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The Agreement on Succession Issues and Some Dilemmas Regarding Its Implementation

1. Introduction

The purpose of this article is to examine the Agreement on Succession Issues (Agreement) concluded between the successor states to the former Socialist Federal Republic of Yugoslavia (SFRY) in the light of its implementation and to assess to what extent the process of the succession of states to the former SFRY has been terminated and which outstanding issues still remain to be resolved.

The dissolution of the former Yugoslavia was a turbulent process which in addition to the establishment of five successor states in 1991 through 1992, resulted in the further disintegration of one successor state to the SFRY – that is the Federal Republic of Yugoslavia (FRY). Namely, Montenegro seceded from the State Union of Serbia and Montenegro and became independent in 2006, while Kosovo seceded from Serbia and proclaimed its independence in 2008. This further disintegration is beyond the scope of our discussion. All legal consequences originating therein are to be resolved between these states and in no way affect the succession issues originating from the dissolution of the SFRY in the period from 1991 to 1992.

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Following prolonged negotiations which lasted almost ten years, the five successor states to the SFRY, namely Bosnia and Herzegovina, Croatia, FRY, Macedonia and Slovenia signed the Agreement on Succession Issues at the Hofburg Palace, the seat of the Organization for Security and Cooperation in Europe (OSCE), in Vienna on 29 May 2001.¹ In conformity with Article 12(1), it entered into force on 2 June 2004, i.e. thirty days after Croatia had deposited the fifth instrument of ratification. According to Article 13, the Secretary-General of the UN, acting as depositary, ensured its registration in accordance with Article 102 of the Charter of the UN.²

Besides the fact that the dissolution of Yugoslavia was non-consensual and violent, the main reason for the almost 10-year delay in reaching an agreement on succession issues was the adamant position of the FRY that it was entitled to continue the legal personality of the SFRY while the four successor states, Bosnia and Herzegovina, Croatia, Macedonia and Slovenia, seceded from it contrary to the constitutional order of Yugoslavia and international law.³ The position of the FRY was not overcome even by the signing of the Dayton Peace Agreement on 14 December 1995. The FRY's claim to hold the position of predecessor state was nevertheless substantially weakened by the fact that the international community did not allow it to occupy the seat of the former Yugoslavia in the UN and its organs and other international organizations and agencies.⁴

The FRY finally gave up the claim that it continued the legal personality of Yugoslavia after the fall of Milošević and the democratic changes in October 2000, when it finally applied for membership to the UN as a new state.⁵ As a result of these changed circumstances, it was possible to bring the succession process to an end. However, this would not have been possible without the institutional framework of the Peace Implementation Council (PIC) and the skilled guidance of Sir Arthur Watts from the United Kingdom, who acted as a mediator from 1996 to 2001.⁶

One must admit that, without the insistence of the international community to bring the negotiations on succession issues between the successor states to

¹ Initialled on 25 May 2001. Off. Gaz. RS, No. 71/02, Treaties, No. 20/02.

² UN *Treaty Series*, vol. 2262, p. 251.

³ Škrk, *Slovene Views on the Succession of States* (1996), p. 23.

⁴ *Ibidem*, p. 44.

⁵ Bohte, *Sporazum o nasledstvu po SFRJ* [Agreement on Succession Issues to the SFRY] (2001), p. 562. See also Bohte, *Status ZRJ v OZN* [Status of the FRY in the UN] (2000), pp. 801–821; Türk, *TEMELJI MEDNARODNEGA PRAVA* [FOUNDATIONS OF INTERNATIONAL LAW] (2015), pp. 262–264; Shaw, *INTERNATIONAL LAW* (2003), pp. 866–868; Polak Petrič, *Pomen nasledstva po nekdanji SFRJ* [The Importance of Succession to SFRY] (2012), pp. 15–16.

⁶ Škrk, *Slovene Views on the Succession of States* (1996), pp. 24–25 and *infra* at 2.2.

the SFRY to an end, this process would not have been successfully terminated in 2001. But the interest of the international community was primarily political: to normalize to the largest possible extent the over-all relations among the successor states to the SFRY. In this context, the Agreement on Succession Issues was an important achievement. After all, it was the first treaty duly concluded between all the successor states. The Agreement has brought to an end the process of the dissolution of the SFRY of 1991–1992 and regulates almost all succession issues on the basis of the consent of all five equal successor states.⁷ But was the momentum of its adoption, which was difficult to achieve, truly satisfactory from the point of view of its contents as a treaty? The present analysis is an attempt to identify the state of affairs regarding the Agreement almost 15 years after its signature and to identify some accurate legal and practical problems of its (*bona fide*) implementation.

2. Legislative history

2.1. *The political dimensions of the solution of succession issues to the SFRY*

The Agreement is the only multilateral international agreement dealing with the open legal and substantive issues that emerged as a result of the dissolution of the SFRY. Therefore, some have termed it the Peace Treaty of the SFRY.⁸ Foreign Ministers at the time of signing stressed the Agreement's importance for the stabilization of the region.⁹ Likewise, the representatives of international organizations (EU, OSCE and UN) underscored the contribution of the Agreement to international peace and stability. It should also be underlined that the Preamble of the Agreement explicitly states that the successor states are aware of the necessity to resolve questions of state succession in the interest of stability in the region.¹⁰

It was by no means easy to obtain support for the Agreement. During the final stage of negotiations in Vienna, many feared that negotiations would fail.¹¹

⁷ Bohte, *Sporazum o nasledstvu po SFRJ* (2001), p. 561.

⁸ *Ibidem*.

⁹ *Ibidem*.

¹⁰ The Preamble further notes that the mandate given to the High Representative by the Decision of the Peace Implementation Conference held in London in December 1995 of the desirability of a consensual solution of the outstanding succession issues.

¹¹ Bohte, *Sporazum o nasledstvu po SFRJ* (2001), p. 581.

Because of its financial implications, the most controversial issue was without doubt that of the hard currency savings deposited in a commercial bank and any of its branches in any successor state before the independence date of that state. The special negotiator Sir Watts appointed Hans Meyer, the former Governor of the Swiss Central Bank, as a mediator for the negotiations under the auspices of the Bank for International Settlements (BIS) without prior consultations with successor states.¹² The compromise language in Article 7 of Annex C of the Agreement reached at the last moment of negotiations can be seen as a failure from today's perspective and the fears of the Slovene delegation at that time were very much justified, as this issue has created major tensions among successor states in the course of the Agreement's implementation and remains unsolved even 15 years after its signature.

The other controversial issue at the final stage of negotiations related to the dispute resolution mechanism. The provisions that ultimately obtained support are relatively unique with respect to the common practice of treaties, since they do not explicitly provide for an arbitration clause in case of potential disputes. Pursuant to Article 5(1) of the Agreement, differences regarding its interpretation and application shall be in the first place resolved in discussion among the states concerned. If this does not bring success within one month, the concerned successor states may refer the dispute to »an independent person of their choice« or to the Standing Joint Committee established under Article 4. Both of these options require the consent of the states concerned. By contrast, Article 5(3) of the Agreement allows a unilateral referral of »any differences which may arise in practice over the interpretation of the terms used in this Agreement« to binding expert solution. The expert can be appointed by the consent of the parties to the dispute or, if this is not possible, by the President of the Court of Conciliation and Arbitration within the OSCE.¹³ Unfortunately, this dispute settlement mechanism, which relies almost exclusively on the consent of successor states, actually gives individual successor states the possibility to block the progress of the implementation of the Agreement. As a result, the Agreement does not provide for an efficient mechanism to finally resolve some of the most vital issues of succession by means of a peaceful settlement of the disputes.

Politically, the Agreement is of the utmost significance both for historical and substantive reasons, which are explained in detail below. However, its implementation is not satisfactory. It has been successful only in part, mostly due

¹² See *infra* at 3.3.

¹³ This procedure is strictly limited to the interpretation of terms used and shall not permit the expert to determine the practical application. In addition, some provisions of the Agreement are explicitly excluded from this procedure. See Article 5(4) of the Agreement.

to obstruction on the part of certain successor states. Taking this into account, it is regrettable that the international community has been hesitant to encourage the successor states to fully implement the Agreement. The EU, inspired by the suggestion of Slovenia, went as far as to link the implementation of the Agreement to the principle of good neighbouring relations and respect for international legal obligations in the annual European Council conclusions relating to the Enlargement process.¹⁴ Since the full implementation of the Agreement provides the foundation for stable, long-lasting and friendly relations between the states parties, the settlement of the remaining succession issues could significantly contribute to better regional cooperation. Thus, it should be in the interest of the EU and the region to bring about a faster implementation of the Agreement.

2.2. Negotiations

2.2.1. The institutional framework of negotiations

The first institutional framework for negotiations on state succession issues was the (Peace) Conference on Yugoslavia, which was established on behalf of the European Community (EC) when the Extraordinary Ministerial Meeting adopted the Declaration on Yugoslavia in Brussels on 27 August 1991.¹⁵ At the Conference on Yugoslavia, state succession was discussed for the first time in the Working Group (WG) on institutions in Brussels on 25 and 26 March 1992,¹⁶ while the WG on state succession issues was initially convened in Brussels from 20 through 24 July 1992.

The framework for succession issues was formally institutionalized by the London Conference on the Former Yugoslavia on 25 to 27 July 1992 whereas the EC was formally joined by the UN. The result of this merger was the International Conference on former Yugoslavia (ICFY) which *inter alia* re-established the WG on the succession of states and transferred its seat from Brussels to Ge-

¹⁴ See for example, Council of the EU, Council Conclusions on Enlargement and Stabilisation and Association Process (2012). URL: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/genaff/134234.pdf.

¹⁵ For details see Škrk, *Slovene Views on the Succession of States* (1996), pp. 22–25.

¹⁶ At the same time the WG on economic issues started to evaluate the state property of the SFRY. This WG prepared A Draft Single Inventory of the Assets and Liabilities of the Socialist Federative Republic of Yugoslavia as at 31 December 1990, which was amended following the 20 to 21 January 1993 meeting of the sub-group on valuation. Its agreed items formed an important basis for the definition of the state property of the SFRY.

neva. In addition, it formalized the role of the Arbitration Commission as the organ of the ICFY to which the Conference could address questions and seek perpetual advice.¹⁷

One of the principles laid down by the 1992 London Conference was that all succession issues should be resolved by the consensus of all five successor states. This far-reaching principle, which was respected during the entire negotiating process from 1992 through 2001, virtually led the negotiations into a stalemate, as it was impossible to reach common ground for agreement as long as the FRY claimed the position of the sole continuator to the SFRY. The negotiations for the adoption of the Agreement of Succession Issues in Vienna in 2001 were also conducted on the basis of consensus without any voting procedure. Such a negotiating process, as explained above, also continues regarding its implementation and the lack of cooperation of one or some of the parties to the Agreement may jeopardize its realization *ad infinitum*. The impediment of negotiations regarding the distribution of the SFRY's (and the NBY's) guarantees for the hard currency savings serve as the most striking example of the unwillingness of some of the successor states to cooperate.¹⁸

After the Dayton Peace Agreement was initialled on 21 November 1995, the ICFY structure was gradually dissolved by 31 January 1996 at the Peace Implementation Conference, held at Lancaster House in London on 8 to 9 December 1995.¹⁹ It was replaced by the Peace Implementation Council (PIC), which was entitled to continue the work of the ICFY in the new circumstances. It was also envisaged that the WG on state succession would continue its work within its terms of reference as long as necessary. The PIC was guided by the Steering Board under the presidency of the High Representative, Mr. Carl Bildt from Sweden. The role of the UN was substantially diminished and the negotiations on state succession were retransferred to Brussels, where they continued until the final phase in Vienna in May through June 2001. The High Representative of the PIC nominated Sir Watts as his special representative for state succession issues in spring 1996.

¹⁷ Work Programme of the Conference (1992).

¹⁸ For almost 10 years, Croatia did not agree to the continuation of negotiations under Article 7 of Annex C. The individual savers remained unpaid for more than two decades because of the inability of the successor states to agree on this issue. For details see *infra* at 3.3.

¹⁹ The General Framework Agreement for Peace in Bosnia and Herzegovina with accompanying Annexes (1–11) and Agreements was signed in Paris on 14 December 1995 and entered into force upon signature (Article 10). Slovenia and Macedonia are not parties to the Peace Agreement. 35 International Legal Materials (ILM) (1996), pp. 75–183.

2.2.2. The substantive legal framework of negotiations

The negotiations on state succession were not recorded and no official minutes exist regarding their contents. However, during the entire course of the negotiations there were drafts and non-papers introduced by a number of mediators nominated by the competent international bodies.²⁰

In order to establish the basic legal background for these negotiations, it must be noted that all five successor states to the SFRY (and Montenegro) are parties to the 1978 Vienna Convention on Succession of States in Respect of Treaties (Vienna Convention of 1978) by means of succession to treaties.²¹ On the other hand, only Croatia, Macedonia and Slovenia are parties to the Vienna Convention on Succession of States in respect of State Property, Archives and Debts of 1983 (Vienna Convention of 1983), while the FRY (and later Montenegro) are signatories only by means of succession.²² Norms contained in these conventions are of a dispositive nature and they reflect customary international law.²³ Initially, the successor states to the SFRY agreed that the Vienna Conventions of 1978 and 1983 would serve as the legal basis for solving the succession issues between them, but in the course of negotiations the FRY changed its affirmative position towards their application.²⁴

Likewise, at that time the FRY also contested Opinions Nos. 1–15 given by the Arbitration Commission of the (Peace) Conference on Yugoslavia from 7 December 1991 to 13 August 1993.²⁵ Nonetheless, these non-binding Opinions brought about the most valuable contribution regarding the clarification of numerous contemporary state succession issues, including the definition of the state property of the SFRY.²⁶ Although, as a matter of compromise, the Vienna

²⁰ Initially, the Portuguese diplomat Do Valle, then the UK diplomat Henry Darwin and after Darwin's death in September 1992, the Danish diplomat Jorgen Boyer, who was replaced by another Danish diplomat Alf Jonsson in 1993. Bohte, *Mednarodnopravni vidiki nasledovanja držav – II. del* [International Legal Aspects of State Succession – Part II] (1999), p. 684 and n. 52.

²¹ Status as of 31 May 2015. UN *Treaty Series*, vol. 1946, p. 3.

²² Not yet in force. Status as of 31 May 2015. The SFRY was a signatory. Slovenia became party after the adoption of the Agreement on Succession Issues. Off. Gaz. RS, No. 60/02, Treaties, No. 17/02.

²³ Bernhardt, *ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW* (1987), p. 448. See Opinion of the Arbitration Commission No. 1 of 7 December 1991, *infra* at n. 18: “The phenomenon of State Succession is governed by the principles of international law, from which the Vienna Conventions of [...] 1978 and [...] 1983 have drawn inspiration”. See also Stern, *LA SUCCESSION D'ÉTATS* (1996), pp. 164–176.

²⁴ Škrk, *Slovene Views on the Succession of States* (1996), p. 28.

²⁵ Opinions Nos. 1–10, 31 ILM (1992), pp. 1494–1526. Opinions Nos. 11–15, 32 ILM (1993), pp. 1586–1598.

²⁶ Škrk, *Slovene Views on the Succession of States* (1996), p. 27.

conventions on the succession of states and the Opinions of the Arbitration Commission are not explicitly mentioned in the Preamble or in any other part of the Agreement, their contribution to its final text must not be neglected and they remain an important interpretative tool for the meaning of the provisions of the Agreement.

The Vienna conventions of 1978 and 1983 also served as a basis for the informal drafts presented at different stages of the negotiating process. The first informal draft, “Do Valle’s Non-paper” was introduced to delegations as a starting point for the discussion in April 1992.²⁷ On the basis of the meeting in Brussels in July 1992, the Revised Non-paper on state succession of 17 August was prepared by the Conference on Yugoslavia.²⁸ Next, the ICFY prepared the Draft Treaty concerning succession to the former SFRY (Portion One) of 23 August 1994.²⁹ It contained a preamble, general provisions and parts on citizenship, acquired rights and pensions, state archives and succession to treaties.³⁰ As it was based on the fact that the former SFRY had been dissolved and ceased to exist, negotiations on the basis of this draft never began. Portion Two of the same draft, which contained provisions on the state property of the former SFRY, including the provisions on the division of foreign exchange reserves, immovable property abroad and state debts, was not formally submitted to the successor states.³¹

This process evolved after Sir Watts took up the position of special negotiator for succession issues.³² According to Professor Bohte, in the period from 1996 to 1998 he prepared a series of drafts as the basis for negotiations.³³ All these attempts, including the Mini-Agreement Package of 27 March 1998, which

²⁷ *Ibidem*, p. 22.

²⁸ Revised Parts A to F of the Note on Succession of States. *Ibidem*, pp. 22–23.

²⁹ *Ibidem*, p. 24.

³⁰ *Ibidem*.

³¹ Nonetheless, they became informally acquainted with its text. *Ibidem*.

³² Bohte, *Mednarodnopravni vidiki nasledovanja držav v luči novejših primerov nasledovanja držav – II. del* (1999), p. 687. According to Professor Bohte, Sir Watts acted as a genuine mediator as he consecutively provided to the successor states the drafts in different forms that more or less covered all succession issues, including the different variations of their legal ground. Bohte, *Sporazum o nasledstvu po SFRJ* (2001), p. 562.

³³ *Ibidem*, and n. 57. Memorandum, Informal Personal Non-Paper, Draft of 17 July 1996; Memorandum of Understanding on Succession Issues, Informal Personal Non-Paper, Draft of May 1997; Draft Framework Memorandum (17 July 1997); Draft Framework Agreement on Succession Issues, 13 November 1997, Draft Agreement on Certain Succession Issues, 6 January 1998, Draft Agreement on Succession in Respect of Archives, Citizenship, Pensions, Acquired Rights and Treaties, 25 February 1998; Mini-Agreement Package 27 March 1998.

was introduced with the aim to reach consensus on certain issues that did not directly tackle the dissolution of the SFRY, were rejected by the FRY.³⁴

Consequently, negotiations were suspended until December 2000. After the round of bilateral meetings between the special representative and the delegations in the capitals, negotiations resumed on 9 through 11 April 2001 in Brussels.³⁵ In preparation for the April 2001 meeting, the Slovene government instructed its delegation to insist on the distribution of BIS assets on the basis of the IMF key of distribution.³⁶ Indeed, the agreement on the distribution of BIS assets (gold and other reserves, and shares) on the basis of the IMF key was initialled by the heads of the five delegations on 10 April 2001 and now forms the Appendix to the Agreement on Succession Issues, an integral part of the document as a whole.³⁷ At the end of this meeting, the special representative's draft Agreement on Succession Issues of 11 April 2001 was distributed to the successor states in order to serve as the basis for the final round of negotiations held in Vienna from 14 to 25 May 2001.³⁸

3. The agreement on succession issues in the light of its object and purpose

3.1. The text of the agreement and the preamble

During the negotiations on succession issues the question was raised whether it would be possible to reach a final agreement by a series of partial agreements (*piecemeal* approach) instead of an overall succession treaty.³⁹ The Vienna Agreement on Succession Issues reflects this idea. It encompasses the basic text of the Agreement, which is relatively short and contains the Preamble and 13 articles,

³⁴ *Ibidem*, p. 688.

³⁵ Sir Watts visited Ljubljana from 21 to 23 February 2001. The agenda for the meeting included BIS, archives, diplomatic and consular properties, date(s) of succession, state property, foreign exchange reserves and credits, pensions and private property and acquired rights.

³⁶ Bosnia and Herzegovina 13.20%; Croatia 28.49%; Macedonia 5.40%; Slovenia 16.39%; FRY 36.52%.

³⁷ Article 6 of the Agreement.

³⁸ This draft was supplemented by Annexes A and G on Movable and Immovable Property and Rights and Interests of 23 April, 2001; Additional Information on Diplomatic Property of 26 April, 2001; Annex C (Financial Assets and Liabilities) of April 27 and, Additional Information on Financial Assets and Liabilities of 9 May 2001.

³⁹ Škrk, *Slovene Views on the Succession of States* (1996), p. 28.

including the implementation and the settlement of disputes mechanisms as well as the final provisions.

However, Article 3 provides that Annexes A–G set out the terms on which the subject matter of each Annex is settled.⁴⁰ According to Article 6, the Annexes and the Appendices⁴¹ to the Agreement are an integral part of the Agreement. The confirmation of the Appendix on BIS Assets of 11 April 2001 was also included in Paragraph 6 of the Preamble. These are important provisions which must be kept in mind at all times when interpreting the Annexes and Appendices in accordance with Articles 31–33 of the Vienna Convention on the Law of Treaties, 1969 (VCLT).⁴² The same applies to the Preamble as an interpretative tool for the Agreement as a whole, including its Annexes and Appendices.

First, the Preamble confirms the sovereign equality of all successor states which arose upon the break-up of the former SFRY. Literally, the Agreement applies the term *break-up* of the SFRY, as Sir Watts firmly avoided the usage of the term *dissolution* during the entire course of negotiations.⁴³ Next, the Preamble mentions the negotiating process under the auspices of the ICFY and the Peace Implementation Council. Professor Bohte establishes that while all other relevant resolutions of the UN Security Council relating to the SFRY were omitted from the final text of the Agreement, the Preamble has preserved the acknowledgement by the Security Council in its Resolution 1022 (1995) of the desirability of a consensual solution to outstanding succession issues.⁴⁴ Finally,

⁴⁰ Annex A: Movable and immovable property; Annex B: Diplomatic and consular properties; Annex C: Financial assets and liabilities (other than those dealt with in the Appendix to this Agreement); Annex D: Archives; Annex E: Pensions; Annex F: Other rights, interest, and liabilities; Annex G: Private Property and acquired rights.

⁴¹ Appendix on BIS Assets of 10 April 2001; Appendix to Annex B (list of diplomatic and consular properties); Appendix 1 to Annex C (Disclosure Authorisation to Central Banks and/or responsible ministries regarding data on financial and other assets of the SFRY held by third country central banks and/or other financial institutions); Appendix 2 to Annex C (assets due to the National Bank of Yugoslavia from banks in other countries from uncompleted clearing arrangements).

⁴² Off. Gaz. SFRY, Treaties, No. 30/72, Act on notifying succession, Off. Gaz. RS, 35/92, Treaties, 9/92.

⁴³ Bohte, *Sporazum o nasledstvu po SFRJ* (2001), p. 563 and n. 11. It must be pointed out that despite the fact that the Agreement firmly acknowledges and confirms the dissolution of the SFRY in terms of international law, it seems that there are still views expressed to the contrary. See, Dugard, Raić, *The role of recognition in the law and practice of secession* (2006), p. 119. The authors consider the case of Croatia as a successful secession from the SFRY. But they admit that “the creation of Slovenia and FYROM are not, however, clear examples of unilateral secession, as the central Yugoslav government implicitly accepted their separation from Yugoslavia”.

⁴⁴ Bohte, *Sporazum o nasledstvu po SFRJ* (2001), p. 563.

the last paragraph of the Preamble expresses the readiness of the successor states to resolve outstanding issues in accordance with international law, meaning that the rules and principles of international law constitute the legal ground for the settlement of the succession issues which are the subject of the Agreement.

The ‘chapeau’ Agreement does not contain a provision on the use of terms, but determines in Article 1 that the SFRY means the former Socialist Federal Republic of Yugoslavia. Article 2 includes the principle that the successor states must preserve the state archives, state property and those assets of the SFRY in which the successor state(s) have an interest in good repair and prevent any loss, damage or destruction. This provision applies mainly to Serbia, which continues the legal personality of the FRY, as the latter held in its possession the majority of the SFRY’s movable and immovable state property (including almost all diplomatic and consular properties),⁴⁵ archives and financial assets at the time of the adoption of the Agreement.

The implementation mechanism was set up in Article 4 by establishing a Standing Joint Committee composed of senior representatives of each successor state. The Committee’s principal task is to monitor the effective implementation of the Agreement and to serve as a forum in which issues arising in the course of this implementation are discussed (Paragraph 2). It was expected that the Committee would hold periodical meetings and conduct the implementation of the Agreement effectively.⁴⁶ Unfortunately, the implementation process has been extremely slow and has not met the expectations of Slovenia, in particular regarding the distribution of diplomatic and consular properties, guarantees for hard currency savings and state archives.⁴⁷ If successor states are not willing to participate in the Committee, this is not in conformity with their obligation to implement the Agreement in good faith in accordance with the Charter of the UN and international law (Article 9). In addition to the Committee of High or Senior Representatives, which are nominated by the governments of successor states, Committees of states’ representatives are established at a lower level with respect to specific issues and Annexes.

Article 7 stipulates that the Agreement finally settles the mutual rights and obligations covered by it. Initially, the negotiations on succession issues also in-

⁴⁵ On the date of signature of the Agreement three properties were possessed by Slovenia (Klagenfurt, Consulate General; Trieste, an apartment and Rome, an apartment) and one by Croatia (Vienna, residence). For details see the Agreement on Succession Issues, Appendix to Annex B.

⁴⁶ Pursuant to Article 4(2) the Committee makes recommendations to the Governments of the successor states.

⁴⁷ So far, the Committee has met only three times – in June 2005 (Skopje, Macedonia), in June 2007 (Brdo, Slovenia) and in September 2009 (Belgrade, Serbia). The next meeting is to be held in Sarajevo, Bosnia and Herzegovina.

cluded succession to treaties and citizenship.⁴⁸ During the course of negotiations the successor states resolved these two fundamental succession issues unilaterally and at the Vienna round no successor state insisted on these two issues to be part of the package deal. As a result, treaties and citizenship are not part of the Agreement on Succession Issues. In addition, Article 7 explicitly provides that the fact that the Agreement does not deal with certain other non-succession matters is without prejudice to the rights and obligations of the parties to this Agreement in relation to those matters. This blurred provision actually establishes that the war damage claims between the successor states are without prejudice in relation to succession issues.

The 'chapeau' Agreement also obliges each successor state to take on a basis of the reciprocity necessary measures in accordance with its internal laws to ensure that the provisions of the Agreement are recognised and effective in its courts, administrative tribunals and agencies and that the other successor states and their nationals have access to those courts, tribunals and agencies to secure the implementation of the Agreement. A similar provision is contained in Annex G on acquired rights.⁴⁹

According to Article 12, the Agreement was done in English original(s) and entered into force thirty days after the deposit of the fifth instrument of ratification, i.e. on 2 June 2004. It was deposited by the High Representative with the Secretary General of the UN as depositary (Article 13). No reservations were allowed to the Agreement on Succession Issues (Article 10).

3.2. *The distribution of the state property of the SFRY (Annexes A, B, D and F)*

The definition of SFRY state property and the contents of the inventory of this property has been one of the most disputed issues since the beginning of the negotiations on state succession. It must be noted that the Vienna Convention of 1983 does not contain a definition of state property. During the course of negotiations, two completely opposite concepts of SFRY state property emerged. Four successor states, namely Bosnia and Herzegovina, Croatia, Macedonia and Slovenia took the common position that the property of the

⁴⁸ Škrk, *Slovene Views on the Succession of States* (1996), pp. 33–34 and pp. 41–42. See Mahnič, *The Republic of Slovenia, the Concluding of International Treaties, And the Succession Regarding International Treaties* (1996), pp. 45–53. See also Džunov, *Succession of States in Respect of Citizenship* (1999), pp. 143–159.

⁴⁹ For details see *infra* at 3.5.

former federation and of its statal and parastatal organs and institutions formed the state property of the predecessor state. On the other hand, the FRY took the position that in the post-World War II legal system the notion of state property was virtually unknown, apart from the period between 1946 and 1953.⁵⁰ Therefore, the definition of state property did not exist within the legal system of former Yugoslavia and it was left to the successor states to the SFRY to agree on this definition by negotiations. The FRY made its own List of Inventory Items, which encompassed practically all social property⁵¹ of the SFRY.⁵² The Vienna Convention of 1983 proved to be indispensable during the negotiations despite the FRY's strong opposition to refer to its provisions.

Needless to say, the date of the succession of states plays a pivotal role regarding the effects of state succession with respect to state property, archives and debts.⁵³ As a result of compromise, the Agreement on Succession Issues does not contain a uniform date of succession but resorts to a pragmatic approach. However, the most often used reference date entailing legal consequences is the date on which an individual successor state proclaimed its independence.

3.2.1. *Movable and immovable property (Annex A)*

In Annex A, the territorial principle prevailed and all the movable and immovable property of the Federation became the property of the successor state where it was situated on the day of proclamation of its independence (Articles 2(1) and 3(1)).⁵⁴

However, the territorial principle is obviously in favour of the FRY because most of the movable and immovable federal property was located on its terri-

⁵⁰ Škrk, *Slovene Views on the Succession of States* (1996), p. 36.

⁵¹ »Social property« totally or partly created by juridical persons from two or more federal entities, or financed with the federal budget and other federal funds, or with funds of two or more federal entities. The FRY's claim did not take into account the date or dates of the succession of states. This allegation opened the door to »historic claims«, dating from the creation of the common Yugoslav State on 1 December 1918 until the alleged secession of the Federal Republics in 1991 and 1992. Degan, *State Succession, Especially in Respect of State Property and Debts* (1993), p. 149.

⁵² Škrk, *Slovene Views on the Succession of States* (1996), pp. 35–36.

⁵³ The date of the passing of state property and debts brings about enormous economic consequences for a predecessor state and a successor state or, for successor states in case of dissolution of a state. Škrk, *Date of the Succession of States* (2003), p. 353.

⁵⁴ Principle proposed by the special negotiator Sir Watts by letter to successor states dated 13 March 2001. Bohte, *Sporazum o nasledstvu po SFRJ* (2001), p. 567. The date of independence has been inserted instead of applying the term the date of succession from Article 34 of the Vienna Convention of 1983.

tory. Sir Watts explained that, in his view, it would be very difficult, if not impossible, to determine and identify as well as to assess the value of the SFRY's state property. Article 1 stipulates that distribution of state property is done "in order to achieve an equitable solution". This is to be understood in relation to Article 8, which points out that if any successor state considers that the application of Articles 1 to 3 of Annex A (application of territoriality principle) results in a significantly unequal distribution of the SFRY's state property (other than military property) among the successor states, that state may raise the matter in the Joint Committee established pursuant to Article 5 of this Annex. This provision therefore provides for a corrective mechanism in case of major discrepancies in the property distribution of the successor states. However, although such a mechanism exists, it has not so far been used in practice.⁵⁵

Sir Watts devised the category of tangible movable state property of the SFRY. According to Paragraph 1 of Article 3 it shall pass to the successor state on whose territory that property was situated on the date on which it proclaimed independence. However, this principle does not apply to tangible movable state property of great importance to the cultural heritage of one of the successor states and which originated from the territory of that state (Paragraph 2 of Article 3). So far only Slovenia has identified property of this kind which is situated in Serbia. The restitution of movable cultural property which should be returned to the successor state of its origin is one of the issues where the implementation of the Agreement should be enhanced in the future.

The tangible movable property of the SFRY which formed part of the military property of the state is supposed to be the subject of special arrangement to be agreed on among the successor states (Article 4). One of the issues which has yet to be dealt with is that of the military equipment, some of which was used during the war, and some of which is out of date.⁵⁶ It appears unlikely that this issue will be dealt with adequately in the future.

There were lengthy debates concerning the date when a property title passes to a successor state. The pragmatic approach was taken that the title to and rights regarding that property shall be treated as having arisen on the date on which a successor state proclaimed independence, and any other successor state's title to and rights regarding the property shall be treated as extinguished from that

⁵⁵ In practice it is difficult for such compensation to be obtained for the benefit of any of the successor states because it requires the consent of all five Yugoslav successors, which have representatives in the Committee. Hasani, *The Evolution of the Succession Process in former Yugoslavia (2006–2007)*, p. 131.

⁵⁶ For this reason, the Agreement itself excludes from the succession arrangements the military property of the former Yugoslav army. *Ibidem*, p. 132.

date (Article 7). The provisions of this Annex are without prejudice to the provisions of Annexes B and D concerning diplomatic and consular properties, and archives (Article 9).

For the purpose of ensuring the proper implementation of the provisions of this Annex a Joint Committee on Succession to Movable and Immovable Property was established. The Joint Committee was supposed to commence its work within 3 months of the signature of this Agreement (Article 5). One of the issues the Joint Committee might deal with is a provision of Article 6, namely, that the successor state on whose territory the immovable and tangible movable property is situated shall determine whether that property was state property of the SFRY in accordance with international law. Unfortunately, the Joint Committee has not yet met, and it has been waiting on Serbia to organize this meeting since 2009.

3.2.2. *Diplomatic and consular properties (Annex B)*

From the outset it has been clear that the diplomatic and consular properties represent the property of the SFRY *par excellence*.⁵⁷ According to the Appendix to Annex B, it comprises 123 real estate units in third states, which were owned or rented on favourable terms by the former SFRY.⁵⁸ At the time of the dissolution of Yugoslavia the FRY (now Serbia) was in possession of almost all the immovable and movable property of the diplomatic and consular missions of the former Federation abroad.⁵⁹

In Annex B it was agreed to allocate this property in kind (i.e. as properties) rather than by way of monetary payments. The states agreed that Bosnia and Herzegovina and Macedonia were to receive a greater share than they would receive under the IMF key (Article 2). As an interim and partial distribution of SFRY diplomatic and consular properties, the successor states have selected the following properties for allocation (Article 1): Bosnia and Herzegovina – London (Embassy); Croatia – Paris (Embassy); Macedonia – Paris (Consulate General); Slovenia – Washington D.C. (Embassy);⁶⁰ Federal Republic of Yugoslavia – Paris (Residence).

⁵⁷ Bohte, *Sporazum o nasledstvu po SFRJ* (2001), p. 569.

⁵⁸ Škrk, *Date of the Succession of States* (2003), pp. 369. However, it should be stressed that this property composes only one percent of the overall property of the former Yugoslavia. Hasani, *The Evolution of the Succession Process in former Yugoslavia* (2006–2007), p. 133.

⁵⁹ Degan, *State Succession, Especially in Respect of State Property and Debts* (1993), p. 150.

⁶⁰ Slovenia wanted to obtain the building of the Permanent mission of the SFRY to the UN on the 5th Avenue in New York. However, because the FRY also expressed interest for that

The diplomatic and consular properties shall be distributed in such a way that the total and final distribution in kind of diplomatic and consular properties reflects as closely as possible the following proportions by value for each state: Bosnia and Herzegovina – 15%; Croatia – 23.5%; Macedonia – 8%; Slovenia – 14%; Federal Republic of Yugoslavia – 39.5% (Article 3). In Article 4 the Agreement sets out the diplomatic and consular properties of the SFRY in the list appended to this Annex. That list groups properties according to their geographical regions.⁶¹ Each successor state shall, within each geographical region, be entitled to its proportionate share. The distribution of properties shall be by agreement between the five states. The basis for the proportionate distribution of properties is the valuation in the “Report dated 31 December 1992 on the valuation of the assets and liabilities of the former Socialist Federal Republic of Yugoslavia as at 31 December 1990”.

The movable state property of the SFRY which forms part of the contents of diplomatic or consular properties shall pass to whichever successor state acquires the diplomatic or consular properties in question (Article 4, Paragraph 4). However, such movable state property which is of great importance to the cultural heritage of one of the successor states shall pass to that state. The Agreement also calls upon successor states which are in a position to maintain and keep in repair any diplomatic or consular properties of the SFRY to take the necessary steps to that end. The Agreement also envisages the establishment of a Joint Committee to ensure the effective implementation of this Annex (Article 5).

This is one of the Annexes of the Agreement that has been most successfully implemented. Approximately more than 60% of the total number of diplomatic and consular property was distributed among successor states, but many of properties have yet to be handed over by Serbia to other successor states. The remaining difficulty is the individual successor states’ acquisition of legal ownership from Yugoslavia, since this involves long and complicated procedures. The Joint Committee pursuant to Annex B has met on many occasions, but there has been a stalemate since 2012. A meeting is to take place in Ohrid (Macedonia), where the successor states are to discuss further allocations and possible joint sales of the diplomatic property of Yugoslavia abroad. Despite the fact

building, no agreement was reached. Bohte, *Sporazum o nasledstvu po SFRJ* (2001), p. 569. Consequently, Slovenia got the second building on its preference list, which was the Embassy in Washington.

⁶¹ The geographical groups are: OECD, Rest of Europe, Latin America and Caribbean, Asia, North Africa, Africa South of the Sahara. The properties are then listed according to different geographical regions.

that the implementation of Annex B has been one of the most effective parts of the Agreement, there are still issues to be resolved. Primarily, this relates to the biggest and most valuable properties like the ones in New York, Moscow, New Delhi and Tokyo. Furthermore, the allocation of the military missions of the SFRY abroad has yet to be dealt with.

In the allocation process Slovenia obtained the following diplomatic or consular buildings of the SFRY: Washington (Embassy), Klagenfurt (Consulate), Milano (Consulate), Rome (Residence), Morocco (Embassy and Residence), Mali (Residence), Brasilia (Residence for diplomats), São Paulo (Consulate), and Dar Es-Salaam (Embassy and Residence). Buildings located outside Europe have not yet been handed over to Slovenia. Slovenia also obtained most of its cultural heritage (approximately 200 works of art), which was located in diplomatic and consular properties of the SFRY.

3.2.3. Archives (*Annex D*)

State archives are indispensable to the normal functioning of every state.⁶² The discussion of the provisions on the archives was controversial⁶³ because of the FRY's definition of state archives.⁶⁴ Nonetheless, the basis for negotiations was the Vienna Convention of 1983,⁶⁵ supplemented by the professional advice formulated by the International Council on Archives (ICA).⁶⁶

The Agreement defines "SFRY State archives" as all documents, of whatever date or kind and wherever they may be located, which were produced or received by the SFRY (or by any previous constitutional structure of the Yugoslav State after 1 December 1918) in the exercise of its functions and which, on 30

⁶² Škrk, *Slovene Views on the Succession of States* (1996), p. 38.

⁶³ Bohte, *Sporazum o nasledstvu po SFRJ* (2001), p. 576. See also Oblak-Čarni, Bohte, *Succession to the Archives of the Former SFR Yugoslavia* (1999), pp. 171–185.

⁶⁴ The FRY wished to impose the definition of state archives, which substantially departs from the notion of state archives as defined by the Vienna Convention of 1983 and the Law on the Archive Materials of the Federation of 1986. According to the FRY's position, state archives indispensable for the functioning of the FRY and archives constituting the historical and cultural heritage of Yugoslavia should remain its property, regardless of where they are situated, while other successor states would only be entitled to state archives indispensable for their regular functioning. Škrk (1996), pp. 39–40.

⁶⁵ Former Yugoslavia was one of four states which signed the Vienna Convention of 1983, but ratification did not follow. Seršić, *Sukcesija država u pogledu državnih arhiva* [Succession of States as Regards State Archives] (1992), p. 976.

⁶⁶ Bohte, *Sporazum o nasledstvu po SFRJ* (2001), p. 576. With numerous amendments the FRY tried to preserve the bulk of the archives in Belgrade, also including their preservation as the common heritage of mankind.

June 1991, belonged to the SFRY in accordance with its internal law and were, pursuant to the federal law on the regulation of federal archives, preserved by it directly or under its control as archives for whatever purpose (Article 1(a)). For archives therefore a single reference date has been applied.⁶⁷

The Agreement also defines “Republic or other archives” which refers to the archives of any of the states in their former capacities as constituent Republics of the SFRY, or of their territorial or administrative units, and means all documents⁶⁸, of whatever date, kind or location, which were produced or received by any of those Republics or territorial or administrative units in the exercise of their functions and which, on 30 June 1991, belonged to them (Article 1(b)).

If Republic or other archives were displaced from the Republic to which they belonged, or if SFRY state archives were displaced from their proper location, they shall, subject to the provisions of this Annex and in accordance with international principles of provenance, be restored respectively to the Republic to which they belonged or their proper location as soon as possible by the state which currently has control of them (Article 2). The part of the SFRY state archives (administrative, current and archival records) necessary for the normal administration of the territory of one or more of the states shall, in accordance with the principle of functional pertinence, pass to those states, irrespective of where those archives are actually located (Article 3).

According to Professor Bohte, the foregoing provisions of Articles 2 and 3 are the most important for Slovenia because they stipulate that the archives must be restored to the republics in conformity with the principle of provenance; on the other hand, the state archives, necessary for the normal administration of their territory shall pass to those states in accordance with the principle of functional pertinence. The part of the SFRY state archives which (i) relates directly to the territory of one or more of the states, or (ii) was produced or received in the territory of one or more of the states, or (iii) consists of treaties of which the SFRY was the depository and which relates only to matters concerning the territory of, or to institutions having their headquarters in the territory of one or more of the states, shall pass to those states, irrespective of where those archives are actually located (Article 4(a)).

According to Article 4(b)(iii), the original text or certified copies of the Treaty of Osimo and the Osimo Agreement of 1975, and any related agreements, archives and *travaux préparatoires* concerning their negotiation and implemen-

⁶⁷ Škrk, *Date of the Succession of States* (2003), p. 370.

⁶⁸ The term “Documents” means *inter alia* film, audio and video tapes and other recordings, as well as any form of computerised records, and includes documents which constitute cultural property (Article 1(c)).

tation, shall be made available forthwith to Croatia and Slovenia in order to enable them, in full possession of the relevant material, to negotiate with Italy over the consequences of those treaties for their respective states. Both states shall agree which one will receive the original and enable the other to make copies. No agreement has been reached on this issue so far. Both delegations met only once in 2010. Hopefully, after the boundary dispute between Slovenia and Croatia is resolved by means of the ongoing arbitral proceedings, the two states will be able to pursue joint action in the interest of both states in order to resolve this issue.

The states shall, by an agreement to be reached within 6 months of the entry into force of this Agreement, determine the equitable distribution of the archives among themselves or their retention as the common heritage of the states which shall have free and unhindered access to them. If no such agreement is reached, the archives shall become common heritage. In either event, each state may make copies of the archives in question on an equitable cost sharing basis (Article 6(a)).

The states shall within 24 months of the date on which this Agreement enters into force identify, and circulate to each other, lists of groups of archives to which the common heritage principle should apply, and shall thereafter seek to agree on a single such list within a further period of 3 months (Article 6(b)).

Article 7 stipulated that, pending implementation of the Agreement, the representatives of the states concerned should gain immediate free and unhindered access to the SFRY state archives, dated on or before 30 June 1991.

Already in 2006 Slovenia submitted a list of archives which are to be restored to it in line with the Agreement. Additionally, in 2015, Slovenia submitted a list of treaties which relate to its territory or its institutions in order to receive their originals or certified true copies.

Within 3 months of the date on which this Agreement enters into force, representatives responsible for archives in each of the successor states were supposed to meet to give effect to this Annex while the implementation was to be supervised by the Standing Joint Committee (Article 12).

However, in practice, the implementation of these provisions was difficult, especially immediately after the Agreement was signed. Archivists encountered a number of obstacles in obtaining documents. It should be noted that lately progress has been made in this regard and the successor states are discussing the possibility to digitalize those archives that represent their common heritage. However, successor states still face difficulties in obtaining documents from the Federal Archives in Belgrade, especially the military, police and bank archives.

3.2.4. Other rights, interests, and liabilities (Annex F)

This Annex has only two articles. The first one states that all rights and interests which belonged to the SFRY and which are not otherwise covered by this Agreement (including, but not limited to, patents, trade-marks, copyrights, royalties, and claims of and debts due to the SFRY) shall be shared among the successor states, taking into account the proportion for the division of SFRY financial assets in Annex C of this Agreement. The division of such rights and interests shall proceed under the direction of the Standing Joint Committee established under Article 4 of the Agreement. Article 2 states that all claims against the SFRY which are not otherwise covered by this Agreement shall also be considered by the Standing Joint Committee established under Article 4 of the Agreement.

3.3. The financial assets and liabilities of the former SFRY (Annex C)

In the eyes of public opinion and political discourse, Annex C is seen as the most important part of the Agreement – firstly due to its financial implications (the division of assets and liabilities), and secondly because of the long-lasting unresolved issue of “old” foreign-currency savings, which has on many occasions been the reason for the deterioration of bilateral relations among the successor states and has drawn the attention of the international community and international jurisprudence. An important characteristic of this Annex is the difficulty to define the state of its implementation in a clear-cut manner. On the one hand, it contains some very important provisions which still remain unresolved by the state parties to the Agreement, while on the other hand, many financial issues were settled before or immediately after the Agreement was concluded.

The provisions of this Annex deal with almost all aspects of the division of the financial assets and liabilities which belonged to the SFRY and were identified in 2001, except those that were in practice settled beforehand and distributed on the basis of special agreements. Since the Agreement was signed only a decade after the break-up of Yugoslavia, the successor states as new sovereign states made individual or joint financial settlements of their share of the SFRY assets and liabilities with institutions like the International Monetary Fund, the World Bank, the European Bank for Reconstruction and Development, the African Development Bank, the Inter-American Development Bank, the Euro-

pean Investment Bank, the Bank for International Settlements⁶⁹, the Post Office Savings Bank and its branches, the members of the “Paris Club” and “London Club”.⁷⁰ These distributions were declared final and were not to be reopened by any of the successor states in the context of succession issues (Article 3(3)).

Firstly, Annex C provides a clear and detailed definition of the financial assets and liabilities of the predecessor state. In Article 1 the SFRY’s financial assets are comprised of “all financial assets of the SFRY (such as cash, gold and other precious metals, deposit accounts, and securities)”, including in particular accounts and other financial assets in the name of the SFRY Federal Government Departments, Agencies and NBY; foreign currency assets, gold and precious metals of the SFRY or the NBY; sums due to the NBY from banks in other countries, financial quotas and drawing rights of the SFRY, NBY or other federal organs in international financial organizations, as well as financial assets held with such organizations. The SFRY’s financial liabilities are, in accordance with Article 2, comprised of the “debts of the SFRY, debts guaranteed by the SFRY and financial claims against the SFRY”, principally the external debts of the SFRY⁷¹ to official creditors, the international financial institutions, commercial and other creditors; the sums payable by the NBY to banks in other countries; as well as liabilities of the SFRY, NBY or other federal institutions towards international financial organizations. Other financial liabilities include guarantees by the SFRY or the NBY of hard currency savings deposited in a commercial bank or any of its branches in any successor state before the date on which it proclaimed independence⁷²; and guarantees by the SFRY of savings with the Post Office Savings Bank at its branches in any of the Republics of the SFRY (Article 2(3)).

Second, Annex C identifies the assets to be distributed – in Article 4 on a net basis (the SFRY’s ownership of a 27% share of the capital of the Yugoslav Bank for International Economic Cooperation and the net amount due to the NBY from banks in other countries) and in Article 5 in values (foreign financial

⁶⁹ The agreement on SFRY’s assets (gold, reserves, shares) at BIS, which were already divided in equitable shares forms the Appendix to the Agreement. See *supra* at 3.1.

⁷⁰ On the negotiations prior to the Agreement, see Stanič, *Financial Aspects of State Succession* (2001).

⁷¹ As regards the external debt it is important to note that the allocated debt (if the final beneficiary of the debt is located on the territory of a specific successor state or group of successor states) is not subject to succession and is accepted by the successor state on the territory of which the final beneficiary is located. Article 2(1)(b). On these issues and more on Yugoslavia’s external debt, see Mrak, *Succession to the Former Yugoslavia’s External Debt* (1999), pp. 159–170. Generally on the succession of state’s debts, see Brownlie, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (2008), pp. 653–654.

⁷² In connection with Article 7, see *infra* at 3.3.1.

assets – monetary gold, foreign exchange accounts held at foreign commercial banks, foreign exchange accounts held at SFRY joint venture banks abroad and gold formerly held by the France-UK-USA Gold Commission). These assets are to be distributed among the successor states in equitable proportions set by Annex C (Slovenia gets 16% of these assets).⁷³ If any other financial assets are to be found in the five years following the signature of the Agreement, they shall also be distributed.

These provisions in fact evaluate and/or define which assets are to be divided among the successor states. Thus far the distribution of the monetary gold and assets in foreign exchange accounts held at foreign commercial banks have been settled successfully. A still outstanding issue is the division of foreign exchange accounts held at SFRY joint venture banks, where the amount established in the Agreement (645.55 million USD on 31 March 2001) differs greatly from the values identified as available assets in these banks after the signature of the Agreement.

And lastly, Article 6 sets up a Committee of representatives of the successor states with the aim to arrange the foreseen distributions as quickly as possible. This Committee started its work immediately after the Agreement was signed and proceeded with its effective work until 2009. After this period a stalemate set in. The last meeting took place at the end of 2014 in Skopje, Macedonia.

In addition to the pending issue of the distribution of the guarantees of hard currency savings, which is analysed in detail below, there is also the question of the SFRY's unpaid obligations to the United Nations. Following long negotiations and discussions among the successor states⁷⁴, the UN Secretariat and other UN member states, in 2008 the General Assembly of the UN adopted resolution 63/249 on the unpaid assessed contributions of the former Yugoslavia. The resolution decided that the unpaid assessed contributions to the account of the former Yugoslavia up to 27 April 1992 amount to 1,254,230 USD and shall be apportioned among the successor states of the SFRY taking into account the respective succession dates and the proportions set forth in

⁷³ Article 5. A special arrangement is made on the distribution of the financial liabilities of the SFRY under the Agreement concluded between the SFRY and Italy on the Final Settlement of Reciprocal Obligations, 1983, and regarding the 1955 Trieste and Gorica Agreements, see Article 8(2). Slovenia and Croatia as the beneficiaries are jointly liable to carry out the obligations from these agreements.

⁷⁴ It was impossible to reach any agreement on the debt of the SFRY to the UN while the FRY (now Serbia) claimed to be the continuity of the SFRY, together with its seat in the UN. See, *infra* at 1.; Bühler, STATE SUCCESSION AND MEMBERSHIP AND MEMBERSHIP IN INTERNATIONAL ORGANIZATIONS (2001), pp. 180-248; Polak Petrič, Kronologija mednarodnopravno pomembnih dogodkov [The Chronology of Important International Legal Events] (2012), pp. 79-80.

Article 5 (2) of Annex C to the Agreement on Succession Issues.⁷⁵ The successor states were urged to inform the UN Secretary-General as soon as possible of their respective shares of the outstanding amounts and credits.⁷⁶ Until today the successor states have not yet agreed on their respective shares in accordance with the resolution. However, in 2013 an important achievement was made in the framework of the International Atomic Energy Agency (IAEA) – the successor states agreed, under the leadership of the IAEA Secretariat, on the division of the SFRY's debt to this specialized agency. This is to be seen as an important precedent for future talks on the distribution of Yugoslav liabilities to other international organizations.

3.3.1. Background on the issue of “old” foreign-currency savings

This outstanding issue of succession originates in the last years of the existence of the SFRY, when the monetary crisis of the 1980s caused Yugoslav banks increasing liquidity problems, resulting in legislation which substantially restricted the withdrawal of foreign-currency savings. The SFRY introduced a system for “re-depositing” foreign currency, allowing banks to transfer citizens’ foreign-currency deposits to the NBY, which assumed the currency risk.⁷⁷ Banks were granted dinar loans by the NBY in return for the value of the re-deposited foreign currency.⁷⁸ These foreign-currency savings remained frozen when the SFRY disintegrated in 1991/92 and are today referred to as “old” foreign-currency savings. Since the breakup of Yugoslavia was violent and without consent the successor states used different methods to assume the guarantee for foreign-currency savings from the former common state.

In 1991, at the time of the proclamation of its independence, Slovenia through the Constitutional Act⁷⁹ assumed a statutory guarantee from the SFRY for »old« foreign-currency savings in all banks and bank branches on its territory, including foreign banks and regardless of the citizenship of the depositors concerned.⁸⁰

⁷⁵ A/RES/63/249. URL: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/63/249.

⁷⁶ *Ibidem*.

⁷⁷ ECtHR, Grand Chamber Judgment, *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and “The former Yugoslav Republic of Macedonia”* (Application no. 60642/08) (*Ališić* judgement), para 17.

⁷⁸ The dinars so received were used by banks to offer loans, at interest rates below the rate of inflation, to companies based, as a rule, in the same territorial unit. *Ibidem*, para. 19.

⁷⁹ Article 19(3) of the 1991 Constitutional Act on the Implementation of the Fundamental Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia, *Off. Gaz. RS*, No. 1/91.

⁸⁰ Council of Europe, Action Plan of the Republic of Slovenia (2015), p. 1.

This means that it has applied the territoriality principle⁸¹ and converted the banks' liabilities towards depositors into public debt⁸². The same principle was applied by Macedonia, and with some modifications also by Serbia.⁸³

Croatia and Bosnia and Herzegovina did not follow this path. After independence Croatia repaid "old" foreign-currency savings based on the principle of the bank's head office, namely in domestic banks and their foreign branches. In addition, it has according to the principle of territoriality, but applied only to Croatian citizens, allowed the depositors of foreign banks' branches to transfer their "old" foreign-currency savings to 25 Croatian domestic banks⁸⁴, which then proceeded by transferring them to the Croatian public debt with Croatia ensuring funds for repayment by issuing bonds (i.e. transferred deposits).⁸⁵

The legislation on this matter in Bosnia and Herzegovina changed over time. After the war, in 1997 the Federation of Bosnia and Herzegovina (FBH) assumed liability for "old" foreign-currency savings in banks and branches placed in its territory⁸⁶ and they could be used in the privatization process to purchase state-owned flats and companies. In 2004 the FBH enacted new legislation, namely it undertook to repay "old" foreign-currency savings in domestic banks regardless

⁸¹ The principle of territoriality is in line with the International Monetary Fund and the World Bank's practices. This principle is suitable for dividing bank liabilities which arose according to the territorial organisation of the banking system in the SFRY – individual banks were granted loans by the NBY on the basis of the foreign exchange deposits and those loans were almost exclusively used in the region where the bank in question operated. *Ibidem*. The territorial principle is also in line with the International Law Association Resolution No. 3/2012 of the Committee on International Monetary Law (Sofia).

⁸² Zakon o poravnavanju obveznosti iz neizplaćanih deviznih vlog [Old Foreign-Currency Savings Act], Off. Gaz. RS, No. št. 7/93.

⁸³ Only in 1998 and then again in 2002 did Serbia agree to repay, partly in cash and partly in government bonds, "old" foreign-currency savings in domestic branches of domestic banks of its citizens and of citizens of all states other than the successor states of the SFRY together with "old" foreign-currency savings in foreign branches of domestic banks of citizens of all states other than the successor states of the SFRY. The savings of citizens of the SFRY successor states other than Serbia deposited in all branches of Serbian banks, both domestic and foreign, as well as the savings of Serbian citizens in Serbian banks' branches located outside Serbia remained frozen pending succession negotiations. *Ališić* judgement, paras. 44–46.

⁸⁴ Zakon o pretvaranju deviznih depozita građana u javni dug Republike Hrvatske, Off. Gaz. RC, No. 106/93.

⁸⁵ The majority of these deposits were transferred to Zagrebačka banka and Privredna banka Zagreb, which are now claiming repayment from Ljubljanska banka (LB) and Nova Ljubljanska banka (NLB) on the basis of the authorisations issued by the Croatian finance minister. Although Slovenia and Croatia have signed a Memorandum of Understanding on this issue, this is still an outstanding dispute between the two states. See *infra*.

⁸⁶ Zakon o utvrđivanju i realizaciji potraživanja građana u postupku privatizacije, Off. Gaz. FBH, Nos. 27/97, 8/99, 45/00, 54/00, 32/01, 27/02, 57/03, 44/04, 79/07 and 65/09.

of the citizenship of the depositor concerned, but it has explicitly excluded its liability for such savings in the branches of Ljubljanska Banka (LB) Ljubljana, Investbanka or other foreign banks.⁸⁷ In 2006, this liability passed from the FBH to the state.

Because of the different approaches and practices of the successor states, based mainly on their understanding of the matter and national and financial interests, hundreds of thousands of depositors were left with no repayment for more than 20 years. They filed numerous legal actions against the successor states in their domestic courts and abroad, as well as at the European Court of Human Rights (ECtHR). As regards Slovenia, this case is closely linked to the LB and the depositors in its Zagreb and Sarajevo branches.⁸⁸

Such was the situation when, 10 years after the break-up of Yugoslavia, the Agreement on Succession Issues was negotiated and the successor states could not agree on the principle of the distribution of this liability even during the negotiations in Vienna. Croatia and Bosnia and Herzegovina considered this a civil matter (bank-depositors relationship) to be placed in Annex G and the apportionment to be done according to the principle of the location of the legal entity's/the bank's head office. The Slovenian standpoint was that this matter should be dealt as a matter of public law, i.e. a succession matter and proposed that the remains of the foreign currency reserves of the NBY should first be used to pay the remaining, as yet unpaid individual depositors.⁸⁹ This was one of the most important open questions in the negotiations, and the destiny of the whole Agreement depended on its solution. The provisions in Annex C thus

⁸⁷ *Ališić* judgement, para. 27.

⁸⁸ The commercial banking system in the SFRY consisted of basic and associated banks (basic banks had a separate legal personality, but were integrated into the structure of associated banks). Until 1990 LB Ljubljana operated as an associated bank, established by and for the benefit of a number of basic banks, including Ljubljana Basic Bank Sarajevo and Ljubljana Basic Bank Zagreb, which had separate legal personalities under the laws of the republics in which they were located. During the 1989–1990 economic reforms, banking regulations allowed basic banks to opt for an independent status, while others became branches (without legal personality) of the former associated banks. This reform due to the break-up of Yugoslavia was not finished. Since LB Ljubljana was on the verge of bankruptcy, Slovenia had to place it into rehabilitation, which was concluded through the 1994 restructuring split operations between LB Ljubljana and the newly founded NLB Ljubljana. Pursuant to the territorial principle, no assets or liabilities of the main branches in the other successor states were transferred to NLB. Article 22(b) of the Constitutional Act on the Implementation of the Fundamental Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia, as Amended in 1994, Off. Gaz. RS, No. 45/94.

⁸⁹ Bohte, *Sporazum o nasledstvu po SFRJ* (2001), p. 575.

represent a compromise, reached at late hours of the night on the last day of negotiations in 2001 in Vienna.

Article 2 of Annex C recognizes that »guarantees by the SFRY or its National Bank of Yugoslavia of hard currency savings deposited in a commercial bank and any of its branches in any successor state before the date on which it proclaimed independence» are considered financial liabilities of Yugoslavia. This means that this is a succession matter, a common liability which is to be divided among the successor states. However, the Agreement does not itself regulate the form of distribution among successor states, but rather imposes on them the obligation to negotiate and reach an agreement on the distribution under the auspices of the Bank for International Settlements (”BIS”). The famous Article 7 of Annex C reads as follows:

”Guarantees by the SFRY or its NBY of hard currency savings deposited in a commercial bank and any of its branches in any successor State before the date on which it proclaimed independence shall be negotiated without delay taking into account in particular the necessity of protecting the hard currency savings of individuals. This negotiation shall take place under the auspices of The Bank for International Settlements.”

Immediately after the Agreement was concluded, in 2001 and 2002, the successor states engaged in four rounds of negotiations under the auspices of the BIS and the leadership of the mediator Hans Meyer, but without success. In 2002, BIS urged all states concerned to assume a stance and give their consent to continue negotiations, since it was ready to consider the possibility of further cooperation provided that all five successor states agreed.⁹⁰ Slovenia, Bosnia and Herzegovina and Macedonia provided written consent, while the State Union of Serbia and Montenegro gave verbal consent to resume negotiations following a favourable response by other successor states. Croatia failed to provide any response until 2010.

Meanwhile, in 2004, the Parliamentary Assembly of the Council of Europe adopted resolution no. 1410 (2004) on the »Repayment of the deposits of foreign exchange made in the offices of the Ljubljanska banka not on the territory of Slovenia, 1977–1991«, stating that the matter of compensating so many thousands of individuals could best be solved politically, between the successor states, and appealing to them to address without further delay the plight of the depositors of foreign-currency savings in former Yugoslav banks.⁹¹ It further

⁹⁰ Archives of the Ministry of Foreign Affairs of the Republic of Slovenia.

⁹¹ ECtHR, Grand Chamber Judgment, *Kovačić and Others v. Slovenia* (Applications nos. 44574/98, 45133/98 and 48316/99) (*Kovačić* judgement), para. 188.

proposed the establishment of a common fund with contributions from the successor states, principally pursuant to the territorial principle, to service the outstanding “old” foreign-currency debt.⁹² The idea was never carried out due to disagreement among the successor states.

The political, not just legal importance of the matter is clear from the fact that the issue of the “old” foreign-currency debt of Yugoslavia was one of the most important problems to be settled before Croatia’s accession to the EU.⁹³ In October 2010 an agreement was reached by the prime ministers of Slovenia and Croatia (Pahor-Kosor). After almost a decade, the Croatian side finally forwarded a letter to BIS expressing its willingness to resume negotiations in accordance with Article 7 of Annex C to the Agreement and consequently Slovenia withdrew its reservations as regards Chapter 4 (Free Movement of Capital) of Croatia’s EU accession negotiations. However, the matter was not settled. Soon after, negotiations were conducted by experts appointed by Slovenia and Croatia (Arhar-Rogić) concerning “transferred foreign deposits”. On 11 March 2013, as a result of these negotiations and with a view to ensuring the ratification process of the Treaty on the Accession of Croatia to the EU and after repeated calls from the EU, a Memorandum of Understanding was concluded in Mokrice. Slovenia and Croatia agreed in this international agreement that this is a succession issue and to “actively proceed with the continuation of negotiations under the auspices of the BIS” to “find a comprehensive solution for this issue as soon as possible.”⁹⁴ Until today no progress has been made on this issue and, contrary to the Memorandum of Understanding, proceedings before Croatian courts continue.

After so many missed opportunities to settle this issue among states, including through IMF arbitration, the Joint Standing Committee set up under the Agreement on Succession Issues, the Governors of the National Central banks⁹⁵ and, as mentioned above, political agreements at the highest level, it was just a matter of time for individual depositors to turn to the ECtHR for justice. In its 2008 decision, the Court in the *Kovačić* case stated that the matter of compensation for so many thousands of individuals could only be resolved through an

⁹² *Ibidem*.

⁹³ See also, Možina, Slovenia and Croatia in dispute over bank deposits from Yugoslav times (2015), pp. 268–288.

⁹⁴ Memorandum of Understanding between the Government of the Republic of Slovenia and the Government of the Republic of Croatia, Off. Gaz. RS, No. 22/2013.

⁹⁵ In June 2011 the governor of the Bank of Slovenia and the minister of finance addressed a letter to their counterparts in all successor states with an invitation to an exploratory meeting in Basel to discuss the issue. Due to a lack of a positive response of all successor states the meeting never took place.

agreement between the successor states. The Court noted that several rounds of negotiations had already been held between the successor states, at different levels, with a view to reaching an agreement on the solution of the issues. It called on the states concerned to proceed with these negotiations as a matter of urgency, with a view to reaching an early resolution of the problem.⁹⁶ In a separate opinion, Judge Ress underlined that the issue cannot be resolved unilaterally, but only through an agreement between the successor states. Their obligation is not only to negotiate (*pactum de negotiando*) but to reach an agreement (*pactum de contrahendo*).⁹⁷

3.3.2. *The Ališić judgement*

Contrary to this reasoning and as no success was achieved at the interstate level, the ECtHR decided in favour of the depositors most recently in July 2014 in a pilot Grand Chamber Judgment in the case *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia (Ališić judgement)*. The case concerned applicants who were unable to withdraw their “old” foreign-currency savings held with two banks in what is now Bosnia and Herzegovina (namely LB Sarajevo branch and Tuzla branch of Investbanka) before the dissolution of Yugoslavia. The applicants submitted the application against all five successor states, but the Court held that only Serbia (with respect to the depositors of the Tuzla branch of Investbanka) and Slovenia (with respect to the depositors of the Sarajevo branch of LB) had violated Article 1 of Protocol No. 1 and Article 13 of the European Convention of Human Rights. It further concluded that there had been no breach by other respondent states.⁹⁸

As regards Slovenia, the Court ordered that it »must make all necessary arrangements, including legislative amendments, within one year and under the supervision of the Committee of Ministers, in order to allow Ms Ališić, Mr Sadžak and all others in their position to recover their ‘old’ foreign-currency savings under the same conditions as those who had such savings in domestic branches of Slovenian banks”.⁹⁹ In paragraph 147 of the judgment’s reasoning, the Court underlined that the measures do not apply to the applicants who had already been repaid.

⁹⁶ *Kovačić judgement*, para. 256.

⁹⁷ ECtHR, Concurring Opinion of Judge Ress, *Kovačić and Others v. Slovenia* (Applications nos. 44574/98, 45133/98 and 48316/99), para. 4.

⁹⁸ Council of Europe, Action Plan of the Republic of Slovenia (2015), p. 2.

⁹⁹ *Ališić judgement*, para. 11.

Even though this judgement was greatly criticised in Slovenian political and professional circles, as well as in public opinion,¹⁰⁰ Slovenia demonstrated its commitment to ensure the implementation of the judgement within the deadline set by the Court and in a manner to appropriately remedy the violation of human rights¹⁰¹, while noting the complexity of a case that involves the dissolution of a state in rather difficult circumstances more than 20 years ago, and the specific banking system of the former state which had no equivalent in other countries.¹⁰² Thus, the Slovenian Parliament adopted the Act on the Method of Execution of the European Court of Human Rights Judgment in Case No. 60642/08 (hereinafter Act on the Execution of the *Ališić* judgement) on 22 June 2015.¹⁰³ It sets up a repayment scheme and ensures the repayment of the savings with interest, which preserve the actual value of the deposit over the past 24 years.¹⁰⁴ Presumably around 300,000 claims will be submitted, the financial burden on Slovenia is enormous and is set to approximately 385 million EUR.

It seems that one of the primary challenges in the implementation of the *Ališić* judgement will relate to the identification and verification of the data. Particular attention must be paid to recovering information related to savings

¹⁰⁰ For main points see *infra* at 3.3.3., Škrk; *Ališić proti Sloveniji* [*Ališić against Slovenia*] (2014), p. 3; Polak Petrič, *Slovenija mora plačati* [*Slovenija must pay*], (2014); Hojnik, *Poplačilo deviznih varčevalcev LB* [*Repayment of LB's Hard Currency Savers*] (2015), Annex, pp. II-IV. Concerns were expressed also beforehand when the Chambers' judgement was issued in 2012. The objectivity of the judgement among the general public was diminished since five out of seven judges were the citizens of the successor states. For legal problems, see ECtHR, *Dissenting Opinion of Judge Zupančič, Judgment, Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and "The former Yugoslav Republic of Macedonia"* (Application no. 60642/08).

¹⁰¹ The binding force in executing the ECtHR's judgements (Article 46 of the European Convention on Human Rights) and respecting international commitments, including those arising from membership in the Council of Europe, is an essential element of the rule of law, democracy and the protection of human rights.

¹⁰² Council of Europe, *Action Plan of the Republic of Slovenia* (2015), p. 2.

¹⁰³ *Off. Gaz. RS*, No. 48/2015.

¹⁰⁴ It should be noted that the preparation of this Act, in which two of the authors of this article were involved, was especially difficult due to the complexity of the legal and factual issues. It needed to take into consideration the fact that in the early 1990s, the depositors to banks on Slovenian territory were repaid through the banks that were operational, while in the present case, the foreign-currency savings were held by two branches not operating since the dissolution of the SFRY. The Act's solutions follow the requirements referred to in the judgment, while taking account of the international practice regarding the standard of proof for savings with banks and affording treatment as equally as possible to that afforded to the depositors on the Slovenian territory. See, Council of Europe, *Action Plan of the Republic of Slovenia* (2015), p. 4.

accounts in Bosnia and Herzegovina, as Slovenia does not have the information needed at its disposal.¹⁰⁵ From the perspective of international law this gives rise to the question of the responsibility to cooperate by a member state of the Council of Europe in the execution of the judgment, although it is not directly responsible for its implementation. The cooperation of the authorities of Bosnia and Herzegovina in implementing the *Ališić* judgement should not be seen as an act of courtesy, but rather as their legal duty. Since this matter exceeds the scope of this article, just few arguments are made to this end. Firstly, the duty to cooperate among states is a fundamental principle of international law and holds a central place in the UN Charter. States must, *inter alia*, cooperate “in the promotion of universal respect for, and observance of, human rights and fundamental freedoms for all”.¹⁰⁶ Secondly, Judge Nußberger in her partly dissenting opinion to the *Ališić* judgement argued that the cooperation between the respondent states in verifying the claims is necessary and was not sufficiently dealt with in the judgment.¹⁰⁷ Lastly, the obligation of Bosnia and Herzegovina to assist the depositors to obtain the payment of their savings from Slovenia and Serbia, respectively, is set in its internal legislation.¹⁰⁸

The *Ališić* judgement represents an important case, not only with respect to further safeguarding individuals’ fundamental right to property, but also as regards its implications on the case law of the Court. It is a judgment that requires activities beyond the sovereignty of the state which needs to implement it. State sovereignty as a fundamental principle of international law is defined on the concept of territoriality – states have rights and responsibilities on their own territories. This judgement and its implementation go beyond this principle – one state (namely Slovenia) is to act with respect to its obligations on the territory of another state, in order to remedy the human rights violations of individuals under the jurisdiction of another state. Thus, cooperation among the successor

¹⁰⁵ The Sarajevo branch of LB was nationalised by Bosnia and Herzegovina in the early 1990s, Slovenia thus does not have relevant data on the repayments and/or other changes in the savings balance on the accounts with this bank.

¹⁰⁶ Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, A/RES/2625, Annex.

¹⁰⁷ ECtHR, Partly Dissenting Opinion of Judge Nußberger, Joined by Judge Popović, *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and “The former Yugoslav Republic of Macedonia”* (Application no. 60642/08), para. C(4). See also Marko, Ločeno mnenje v zadevi *Ališić* [The Dissenting Opinion in the *Ališić* Case] (2014), pp. 17–19.

¹⁰⁸ Article 2, Zakon o izmirenju obaveza po osnovu računa stare devizne štednje [Old Foreign-Currency Savings Act], Off. Gaz. B&H, Nos. 28/06, 76/06, 72/07 and 97/11.

states is a *conditio sine qua non* for the successful and effective implementation of the judgement.

3.3.3. *The influence of the Ališić judgement on the agreement on succession issues*

The *Ališić* judgement takes a position on the debt in the bank–depositor relationship (civil law dimension) which is clearly to the benefit of the depositors. However, the Court disregarded the international law perspective of this case. It is correct that the Court declared that human rights had been violated, but the attribution of the responsibility for this violation is simplified, and does not take into consideration the rules on the succession of states and factual circumstances for more than twenty years. Limiting the argumentation only to the relationship of the judgment’s reasoning to the Agreement on Succession Issues, Judge Nußberger rightly pointed out that »in the context of State succession, the positive obligations of the respondent States were twofold. On a vertical level they had a duty to make up for the losses the applicants had incurred and to provide immediate relief. On a horizontal level they had to negotiate among themselves to achieve an adequate distribution of the debts accumulated within a system that they had all been involved in setting up«, and concluded that »the majority of the Grand Chamber have failed to scrutinise the positive obligations of all the respondent States against whom the applicants’ complaint was directed«. ¹⁰⁹ In addition, the Court did not decide on the distribution of the guarantees for »old« foreign currency savings at the inter-state level. Although it opted for the principle of equitable proportion as the governing international principle in so far as state debts of the former SFRY are concerned, ¹¹⁰

¹⁰⁹ ECtHR, Partly Dissenting Opinion of Judge Nußberger, Joined by Judge Popović, *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and “The former Yugoslav Republic of Macedonia”* (Application no. 60642/08), para. B(4).

¹¹⁰ *Ališić* judgement, para. 121. The reasoning of the Court is deficient in lacking to recognize the principle of territoriality as the appropriate principle for the division of this Yugoslav debt. *Inter alia*, it does not take into account Article 11 of 2001 Resolution on State Succession in Matters of Property and Debts of the Institute of International Law, the International Law Association’s Resolution No. 3/2012 of the Committee on International Monetary Law and the EFTA Court Judgment in the case of Icesave. The latter recognized world economic crisis as a reason for not repayment of depositors of foreign branches of the Icesave bank. »For the sake of completeness, the Court adds that even if the third plea had been formulated differently, one would have to bear in mind that the EEA States enjoy a wide margin of discretion in making fundamental choices of economic policy in the specific event of a systemic crisis provided that certain circumstances are duly proven.« para. 227. URL: http://www.mfa.is/media/icesave-2011-12/16_11_Judgment-Icesave-Case.pdf.

it decided that to evaluate this question is far beyond the case and outside the Court's competence.¹¹¹

Thus, one of the most interesting legal challenges that Slovenia faces in the execution of the *Ališić* judgement is whether it influences the international legal obligations of the successor states under the Agreement in any way. Undoubtedly, Slovenia is under two legally binding obligations – firstly, to implement the ECtHR *Ališić* judgement and enable the payment of the depositors; and secondly, in accordance with the Agreement to negotiate on this issue at the inter-state level with other successor states. But do these two obligations collide or does one prevail over the other?

The important question of succession remains pending and, in legal terms, the *Ališić* judgement does not set aside or change international obligations under Article 7, Annex C of the Agreement nor does it prejudice the result of the negotiations among successor states. It does not define the final distribution of these financial obligations of Yugoslavia in any way. Although it is clear that Slovenia has the duty to execute the judgment, it would not only be unjust in political terms, but also run counter to international law on state succession if it were to cover an unfairly large part of the former Yugoslavia's liabilities. The excessive financial burden put on Slovenia through the execution of the *Ališić* judgement would not be in line with the equitable proportion principle. To avoid this is the aim of Article 23 of the Act on the execution of the *Ališić* judgement, which clearly stipulates that the Republic of Slovenia shall enforce the obligations assumed under this Act under Article 7 of Annex C of the Agreement for the purpose of achieving a just distribution of guarantees of the SFRY or NBY for "old" foreign-currency savings.¹¹²

Slovenia will proceed with the implementation of the *Ališić* judgement, but the question of »old« foreign currency deposits from Yugoslavia will not be closed until a final agreement is reached. After all, at the ECtHR there are still 1850 similar open cases of about 8000 depositors against the successor states of the SFRY, and legal proceedings are continuing in many states on behalf of individuals and banks. There is also the question of the claims of LB against Croatian companies. Due to limitations on the length of this article, it should only be mentioned briefly that the *Ališić* judgement has introduced a new legal fact for Slovenia in this regard – since it must repay the foreign-currency deposits with LB (its liabilities), it is clearly now in a position to take care of its assets and claims. The LB was unable to collect debts from Croatian companies for

¹¹¹ *Ališić* judgement, para. 122.

¹¹² Off. Gaz. RS, No. 48/2015.

a number of years due to lengthy and mostly unsuccessful legal procedures in Croatia. In April 2014, the Constitutional Court of the Republic of Croatia finally rejected three complaints by LB.¹¹³ In addition, most recently, the ECtHR after 8 years declared one application of LB against Croatia inadmissible.¹¹⁴

To conclude, the successor states are still bound by Article 7, Annex C of the Agreement and this inter-state relation among them remains open. It is the obligation of successor states to negotiate in good faith on the distribution of the guarantees for “old” foreign- currency deposits and even further based on the fundamental principle of *pacta sunt servanda* with a view to conclude an agreement.¹¹⁵ Since it is a fact that negotiations among the successor states have not been successful in all these years following the dissolution of the SFRY, it is still to be seen if there are any incentives after the *Ališić* judgement for Croatia and Bosnia and Herzegovina to enter inter-state negotiations on this matter in the future. This is the more so as the Agreement does not provide for an efficient dispute settlement mechanism in cases where its implementation, because of the lack of political will of the individual successor states, is hindered.

Slovenia is in a difficult and unjust position – on the one hand, the ECtHR judgement requires that it must pay the unpaid »old« foreign currency deposits, and on the other hand, there is no mandatory mechanism under the Agreement which would enable the continuation of inter-state negotiations and the achievement of the equitable distribution of these liabilities. Slovenia has provided payment to all depositors on its territory without discrimination and has continuously strived to settle this issue at the interstate level in the succession framework, while

¹¹³ It upheld that LB has no active standing to collect debts from Croatian companies due to the transfer of its rights and liabilities to NLB in 1994. Without going into a detailed analysis of the reasoning, this is not in line with Article 22(b) of the Constitutional Act on the Implementation of the Fundamental Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia, as Amended in 1994, and also not in line with the previous practice of the Croatian Courts, which have recognised the passive standing of LB in matters relating to its debts towards the depositors. See for example, Constitutional Court of the Republic of Croatia, Decision U-III-97/2010 (3 April 2014).

¹¹⁴ ECtHR Decision, *Ljubljanska banka d.d. v. Croatia* (Application no. 29003/07). The case concerned the enforcement proceedings brought by LB against a Croatian sugar factory for recovery of debt, which LB could not successfully enforce its claims. It was a publically well-known case, in which the former Croatian deputy Prime Minister has explicitly confirmed that no progress will be made in the proceedings concerning the collection of debts and he had personally influenced the work of competent courts in these matters. The ECtHR reiterated its rule that governmental bodies or public companies under the strict control of a state are not entitled to bring an individual application before the Court. It found that LB did not have sufficient institutional and operational independence from the state and therefore had to be regarded as a governmental organization.

¹¹⁵ *Ališić* judgement, para. 68.

Croatia and Bosnia and Herzegovina have in the past excluded state guarantees for some depositors and refused to continue the succession negotiations. It is to be seen in the future whether this long-lasting question will get its epilogue in the framework of the Agreement. If not, this is to be one of the biggest failures of its implementation.

3.4. *Annex E – Pensions*

Annex E on pensions is virtually based on the ICFY's non-paper, the Draft on Citizenship, Acquired Rights and Pensions, adopted by the WG on Succession Issues by consensus in Brussels on 19 January 1993.¹¹⁶ The Draft did not discuss federal pensions, but it was nonetheless agreed that the pensions from the former federal budget and other federal pensions and their continued payment would be taken over by the successor states on the basis of new citizenship.¹¹⁷ In addition, the non-paper stipulated that bilateral agreements were needed in order to assure payments and the transfer of funds for pensions between the successor states.

Annex E incorporates the general rule on the continuation of payment of pensions in Article 1. Namely, it stipulates that

“Each State shall assume responsibility and regularly pay legally grounded pensions funded by that State in its former capacity as the constituent Republic of the SFRY, irrespective of the nationality, citizenship, residence or domicile of the beneficiary.”

Article 2 regulates the pensions of the civil and military servants of the SFRY and it provides that each state shall assume responsibility and regularly pay the pensions which are due to its citizens that belong to these categories irrespective of where they are resident or domiciled, if those pensions were funded from the federal budget or other federal sources of the SFRY. In case such person is a citizen of more than one state, the payment of pension shall be made by the state of his/her domicile; in case that person is not domiciled in any state of which such person is a citizen, meaning that he/she is domiciled abroad, the pension shall be made by the state in which such person was resident on 1 June 1991.

Finally, Article 3 imposes an obligation on successor states, if necessary, to conclude bilateral agreements for ensuring the payment of pensions that are subject of the Agreement to persons located in a successor state other than that

¹¹⁶ »3.4. The responsibility for continuing payment of legally grounded pensions, funded from former republican sources, will be taken over by the respective successor state.«

¹¹⁷ Škrk, *Slovene Views on the Succession of States* (1996), p. 35.

which is paying the pensions of those persons.¹¹⁸ In addition, it stipulates that any bilateral agreements concluded between two of the successor states shall prevail over the provisions of Annex E. This provision attaches to Annex E the character of a frame-work agreement. This suggests that duly concluded bilateral agreements may depart from the provisions of Annex E. Slovenia concluded bilateral social security agreements which include provisions on pensions with Croatia,¹¹⁹ Macedonia,¹²⁰ Bosnia and Herzegovina¹²¹ and Serbia.¹²² This Annex is the only one where the implementation is satisfactory and almost complete.

3.5. Annex G – Acquired rights

The protection of acquired rights is one of the cornerstones of state succession law.¹²³ It stems from Article 6 of the Vienna Convention of 1983, which says that nothing in this Convention shall be considered as prejudging in any respect any question relating to the rights and obligations of natural or juridical persons.

The foregoing Draft on Citizenship, Acquired Rights and Pensions of 19 January 1993 represents the foundation on which Annex G of the Agreement resides. Namely, it stipulated,

“3.3. Any property right of a former SFRY citizen shall be recognized and guaranteed to him/her in the appropriate Successor State, irrespective of whether he/she holds its citizenship or is domiciled there.

In particular, property rights of natural and juridical persons, including the right to restoration of or compensation for the destruction, confiscation, sequestration or any kind of illegal dispossession, shall be fully observed. Trans-

¹¹⁸ According to Article 3 this includes the arrangements for transferring the necessary funds to ensure payment of those pensions, and for the payment of pensions proportionally to the payment of contributions. This provision relates to former federal civil servants for whom pension contributions from federal resources were paid to the Pension Fund of the former Socialist Republic of Serbia. Compare to Draft Agreement on Succession Issues of 11 April 2001, Annex E, Pensions, para. (3).

¹¹⁹ Off. Gaz. RS, No. 71/97, Treaties, No. 21/97.

¹²⁰ Off. Gaz. RS, No. 25/2000, Treaties, No. 10/2000.

¹²¹ Off. Gaz. RS, No. 37/08, Treaties, No. 10/08.

¹²² Off. Gaz. RS, No. 30/2010, Treaties, No. 5/2010. See Art. 35(5), Right to Payment; Art. 36(2I), Taking into Account of the Insurance Periods; Art. 37(3), Pensions Based on Former Legal Regulations; and, Art. 38, Renewed Assessment of Pensions. The reference date in the provisions that relate to the succession of pensions is 8 October 1991.

¹²³ Škrk, *Slovene Views on the Succession of States* (1996), p. 34.

fers of property rights and sales contracts concluded under duress shall have no legal effect.”

The underlying idea of this provision was not only to preserve the property and rights of private natural and legal persons in general, but also to protect them against the detrimental consequences of war and ethnic cleansing. However, during the course of negotiations and in particular at their final stage, the foregoing Draft on acquired rights increased significantly in size.

Article 1, Annex G contains a general rule on the protection of private property and acquired rights of citizens and other legal persons of the SFRY in accordance with the provisions of this Annex.

Article 2 represents the core provision on the preservation and protection of rights of citizens or other legal persons to movable and immovable property, including the observance of contracts. It provides that the rights to movable and immovable property located in a successor state and to which nationals or other legal persons of the SFRY were entitled on 31 December 1990¹²⁴ shall be recognized, and protected and restored by that state in accordance with the established standards and norms of international law and irrespective of the nationality, citizenship, residence or domicile of those persons (Paragraph 1(a)).¹²⁵ In addition, it specifies that purported transfers of rights to movable or immovable property made after 31 December 1990 and concluded under duress or contrary to the established standards and norms of international law (including the prohibition of discrimination) shall be null and void (Paragraph 1(b)). Paragraph 2 prescribes that all contracts concluded by citizens or other legal persons (including those concluded by public enterprises) of the SFRY as of 31 December 1990, shall be respected on non-discriminatory basis. It is further asserted that the successor states are obliged to provide for the carrying out of such contracts, where their performance was prevented by the break-up of the SFRY.

It seems that in recent practice¹²⁶ a question arose regarding the meaning of the wording ‘as of 31 December 1991’ contained in the abovementioned provi-

¹²⁴ “In Annex G on Private Property and Acquired Rights, the date 31 December 1990 is applied as a reference date in respect of the protection of rights to movable and immovable property belonging to natural and legal persons, nationals of the SFRY, and located in the former SFRY.” Škrk, *Date of the Succession of States* (2003), p. 370.

¹²⁵ “This includes persons who, after 31 December 1990, acquired the citizenship of or established domicile or residence in a state other than a successor state. Persons unable to realize such rights shall be entitled to compensation in accordance with civil and international legal norms.”

¹²⁶ Svetličič, *Mednarodni center za reševanje investicijskih sporov* [International Centre for the Settlement of Investment Disputes] (2014), p. 1370 and n. 18.

sion of Paragraph 2. According to one view, this provision relates to contracts concluded (as) starting 31 December 1990.¹²⁷ But this is not the only meaning of the term ‘as of’.¹²⁸ This provision can also be understood as applying to contracts concluded up to 31 December 1991. This is easier to comprehend, if we understand the date 31 December 1991 as the reference date for the preservation of acquired rights, i.e., in the context of Article 2 as a whole and also taking into account its legislative history, in particular the Draft on acquired rights of 19 January 1993.¹²⁹ Namely, the purpose of the reference date in the entire provision on acquired rights was to protect the existing property rights and contracts on that date against any purported transfer or destruction on a discriminatory basis, as a result of hostilities already emerging on the territory of the SFRY.¹³⁰ Such an interpretation corresponds to the rule enshrined in Article 31(1) of the VCLT.¹³¹ It also gives the reference date an effective meaning, as on the eve of the break-up of Yugoslavia, it was not plausible to expect that citizens and other legal persons, including public enterprises, would conclude joint ventures or similar legal arrangements on the territories of other former Republics. Logically, its purpose was to provide legal protection for those already in existence.

The provision on the protection of intellectual property stems from Article 3.

Article 4 contains the obligation of successor states to take such action as may be required by general principles of law or otherwise appropriate to ensure the effective application of the principles set out in Annex G, such as concluding bilateral agreements and notifying their courts and other competent authorities. This provision obliges the successor states to ensure the effective application of Annex G within their national jurisdiction in accordance with the general principles of law. These include the right to have access to the court, the right to ensure an effective legal remedy, an independent judiciary, the right to equality of arms, etc. Any impediments to the effective application

¹²⁷ Bohte, *Sporazum o nasledstvu po SFRJ* (2001), p 563. The Slovene translation, which is not the authentic version of the Agreement, also follows this interpretation. *Off. Gaz. RS*, No. 71/02, *Treaties*, No. 20/02.

¹²⁸ As of: up to, on, or from (a specified time). *Webster’s New World College Dictionary* (1999), p. 81.

¹²⁹ This was the understanding of the reference date 31 December 1990 in Article 2(2) by one of the authors of the present text as she wrote: »In paragraph 2 it is stipulated that all contracts concluded by nationals or other legal persons of the SFRY (including those concluded by public enterprises) shall be respected on a non-discriminatory basis«. Škrk, *Date of the Succession of States* (2003), p. 370.

¹³⁰ This also follows from the last sentence of Article 2.

¹³¹ »A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.«

of Annex G at the national level, including the requirement of the adoption of bilateral agreements between the successor states,¹³² are unfounded and give rise to state responsibility. The provision of Article 4 seemed right at the time of the adoption of the Agreement in 2001 as the FRY and Bosnia and Herzegovina were not yet parties to the European Convention on Human Rights.¹³³ Now, these principles are binding on all parties to the Agreement on the basis of that Convention.

Article 5 stipulates that nothing in the foregoing provisions in Annex G shall derogate from the provisions of bilateral agreements on the same matter between successor states, which in particular areas may be conclusive as between those states. This provision gives priority to acquired rights, guaranteed in Articles 2 to 4¹³⁴ of Annex G, over bilateral agreements concluded on the same matter between the successor states.

Article 6 relates to the protection of dwelling rights and imposes the duty of successor states to apply the domestic legislation regarding this right on a non-discriminatory basis.

Article 7 reflects the obligation of successor states enshrined in Article 8 of the ‘chapeau’ Agreement and provides that,

“All natural and legal persons from each successor state shall, on the basis of reciprocity, have the same right of access to the courts, administrative tribunals and agencies, of that state and of other successor states for the purpose of realizing the protection of their rights.”

The requirement of reciprocity¹³⁵ does not deprive this provision of being ‘*self-executing*’.¹³⁶ As such this provision prevails over the provision on effective application, contained in Article 4, Annex G. Namely, the latter provision obliges the successor states to provide before their courts and other state organs the effective application of rights guaranteed by Annex G, including the adoption of the legislative measures necessary to fulfil such obligations. Instead, Article 7 is directly applicable and it asserts that natural and legal persons are entitled to the judicial protection of their rights emanating from the succession before the courts of the successor states, under the condition of reciprocity.

¹³² As regards the duty to conclude the relevant bilateral agreements compare Article 3, Annex E and Article 4, Annex G.

¹³³ Bosnia and Herzegovina became the party on 12 July 2002 and the FRY on 3 March 2004.

¹³⁴ This includes the duty to provide their effective application.

¹³⁵ Formally, here we are faced with a diplomatic reciprocity. Francescakis, *RÉPERTOIRE DE DROIT INTERNATIONAL* (1969), pp. 714–715. In Serbia many Slovene companies have problems, because the Serbian courts, in contrary to the positions of the Serbian government, claim that there is no reciprocity between the two successor states.

¹³⁶ Škrk, *The Relationship between International Law and Internal Law* (2010), p. 65.

Finally, Article 8 provides that the provisions of Annex G are without prejudice to any guarantees of non-discrimination related to private property and acquired rights that exist in the national legislation of the successor states.

4. Concluding remarks

The Agreement on Succession Issues was an enormous achievement if one looks at it from the perspective of the situation on the territory of the former Yugoslavia in the 1990's. It confirms the dissolution of the SFRY and recognizes the sovereign equality of all its five successor states (Slovenia, Croatia, Bosnia and Herzegovina, FRY – today Serbia, and Macedonia). Therefore, it has been rightfully termed the 'petty constitution' of the region despite the fact that its implementation is progressing slowly.¹³⁷

The political significance of the Agreement is undisputed. It has confirmed once and for all the end to a painful dispute between the FRY and the four successor states regarding the FRY's claim to continue the international legal personality of Yugoslavia. The international community has affirmed the Agreement's contribution to peace and stability in the region on several occasions. Some have even considered it as the Peace Treaty of the SFRY.

Legally speaking, the Agreement settles almost all succession issues apart from treaties, citizenship, territorial questions and the membership of the successor states in international organizations.¹³⁸ One of the true achievements of the Agreement was the distribution of the BIS assets on the basis of the IMF key. Regarding the distribution of the SFRY's movable and immovable property, the Agreement is based on the territorial principle. This was a realistic approach, but it has nonetheless given priority to the FRY, as most of this property was situated on its territory, while the discussions on tangible military property has been postponed *sine diem*. A remarkable provision is the one on the return of the tangible movable state property which represents a cultural heritage to the successor state of its origin. Despite the fact that the distribution of the diplomatic and consular properties has been relatively slow, it has produced some results in the past ten years. A similar assessment can be made regarding the distribution and the access to the SFRY's state archives. Although it is realistic to assume that the bulk of the state archives will remain in Belgrade as a common heritage, it

¹³⁷ Drenik, *Mednarodne pogodbe v pravnem redu Republike Slovenije* [Treaties in the Legal Order of the Republic of Slovenia] (2013), p. 96.

¹³⁸ Bohte, *Sporazum o nasledstvu po SFRJ* (2001), p. 582.

is also provided by Agreement that the successor states and their nationals must have unhindered access to these archives.

The Agreement was very carefully drafted in order to find compromise solutions for individual items. When these solutions were negotiated, the Agreement was initialled and submitted to signature *telle-quelle*, without checking the eventual textual inconsistencies between the ‘chapeau’ Agreement and the annexes and within the individual annexes. As a result, there are some inconsistencies in the text on acquired rights in Annex G. It is expected that the courts and other competent bodies in individual successor states will treat the nationals of other successor states in conformity with international legal standards as required by this Annex and the Agreement as a whole. Slovenia could provide diplomatic protection to its nationals if the restitution of their acquired rights stemming from the dissolution of the SFRY before the competent bodies of other successor states were not duly met.

The biggest deficiency of the Agreement is the lack of an effective dispute settlement mechanism. This is the reason why the most difficult and politically sensitive question remains the unresolved issue of “old” foreign currency deposits. The *Ališić* judgement of the ECtHR has drastically changed the relationships among the successor states on this issue. Slovenia is in a difficult and unjust position – on the one hand the judgement requires that it is to pay the unpaid “old” foreign currency deposits, and on the other hand under the Agreement there is no mandatory mechanism, which would enable the continuation of interstate negotiations and the achievement of an equitable distribution of these liabilities. However, the successor states are still bound by Article 7, Annex C of the Agreement and this interstate relation among them remains open. It is the obligation of successor states to negotiate in good faith on the distribution of the guarantees for “old” foreign currency deposits and even further based on the fundamental principle of *pacta sunt servanda* with a view to conclude an agreement. Since it is a fact that the negotiations among the successor states have not been successful in all these years after the dissolution of the SFRY, it is to be seen if there are any incentives for Croatia and Bosnia and Herzegovina to enter inter-state negotiations on this matter in the future.

As the EU has been actively involved in the process of succession to the SFRY throughout the negotiations, the *bona fide* implementation of the Agreement is expected to be one of the criteria which will be used to evaluate the successor states’ applications to join the EU. Unfortunately, the *Ališić* judgement disregarded the lack of political will of some successor states to implement the Agreement. Also the EU Council seems to be rather careful in calling upon successor states to strengthen their endeavours to this end. In the future more

attention and consistency should be put towards the full implementation of the Agreement from the successor states and the international community, because of its importance for the good-neighbourly relations and cooperation among states, as well the maintenance of peace and stability in the region.

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