.'s Internal Debt ("Internal Debt Agreement").[99] The Rules provided that the interstate council would: (1) supervise the servicing of the debt and provide an accounting of that service to the successor states; (2) supervise the collection and possible sale of foreign currency debts and other assets owed to the former Soviet Union; and (3) carry out administrative oversight of the VEB.[100] The Protocol on Debts and Assets instructed the interstate council to present to the successor states, within one month, information on the existing assets of the former Soviet Union abroad.[101]

The Internal Debt Agreement provided that the successor states accepted responsibility for repaying the former Soviet Union's state debt to the public in sums "proportional to the residual debt outstanding on January 1, 1991, on balances held with branches of the U.S.S.R. Savings Bank on the territory of each of the parties."[102] The debt owed to the Soviet Union State Bank, and to the Soviet Union State Insurance body and other internal bodies,

96. The Position of the Republic of Uzbekistan's Delegation Regarding the Draft Agreement on Additions to the Treaty on Legal Succession in Respect of the U.S.S.R.'s Foreign State Debt and Assets, *appended to* Agreement on Additions to the Treaty on Succession Concerning the Foreign State Debt and Assets of the U.S.S.R., *supra* note 95; *see also* Leyla Boulton, *Russia Aims to Take Control of Central Banking*, FIN. TIMES, Nov. 23, 1991, at 2.

97. Rules of the Interstate Council on Supervising the Servicing of the Debt and Use of the Assets of the U.S.S.R. (Mar. 13, 1992), TASS, Mar. 14, 1992, *reprinted in* FBIS SPECIAL MEMORANDUM, *supra* note 94, at 72 (signed by Armenia, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, and Ukraine).

98. Protocol on Foreign Debt and Assets (Mar. 13, 1992), TASS, Mar. 14, 1992, *reprinted in* FBIS SPECIAL MEMORANDUM, *supra* note 94, at 74 (signed by Armenia, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, and Ukraine).

99. Agreement on the Former U.S.S.R.'s Internal Debt (Mar. 13, 1992), TASS, Mar. 14, 1992, *reprinted in* FBIS SPECIAL MEMORANDUM, *supra* note 94, at 75 (signed by Armenia, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Uzbekistan, and Ukraine).

100. Rules, *supra* note 97, art. 1.

101. Protocol on Debts and Assets, *supra* note 98, art. 2.

102. Internal Debt Agreement, *supra* note 99, art. 2.

would be apportioned among the successor states based on their respective contributions to "producing national income and the utilization of centralized capital investment from the Union budget" on their territory as averaged from 1986 to 1991.[103]

The national banks of the successor states failed to prepare an interstate agreement on the division of liabilities and assets of the former Soviet Union State Bank as required in the February 14, 1992 protocol.[104] Thus on March 20, 1992, Azerbaijan, Armenia, Belarus, Kazakhstan, Kyrgyzstan, Uzbekistan, and Ukraine signed an Agreement on Division of Assets and Liabilities of the U.S.S.R. State Bank Among Central Banks of the CIS Member States.[105] This agreement provided that the national banks would create a joint commission to which the Central Bank of Russia would furnish all the necessary information concerning the former Soviet Union State Bank's consolidated balance as of January 1, 1992. Within one month after its formation, the joint commission would devise a mechanism for sharing out the debts and assets of the Central Bank of Russia among the successor states.[106] Notably, Russia did not sign this agreement, most likely because it did not wish to relinquish its control over the assets of the former Soviet Union or to provide the other successor states any information which could assist their efforts to secure control over those assets.

Despite the attempts of the successor states to use a series of CIS agreements to allocate and distribute the debts and assets of the former Soviet Union, an actual division never occurred, as the states were unable to overcome the obstacles to such allocation and distribution. It appears that the primary political obstacle was Russia's intention to frustrate such an allocation so that it could assume the sole responsibility for the former Soviet Union's debts and assets. Once the creditor states had received their necessary assurances regarding liability for the debt of the former Soviet Union, they ceased taking an active role in the negotiations relating to allocation of assets.

B. *Russia's Assumption of the Debts and Assets of the Former Soviet Union*

As noted above, almost immediately after the creditor states received the necessary assurances regarding the assumption of debt obligations by the successor states, Russia began to position itself to assume the assets of the former Soviet Union, and then necessarily the debts.[107] At a December 30,

103. *Id.*

104. *See* Protocol on Preparing an Agreement on U.S.S.R. Assets and Liabilities, *supra* note 94.

105. Agreement on Division of Assets and Liabilities of the U.S.S.R. State Bank Among Central Banks of the CIS Member States (Mar. 20, 1992), TASS, Mar. 23, 1992, *reprinted in* FBIS SPECIAL MEMORANDUM, *supra* note 94, at 143.

106. *Id.*, arts. 1, 2.

107. As early as November 1991, Russian government officials were making statements as to Russia's intentions toward the Soviet Union's debt. Egor Gaidar, the drafter of the laws that were intended to

1991 press conference, President Yeltsin declared that the other Commonwealth states would receive their shares of the Soviet embassies in foreign countries if they decided to open their own diplomatic missions. However, Russia asserted its right to a general takeover of property belonging to the central government.[108]

Russian actions with respect to the operation of the VEB and the allocation of debts and assets were similarly duplicitous. On January 4, 1992, the VEB, on behalf of the CIS states, reaffirmed the joint and several liability of the successor states with the creditor states.[109] Days later, on January 13, 1992, Russia issued a Decree of the Presidium of the Supreme Soviet of the Russian Federation Regarding the VEB, declaring that the VEB would henceforth be subject to Russian legislation and Russian central bank regulation. The VEB's assets belonged to Russia pending further inter-republic negotiation, and Russia would be considered the sole successor to the former Soviet Union regarding obligations for VEB hard currency accounts belonging to Russian entities.[110] This decree was likely viewed by the creditor states as a preliminary step to Russia becoming the sole successor to the debts and assets of the former Soviet Union in the event that the continuing negotiations failed to lead to a final inter-republic agreement on the allocation of the debts and assets.

More appropriately, this decree could be seen as a logical step in preparing to enter into zero-option agreements with the other successor states and assume sole control over the debts and assets. Following the failed attempts to create an effective interstate commission and to wrest control of the assets from Russia, the other successor states did in fact begin to enter into zero-option agreements with Russia on an individual basis.[111] By the end of 1992, Russia had entered into zero-option agreements with all of the successor states except Ukraine.[112] Russia persuaded the Baltic states to enter into similar zero-option agreements by threatening to refuse to enter into trade agreements with them if they declined to assume a share of the debt or to sign a zero-option agreement.[113] Adopting the zero-option agreements was

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transform the Russian economy declared, "Russia must have its own monetary and fiscal policy, and its own bank." He also said that he believed the Soviet Union was finished and all other republics should be viewed as foreign states. In addition, Gaidar noted that Russia should assume the foreign debt and the Russian bank should be transformed. *See* John Lloyd, *Russian Republic 'Must Take Over Responsibility for the Soviet Debt,'* FIN. TIMES, Nov. 4, 1991, at 4.

108. *See* James Rupert, *Yeltsin to Control Most Nuclear Arms; 11 Former Soviet Republics Declare Formation of Commonwealth*, WASH. POST, Dec. 22, 1991, at A1.

109. *See* Oeter, *supra* note 46, at 81.

110. *See* Decree of the Presidium of the Supreme Soviet of the Russian Federation Regarding the VEB (Jan. 13, 1992) (on file with the Harvard International Law Journal).

111. *Russia-Belarus Debt Deal*, FIN. TIMES, Sept. 1, 1992, at 4. *See also* Leyla Boulton and Dmitry Volkov, *Russian Offer to Ex-Soviet States on Debt*, FIN. TIMES, Sept. 9, 1992, at 5.

112. *See* Suspension of Financial Transactions with Ukraine—Debt Agreement with Belarus, Turkmenistan, and Uzbekistan, 38 KEESING'S RECORD OF WORLD EVENTS 39,107 (Sept. 1992).

113. On August 31, 1992, Russia proposed a zero-option agreement to Estonia. *See Russian Proposals on Debt*, 38 KEESING'S RECORD OF WORLD EVENTS 39,060 (Aug. 1992). Lithuania signed a zero-option

consistent with the position of the Baltic states that they were illegally incorporated into the former Soviet Union and thus not obligated by its debt, and correspondingly not entitled to any of its assets.[114] The zero-option agreements were also consistent with the fact that when the Baltic states were incorporated into the Soviet Union, their public and private property remained the property of the three Baltic Soviets.[115]

Russia's eventual assumption of the Soviet Union's debt was consistent with Russia's intention to be considered as continuing the international legal personality of the former Soviet Union and to inherit as many of its rights and responsibilities as possible.[116] Russia most likely reasoned that the cost of assuming the debt obligations was justified given the financial and practical benefits of assuming the assets and the fact that the creditor states would likely require Russia, based on the joint and several liability agreement, to pay any debt obligations on which the other successor states defaulted.

C. Ukrainian Objection to the Assumption of the Debts and Assets of the Former Soviet Union by Russia

Ukraine was the one successor state that refused to accept Russia's policy of assuming the debts and assets of the former Soviet Union, and it considered the January 13, 1992 Russian decree regarding the VEB a unilateral nationalization of the former Soviet Union VEB assets.[117] In an attempt to prevent Russia from assuming all of the debts and assets of the former Soviet Union, Ukraine circulated, on January 29, 1992, a letter to the creditor states and international financial institutions calling for a conference of the "world financial circles" to meet in Kiev and plan out a "go it alone" program for Ukrainian debt management. The letter also called upon the creditor states to suspend Russian use of the former Soviet Union's property until the successor states agreed upon an actual division of that property between the successor states.[118]

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agreement with Russia on October 12, 1992. *See Economic Agreement with Russia*, 38 KEESING'S RECORD OF WORLD EVENTS 39,157 (Oct. 1992).

114. Latvia, Estonia, and Lithuania retained some assets that were not under the control of the former Soviet Union. For instance, the three states controlled tens of millions of dollars held by Swiss banks for over fifty years. These reserves were placed into accounts prior to the Baltic states' assets being seized by the Soviet Union at the time of the communist takeover. In addition, the Baltic states claimed to have deposited approximately U.S.$6 million worth of gold in the Bank of England in the 1930s. Peter Marsh, *The Soviet Union; Baltics Set to Share Pre-1940s Secret Fund*, FIN. TIMES, Sept. 4, 1991, at 2.

115. O'CONNELL, *supra* note 16, at 214.

116. For a review of Russia's claim to be the continuity of the former Soviet Union, see Malcolm N. Shaw, *State Succession Revisited*, 34 FINNISH Y.B. INT'L L. 5 (1994).

117. Ukraine accused Russia of illegally taking control of gold reserves and other assets, as well as the VEB. *See* Chrystia Freeland, *Ukraine Rejects Joint Line on Debt; Kiev Says It Will Pay Its Share of Soviet Foreign Dues Independently*, FIN. TIMES, Jan. 30, 1992, at 2.

118. Appeal of the Prime Minister of Ukraine Vitold P. Fokin to the World Financial Circles (Jan. 29, 1992) (on file with the Harvard International Law Journal); *see also* Freeland, *supra* note 117.

In calling for an international financial conference, Ukraine committed to pay its share of the former Soviet Union's external debt through the Ukrainian Bank for Foreign Economic Activities. Ukraine wanted to service its share of the debt independently because (1) Russia, Belarus, Kazakhstan, and other successor states had approved an agreement, empowering the interstate council to take actions related to debt facilitation which contradicted the Treaty on Debts and Assets; (2) Russia had unilaterally appropriated the internal and external gold-device assets of the former Soviet Union, its real estate and property located abroad, and had withheld information about those assets from the other successor states; and (3) with sixty-one percent of the vote, Russia could legalize its actions through the interstate council.[119]

Ukraine proposed that in order to make it possible for it to service its share of the former Soviet Union's debt independently, creditor states should: (1) calculate Ukraine's foreign currency debt based on the 16.37% proportion set forth in the Treaty on Debts and Assets; (2) provide the National Bank of Ukraine and the Export-Import Bank of Ukraine with the opportunity to participate in international financial transactions related to debt obligations; (3) provide recognition and protection of the property rights of Ukraine in the share of 16.37% of all the assets of the former Soviet Union abroad, which would then be used as a necessary guarantee of Ukraine's international financial obligations; and (4) temporarily suspend the exercise of property rights by Russia on the property of the former Soviet Union abroad, until its actual division between successor states.[120]

The creditor states, although sympathetic to Ukraine's position,[121] refused to agree to an independent servicing of Ukraine's share of the debt and declined to suspend Russia's use of the property of the former Soviet Union abroad. The creditor states were probably motivated by a concern that Ukraine might not be able to service its share of the debt, that permitting independent servicing would nullify the successor states' commitment to joint and several liability, and that other successor states far less able to service their debt might also seek to service their shares independently.[122] Moreover, international law prohibited the creditor states from interfering

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119. *See* Appeal of the Prime Minister of Ukraine Vitold P. Fokin to the World Financial Circles, *supra* note 118.

120. *Id.*

121. There was some disagreement among the creditor states, with Canada opening a C$50 million credit line to the Ukraine prior to its acquiescence to the joint and several liability commitment. Chrystia Freeland, *Canada Breaks Ranks with G-7 Over Credit for Kiev,* FIN. TIMES, Feb. 20, 1992, at 2.

122. Ukraine attempted to extricate itself from the joint and several liability commitment and reach separate agreements with the major creditor states by proposing to assume responsibility for the debt of the smaller republics, amounting to 21.13% of the debt, which amounted to U.S.$17.32 billion (an increase from Ukraine's assigned share of 16.37% or U.S.$13.42 billion). However, the G-7 countries, in particular Germany, declared that Ukraine would be denied foreign credit until it agreed to assume joint and several responsibility for the debt obligations of the former Soviet Union. Freeland, *supra* note 121.

with the exercise of property rights on diplomatic premises,[123] and they could therefore not effectively suspend many of the property rights exercised by Russia.

Following the rejection of its initial call for independent debt servicing, Ukraine attended the February 8, 1992 CIS meeting and announced that it would continue to refrain from paying into the centralized fund for servicing the former Soviet Union's foreign debts. Ukraine asserted that it intended to pay its share of the debt, but wanted to do so separately.[124] In mid-February, Ukraine sent a diplomatic note to Russia protesting Russia's assumption of the assets and international rights of the former Soviet Union. Ukraine expressed particular concern about the assumption of diplomatic property and the representation of the successor states in arms control negotiations. Russia informally replied that the independent states had moved to the sidelines and that the matter of continuation was proposed by the international community and accepted by Russia.[125]

In response to creditor state concern over the succession of debts, Russia declared itself the sole successor to the Soviet Union, claiming that it was thrust into this capacity and universally recognized as such by the international community.[126] This provided it with the legal basis to provisionally seize control of all accounts abroad, currency reserves, and property abroad in December 1991.[127] Ukraine resisted both the concentration of debt handling in Moscow and the seizure of property and currency accounts abroad.[128]

On March 20, 1992, at the CIS meeting in Kiev, a resolution was passed which would designate all of the CIS member states as successors to the Soviet Union, and establish a commission of representatives that would have full power to prepare and negotiate the details of apportionment of assets and liabilities. This commission produced an agreement that was signed on July 6, 1992, which provided for a distribution of assets according to the general quota agreed upon earlier, to be adjusted bilaterally as necessary.[129] Thus, Russia and Ukraine had reached a temporary compromise. Russia conceded that each successor state was entitled to a proportionate share of the

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123. The 1961 Vienna Convention on Diplomatic Relations establishes the inviolability of diplomatic missions:

> The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of mission.
>
> The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

Vienna Convention on Diplomatic Relations, *done* Apr. 18, 1961, art. 22, 500 U.N.T.S. 95, *quoted in* BROWNLIE, *supra* note 21, at 353.

124. *See* Parks, *supra* note 93.

125. Foreign Broadcast Information Service, *Official on Ukraine's Stand on Succession*, FBIS-SOV-92-033, Feb. 19, 1992, at 28.

126. *See* Oeter, *supra* note 46, at 79–80.

127. *Id.* at 80.

128. *Id.* at 82.

129. *Id.* at 81.

total property, based on the share of the external debt for which each state had accepted responsibility, but each would receive its share in "individual premises, property, and land," rather than as monetary compensation for the value of its share. Ukraine insisted that all successor states should receive a proportionate share of the total value of the former Soviet Union's property abroad, while Russia proposed to turn over particular pieces of property on a case-by-case basis. The media covering the meeting indicated that Ukraine would receive a certain amount of property abroad, but it would not necessarily be in line with its 16.37% share of the debts.[130]

In November 1992, Russia and Ukraine reached an agreement allowing Russia the sole right to negotiate with Western creditors. Russia promised to negotiate with Ukraine a special pact on sharing out remaining assets and liabilities. An escape clause within the agreement provided that either party could withdraw if they failed to agree by the end of the year.[131] Unfortunately, this accord did not remain active as Ukraine renounced the deal in January 1993.[132] As a result of the dispute with Ukraine over the assets of the former Soviet Union, Russia called off debt rescheduling talks with creditor states.[133]

Russia eventually reached an agreement with Ukraine on January 16, 1993, which provided for an allocation of debts and assets between those two successor states according to the standards in the Treaty on Debts and Assets, before declaring on February 8 that all other rights and obligations concerning property of the U.S.S.R. were taken over by the Russian Federation.[134] Ukraine and Russia also agreed that the assets of the former Soviet Union would be allocated in the same percentage as the debts were distributed.[135]

Unfortunately, this agreement did not resolve the difficult issue of the actual distribution of assets.[136] This agreement was considered and strongly opposed by the Paris and London Clubs of creditors,[137] which feared that Ukraine would be unable to repay its portion of the debt.[138] Subsequent ne-

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130 *See* FBIS TRENDS, DIVISION OF THE SOVIET PROPERTY, July 22, 1992. *See also* FBIS TRENDS, Jan 8, 1992, at 4–5; FBIS TRENDS, Mar. 1992, at 13–14; FBIS TRENDS, Mar. 25, 1992, at 5–6; and FBIS TRENDS, July 1, 1992, at 7.

131. Leyla Boulton, *Russia Agrees Debt Accord with Ukraine*, FIN. TIMES, Nov. 24, 1992, at 4.

132. John Lloyd, *Ukraine Renounces Debt Deal*, FIN. TIMES, Jan. 6, 1993, at 2.

133 George Graham & Leyla Boulton, *Row with Ukraine Hits Debt Rescheduling Talks*, FIN. TIMES, Jan. 14, 1993, at 2

134. Oeter, *supra* note 46, at 82.

135 *Id.* at 83.

136 *Id.*

137. A Paris Club is "an informal organization of creditor countries created when a debtor country is unable to meet its government-to-government repayment obligations on schedule," with the objective "to see that all creditors are treated equally, and to arrange a stretched-out but (if possible) fixed schedule of payments for the debtor country." ANDREAS F. LOWENFELD, THE INTERNATIONAL MONETARY SYSTEM 302 (2d ed. 1984). A London Club is a similar organization of creditor banks.

138. *See* John Lloyd & Leyla Boulton, *Moscow Warning on Debt Talks*, FIN. TIMES, Feb. 16, 1993, at 3.

gotiations between Ukraine and Russia made little progress as Ukraine feared that Russia was attempting to cripple its economy.[139]

Finally, in April 1993, Russia and Ukraine made some progress with regard to debts and assets. In exchange for Russia assuming negotiation power with foreign creditors, Ukraine gained space in thirty-six former Soviet embassies worldwide plus parts of the former Soviet Union's Danube and Black Sea merchant fleets.[140] Following the inauguration of a new Ukrainian government in September 1994, Ukraine also decided to allow a division of the on-shore military installations in the Crimea, which had held up a final agreement on the division of the Black Sea Fleet.[141] Russia and Ukraine then decided to jointly control the Black Sea Fleet until 1995.[142] Later, the fleet was allegedly sabotaged by the Russian military, and Ukraine, in desperate need of economic concessions, was forced to relinquish its claim on half of the fleet.[143]

D. *Russian Debt Management*

In order to manage and continue servicing the debt of the former Soviet Union, Russia sought to defer much of the debt with the creditor states and private banks. Therefore, on January 10, 1992, Russia requested and received a deferral of the interest payments on U.S.$84 billion of the Soviet Union's debt.[144] An additional three-month rollover of the interest was granted on September 29, 1992.[145]

The creditor states then began to discuss the possibility of debt rescheduling. It appeared that for the U.S.$84 billion debt burden, Russia could pay no more than U.S.$2.5 billion of the U.S.$19.9 billion in debt service due in 1993. The creditor states were likely concerned about how rescheduling Russia's debt would be affected by the commitment to joint and several liability. Nonetheless, the foreign debt of Russia was eventually rescheduled with the creditor states along fairly lenient terms. The United States, for instance, reached agreement with Russia on September 30, 1993

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139. *See* Chyrstia Freeland & John Lloyd, *Russia 'Trying to Paralyse Ukraine,'* FIN. TIMES, Feb. 19, 1993, at 2.

140. Leyla Boulton & John Lloyd, *Western Creditors May Soon Reschedule Russian Debt*, FIN. TIMES, Mar. 31, 1993, at 22.

141. Matthew Kaminski, *Ukraine and Russia Patch Up Relations*, FIN. TIMES, Sept. 5, 1994, at 2.

142. Kendall Butterworth, *Recent Developments: Successor States-Property Rights-Russia and Ukraine Agree to Share Control of the Former Soviet Union's Black Sea Fleet*, 22 GA. J. INT'L & COMP. L. 659 (1992). Butterworth asserts that this decision not only postponed the final designation of the true successor states to the rights, obligation, and property of the former Soviet Union but also upset the stability of the region. In the view of Butterworth, the two countries violated the original CIS agreement by excluding other republics from the decision and by denying the other successor states their legitimate claim to certain property rights.

143. Oeter, *supra* note 46, at 83.

144. *See Conference on Aid to CIS*, 38 KEESING'S RECORD OF WORLD EVENTS 38,730 (Jan. 1992).

145. *See Russian Debt Rescheduling*, 38 KEESING'S RECORD OF WORLD EVENTS 39,120 (Sept. 1992).

to reschedule repayment of U.S.$400 million for the end of 1993, with the remaining U.S.$1.1 billion to be paid over the next ten years.[146]

In order to settle the debt obligations of the former Soviet Union with some of its secondary creditor states, Russia entered into a number of bilateral agreements. On April 1, 1994, Russia agreed to supply Hungary with military equipment and spare parts in order to settle U.S.$800 million of trade debt.[147] Similarly, the debt to Turkey was settled on May 15, 1992, by a promise to supply Turkey with Russian natural gas.[148]

The above examination of the consensual break-up of the Soviet Union shows a minor role for the norms and regimes relating to the identification of national, territorial, and identifiable debt, but it demonstrates the centrality of the principle of *pacta sunt servanda*, and how this principle manifested itself in the form of strict liability. With regard to the principle of equitable allocation, the Soviet case highlights the contrast in the role of the creditor states, which were intensely involved in the allocation of debts but played a negligible role in the allocation of assets. The detailed negotiations conducted by the Soviet successor states also demonstrate the criteria relied on in negotiating an equitable allocation of debts and assets, as well as the relationship between the allocation of debts and the allocation of assets.

Given that the break-up of the Soviet Union represents the only case study where one successor state clearly continued the international legal personality of the predecessor state, this case provides an opportunity to resolve the contrary positions of the 1983 Vienna Convention and past state practice as to whether and how the distinction between continuity and dissolution affects the allocation of rights and obligations. Moreover, the Soviet case provides insight into the role of international law in structuring a resolution of the many questions of state succession to debts and assets, as well as the differing reliance on the norms and principles of international law by the successor states and the creditor states.

IV. FORMULATION OF THE MODERN LAW AND POLICY OF SUCCESSION TO DEBTS AND ASSETS IN THE FORMER YUGOSLAVIA

The political situation in the Socialist Federal Republic of Yugoslavia (SFRY), following the death of Josip Tito in 1981, was characterized by the gradual assertion of liberal democratic and anti-Communist doctrines by some of the constituent republics.[149] In addition, power rivalries emerged

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146. *See Rescheduling of Debt to USA*, 39 KEESING'S RECORD OF WORLD EVENTS 39,694 (Oct. 1993).

147. *See Agreement on Russian Debt*, 40 KEESING'S RECORD OF WORLD EVENTS 39,972 (Apr. 4, 1994).

148. *See Relations with Turkey*, 38 KEESING'S RECORD OF WORLD EVENTS 38,924 (May 1992).

149. *See* BRANKA MAGAS, THE DESTRUCTION OF YUGOSLAVIA: TRACKING THE BREAK-UP 1980–92, at 340 (1992). According to one commentator, Yugoslavia's other nationalities generally considered Slovenia the republic that was least enthusiastic about the concept of Yugoslavia, often referring to Slovenia as "a country within a country," because of its homogeneity and isolation from the other nationalities. MIHAILO CRNOBRNJA, THE YUGOSLAV DRAMA 108 (2d ed. 1996).

between the republics, whose leaders shifted to a policy of nationalism to retain and garner additional public support.[150] In 1990, Slovenia, Croatia, and Macedonia issued individual declarations of sovereignty.[151]

In an unsuccessful attempt to resolve their differences, a series of meetings were held between the presidents of the republics and the president of Yugoslavia in mid-March of 1991.[152] In May 1991, Serbia blocked the rotation of the Yugoslavian presidency, which was scheduled to shift from the Serb representative to the Croat representative.[153] In response, Slovenia and Croatia adopted legislation to complete the secession process.[154] The federal government, now composed almost solely of Serbians and Montenegrins, con-

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150. For an overview of Yugoslavia's disintegration, see LENARD J. COHEN, BROKEN BONDS: YUGOSLAVIA'S DISINTEGRATION AND BALKAN POLITICS IN TRANSITION (1995); *see also* ALEKSANDAR PAVKOVIC, THE FRAGMENTATION OF YUGOSLAVIA: NATIONALISM IN A MULTINATIONAL STATE 122–76 (1997).

Branka Magas sums up the events leading to the dissolution of Yugoslavia as involving:

> Milosevic's coup in Serbia and the fanning of state-sponsored nationalism that followed it; the forced incorporation of Vojvodina and Kosovo into Serbia, and their effective removal from the Federal institutions while leaving their votes in Serbia's pocket; the overthrow of the Montenegrin government and its replacement by Milosevic's men; the break-up of the League of Communists of Yugoslavia; the multi-party elections which returned non-Communist governments in all but two republics (Serbia and Montenegro); the creation of the armed Krajina in Croatia; the Army's attempt to bring down the Croatian government; successive attempts by hard-liners to put the country under a state of emergency; the blocking of proposals for a Yugoslav confederation by Slovenia, Croatia, Bosnia-Herzegovina and Macedonia; the effective marginalization of the Federal presidency and government.

MAGAS, *supra* note 149, at 317.

151. *See Slovenian and Croatian Declarations of Independence*, 37 KEESING'S RECORD OF WORLD EVENTS 38,274 (June 1991). Slovenia issued the Slovene Declaration of Sovereignty of July 1990, which was subsequently supported by a referendum on sovereignty in December 1990. NOEL MALCOLM, BOSNIA: A SHORT HISTORY 223 (1994). Slovenia had previously adopted a new constitution that gave itself legislative sovereignty and provided for the right to secede from Yugoslavia. *Id.* at 214.

For a chronology of the subsequent events in Yugoslavia, see MICHÈLE MERCIER, CRIMES WITHOUT PUNISHMENT: HUMANITARIAN ACTION IN THE FORMER YUGOSLAVIA (1995).

Slovenia's Declaration was soon followed by a Declaration of Sovereignty from Croatia. Then in October of 1990, a group of municipalities in Croatia, populated mainly by ethnic Serbs, declared the creation of the Autonomous Region of Krajina within Croatia. MALCOLM, *supra*, at 216; *see Slovenia Secession Law—Related Measures in Croatia*, 37 KEESING'S RECORD OF WORLD EVENTS 38,019 (Feb. 1991).

The republic of Macedonia adopted a Declaration of Sovereignty on January 25, 1991, providing for the right of Macedonia to self-determination and the right to secede from Yugoslavia. *See Challenge to Slovene Sovereignty—Macedonian Sovereignty Declaration*, 37 KEESING'S RECORD OF WORLD EVENTS 37,973 (Jan. 1991).

152. For a description of the mid-March meetings, see COHEN, *supra* note 150, at 202–06. At these meetings, Slovenia and Croatia proposed the establishment of a community of independent and sovereign states, with Serbia and Montenegro proposing a united federal state in which the republics continued to delegate some sovereign rights to the federal bodies, and with Bosnia and Macedonia favoring a compromise solution. *See Proposal for Referendum on Country's Future—Development in Croatia and Serbia*, 37 KEESING'S RECORD OF WORLD EVENTS 38,163 (Apr. 1991).

153. *See* James L. Rowe Jr., *U.S. Aid to Yugoslavia Halted Amid Political Turmoil There*, WASH. POST, May 20, 1991, at A15.

154. *See Slovenian and Croatian Declarations of Independence*, *supra* note 151. On June 5, 1991, the Slovenian Assembly passed the last of the necessary laws to facilitate the transfer of sovereign authority from Yugoslavia to Slovenia, and on June 11, 1991, the Slovene Constitutional Committee approved a new constitution, transferring all sovereign powers to the Republic. Croatia, on June 18, 1991, began the process of adopting the necessary legislation for secession. *Id.*

demned Slovenia's and Croatia's actions as illegal[155] and called upon the Yugoslav National Army (JNA) to protect the borders of Yugoslavia.[156]

As it became quickly apparent that the JNA would fail to secure its military objectives in Slovenia, it announced in July 1991 that it would withdraw from Slovenia within the next three months.[157] Within Croatia, fighting lasted for four years, ending when the Croatian army defeated Serb forces.[158] Bosnia declared full independence on March 3, 1992.[159] The Bosnian Serbs, who had boycotted the referendum, proclaimed the Serbian Republic of Bosnia-Herzegovina on March 27, 1992.[160] Thereafter, Bosnia's territorial integrity was threatened by a combination of internal and external military forces. This military aggression soon developed into orchestrated genocide against Bosnian nationals.[161] After NATO military intervention, a Bosnian peace agreement was reached in November 1995 at Dayton's Wright Patterson Airbase.[162]

In order to assist the International Peace Conference ("Peace Conference") in reaching a negotiated settlement to the Yugoslav conflict, the European Community (EC) created the EC Arbitration Commission with the intent to render arbitral decisions on matters in dispute between the parties to the

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155 *Id.*

156. *Id.* at 38,275.

157. *See* Laura Silber, Judy Dempsey, & Quentin Peel, *Yugoslav Army to Pull Out of Rebel Slovenia*, FIN. TIMES, July 19, 1991, at I2.

158. *See* Raymond Bonner, *Frightened and Jeered At, Serbs Flee From Croatia*, N.Y. TIMES, Aug. 10, 1995, at A8.

159 *See Moves Towards Bosnian Independence—Ethnic Violence*, 38 KEESING'S RECORD OF WORLD EVENTS 38,832 (Mar. 1992).

160 *See Bosnia-Hercegovina*, 40 KEESING'S RECORD OF WORLD EVENTS R103 (1994). The Bosnian Serb nationalists had set up their autonomous regions in May 1991 and established a parliament in October 1991. MALCOLM, *supra* note 151, at 232.

161 For a detailed listing of the atrocities committed in Bosnia, including systematic and mass killings, torture, deliberate attacks on civilians, systematic rape, wanton devastation and destruction of property, and mass forcible expulsion and deportation of civilians, see *War Crimes in the Former Yugoslavia*, U.S. DEP'T ST DISPATCH, Sept. 28, 1992; *Supplemental Report on War Crimes in the Former Yugoslavia*, U.S. DEP'T ST. DISPATCH, Nov. 2, 1992; *Third Report on War Crimes in the Former Yugoslavia*, DEP'T ST. DISPATCH, Nov. 16, 1992; *Fourth Report on War Crimes in the Former Yugoslavia*, U.S. DEP'T ST. DISPATCH, Dec. 28, 1992; *Fifth Report on War Crimes in the Former Yugoslavia*, U.S. DEP'T ST. DISPATCH, Feb. 8, 1993; *Sixth Report on War Crimes in the Former Yugoslavia*, U.S. DEP'T ST. DISPATCH, Apr. 12, 1993; *Seventh Report on War Crimes in the Former Yugoslavia*, U.S. DEP'T ST. DISPATCH, Apr. 19, 1993; *Eighth Report on War Crimes in the Former Yugoslavia*, U.S. DEP'T ST. DISPATCH, July 26, 1993.

For additional information regarding the practice of ethnic cleansing and crimes of genocide, see *Report on the Situation of Human Rights in the Territory of the Former Yugoslavia Submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights*, U.N. ESCOR, 1st Special Sess., Agenda Item 3, U.N. Doc. E/CN.4/1992/S-1 (1992); HELSINKI WATCH, WAR CRIMES IN BOSNIA-HERZEGOVINA (1992); John F. Burns, *Ethnic Cleansing in Bosnia Intensifying After a Pause*, N.Y. TIMES, July 4, 1993, at A8; Stephen Engelberg, *Clearer Picture of Bosnia Camps: A Brutal Piece of a Larger Plan*, N.Y. TIMES, Aug. 16, 1992, at A1; Blaine Harden, *Refugee Witnessed Massacres Every Day at the Bridges on the Drina*, WASH. POST, Aug. 7, 1992, at A18; Alan Riding, *European Inquiry Says Serbs' Forces Have Raped 20,000*, N.Y. TIMES, Jan. 9, 1993, at A1; A.M. Rosenthal, *Deaths in Sarajevo*, N.Y. TIMES, Dec. 1, 1992, at A25.

162 *See* Bruce Clark & Laura Silber, *Bosnia Peace Plan Agreed After 11th-hour Moves*, FIN. TIMES, Nov. 22, 1995, at 1.

Peace Conference.[163] On November 29, 1991, in response to a question submitted by the chair of the Peace Conference, the Arbitration Commission found that the SFRY was in the process of dissolution.[164]

On December 16, 1991, the EC Council of Ministers adopted a Declaration on Guidelines on the Recognition of New States in Eastern Europe and the Soviet Union (Declaration on Recognition) and agreed to extend recognition by January 15, 1992 to those republics meeting the conditions of recognition. The Declaration on Recognition affirmed the principles of the Helsinki Final Act and the Charter of Paris, particularly the principle of self-determination. The Declaration on Recognition then noted that the EC would

> recognise, subject to normal standards of international practice and the political realities in each case, those new states which, following the historic changes in the region, have constituted themselves on a democratic basis, have accepted the appropriate international obligations and have committed themselves in good faith to a peaceful process and to negotiations.[165]

The EC then issued a second, more specific, Declaration on Yugoslavia.[166] This declaration noted that the EC and its member states had agreed to recognize the independence of all the republics that fulfilled the criteria set forth in the Declaration on Recognition; that accepted the provisions laid down in the European Community Draft Convention on Human Rights, especially those in Chapter 11 on the rights of national or ethnic groups; and that continued to support the efforts of the UN and the continuation of the Peace Conference.

As a result of the promulgation of the Declaration on Recognition and the Declaration on Yugoslavia, the EC received applications for recognition from Bosnia, Croatia, Macedonia, and Slovenia.[167] Serbia objected to the Declaration on Recognition and to the Declaration on Yugoslavia issued by the EC

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163. The Arbitration Commission consisted of five members chosen from the French, German, Italian, Spanish, and Belgian Constitutional Courts, with the chairman being the president of the French Conseil Constitutionnel. Maurizio Ragazzi, *Introductory Note*, Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising From the Dissolution of Yugoslavia [hereinafter Arbitration Commission], Jan. 11 and July 4, 1992, 31 I.L.M. 1488.

164. Arbitration Commission Opinion No. 1 (Nov. 29, 1991), 31 I.L.M. 1488, 1497.

165. European Community: Declaration on Guidelines on Yugoslavia and on the Recognition of New States, Dec. 16, 1991, 31 I.L.M. 1485, 1487.

166. *Id.* at 1486.

167. Arbitration Commission Opinion No. 4: On International Recognition of the Socialist Republic of Bosnia-Hercegovina by the European Community and Its Member States (Jan. 11, 1992), 31 I.L.M. 1488, 1501; Arbitration Commission Opinion No. 5: On the Recognition of the Republic of Croatia by the European Community and Its Member States, (Jan. 11, 1992), 31 I.L.M. 1488, 1503; Arbitration Commission Opinion No. 6: On the Recognition of the Socialist Republic of Macedonia by the European Community and Its Member States (Jan. 11, 1992), 31 I.L.M. 1488, 1507; Arbitration Commission Opinion No. 7: On International Recognition of the Republic of Slovenia by the European Community and Its Member States (Jan. 11, 1992), 31 I.L.M. 1488, 1512.

and charged that these decisions violated international law and set a dangerous precedent for challenging a state's territorial integrity and the inviolability of borders.[168] On January 11, 1992, the Arbitration Commission determined that Slovenia and Macedonia met the requirements for recognition, that Croatia could meet the requirements if it provided sufficient guarantees for the protection of minority rights, and that Bosnia would meet the requirements once the will of its population to secede had been formally determined.[169] The EC then announced recognition of Slovenia and Croatia on January 15, 1992.[170]

As required by the EC, Bosnia held a referendum on independence from February 29 to March 1, 1992, wherein 63% of the population voted, with 99.4% voting for independence. Bosnia then declared full independence on March 3, 1992.[171] On April 6, 1992, the EC recognized Bosnia as an independent state. The EC, however, denied recognition to Macedonia.[172] The United States then recognized Slovenia, Croatia, and Bosnia as independent states on April 7, 1992.[173]

Then, on April 27, 1992, the Serbian and Montenegrin Republic Parliaments and the rump Yugoslavia Federal Assembly issued a Declaration on the Formation of the Federal Republic of Yugoslavia, which modified the constitutional structure of the SFRY and transformed it into the Federal Republic of Yugoslavia (FRY).[174] The FRY then announced that, "continuing the state, international legal and political personality of the Socialist Federal Republic of Yugoslavia," it would honor the international obliga-

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168 Declaration by the Assembly of Yugoslavia Regarding the Declaration on Yugoslavia adopted by the European Community Ministers of Foreign Affairs, December 21, 1991. Yugoslavia relied for the authority of its arguments upon the UN Charter, the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States, the Helsinki Final Act, and the Charter of Paris

169. Arbitration Commission Opinion No. 4, *supra* note 167, at 1503; Arbitration Commission Opinion No. 5, *supra* note 167, at 1505; Arbitration Commission Opinion No. 6, *supra* note 167, at 1511, Arbitration Commission Opinion No. 7, *supra* note 167, at 1517.

170. *See* William Drozdiak, *12 West European Countries Recognize Croatia, Slovenia*, WASH. POST, Jan. 16, 1992, at A21.

171. *See* Moves Towards Bosnian Independence—Ethnic Violence, *supra* note 159.

172. BULLETIN OF THE EUROPEAN COMMUNITIES, *Intergovernmental Cooperation*, Supp. 4/92 81 (1992).

173. *See* David Binder, *U.S. Recognizes 3 Yugoslav Republics as Independent*, N.Y. TIMES, Apr. 8, 1992, at A10.

174. The announcement expressed the will of the Serbian and Montenegrin citizens to remain in a common Yugoslav state and provided a number of the assurances sought by the EC in its Declaration on Recognition, although the announcement made no reference to it and did not express a desire for recognition. The Declaration on a New Yugoslavia provided that the FRY would not use force to settle questions related to the dissolution of Yugoslavia; would accept all the basic principles in the UN Charter, Helsinki Final Act, and Paris Charters, specifically the principles of respect for human rights, including the rights of ethnic minorities, parliamentary democracy, and market economy; and would settle questions of state succession such as the division of assets through the Peace Conference. Declaration on a New Yugoslavia of April 27, 1992, *reprinted in* YUGOSLAVIA THROUGH DOCUMENTS: FROM ITS CREATION TO ITS DISSOLUTION 532 (Snezana Trifunovska ed., 1994) (Adopted by the participants of the Joint Session of SFRY Assembly, the National Assembly of the Republic of Serbia, and the Assembly of the Republic of Montenegro).

tions assumed by the SFRY, would honor the territorial integrity of the seceding states, would announce recognition of those states once outstanding issues were resolved in the Peace Conference, and would retain the membership of the SFRY in international organizations.[175]

To assert its claim to the continuity of the former SFRY, the FRY circulated a diplomatic note to all states with which the SFRY had diplomatic relations informing them of its claim to the continuity of the SFRY.[176] On July 4, 1992, the EC Arbitration Commission found that the federal institutions of the SFRY were incapable of functioning as originally designed in the Yugoslav constitution. Thus, the SFRY should be considered to have dissolved and ceased to exist. The Arbitration Commission also found that the FRY could not be considered the continuity of the SFRY.[177] The EC and United States denied the FRY's claim to be the continuation of the SFRY,[178] and refused to recognize it as a state.[179]

Unlike the case of the former Soviet Union, the successor states of Yugoslavia neither reached agreements nor entered into anything more substantive than preliminary discussions relating to the allocation of the debts and assets. In order to attempt to reach an allocation of these debts and assets, some of the successor states sought rulings from the Arbitration Commission which could then be used as a basis for structuring an allocation. Unfortunately, the decisions of the Arbitration Commission were generally limited to technical legal determinations and did not promote a resolution of the issues to the degree that some parties to the conflict had hoped. As Yugoslavia did not have a substantial amount of external debt other than to international financial institutions, there was little pressure by creditor states to reach an agreement on the allocation of the debts or assets.

An examination of the state practice relating to the dissolution of the former Yugoslavia and the reliance on various legal rationales by the successor states and the creditor states provides an opportunity to develop further

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175. *Id.*

176. *See, e.g.*, Diplomatic Note No. 8/I/92 from the Embassy of the Socialist Federal Republic of Yugoslavia to the United States Department of State 1 (April 27, 1992) (on file with the Harvard International Law Journal). This note referenced the new constitution and proclaimed that the SFRY had been "transformed into the Federal Republic of Yugoslavia consisting of the Republic of Serbia and the Republic of Montenegro." *Id.* It concluded by declaring that the diplomatic missions and consular posts of the SFRY would continue to operate and represent the interests of the FRY, and the diplomatic missions and consular posts of foreign states and international organizations accredited to the SFRY would continue to be accorded the same status by the FRY. *Id.* at 2.

177. Arbitration Commission Opinion No. 10 (July 4, 1992), 31 I.L.M. 1488, 1525.

178. *See* Communiqué on Yugoslavia from President George Bush to the Munich Economic Summit (July 7, 1992), [1992] 1 PUB. PAPERS at 1086 ("We do not accept Serbia and Montenegro as the sole successor state to the former Yugoslavia. We call for the suspension of the delegation of Yugoslavia in the proceedings of the CSCE and other relevant international fora and organizations.").

179. *See* Joint Statement on Yugoslavia of 20 July (July 20, 1992), *in* BULL. EUR. COMMUNITIES, July-Aug. 1992, § 1.5.5, at 107, for the position of the EC. See *Chronology: Developments Related to the Crisis in Bosnia, March 10–August 28, 1992*, 3 DEP'T ST. DISPATCH, Aug. 31, 1992, at 676, for the position of the United States.

the articulation of the modern law and policy of state succession to debts and assets initiated in the Soviet case.

Unlike the case of the former Soviet Union, the dissolution of Yugoslavia is particularly useful for crystallizing a distinction between national and territorial debt and for refining the definition of each category. Because the Yugoslav successor states could not agree upon an allocation of the debt obligations among themselves, it was necessary for the creditor states to divide the debt. At a loss for clear criteria for allocating the debt, the creditor states turned to the distinction between national and territorial debt, finding that territorial debt was more readily identifiable. Relying upon an identification of territorial debt, the creditor states then chose to allocate national debt in the same proportion. This practice greatly solidified the distinction and furthered the specific description of each category of debt.

As in the Soviet case, the Yugoslav dissolution confirmed the priority nature of the principle of *pacta sunt servanda* in that the creditor states made substantial efforts to ensure that all of Yugoslavia's debt obligations were met by its successor states. While unable to insist on joint and several liability, the creditor states conditioned further lending and membership in international financial institutions on adherence to the principle of *pacta sunt servanda* and servicing of debt obligations. The territorial/national debt formula developed by the creditor states to assign debt obligations also became a criterion for the equitable allocation of the debt—and not one entirely consistent with that employed in the case of the former Soviet Union.

With respect to the allocation of assets, the state practice associated with the dissolution of Yugoslavia indicates a natural desire among the debtor states to link the allocation of debts and assets. Unlike the case of the former Soviet Union, here the creditor states took an active role in allocating and distributing the assets held by international organizations. In the case of assets held by foreign banks, the creditor states adopted the Soviet precedent and studiously avoided the linkage of debts and assets. In fact, the creditor states made no effort to intervene in the allocation of these assets, in large part because the assets had been frozen as part of the sanctions regime against Serbia/Montenegro.

Concerning the issue of continuity and dissolution, the Yugoslav case study provides a useful review of the relevant legal rationales, but not of state practice, since Serbia/Montenegro's claim to continuity was rejected by the other successor states and the international community. Consequently, this case illustrates one situation where a successor state's claim to be the continuity was rejected, but it provides confirmation of the principles relied upon in the Soviet case. Nevertheless, Yugoslavia does illustrate the applicable principles for debt and asset allocation in the case of a dissolution.

Like the Soviet case, the Yugoslav dissolution provides a fertile testing ground for the relationship between international law and foreign policy, given the massive international involvement in the crisis associated with Yugoslavia's dissolution. Moreover, given the desire of the international community to use the question of succession to debts and assets as a political tool for bringing stability to the region, there was significant interplay between law and politics in this case.

A. *Attempts of the Peace Conference to Structure a Succession to Debts and Assets of the Former Yugoslavia*

The co-chairs of the Peace Conference determined that a resolution of the issues of state succession, including the allocation of the debts and assets of the former Yugoslavia, might play a modest role in promoting peace. In April 1992, the co-chairs thus created two working groups. The first, the Working Group on Succession Issues, had the objective of defining succession issues, including apportionment of assets and liabilities of the former Yugoslavia.[180] The second, the Working Group on Economic Issues, was assigned the task of drafting an inventory of all assets, archives, and liabilities of the former Yugoslavia.

On February 26, 1993, the Working Group on Economic Issues introduced the Draft Single Inventory of Assets and Liabilities of the Former Yugoslavia as of December 31, 1990. The inventory used a definition of state property consistent with Article 8 of the 1983 Vienna Convention,[181] and was generally approved by Slovenia, Croatia, Bosnia-Herzegovina, and Macedonia.[182] Serbia/Montenegro, however, strongly opposed the proposal, insisting that the definition of state property, and hence the inventory, should include: all property in possession of the former republics and other territorial entities, all public property, all property belonging to associated labor organizations, and all property financed by more than one republic.[183]

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180. In August 1994, the Working Group on Succession Issues did produce a draft agreement, but this agreement did not include any reference to the allocation of the debts and assets of the former Yugoslavia. Moreover, the agreement was never signed by the parties. *See* Draft Treaty Concerning Succession to the Former Socialist Federal Republic of Yugoslavia, *in* 2 THE INTERNATIONAL CONFERENCE ON THE FORMER YUGOSLAVIA: OFFICIAL PAPERS 1616 (B.G. Ramcharan ed., 1998).

181. *See* V.D. Degan, *State Succesion Especially in Respect of State Property and Debt*, IV FINNISH Y.B. INT'L L. 130, 174–79 (1993). Article 8 of the 1983 Vienna Convention reads: "State property of the predecessor State means, property, rights and interests which, at the date of succession of States, were, according to the internal law of the predecessor State, owned by that State." 1983 Vienna Convention, *supra* note 4, art. 8.

182. *See* Degan, *supra* note 181, at 174–79. Slovenia, Croatia, Bosnia-Herzegovina, and Macedonia had insisted on the Article 8 definition of state property. *Id.* at 175; *see also* Oeter, *supra* note 46, at 92–94 (describing the criteria of, and reactions to, proposals for the redistribution of assets and liabilities).

183. *See* Degan, *supra* note 181, at 174–75. See also the definition of state property proposed in the Draft Agreement on Succession between Serbia/Montenegro and the Successor States of May 4, 1993:

> 1. State property of the SFRY means the property, rights and interests of the federal institutions, property of the institutions of the federal units and those parts of the so-called Asocial property which have in their totality or in part been created by or financed from the federal budget and other federal funds or from those of two or more federal units, or by judicial persons from two or more federal units.
>
> 2. The net value of the State property of the SFRY shall be determined on the basis of subsuming to permanent prices of December 31, 1990 the real value of individual items in the agreed Inventory List of assets and liabilities of the SFRY.

Draft Agreement on Succession between Serbia/Montenegro and the Successor States of May 4, 1993 (on

Croatia responded to Serbia/Montenegro's position on state property on May 21, 1993, by reaffirming the Working Group on Economic Issues' proposal, arguing that state property only encompassed specific property of the federation and its subsidiary organs with regard to the law of succession.[184] Serbia/Montenegro responded by refusing to provide a valuation of assets generally considered to be the property of the federal government, arguing that the Peace Conference did not possess sufficient jurisdiction to discuss the allocation of assets.[185] Unfortunately, none of the other successor states were capable of providing a mutually acceptable valuation of federal assets, and the estimates reached by an independent team of consultants hired by the EC were imprecise.[186]

The other complicating factor was the rigidity of the positions taken by the successor states regarding the effect of the break-up of the former Yugoslavia on the appropriate allocation of the debts and assets.[187] Slovenia and Croatia argued that Yugoslavia had dissolved and that all the successor states were entitled to an equal share in its debts and assets, rejecting Serbia/Montenegro's contention that it remained the continuity of the former Yugoslavia and was thus entitled to a greater, if not sole, share of the assets.[188]

Macedonia asserted that the disintegration of the former Yugoslavia could not be seen as a secession of one or two parts, since secession could be considered possible only if one republic would secede from Yugoslavia with the other republics evidencing a strong will to remain together. In the case of Yugoslavia, all six former republics had in fact expressed the political will

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file with the Harvard International Law Journal). For more information on Serbia/Montenegro's view with respect to state owned property, which relies heavily on experiences of East African states, see Dragana Gnjatovic, *Distribution of the State Property and Debts of SFR Yugoslavia*, 34 YUGOSLAV SURVEY, October 1993, at 113.

184. *See* Degan, *supra* note 181, at 174–75.

185. For a more detailed review of the position of Serbia/Montenegro, see Gnjatovic, *supra* note 183, at 114.

186. *See id.* at 116–17 (noting that the auditing firm of Deloitte & Touche, hired by Yugoslavia, had identified an error of U.S.$28 billion in the EC team's estimate of the value of military property).

187. According to the Croatian government, the delegation from Serbia/Montenegro argued that common assets should be valued and rated at the year 1918, when the Kingdom of the Serbs, Croats, and Slovenes (the forerunner of Yugoslavia) was formed, and that Belgrade was entitled to all common assets while common liabilities were to be divided among the successor republics. Communiqué from the Permanent Mission of Croatia to the United Nations (Dec. 15, 1994), *in* CROATIA AT THE UNITED NATIONS: COMPILATION OF STATEMENTS ISSUED BY THE PERMANENT MISSION OF CROATIA TO THE UNITED NATIONS, OCTOBER 21, 1993–JANUARY 16, 1998, at 98 (1998) [hereinafter CROATIA AT THE UNITED NATIONS].

188. *See* Communiqué from the Permanent Mission of Croatia to the United Nations (Mar. 6, 1996), *in* CROATIA AT THE UNITED NATIONS, *supra* note 187, at 184 (citing a joint statement circulated at the United Nations in February 1996 by the Foreign Ministers of Bosnia-Herzegovina, Croatia, Macedonia, and Slovenia, U.N. Docs. A/51/71, S/1996/147, firmly maintaining that Serbia/Montenegro was not the sole successor of the SFRY, but rather one of five equal successors, and that the four governments retained their rights to take legal action against any subject that chooses to unfreeze common assets); *see also* Kevin Done, *Foreign Policy: Aspiring to Take On a Bigger Role,* FIN. TIMES, May 18, 1998, at 2 (noting that the four Republics continued to reject Belgrade's claims that it is the sole successor of the SFRY).

for the reconstruction of their relations. The claim by one of the successor states to be the continuity would thus be illegal. Macedonia thus advocated a reconstruction of the relations among the successor states that would create a new international legal subject with all the successor states being equal. In fact, Macedonia preferred a political and economic union with some association to the EC. In order to establish such a union, Macedonia believed it necessary to settle the question of the legal inheritance of the former Yugoslavia beginning with the division of state assets, with particular emphasis on the property of the JNA, the consular-diplomatic property, and the remaining financial funds of the former Yugoslavia. Macedonia therefore argued that only after the settlement of these issues should the successor states address the questions of the allocation of archives and succession to international agreements and membership in international organizations.[189]

On the whole, the inability of the working groups to make progress on the matter of allocating the debts and assets of the former Yugoslavia was heightened by: (1) the insistence of the chairs of the Peace Conference that decisions of the working groups be reached by consensus;[190] (2) the inability of the chair of the working groups to persuade Serbia/Montenegro to participate constructively; (3) the inability of the successor states to access information about the debts and assets of the former Yugoslavia; (4) the unwillingness of third-party states to provide information on the assets of the former Yugoslavia; (5) the intermixing of questions related to the war in the former Yugoslavia with questions of succession (e.g., Croatian claims that war damages be apportioned from the allocation of assets); and (6) the vague nature of the law of state succession to debts and assets.

B. *Decisions of the EC Arbitration Commission*

In an attempt to remove some barriers to the effective functioning of the Working Group on Economic Issues and to establish a set of guiding principles for the succession of the debts and assets, the co-chairs of the Steering Committee of the International Conference on the Former Yugoslavia, at the request of Croatia, Slovenia, Macedonia, and Bosnia-Herzegovina,[191] submitted three sets of issues to the EC Arbitration Commission: the legal principles that should govern the allocation of debts and assets; the effect of war damages on this allocation; and a request for a specific determination of the division of assets and liabilities among the successor states.

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189. *See* President Kiro Gligorov of Macedonia, Statement to the Conference on Yugoslavia (Mar. 9, 1992) (on file with the Harvard International Law Journal).

190. According to Bozo Marendic, head of Croatia's delegation to the Working Group on Economic Issues, the insistence on consensus gave, "a chance to the Yugoslav delegation to endlessly elaborate on their ideas about succession, which the other four delegations have repeatedly turned down as legally unfounded and unacceptable." Press Release, Permanent Mission of Croatia to the United Nations, Succession Negotiations Stalled (May 27, 1994), *in* CROATIA AT THE UNITED NATIONS, *supra* note 187, at 53.

191. *See* Arbitration Commission Opinion No. 11 (July 16, 1993), 32 I.L.M. 1586, 1587.

1. Legal Principles Governing the Allocation of Debts and Assets

On April 20, 1992, the co-chairs of the Peace Conference, at the request of Slovenia and Croatia, asked the Arbitration Commission to determine what legal principles applied to the division of state property, archives, and debts of the former Yugoslavia in connection with the succession of states when one or more of the successor states refused to cooperate in such an allocation.[192]

In particular the co-chairs inquired: (1) What should be the disposition of property located on the territory of third-party states and of property located on the territory of the individual successor states? (2) On what conditions can states, within whose jurisdiction property of Yugoslavia is situated, block the free disposal of that property or take other protective measures? And (3) on what conditions and under what circumstances would such states be required to take such action? The Arbitration Commission received opinions on these matters from Slovenia, Croatia, Bosnia-Herzegovina, and Macedonia. Serbia/Montenegro objected to the competence of the Arbitration Commission to render a determination.[193]

In formulating an opinion, the Arbitration Commission recalled that in an earlier opinion it had found that of the few well-established principles of state succession, the fundamental rule was that rights and obligations should be equitably assumed by the successor states as the result of a negotiated process.[194] Successor states refusing to cooperate would be considered in breach of that fundamental rule. Thus, states sustaining loss as a result of this non-participation would be entitled to take non-forcible countermeasures in accordance with international law. Those states that do cooperate in an allocation should determine an equitable allocation among themselves but also reserve the rights of states that refuse to cooperate.[195]

The Arbitration Commission concluded that an allocation of the debts and assets of the former Yugoslavia could only be achieved by an agreement between the successor states. Any agreement between successor states would not, however, bind third-party states in whose territory property of the former Yugoslavia existed. The third-party states could, nevertheless, voluntarily give effect to the agreement worked out between the cooperating successor states. In addition, the agreement would not be binding upon those suc-

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192. *See* Arbitration Commission Opinion No. 12, (July 16, 1993), 32 I.L.M. 1586, 1589.

193. *See id.* at 1589–90. On July 4, 1992, the federal government of Serbia/Montenegro issued an official statement making clear that it did not consider the opinions of the Arbitration Commission as legal grounds for any meritorious decision, but as doctrinaire opinions in the sense of Article 38(d) of the Statute of the International Court of Justice. See Gnjatovic, *supra* note 183, at 115. Article 38(d) states, in relevant part, that the "judicial decisions and the teachings of the most highly qualified publicists of the various nations [are] subsidiary means for the determination of the rules of law." Statute of the International Court of Justice, June 26, 1945, art. 38(d), 59 Stat. 1055, 33 U.N.T.S. 993. For more information on the position of Serbia/Montenegro with respect to the Arbitration Commission, see MIKENKO KRECA, THE BADINTER ARBITRATION COMMISSION–CRITICAL REVIEW (bilingual ed. 1993).

194. Arbitration Commission Opinion No. 12, *supra* note 192, at 1590.

195. *Id.*

cessor states refusing to cooperate. In a weak attempt to create some type of binding authority, the Arbitration Commission did conclude that third-party states may be obligated to abide by any decisions of an international tribunal competent to determine matters of state succession if the third-party states had submitted to the jurisdiction of the tribunal. The Arbitration Commission did not, however, identify any currently existing tribunals with such competence or jurisdiction.[196]

This opinion thus had little impact on the ability of the successor states of the former Yugoslavia to allocate debts and assets. Although the first question, regarding the disposition of property located on the territory of third-party states or on the territory of individual successor states, could have been answered with a relatively straightforward explanation of the principles of international law governing territorial assets, the Arbitration Commission failed even to address this issue. Similarly, it did not provide an answer to the second question of when third-party states could take action to block the free access to property and thus preserve the assets of the former Yugoslavia until an agreement on allocation was reached. Many third-party states were most likely interested in preserving the assets, but were unwilling to take action absent some sort of legal justification. Here, the Arbitration Commission missed an opportunity to use international law effectively to support the policy on state succession by determining that under certain circumstances third-party states could voluntarily freeze the non-diplomatic assets of a state in the process of breaking up. Even if the Arbitration Commission had determined that a third-party state did not have any authority based in international law to freeze the assets of a dissolving state, this conclusion would have promoted the role of law in allocating assets by eliminating the prospect that the third-party states would extra-legally assist the successor states in obtaining a share of the assets.

2. *The Effect of War Damages on the Allocation of Debts and Assets*

On April 20, 1992, at the request of Slovenia and Croatia, the co-chairs of the Peace Conference asked the Arbitration Commission to determine whether any amounts owed by one or more states in the form of war damages could affect the distribution of the debts and assets of the former Yugoslavia in connection with the succession process. Slovenia, Croatia, Bosnia-Herzegovina, and Macedonia submitted opinions. Serbia/Montenegro again objected to the competence of the Arbitration Commission to render a determination.[197]

The Arbitration Commission noted that although the 1983 Vienna Convention required an equitable division of the debts and assets, it did not require that each particular category of the debts and assets be equitable, but

196. *See id.* at 1590–91.

197. Arbitration Commission Opinion No. 13 (July 16, 1993), 32 I.L.M. 1591.

only that the overall settlement be equitable. The Arbitration Commission then determined that the questions of state succession to debts and assets and reparations for war damages were governed by separate fields of international law (the law of state succession and law of state responsibility, respectively). The question of war reparations could not be permitted to interfere in the resolution of issues of state succession, unless the parties unanimously consented to such an arrangement. The Arbitration Commission, however, concluded that "the possibility cannot be excluded in particular of setting off assets and liabilities to be transferred under the rules of state succession on the one hand against war damages on the other."[198]

This opinion had little effect on the allocation of the debts and assets, as it answered the submitted question on war damages both in the affirmative and in the negative. While determining that the questions of state succession and war damages were governed by separate fields of international law, and must therefore be treated as separate determinations, the Arbitration Commission acknowledged the possibility that the transfer of assets and liabilities could be set off against war damages.

A more appropriate answer by the co-chairs might have been that since the allocations of both the debts and assets and war damages arose from the same event—the contentious break-up of the former Yugoslavia—they could properly be calculated together. A successor state's equitable share of debts and assets could thus be modified by the consideration of war damages caused or suffered by that state during the course of the break-up of the predecessor state.

The Arbitration Commission did, however, provide some practical guidance as to the equitable allocation of the debts and assets by noting that the particular categories of division need not be equitable so long as the overall divisions are equitable.[199] Although useful in the general context of allocating debts and assets, this principle is irrelevant to the question on war damages put to the Arbitration Commission.

3. *A Request for a Specific Determination as to What Assets and Liabilities Should be Divided Among the Successor States*

In April 1993, the co-chairs of the Conference on Yugoslavia sought to involve the Arbitration Commission directly in the division of the debts and assets of the former Yugoslavia by asking it to determine, "[i]n the light of the inventory in the report by the Chairman of the Working Group on Economic Issues, what assets and liabilities should be divided between the successor states to the former Socialist Federal Republic of Yugoslavia in connection with the succession process?"[200]

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198 *See id.* at 1592.

199. *See id.*

200. Arbitration Commission Opinion No. 14 (Aug. 13, 1993), 32 I.L.M. 1593. For more information on the Draft Single Inventory of Assets and Liabilities of the SFRY as of 31 December 1990, see

In considering the matter, the Arbitration Commission concluded that it did not have sufficient information on which to base a decision as to each asset or liability listed in the inventory. Moreover, it considered such a determination to be a non-legal matter on which it could not properly rule. However, it indicated that general principles of international law provided that "immovable property situated on the territory of a successor state passes exclusively to that state," and that "the origin or initial financing of the property and any loans or contributions made in respect of it have no bearing on the matter."[201] With respect to movable property, the Arbitration Commission indicated that the provisions of the 1983 Vienna Convention represented commonly agreed principles and that federal property should be divided equitably among all of the successor states. It further noted that the initial financing arrangements for the property in question were irrelevant to its final allocation among the successor states.[202]

Although the Arbitration Commission considered a determination of the specific allocation of debts and assets to be outside its jurisdiction, it did promote a narrowing of the dispute regarding the distribution of the assets by affirming the principles in the 1983 Vienna Convention and by rejecting Serbia/Montenegro's claim that property should be considered state property if it was financed by one or more republics, regardless of where it was physically located. Thus, when the successor states reach a point at which they are able to agree upon a formula for the distribution of debts and assets, they will have at their disposal a formula for ascertaining which assets are to be considered federal property subject to succession.

C. *The Succession to Debts and Assets of the Former Yugoslavia*

Despite the inability of the successor states to agree upon an allocation of the debts and assets of the former Yugoslavia, the creditor states acted to protect their interests by assigning responsibility for the debt obligations of the former Yugoslavia among the successor states. The assignment of liability was complicated by the competing desires of the creditor states to ensure that all the debt obligations of the former Yugoslavia would be met, while also excluding Serbia/Montenegro from participation in the international community as a means of influencing its activities with respect to Croatia and Bosnia-Herzegovina.

1. *Assessment of Liability, and Allocation and Rescheduling of the Paris Club Debts*

In June 1992, Slovenia, which was making payments to the Paris Club members, requested that the Paris Club assess individual liability, allocate

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Degan, *supra* note 181, at 176–77.

201. *See* Arbitration Commission Opinion No. 14, *supra* note 200, at 1593–94.

202. *See* id. at 1594.

the debt of the former Yugoslavia, and change its accounting procedures to provide Slovenia credit for the debt it had already paid. Because the Paris Club neither assessed individual liability nor allocated the debt, and the commercial banks applied standard accounting procedures, it credited payments, regardless of their source, to the oldest outstanding claims. As a result, payments made by Slovenia were being applied against Serbian debt, creating a disincentive for Slovenia to continue payments.[203]

As in the case of the former Soviet Union, Germany, which was owed the greatest share of outstanding obligations, took the lead in proposing an allocation of the debt. As a result of Slovenia's request, Germany proposed at the July 1992 Paris Club meeting that the Paris Club recognize the EC Arbitration Commission ruling that the former Yugoslavia no longer existed and that Serbia/Montenegro could not be considered its continuation. Germany also noted that most of the external debt of the former Yugoslavia could be allocated among the successor states.[204]

Germany therefore proposed that the creditors agree to allocate payments received on the basis of which successor states made the payment rather than crediting the payment to the oldest claim. Each creditor would then conclude new bilateral agreements with Slovenia and Croatia on their identifiable share of the debt, including a share of the non-identifiable debt. The non-identifiable debt would be allocated in the same proportion as the respective successor state's share of the identifiable debt. If the successor states subsequently reached an agreement on a different allocation of the debt, that agreement could be substituted for the interim allocation. Germany further proposed that successor states currently at war or not recognized would still be expected to make the payments when they fell due pursuant to the original contracts.[205] This latter determination was consistent with the declarative view of recognition since the successor states have an international legal personality and are liable for the debt obligations of the predecessor state regardless of recognition. By 1993, the Paris Club creditor countries had reached tentative agreements in principle with Slovenia, which were finalized in 1996, and they concluded similar agreements with Croatia in March 1995.[206]

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203. *See* Letter from Stanislav Debeljak, Deputy Minister of Finance for Slovenia, to Bernard Trichet, Director of the Paris Club (June 23, 1992) (on file with the Harvard International Law Journal); Letter from Stanislav Debeljak, Deputy Minister of Finance for Slovenia, to Margaret F. Mudd, Vice President of Chemical Bank (June 19, 1992) (on file with the Harvard International Law Journal).

204. *See* German Delegation to the Paris Club, Treatment of the Debt of the Former Socialist Federal Republic of Yugoslavia 2 (July 13, 1992) (submitted for review at the Paris Club meeting on July 22, 1992) (on file with the Harvard International Law Journal).

205. *See id.*

206. *See* Kevin Done, *Survey of Slovenia*, FIN. TIMES, Mar. 26, 1996, at II; Richard Lapper, *Hopes Rise of Debt Deal for Former Yugoslav Republics*, FIN. TIMES, Mar. 28, 1995, at 32.

2. Assessment of Liability and Allocation of the London Club Debts

At Slovenia's initiative, in June 1993 the London Club of private foreign creditors began the process of bilateral negotiations with each of the successor states of the former Yugoslavia, except Serbia/Montenegro.[207] The primary issues with respect to the London Club debt related to: (1) a determination of whether the newly reconstituted National Bank of Yugoslavia, which operated under the jurisdiction of Serbia/Montenegro, continued the legal personality of the National Bank of Yugoslavia, which operated under the jurisdiction of the SFRY, and was therefore authorized to negotiate with the London Club on behalf of all the successor states; (2) the proper allocation of responsibility for identifiable and unidentifiable debt; and (3) the proper means for adjusting the joint and several liability provisions of the original New Financing Agreement concluded with the SFRY and the members of the London Club for U.S.$7.3 billion.[208]

To resolve the question of whether the new National Bank of Yugoslavia continued the legal personality of the former National Bank of Yugoslavia, Slovenia and Croatia persuaded the co-chairs of the Peace Conference to request a ruling from the Arbitration Commission. In Opinion No. 15, the Commission found that the new National Bank of Yugoslavia did not continue the legal personality of the former National Bank of Yugoslavia and that the successor states were not required to resolve the question of debt allocation to private lenders within the confines of the Working Group. However, they could properly engage in bilateral negotiations with representatives of the London Club.[209]

As with the Paris Club debt, a significant percentage of the debt obligations could be allocated on the basis of the identifiable projects which were financed by the debt. However, the question of how to allocate the unidentifiable debt obligations remained.[210] The London Club decided that an initial allocation of unidentifiable debt could be determined on the basis of the percentage of identifiable debt held by the successor states, but that the allocation could be adjusted to compensate for the fact that the successor states, as republics of the former Yugoslavia, had consented to be jointly and severally liable with the other republics and with the central government of

207. Negotiations began with Croatia in the winter of 1996, with Macedonia in the summer of 1996, and with Bosnia-Herzegovina in the winter of 1997. The London Club of international banks indicated that the door was still open for debt talks with Yugoslavia despite the country's deputy prime minister saying that negotiations had collapsed. *See* Kevin Done, *Hope for Yugoslavia Debt Talks*, FIN. TIMES, Oct. 27, 1997, at 2.

Yugoslavia agreed the outlines of a U.S.$1.7 billion debt restructuring program with its commercial bank creditors, after two years in which the two sides appeared irreconcilable. *See Belgrade Debt Programme Outline*, FIN. TIMES, July 17, 1998, at 1.

208. This amount was later reduced to U.S.$4.2 billion. *See* Mrak, *supra* note 180, at 177.

209. *See* Arbitration Commission Opinion No. 15 (Aug. 13, 1993), 32 I.L.M. 1595, 1597.

210. The unidentifiable or non-allocated debt consisted of an estimated U.S.$1 billion of the U.S.$4.2 billion in loans made to the former Yugoslavia. *See* Laura Silber & Gavin Gray, *Survey of the Republic of Slovenia,* FIN. TIMES, Apr. 6, 1995, at 35.

the SFRY at the time of the initial loan. The London Club thus increased Slovenia's and Croatia's allocation to account for the fact that they were in a better position than the other successor states to service the debt obligations.[211]

3. Allocation of Assets

Due to the unwillingness of the third-party states to freeze or preserve the assets of the former Yugoslavia located abroad, and the location of almost all of the former Yugoslavia's national assets in Belgrade, Serbia/Montenegro was effectively able to seize most of the national assets of the former Yugoslavia, a significant percentage of which were used to finance Serbia's efforts to destabilize Croatia and Bosnia.[212] The other four successor states will thus inherit at most a negligible fraction of the national assets of the former Yugoslavia.

As a result of the economic sanctions on Serbia/Montenegro, the assets of the former Yugoslavia located in foreign banks were eventually frozen, including the gold and foreign currency reserves held by the Bank of International Settlements in Basle. Unfortunately, this action occurred after most of the accounts were substantially depleted by Serbia/Montenegro.[213] Although the other successor states were not subject to sanctions, they were denied access to the frozen accounts.[214]

Negotiations regarding the remaining assets of the former Yugoslavia remained stagnant until December 18, 2000, when official negotiations resumed in Brussels. The resumption of negotiations occurred following the defeat of Slobodan Milosevic by President Vojislav Kostunica and the change in position that arose due to the transition in leadership. Leaders of Serbia/Montenegro no longer claimed that it was solely entitled to the assets of the former Yugoslavia, thereby allowing for a resumption of talks. The continuing Brussels round is the first step forward toward a final distribution of assets.[215]

The above examination of the former Yugoslavia, which involved the adversarial break-up of a state, helped clarify the significant evolution of the norms and regimes relating to the identification of national, territorial, and

211. *See* Mrak, *supra* note 180, at 177–80. Slovenia had calculated that its rightful share of London Club debt amounted to approximately U.S.$580 million, but eventually agreed to accept responsibility for U.S.$812 million. *Id.* at 178–79.

212. *See* Oeter, *supra* note 46, at 85.

213. *See* Gabriel Partos, *New Bid to Resolve Yugoslav Assets Row*, BALKAN CRISIS REPORT (Inst. for War and Peace Reporting), Jan. 5, 2001, at 2, ¶ 15 (summarizing the current state of the Socialist Federal Republic of Yugoslavia's assets), http://iwpr.vs4.cerbernet.co.uk/index.pl?archive/bcr/bcr_20010105_2_eng.txt (visited Mar. 18, 2001).

214. Office of Foreign Assets Control, Foreign Assets Control Regulations for the Financial Community 4 (2001) (explaining that a frozen, or blocked asset "is subject to an across-the-board prohibition against transfers or transactions of any kind"), http://www.treas.gov/ofac/t11facbk.pdg. (visited Mar. 18, 2001).

215. *See* Partos, *supra* note 213, at ¶ 1.

identifiable debt, as well as the further evolution of the principle of *pacta sunt servanda*, in particular how the creditor states sought to ensure compliance with this principle when the successor states failed to agree on an assumption or allocation of debts and assets. With regard to the principle of equitable allocation, the Yugoslav case provides an opportunity to further explore the contrast between the intense role of creditor states in the allocation of debts with their negligible role in the allocation of assets. It also shows how creditor states sought to allocate responsibility for the predecessor state's debt absent an agreement among the successor states, and how the allocation of assets was then linked to the allocation of debts.

Given that the break-up of Yugoslavia was the first modern instance of a dissolution where no successor state clearly continued the international legal personality of the predecessor state—despite Serbia-Montenegro's claim—this case provides an opportunity to compare and contrast the actual significance of the distinction between continuity and dissolution on important questions of state succession to debts and assets. Moreover, the Yugoslav case study provides insight into the role international law may play in enabling creditor states to structure a resolution of the many questions of state succession to debts and assets in a situation where the successor states are unable to reach agreement among themselves.

V. FORMULATION OF THE MODERN LAW AND POLICY OF SUCCESSION TO DEBTS AND ASSETS IN THE FORMER CZECHOSLOVAKIA

In February 1992, the Czech and Slovak Republics[216] entered into negotiations on a future constitutional framework, with the respective republics recognizing each others' sovereignty, but expressing a desire to maintain a federal state.[217] Negotiations between the Czechs and Slovaks to create a new type of federation proved fruitless; Vaclav Klaus, prime minister of the Czech Republic, rejected the proposal of Vladimir Meciar, prime minister of the Slovak Republic, to form a Czech-Slovak Union. Instead, Klaus gave Meciar the option of either a workable, meaningful federation or complete separation. Meciar, who ran for prime minister as a vocal advocate of sovereignty, chose independence.[218]

216. In April 1990, shortly after the Czechoslovakian Velvet Revolution, Czechoslovakia decided to change its name to the Czech and Slovak Federal Republic. For more information on the elections of 1990 and the origins of the break-up, see THE 1990 ELECTION TO THE CZECHOSLOVAKIAN FEDERAL ASSEMBLY: ANALYSES, DOCUMENTS AND DATA (Ivan Gabal ed., 1996).

217. *See Czechoslovakia: Constitutional Talks—Slovak Rejection of Draft Proposals*, 38 KEESING'S RECORD OF WORLD EVENTS 38,776 (Feb. 1992); *Slovak Parliamentary Chairman on 'Velvet Divorce,'* RFE/RL NEWSLINE, Jan. 19, 1998, http://www.rferl.org.newsline/1998/01/190198.html (visited Mar. 18, 2001) (noting that according to Slovak Parliamentary Chairman Ivan Gasparovic, "the Slovaks had not wanted the Czechoslovak federation dismembered but only wider powers for the two component republics. The Czechs, however, had told them it was going to be either a unitary state or two independent states.").

218. *See* Otto Ulc, *Czechoslovakia's Velvet Divorce*, 30 EAST EUROPEAN Q. 331, 343 (1996).

The two prime ministers began immediate discussions pertaining to the break-up of Czechoslovakia.[219] On August 27, 1992, Prime Ministers Klaus and Meciar reached an agreement envisioning the dissolution of Czechoslovakia on January 1, 1993.[220] During the next few months the Czech and Slovak Republics concluded over twenty-five inter-governmental treaties relating to a division of federal responsibilities and the structure of their mutual interaction after the dissolution.[221] The international legal personality of Czechoslovakia was formally terminated at midnight, December 31, 1992.[222]

In the case of the former Czechoslovakia, the distribution of assets was substantially more complicated than the allocation of debts. The reasons for the difficulties encountered in distributing assets were (1) the majority of the institutions were still in state hands, (2) since the Velvet Revolution of 1989, the republics had practically no legal or institutional base for a market economy;[223] (3) privatization, in the form of vouchers, had already begun by the former Czechoslovakian government to citizens of both republics, prior to dissolution;[224] and (4) tension existed between the republics due to the disproportionately severe effects of privatization on the Slovak Republic.[225]

An examination of the state practice relating to the dissolution of the former Czechoslovakia and the invocation of various legal rationales by the successor states and the creditor states provides an opportunity to assess whether the developments in the above case studies may be confirmed as modern developments to the customary international law of succession to debts and assets.

Like the case of the former Yugoslavia, the dissolution of Czechoslovakia crystallizes the distinction between national and territorial debt and confirms the definition of each category articulated in the Yugoslav context. Importantly, while the distinction was forced upon the Yugoslav successor states by the creditor states, in the case of the former Czechoslovakia, the

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219. *See Agreement on Czech-Slovak Split in Doubt*, FBIS TRENDS, July 1, 1992, at 27 (noting that Prime Minister Klaus and Meciar agreed on June 19, 1992 to negotiate a division of Czechoslovakia into two independent states by Sept. 30, 1992).

220. *See Czechoslovakia: Agreement on a Timetable for Partition*, 38 KEESING'S RECORD OF WORLD EVENTS 39,061 (Aug. 1992).

221. *See Former Czechoslovakia: Dissolution of Federation*, 39 KEESING'S RECORD OF WORLD EVENTS 39,281 (Jan. 1993).

222. *See id.* at 39,280.

223. Anthony Robinson, *Regional Division 'Impeding Czechoslovak Reform'; OECD Report Praises Federal Government for Overcoming Political Handicaps*, FIN. TIMES, Jan. 8, 1992, at 2.

224 *See* Ariane Genillard, *Czechoslovak Privatisation Attracts Nearly 8m*, FIN. TIMES, Feb. 5, 1992, at 24; *see also* Ariane Genillard, *Czechoslovakia Makes Bold Leap to People's Capitalism: In a Couple of Months Two Out of Three Citizens Will be Shareholders in Ex-State Enterprises*, FIN. TIMES, May 22, 1992, at 2.

225. *See* Anthony Robinson, *Czechs Lead Slovakia in the Economic Stakes: High Unemployment Has Fueled Resentment Among Slovaks Against Prague*, FIN. TIMES, June 9, 1992, at 2 (noting that Slovakia's unemployment rate rose from zero to twelve percent in eighteen months, to reach three times the official rate in the Czech Republic).

parties themselves agreed to the distinction among debt types and their eventual allocation. Similarly, the dissolution of Czechoslovakia reaffirmed the priority of the *pacta sunt servanda* principle, in that significant efforts were undertaken by both the successor states and the creditor states to ensure that all of Czechoslovakia's debt obligations were met.

With respect to the allocation of assets, the state practice associated with the dissolution of Czechoslovakia confirmed a natural desire among the debtor states to link the allocation of debts and assets. Unlike the case of the former Soviet Union and former Yugoslavia, here the creditor states merely accepted the Czech and Slovak Republics' consensual arrangements to link the allocation of debts and assets on a two-to-one basis. Concerning the issue of continuity and dissolution, the Czechoslovak case provides useful insights into the relevant legal rationales, as the Czech and Slovak Republics' established a clear practice of dissolution, with neither state claiming to be the continuity of Czechoslovakia. Moreover, given the relatively benign political nature of the Czech-Slovak dissolution, the role of international law may be more clearly assessed than in the more politically contested dissolutions of the Soviet Union and Yugoslavia.

A. *The Adoption of an Agreement on Succession to Debts and Assets*

In the early autumn of 1992, the Czech and Slovak governments were unable to agree on a formula for dividing the federation's assets. While it was agreed that under the territorial principle, all fixed assets would remain in the possession of the republic on whose territory they were located, and that all other assets would be divided according to the two-to-one ratio in order to reflect the fact that the Czech Republic's population was double that of Slovakia, there were a number of questions with respect to the application of the formula. For instance, the Slovak Republic objected to the Czech Republic's assertion that the territorial principle applied to army installations, since 80% of Czechoslovakia's military assets were located on Czech territory. Furthermore, some Czechs argued that the two-to-one ratio was unfair, as in their view the Czech Republic had historically generated more of the national wealth than Slovakia.[226]

These disputes were eventually resolved, and on November 13, 1992, the Czechoslovakian Federal Parliament adopted the Constitutional Law on the Division of Czechoslovakia Property Between the Czech Republic and the Slovak Republic ("the Constitutional Law").[227] The Constitutional Law addressed the division and transfer of federal property to the Czech and Slovak Republics and provided detailed regulations for the abolition of the federal

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226. *See* Jiri Pehe, *Czechs and Slovaks Define Postdivorce Relations*, RFE/RL Research Report, Nov. 13, 1992, at 7, 10.

227. *See* CONSTITUTIONAL LAW ON THE DIVISION OF CZECHOSLOVAKIA PROPERTY BETWEEN THE CZECH REPUBLIC AND THE SLOVAK REPUBLIC (1992) (Czech.) [hereinafter CONSTITUTIONAL LAW ON THE DIVISION OF PROPERTY].

national property fund, the division and transfer of its property to the national property fund of the Czech and Slovak Republics, and the transfer of the property of the state bank, including real estate, movable goods, state assets and liabilities, monetary assets and liabilities, and other property rights and obligations belonging to the former Czechoslovakia located on and outside its territory.[228]

With respect to the division of property, the Constitutional Law categorized property as territorial or national property. Territorial property was defined as all real estate located on the territory of the Czech and Slovak Republics, including movable goods that were appurtenant to the real estate in terms of their function, purpose, and nature.[229] Territorial property would become the property of the successor state in which it was located. National property was defined as property to which the territorial principle could not be applied. Such property would be divided based on the principle of the proportion of inhabitants of the Czech and Slovak Republics, under which the property would be transferred to the successor states at a two-to-one ratio.[230]

The Constitutional Law further provided that in dividing the property, two further principles would govern. The principle of *efficiency* provided that the economic efficiency and the further proper use of the property should be safeguarded, while providing for an equitable property and financial settlement. This principle permitted that in exceptional circumstances, singularity of property could be maintained if the functionality of the property depended on it. The division of property would also be governed by the principle of *relevance*, which provided that rights and obligations that by virtue of their contents applied only to the Czech Republic or Slovak Republic would be transferred only to that successor state.[231]

The movable property within the privatization fund would be divided according to the territorial principle, with the net proceeds from the sale of privatization coupons being divided at a 2.29:1 ratio, with the details of the arrangement worked out in additional agreements.[232] The division of the Television, Radio, News Agency, National Railroads, Postal Telegraph and Telecommunications Authority, and Academy of Sciences was to be set out in a Federal Assembly law.[233] Similarly, the rights to operate the transit gas

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228. *See id.* art. 2; *see also* Stephen Denyer & Martin Solc, *Czechoslovakia: What's in the Divorce Settlement?*, 12 INT'L FIN. L. REV., February 1993, at 28, 28–30 (providing more detailed information on the arrangements concluded between the Czech Republic and Slovakia).

229. *See* CONSTITUTIONAL LAW ON THE DIVISION OF PROPERTY, *supra* note 227, arts. 3, 8 (noting that property comprising the right to operate a state enterprise would be considered territorial property and transferred to the state where the headquarters of the enterprise was located, and subunits of state enterprises would be transferred to the territory in which they were located).

230 *Id.* arts. 3, 7 (noting that archives, data files, and intellectual property documentation related to property would be transferred along with such property).

231 *Id.* art. 3.

232 *Id.* art. 13.

233 *Id.*

pipeline, Czechoslovak Airlines, Cechofracht, foreign trade organizations and foreign subsidiaries, as well as the division of other Czechoslovakian property, was to be defined by the agreement of the successor states.[234]

The membership quota of Czechoslovakia in the IMF, as well as its liabilities, would be divided in accordance with the principle determined by the IMF, which was subsequently worked out to 69.1% for the Czech Republic and 30.9% for Slovakia. From 1991, the Czechoslovakian central bank had borrowed 1.5 billion dollars from the IMF. Slovakia originally objected to the IMF's suggested 2.29:1 division, claiming that such a division would give the Czech Republic greater access to future IMF funds. The IMF, however, refused to consider Slovakia's objection.[235] The capital investments in the World Bank, the International Financial Corporation, the International Agency for Investment Guarantees, and the International Association for Development, as well as the liabilities in these organizations, would be divided between the successor states in accordance with the principle of proportion of inhabitants, unless by virtue of their contents, the assets or liabilities were only applicable to one of the successor states.[236]

The liabilities arising from the previously accepted financial credits in freely convertible currencies, the central foreign exchange reserves, and bank assets in nonconvertible currencies would be divided between the successor states consistent with the proportion-of-inhabitants principle. Government credits would also be divided in accordance with such principle, unless otherwise agreed with the creditors and unless the so called relevance principle applied.[237]

The transfer of all debts and assets was to occur on January 1, 1993, the date set for the break-up of Czechoslovakia,[238] with the federal government prohibited from selling or transferring federal property prior to that time.[239] In order to resolve any disputes arising from the allocation of debts and assets, the Constitutional Law provided for the creation of a commission to settle claims. The commission would be composed of an equal number of members appointed by the governments of the successor states, with the rules of procedure set by mutual agreement.[240] Finally, the successor states were required to adopt this Constitutional Law into their law and accept the commitment to submit disputes to binding arbitration.[241]

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234. *Id.*

235. *See* Vincent Boland, *Czechs and Slovaks Seek Last-Minute Deal over External Debt*, FIN. TIMES, Dec. 31, 1992, at 16.

236. *See* CONSTITUTIONAL LAW ON THE DIVISION OF PROPERTY, *supra* note 227, art. 4.

237. *See id.* art. 5.

238. *See id.* art. 7.

239. *See id.* art. 10.

240. *See id.* art. 9.

241. *See id.* art. 12.

B. Implementation of the Agreement on Succession to Debts and Assets

The successor states readily adopted the provisions of the Constitutional Law into their own law, set up a property division committee, and agreed to submit any disputes to arbitration. Although the actual allocation of the debts and assets occurred without major problems, complications arose in two specific areas: the allocation of diplomatic property abroad and the actual division of valuable federal property.

The diplomatic property abroad of the former ministry of foreign affairs was located in sixty-six states, included 258 buildings, and was valued at U.S.$650 million.[242] Although this property was to be divided according to the two-to-one ratio, the successor states were concerned about creating a gap in effective diplomatic representation if the allocation prevented them from holding premises in particular states. The successor states reached agreement on December 28, 1992, just three days before the break-up of Czechoslovakia, on the specific allocation of properties abroad. This agreement included both movable and immovable diplomatic property abroad and on the territory of the former Czechoslovakia, as well as state-owned immovable property abroad.[243] In order to prevent a gap in effective diplomatic representations, the successor states agreed that in Japan, the United States, Sweden, and Italy, they would jointly share the diplomatic property of the former Czechoslovakia.[244]

In order to structure a fair distribution of the property, which included representative offices, commercial sections, and cultural and information centers in addition to the diplomatic property, the successor states retained an independent company to evaluate the property. The property was then divided into three categories, within which the two-to-one allocation applied. The first category contained property located in the G-7 states, the closest neighboring states, Russia, and the UN missions in New York and Geneva. The second category contained property in the rest of Europe, and the third category contained all property not in categories one or two.[245]

The property division commission encountered problems dividing the U.S.$8.1 million in movable property and distributing the newer federal buildings.[246] Slovakia wanted to divide the newer federal assets, such as the Federal Assembly building and the Science Academy buildings, on the basis of the two-to-one principle, whereas the Czech Republic wanted to apply the territorial principle.

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242 *See Czechs. Slovaks Divide Czechoslovakia Embassy Properties*, FBIS-EEU-93-030, Feb. 17, 1993, at 4

243. *See Czechs. Slovaks Agree on Split of Property Abroad*, FBIS-EEU-92-250, Dec. 29, 1992, at 16.

244. *See Czechs. Slovaks Divide Czechoslovakia Embassy Properties*, *supra* note 242, at 4; *see also* Diplomatic Note No. 5007/93 from Embassy of Slovak Republic to U.S. Department of State (Jan. 14, 1993) (on file with the Harvard International Law Journal).

245 *See* Julius Lorinez & Milan Rusko, *Slovak Foreign Minister Views Independent Policy*, FBIS-EEU-92-248, Dec. 24, 1992, at 3–4.

246. *See Czechs. Slovaks Divide Czechoslovakia Embassy Properties*, *supra* note 242, at 4.

Complications also arose with the division of the National Bank assets, valued at over U.S.$660 million, and the resources from the privatization coupons.[247] The Czech Republic wished to use the resources from the coupons to repay mutual state debts.[248] In an attempt to force Slovakia to settle the outstanding issues on the division of the newer federal property, National Bank assets, and resources from privatization coupons, the Czech government, on March 17, 1993, announced that it would not issue shares in newly privatized companies to Slovak investors.[249] The Czech Republic declared that the shares were being held as security until the two governments signed agreements on movable property and on balancing the assets and liabilities. Slovakia was entitled to the equivalent of U.S.$1 billion of shares in Czech firms, an amount similar to the Czech Republic's overall outstanding claims on Slovakia. At the time, Slovakia described this move as a breach of international law that could lead to a trade war.[250] These complications were eventually overcome, and by the end of 1993, more than 95% of the federal property of the former Czechoslovakia was distributed to either the Czech or Slovak Republic.[251]

The case of the former Czechoslovakia involved the second consensual break-up of a state, and it helped to confirm the the norms and regimes relating to the identification of national, territorial, and identifiable debt, as well as the principle of *pacta sunt servanda*, as discussed in the previous two case studies. Concerning the principle of equitable allocation, the Czechoslovak case provides an opportunity to explore the development and implementation of a formulaic approach based on a variety of economic and other factors. This case also illustrates how the successor states may effectively limit the involvement of the creditor states by reaching an early and "equitable" allocation of debts and assets and by limiting the opportunities for creditor state intrusion.

Since the break-up of Czechoslovakia was consensual, it also provides an opportunity to confirm the importance of the distinction between continuity and dissolution, without the complications inherent in the adversarial nature of the Yugoslav break-up. Moreover, the Czechoslovakian case offers clear insight into how international law may be extensively relied upon in a con-

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247. *See Property Division Accord To Be Signed with Slovaks*, FBIS-EEU-93-015, Jan. 26, 1993, at 10.

248. *See Czechs-Slovaks Sign Property Division Accords*, FBIS-EEU-93-048, Mar. 11, 1993, at 11.

249. *See* Patrick Blum, *Prague to Seize Shares in Assets Row*, FIN. TIMES, Mar. 19, 1993, at 2 ("Shares with a nominal value of around U.S.$10 billion were to be transferred to investors starting on March 29."); *see also* Patrick Blum, *Czechs to Allow Transfer of Shares to Slovakia*, FIN. TIMES, May 13, 1993, at 2 (noting that the Czech government decided to allow the transfer of shares in privatized Czech companies to Slovak investors; Prime Minister Klaus had previously said that the shares would be held as security against Czech government claims for compensation from Slovakia, a move which caused widespread unease among domestic and foreign investors who had until then regarded investment in the Czech Republic as safe from political attack (approximately 8.5 million investors held shares in 1500 companies with an estimated book value of U.S.$10 billion)).

250. *See Czech Republic—Slovakia: Seizure of Slovak Privatization Shares*, 39 KEESING'S RECORD OF WORLD EVENTS 39,376 (Mar. 1993).

251. *See Czech Republic*, 40 KEESING'S RECORD OF WORLD EVENTS R107 (1994).

sensual break-up to resolve rapidly the complex questions relating to state succession to debts and assets. This case also exposes some of the limits of international law and indicates when and how some of the questions relating to succession are resolved primarily by political rather than legal criteria.

VI. Conclusion

A. *The Status of the Modern Law and Policy Governing Succession to Debts and Assets*

The recent state practice with respect to the break-ups of the Soviet Union, Yugoslavia, and Czechoslovakia confirmed, modified, and denied various aspects of the traditional law governing succession to the debts and assets of a predecessor state. The primary aspects of state succession relating to the norms and regimes of international law addressed in the above case studies include the important distinction between national and territorial debts and assets, the applicability and function of the principle of *pacta sunt servanda*, the equitable allocation of debts and assets among the successor states, and the requirement of consensual allocation and utilization of joint or expert commissions. Also addressed in these case studies is the continued viability of the distinction between the theoretical frameworks of continuity and dissolution, and the actual role of international law in promoting a resolution of questions arising from state break-ups.

1. *Distinction Between National and Territorial Debts and Assets*

Recent state practice confirms the past state practice of drawing a distinction between national and territorial debts, notwithstanding the contrary position of the 1983 Vienna Convention. Recent practice also affirms the distinction between national and territorial assets articulated in both past state practice and the 1983 Vienna Convention.

In comparing the three cases, the confirmation of the distinction between territorial and national debts was the weakest in the case of the break-up of the Soviet Union, where the entire debt was treated as national debt. The basis of this treatment partly resulted from (1) an inability to identify the territorial application of the debt, (2) the nature of the debt in terms of general assistance, and (3) the centralized nature of the Soviet system, with all debt payments and servicing passing through Moscow. In this case, however, the identification of territorial assets did occur, with the successor states being entitled to the assets located on their territory. In fact, territorial assets were the only assets over which the successor states ever achieved control.

The cases of Yugoslavia and Czechoslovakia both strongly supported the distinction between national and territorial debts and assets. In both cases the creditor and successor states determined that the successor states would be liable for territorial debts and entitled to territorial assets. In the case of Yugoslavia, this allocation occurred by default and at the initiative of the creditor states, but in the case of Czechoslovakia it was initiated by the successor states and confirmed by the creditor states.

The break-ups of Yugoslavia and Czechoslovakia also served to modify the definition of territorial debt and broaden it to that of identifiable debt. Identifiable debt included traditional territorial debt, recognized as debts contracted by the state's national government for projects in a specific region, and also debt identifiable to a particular bank or financial institution located on the territory of a particular successor state. The creditor states assumed that if the funds were loaned to or serviced by a bank located on the territory of a successor state, then the debt must have benefited that state.

The reconfirmed distinction between territorial and national debt is a useful development for future break-ups of states, as it appears to be quite functional in allocating substantial portions of the debts and assets of predecessor states, particularly in cases of non-consensual break-up. The expansion of the territorial principle to include identifiable debt is welcomed by the creditor states since it enlarges the portion of debt which can be identified and secured as territorial debt. However, it should be received by successor states with caution as it can be used to ascribe debt obligations from which successor states might not actually have benefited. In rare cases, the identifiable debt ascribed to the successor states might even belong to the category of odious debt,[252] for which the successor state should not be liable.

2. *The Principle of* Pacta Sunt Servanda

Recent state practice confirms the principle of *pacta sunt servanda* with respect to debt obligations, as all of the predecessor states' debt was accounted for in all three cases. This principle was relied upon to hold continuing states liable for the debt of the predecessor state. Moreover, it was hypothesized that this principle would also apply to the successor states in the event of a dissolution.

With respect to all the successor states of the former Soviet Union, the creditor states initially insisted on joint and several liability and thus not only held the successor states liable for the fulfillment of obligations to which they proportionally agreed, but held even the smaller successor states liable for the entire debt contracted by the predecessor state. This practice in a sense takes the principle of *pacta sunt servanda* to, or even beyond, its logical conclusion. Notably, those creditor states which did not accept the incorporation of the Baltic states into the former Soviet Union did not hold the Baltic states liable for any portion of the debt of the former Soviet Union, jointly and severally or otherwise. Yet, this position is consistent with the principle of *pacta sunt servanda*, since if the Baltic states were not legally

252. Odious debts are debts that are contracted contrary to the interests of the inhabitants of the absorbed territory. They include war debts, subjugation debts, and debts contracted for the committing of acts in violation of fundamental international law. *See* MENON, *supra* note 13, at 161–63.

incorporated into the Soviet Union, they could not have consented to the contracts resulting in the accumulation of debt, and thus they are not considered liable for fulfilling those contracts after the dissolution of the Soviet Union.

In the case of the former Yugoslavia, the successor states never agreed to an allocation of the predecessor state's debt. Therefore, the creditor states allocated the debt and informed the successor states that if they wished to participate in the international financial community, e.g. participate in international financial institutions and receive additional lines of credit, they would have to accept the share of the debt allocated to their state. The creditor states thus enforced the principle of *pacta sunt servanda* by creating a quid pro quo for continued participation in the international financial community.

In the case of the former Czechoslovakia, the successor states themselves recognized that if they wished to participate in the international financial community they would have to agree to fulfill the debt obligations contracted by the predecessor states, and they undertook to divide the debt of the predecessor state effectively among themselves.

The confirmation of the principle of *pacta sunt servanda* in recent state practice is welcome since it encourages lending by creditor states and institutions. However, the use of such a principle to justify joint and several liability is suspect, as it is unrealistic and unfair to assert that a small successor state actually contracted to fulfill the entire amount of debt loaned to the predecessor state at the time the successor state was a constituent entity. The use of *pacta sunt servanda* to justify joint and several liability is particularly unrealistic given the determination of the Restatement of Foreign Relations that successor states should not be held to the treaty obligations of the predecessor state since they likely had little say in those obligations.[253] Although this principle with respect to treaty practice was rejected by recent state practice, one can analogize that even if a successor state can reasonably be considered to have implicitly consented or contracted to a share of the national debt of the predecessor state, it is quite a stretch of reason to argue that it consented to be obligated by the entire share of the debt taken on by the predecessor state.

The use of *pacta sunt servanda* to relieve the Baltic states of liability for any share of the debt of the former Soviet Union contrasted sharply with the requirement for joint and several liability by the other successor states, but was nonetheless quite consistent with the principle and the previous policy of third-party states of not recognizing the incorporation of the Baltics into the Soviet Union. This precedent may, however, raise questions in future

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253. The Restatement holds that "[w]hen part of a state becomes a new state, the new state does not succeed to the international agreements to which the predecessor state was a party, unless, expressly or by implication, it accepts such agreements and the other party or parties thereto agree or acquiesce." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAWS § 210(3)(1986).

cases of state succession with respect to successor states claiming they were never legally incorporated into the predecessor state and thus free from any debt obligations.

3. *The Determination of an Equitable Allocation*

a. The Assessment of Liability and the Allocation of Debts and Assets

Recent state practice provides an elaboration on the definition of an "equitable proportion" of debts and assets. In the case of the former Soviet Union, the creditor states determined that it was "equitable" to hold all of the successor states jointly and severally liable for the debt of the predecessor state. The creditor states justified this approach in part on the basis that the debt of the former Soviet Union was national in character, and it was not possible to establish an equitable allocation among the successor states. The primary rationale was that the creditor states were highly exposed to the former Soviet Union and were concerned that if they attempted to allocate the debt or permitted the successor states to assume individual responsibility for the debt, some of the debt would go unassessed or unallocated, the successor states might never agree on an allocation, and some of the successor states would inevitably default on their debt obligations. The creditor states did not participate in any efforts to allocate the assets of the former Soviet Union equitably, and in fact when called upon by Ukraine to preserve those assets for future allocation, they declined to do so.

While committing to the joint and several liability provision, the successor states endeavored to allocate their responsibility to contribute to the servicing of that debt equitably. The specific criteria used by the successor states are unclear, apart from their reliance upon "economic indicators" to allocate the debt. As the creditor states had feared, however, some of the successor states failed to participate in this allocation meaningfully, while other states actively opposed their allocated share. Successor states sought to allocate the assets of the Soviet Union equitably by adopting the territorial principle for non-moveable assets located within the territory of the former Soviet Union and the principle that successor states would be entitled to a share in the moveable assets and assets located abroad commensurate with their share of liability for the debt of the former Soviet Union. Although Russia's assumption of the national assets violated this agreement, the eventual conclusion of zero-option agreements with all of the successor states except Ukraine brought Russia back into compliance with this agreement and in effect created an equitable allocation of the debts and assets, with Russia held liable for all the debts and entitled to all the national assets.

In the case of the former Yugoslavia, the creditor states assessed liability and allocated most of the debt among the successor states based upon an expanded definition of territorial debt. In order to allocate the remaining national debt, the creditor states calculated the proportionate share of each successor state's territorial debt and then held the respective successor states liable for that share of the remaining national debt. Thus, the creditor states assumed that it was equitable to hold the successor states liable for national debts in the same proportion that they were liable for territorial debts. The creditor states were willing to make this logical leap, as most of the debt of the former Yugoslavia could be allocated as territorial debt. The creditor states did not seek to allocate or preserve the assets of the former Yugoslavia, despite calls from four of the six successor states to do so.

The successor states of the former Yugoslavia did not participate in an agreement on an equitable allocation of its debts and assets. They reluctantly agreed to accept the shares of debt assigned to them by the creditor states in exchange for the ability to participate in the international financial community. The successor states, however, expressed discontent at being held liable for a share of the debt of the former Yugoslavia without being able to access any of its assets. The assets of the former Yugoslavia have not been subject to any equitable allocation, but rather have been wholly assumed by Serbia/Montenegro.

In the case of the former Czechoslovakia, the successor states equitably apportioned the debts and assets on the basis of both a territorial principle and a population principle. The territorial debts and assets became the responsibility of the successor state with whose territory those debts and assets were associated, and the remaining national debts and assets were divided on a two-to-one basis consistent with the proportion of the population of Czechoslovakia retained by the respective successor states. The allocation effected by these two principles was circumscribed by the application of the principle of efficiency and the principle of relevance. The essential aim of these two additional principles was to ensure an efficient as well as equitable allocation. The creditor states did not participate in the allocation of the debts and assets, but did accept the allocations agreed upon by the successor states.

The developments of international law relating to the use and definition of the concept of equitable proportion, if adopted with the necessary caution, can play a useful role in structuring the allocation of the debts and assets in future break-ups. The principle of joint and several liability, as noted above, is unsuitable for most successor states, but might appropriately be used as a principle of liability for continuing states. In the case of continuity, creditor states can seek to hold the individual successor states liable for a proportionate share of the predecessor state's debt, but can then safeguard the repayment of that debt by holding the continuing state jointly and severally liable in the event of a default on that debt by the other successor states. This would in a sense make the continuing state the guarantor of the debt allocated to the other successor states. Holding the continuing state jointly and severally liable would be considered appropriate as the state would retain the rights and privileges of the predecessor state in other matters of state succession and would be more capable of meeting the debt obligations of the predecessor state.

The use of the proportion of territorial debt as a basis for the allocation of national debt should also be greeted with cautious optimism. This method of allocation provides a pragmatic tool for allocating national debt in non-consensual break-ups; however, there is not necessarily a rational connection between each successor state's actual benefit from national debts and its proportionate share of territorial debts. Similarly, there is a problem with identifying the territorial debts of the successor state on whose territory the national bank of the predecessor state was located. The state containing the predecessor state's national bank is likely to receive too large a share of identifiable debt, as much of the national debt would be processed through banks on its territory, and thus it would also be assigned a disproportionate share of the truly national debt. But, absent the promulgation of a better principle in the case of non-consensual break-up, this formula will necessarily be used.

The use of population and economic indicators to determine the share of national debt, as noted above, should also be cautiously relied upon when used by the creditor states to dictate an allocation of debts. However, where the break-up is consensual, these factors appear quite reasonable and might be expanded to include factors such as contribution to gross national product, proportion of territory, and proportion of natural resources. The use of population and economic indicators for allocating national debt in non-consensual cases should not readily be adopted in cases of the dissolution of states with centrally controlled economies, since third-party states are unlikely to have ready access to such data, and the veracity of such data is subject to question. Although successor states are more likely to have access to such data and might be more willing to accept its veracity, the objections of Uzbekistan to the determination of its share of debt based on "economic indicators" is testimony to the caution which should be exercised when utilizing such criteria to allocate national debt.

b. Linking the Allocation of Debts to the Allocation of Assets

Recent creditor state practice rejects, while recent successor state practice confirms, the principle put forth in the 1983 Vienna Convention that a determination of an equitable allocation should take into account the extent of assets passing to the successor states. The assignment of joint and several liability to the successor states of the former Soviet Union by its very nature cannot take into account the share of the assets received by each successor state. In fact, when specifically called upon by Ukraine to preserve the assets of the former Soviet Union for equitable allocation or to modify its responsibility for the debts of the former Soviet Union in relation to its actual share of assets, the creditor states declined. In allocating the territorial and national debt to the successor states of the former Yugoslavia, the creditor states took no account of the fact that none of the successor states except Serbia/Montenegro had access to the assets of the former Yugoslavia, and they did not even attempt to preserve those assets for a future equitable allocation. In the case of the former Czechoslovakia, the creditor states did accept the allocation of debts by the successor states, which corresponded to the allocation of assets. There is no evidence, however, that if the successor states had themselves failed to take into consideration the allocation of assets when assigning liability for debts, the creditor states would have intervened to require such considerations.

Despite the unwillingness of the creditor states to balance liability for debts with access to assets, the successor states generally pursued such a balance. As noted above, the successor states of the former Soviet Union agreed that states would be entitled to access to assets in the same amount as they were liable for debts and that they would eventually sign zero-option agreements providing that they would not be liable for contribution to the debt payments and in return not entitled to access to any national assets. The four successor states of Yugoslavia that did not achieve access to its assets strongly protested against the assumption of the assets by Serbia/Montenegro and continue to seek some compensation. The successor states of Czechoslovakia provided that the allocation of assets would be carried out under the same principles as those applied to the allocation of debts and thus acted consistently with the 1983 Vienna Convention.

The creditor states' reluctance to become involved in the allocation of assets is subject to criticism. Creditor states have substantial power with respect to the allocation of debts and assets, and they have been unwilling to exercise that power regarding the allocation of assets. In addition to improving the chances of having the allocated debt adequately serviced, as noted below, involvement of creditor states in cases of non-consensual break-ups is likely the only way in which an equitable allocation of assets might occur.

c. Creditor States' Consent

Recent state practice inverts the principle set forth in the 1983 Vienna Convention that creditor states must consent to, but cannot dictate, the equitable allocation of debts among the successor states. In the case of the former Soviet Union, the creditor states dictated to the successor states that they would be jointly and severally liable for the debt of the predecessor state, leaving the particular allocation of contributions to that debt to be determined by the successor states. Even when the successor states concluded zero-option agreements, they were still informed by the creditor states that these agreements did not affect their joint and several liability. In the case of Yugoslavia, the creditor states dictated the allocation of territorial and national debt among the successor states. The case of the former Czechoslovakia was the only example in which the creditor states did not dictate an allocation of debts.

4. *The Requirement of Consensual Allocation and the Utilization of a Joint Commission*

Both past state practice and the 1983 Vienna Convention provide that successor states shall determine the equitable allocation of debts and assets based on consensual agreement. Past state practice also provides for the utilization of commissions to carry out the actual allocation of debts and assets. In all three cases, joint commissions were employed to assist in the valuation and allocation of the debts and assets. Naturally, the commissions had varying degrees of success, but it does appear that given the complexity of allocating and then distributing the debts and assets of the predecessor state, the services of a joint commission are invaluable.

The CAHDI and the EC Arbitration Commission placed substantial emphasis on the need for issues to be settled by agreement. Their reliance upon the principle of consensual agreement can be traced back to the unwillingness and inability of the Arbitration Commission to articulate concise principles of state succession that might have impacted the process or progress of the Peace Conference. Interestingly enough, the creditor states were indifferent to inter-successor state agreements when determining liability for debts and took little interest in promoting agreement on the allocation of assets. The creditor states, however, did accept the agreements worked out by the successor states of the former Czechoslovakia, as they were consistent with the purposes of the creditor states.

B. *Continuity vs. Dissolution*

Recent state practice denies the 1983 Vienna Convention and confirms past state practice in drawing a distinction between the continuity and dissolution models of the break-up of a state for the purpose of allocating debts and assets. In the case of the former Soviet Union, the creditor states accepted Russia as the continuity of the Soviet Union for the purposes of administering the debt. By providing in the October 28, 1991 Memorandum that the debt of the former Soviet Union would be serviced through the VEB, the creditor states recognized that Russia possessed the financial expertise of the former Soviet Union associated with debt administration. Similarly, although the joint and several liability commitment treats all the successor states as equal with respect to the debt of the former Soviet Union, the creditor states recognized that Russia would in fact be in the best position to meet the debt obligations of the former Soviet Union, and thus they were able to hold Russia liable for all of such debt. The ability to seek indemnification from the other states can be interpreted as a bonus, although unlikely to be redeemed, for the creditor states. Similarly, the fact that some creditor states encouraged the zero-option agreements confirmed Russia's status as the continuation of the Soviet Union.

The other successor states of the former Soviet Union did not at first recognize Russia's status as the continuity of the Soviet Union for the purpose of the allocation of debts and assets, as indicated by their numerous attempts to allocate and distribute those debts and assets. Eventually, through the adoption of zero-option agreements with all of the successor states except Ukraine, the successor states consented and gave effect to Russia's claim to continuation. It is interesting to note that Russia's claim to complete continuity, although accepted for purposes of membership in international organizations, was not automatically accepted or given automatic effect by the successor states. Instead, Russia had to construct the rights and obligations of continuity for purposes of debts and assets on a case-by-case basis with the other successor states. This construction of continuity supports the view that a determination of continuity is less the result of some objective criteria entitling the continuing state to a collection of rights and privileges, but more the result of bargaining among the successor states where the continuing state must compensate the other successor states for the rights and privileges assumed by the continuing state.

In the case of the former Yugoslavia, the creditor states denied Serbia/Montenegro's claim to continue the international legal personality of Yugoslavia, insisting that the break-up was a case of dissolution. As such, the creditor states have been free to assert that each successor state is liable for its share of territorial debt, as well as a proportionate share of national debt. Serbia/Montenegro, on the other hand, relying on its assertion of continuity, was able to seize virtually all the national, and some non-Serbian territorial, assets of the former Yugoslavia. Although Serbia/Montenegro was able to seize these assets because of the location of the assets in Belgrade or because of the control of Serbian officials over the assets of Yugoslavia prior to its break-up, and not as a result of any legal argument, the claim of Serbia/Montenegro to be the continuity of the former Yugoslavia has provided a veneer of legality for this seizure. The other successor states, of course, contest Serbia/Montenegro's claim to continuity and its claim to the assets. At some point in the future the other successor states might be able to claim indemnification for the seizure of those assets.

In the case of the former Czechoslovakia, the Czech Republic determined that if it intended to claim to be the continuity of Czechoslovakia, it would have to be responsible for the entire amount of Czechoslovakia's debt. When the Czech and Slovak Republics agreed that the break-up of the former Czechoslovakia would be treated as a dissolution, they agreed to allocate the debts and assets on a proportionate basis consistent with the principles of international law applicable to dissolutions.

The reaffirmation of the distinction between continuity and dissolution for purposes of allocating debts and assets will prove useful for promoting peaceful and cooperative interaction between future successor states. As successor states are generally likely to adopt a distinction between continuity and dissolution for purposes of membership in international organizations and other important areas of state succession, the parallel adoption of such a distinction for the purposes of allocating debts and assets will lead to a more equitable resolution of state succession issues on the whole. Similarly, since a successor state that claims to be the continuity of the predecessor state is likely to retain control over the central territory, state organs, and greatest share of the assets of the predecessor, it should thus be held liable for the greatest share of the debts.

C. *The Role of International Law*

On the whole, international law has played a constructive role in facilitating cooperative state break-up where the successor states share a desire to dissolve the predecessor state. In the case of a non-consensual break-up, international law has been fairly ineffective beyond providing principles from which the unjustly treated successor states could argue. Similarly, creditor states have been less obliged to follow the principles of international law, whereas successor states generally have been held to those principles by the creditor states or other successor states.

International law has played an effective role in further preserving the rights of creditor states and in countenancing reasonable agreements reached by the successor states. In all of the recent cases of state succession, the creditor states relied upon the international law of *pacta sunt servanda* and the 1983 Vienna Convention to require that the successor states were bound by the debt of the predecessor state and to dictate or consent to an allocation of that debt. This reliance on international law naturally was coupled with a clear warning that if the successor states wished to participate in the financial community, they would have to agree to service their allocation of debt. In the case of the former Czechoslovakia, the creditor states also successfully relied upon international law to sanction the agreement of the successor states to allocate the debt on a two-to-one basis.

Although international law provided for the link between the allocation of the debts and assets of the predecessor state, this link was only established in the cases of the former Soviet Union and Czechoslovakia upon the initiative and for the benefit of the successor states. With respect to the former Soviet Union, the creditor states ignored this link and pursued their own interest in joint and several liability. In the case of the former Yugoslavia, the successor states were unable to establish a link between the allocation of debts and assets among themselves, and the creditor states showed no interest in establishing such a link. The lack of interest on the part of creditor states in establishing a link between the allocation of debts and assets was short-sighted. If such a link were created, successor states would be more willing and able to service their share of the debt. Not only would the successor states see the allocation as just and fair, but they would be able to use or convert their assets in order to generate income to pay the debt.

Similarly, although international law provides for an equitable allocation of debts and assets, it has not been able to force or dictate an allocation by the successor states in non-consensual break-ups, nor has it been able to persuade third-party states to become involved in allocating or preserving the assets for future allocation. Creditor states, in fact, have relied upon the lack of an obligation in international law to preserve or allocate the assets of the predecessor state as justification for their inaction. In the absence of an effective utilization of international law to preserve or allocate the assets of a predecessor state, it appears that the old axiom that possession is nine-tenths of the law takes precedence. Although international law has not been effectively used to ensure that those states seizing the assets of the predecessor state are entitled to retain those assets, caution should be exercised in future dissolutions such that international law is not used for such purpose.

International law has been useful in consensual break-ups for providing guidance as to how to allocate debts and assets. With respect to debts, it does appear that whether or not the break-up is consensual, the creditor states will invoke the principles of equitable allocation and consent of creditors to ensure that the debt is fully allocated in a manner likely to ensure that it is properly serviced. Interestingly, the expansion of international law with respect to the definition of an equitable allocation occurred at the initiative of the successor states themselves and absent any meaningful assistance from the legal experts of CAHDI or the EC Arbitration Commission.

The enhanced application of the role of international law with respect to succession to the debts and assets of predecessor states would benefit from: (1) a requirement to consider the allocation of assets when assigning liability for debts; (2) a detailed definition of an equitable allocation, with criteria such as proportion of population and economic indicators as employed in the cases of the former Soviet Union and former Czechoslovakia; (3) a greater willingness and ability of international legal bodies to articulate and apply the principles of international law and to reject expedited and vague conclusions; and (4) the rejection of inequitable principles such as joint and several liability for all successor states regardless of their share of the assets or actual ability to repay the entire debt of the predecessor state.

The reasonable and relatively fair application of the principles of international law, as well as their significant evolution and refinement, in the break-ups of the Soviet Union, Yugoslavia, and Czechoslovakia demonstrates the utility of relying on international law to structure a resolution of the many questions relating to state succession to debts and assets. With the modifications suggested above, the modern law and policy of state succession to debts and assets may be relied on to aid in the resolution of highly contentious disputes arising from the future break-ups of states, and may thus enable successor states, international mediators, and other interested third parties to resolve more readily many of the other political and legal issues that arise when a state breaks up.