



STATE SUCCESSION
TO THE IMMOVABLE ASSETS OF
FORMER YUGOSLAVIA

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STATE SUCCESSION TO THE IMMOVABLE ASSETS OF THE FORMER YUGOSLAVIA: THE CASE OF BOSNIA AND HERZEGOVINA

EXECUTIVE SUMMARY

With the ongoing reconstruction efforts in Bosnia and Herzegovina and plans for the imminent privatisation of a number of industrial enterprises, the question has arisen as to whether the Bosnia and Herzegovina central government or the sub-state entities -- Republika Srpska and the Federation of Bosnia and Herzegovina -- properly succeed to the immovable assets of the former Socialist Federal Republic of Yugoslavia located on the territory of Bosnia and Herzegovina. This memorandum seeks to answer this question.

After reviewing and evaluating the specific facts relating to the dissolution of the former Yugoslavia, the establishment of the state of Bosnia and Herzegovina, the creation of Bosnia's internal political units, and the modification of those units by the Dayton Peace Accords in light of the public international law of state succession, including the law as represented by the traditional past practice of states, the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (1983 Vienna Convention), and recent state practice, this memorandum reaches the following conclusions:

- Traditional state practice, the 1983 Vienna Convention, and the opinion of the Legal Advisers of the Council of Europe indicate only state entities possess the necessary capacity to succeed to the rights and obligations of the predecessor state.
- Recent state practice in the case of the former Soviet Union, Czechoslovakia and Yugoslavia confirms that only state entities are considered to possess the necessary capacity to succeed to the rights and obligations of the predecessor state.
- Throughout the course of the dissolution of Yugoslavia, the sub-state entities of the Republika Srpska, the Republic of Krajina, and the Bosnian Federation attempted without success to participate in public forums and diplomatic conferences addressing state succession issues.
- The decisions of the European Union Arbitration Commission relating to matters of state succession support the assumption of territorial assets by states and not sub-state entities.
- World Bank, International Monetary Fund and other lender institution practice supports the assumption of territorial assets by states and not sub-state entities.
- The constitution of Bosnia and Herzegovina adopted as an annex to the Dayton Accords did not express sufficient specific intent to cause the transfer of ownership of territorial assets from the central government to the sub-state entities.

From 1992 until 1995/96 the Republic of Bosnia therefore may be considered to have held title to the territorial assets of the former Yugoslavia located on Bosnian territory. Given the absence of the articulation of an express transfer of this title from the state of Bosnia to its sub-state entities in the Dayton Accords, title may properly be considered to continue to rest with the central government of Bosnia and Herzegovina.

STATE SUCCESSION TO THE IMMOVABLE ASSETS OF THE FORMER YUGOSLAVIA: THE CASE OF BOSNIA AND HERZEGOVINA

I. ISSUE: WHETHER THE BOSNIAN CENTRAL GOVERNMENT OR THE BOSNIAN SUB-STATE ENTITIES PROPERLY SUCCEED TO THE IMMOVABLE ASSETS OF THE FORMER SOCIALIST FEDERAL REPUBLIC OF YUGOSLAVIA LOCATED ON THE TERRITORY OF BOSNIA AND HERZEGOVINA.

The purpose of this memorandum is to examine the question of whether the Bosnian central government or the Bosnian sub-state entities succeed to and may properly regulate the immovable assets of the former Socialist Federal Republic of Yugoslavia (Yugoslavia) located on the territory of Bosnia and Herzegovina (Bosnia).

To answer this question, this memorandum begins with an examination of the specific facts relating to the dissolution of the former Yugoslavia, the establishment of the state of Bosnia, the creation of Bosnia's internal political units, and the modification of those units by the Dayton Peace Accords. These facts are then evaluated in light of the public international law of state succession, including the law as represented by the traditional past practice of states, the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (1983 Vienna Convention),¹ and recent state practice in order to determine the initial allocation of assets amongst the political units of Bosnia.

Specific questions addressed by this memorandum include: 1) Whether states or sub-state entities generally succeed to the predecessor state's territorial assets? 2) Whether there exists a precedent in recent state practice of sub-state succession to a predecessor state's territorial assets? 3) Whether in the case of the former Yugoslavia, the Republika Srpska participated in the process of succession to territorial assets? 4) Whether the decisions of the Arbitration Commission relating to matters of state succession support the assumption of territorial assets by states or sub-state entities? 5) Whether World Bank, International Monetary Fund (IMF) and other lender institution practice supports the assumption of territorial assets by states or sub-state entities? And, 6) whether the constitution of Bosnia and Herzegovina adopted as an annex to the Dayton Accords intended to transfer ownership of territorial assets to the sub-state entities?

¹ Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, UN Doc. A/CONF. 117/14 (April 7, 1983). Yugoslavia signed, but did not ratify Vienna Convention on Succession of States in Respect of State Property, Archives and Debts on October 24, 1983. Multilateral Treaties Deposited with the Secretary-General, at 93 (United Nations 1991).

II. STATEMENT OF FACTS

A. The dissolution of Yugoslavia

The Slovene Declaration of Sovereignty in July 1990, and the subsequent declarations of Croatia and Macedonia, serve as the legal benchmarks for the beginning of the break-up of the former Yugoslavia.²

Following a period of unsuccessful negotiations among the republics of the former Yugoslavia, and Slovenia's and Croatia's subsequent withdrawal from the federal government, in the winter of 1991, President Milosevic of Serbia ordered the Yugoslav National Army (JNA) to forcibly maintain the territorial status of Yugoslavia. These efforts were unsuccessful in Slovenia, while in Croatia the JNA forces, together with the Krajina Serbs, occupied approximately 30% of Croatian territory.

Throughout this period, Bosnia and Macedonia remained a constituent part of Yugoslavia and participated in federal negotiations concerning the future of the Yugoslav Federation. However, in response to continued Serbian military aggression against Croatia and Slovenia, and the take-over of most federal institutions by Serbia, Bosnia announced on August 16, 1991, that it would soon hold a referendum on independence, while Macedonia decided to hold a referendum on September 8, 1991.

On August 27, 1991, the European Community attempted to restore peace to the region by establishing a Yugoslav Peace Conference for the purpose of providing a formal negotiating platform for the republics. The European Community also created an Arbitration Commission for resolving disputes arising during those negotiations. Despite the efforts of the European Community, Slovenia and Croatia declared full independence in October of 1991, and on November 29, 1991, the Arbitration Commission determined that Yugoslavia was in the process of a dissolution.³ Pursuant to subsequent rulings by the Arbitration Commission, the European Community then announced recognition of Slovenia and Croatia on January 15, 1992.

In early January 1992, the remainder of the Yugoslav federal government held a Convention on Yugoslavia to devise a means for secession from Yugoslavia. On January 20, 1992, the rump Yugoslav Federal Assembly produced a draft law on the right to self-determination and proposals for a Constituent Assembly for a new Yugoslavia. These actions were rejected by all of the Yugoslav republics except Montenegro. Serbia and Montenegro then agreed on February 12, 1992, to continue their Federal relations as the "continuity" of Yugoslavia. On April 27, 1992, Serbia and Montenegro declared the formation of a joint state, the Federal Republic of Yugoslavia, which would continue the international legal personality of the former Yugoslavia. The European Community and United States denied

² For a review of the history of the dissolution of the former Yugoslavia see Warren Zimmerman, *Origins of a Catastrophe* (1996); Noel Malcolm, *Bosnia - A Short History* (1994); United States Department of State Chronology, *The United States and the Breakup of Yugoslavia 1980-1993*; United States Department of State Chronology: *Developments Related to the Crisis in Bosnia*, March 10 - August 28, 1992, in Dispatch Vol. 3 No. 35, at 676 (August 31, 1992); U.S. Department of State Background Briefing on the Situation in Yugoslavia, (May 19, 1992).

³ Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising From the Dissolution of Yugoslavia, Opinion No. 1 of November 29, 1991, published on December 7, 1991, 31 ILM 1494, at 1495-96 (1992).

Serbia/Montenegro's claim to be the continuation of the former Yugoslavia and refused to recognise it as a state. On July 4, 1992, the Arbitration Commission determined Yugoslavia ceased to exist.⁴

B. The creation of the state of Bosnia and Herzegovina

Through the summer of 1991, Bosnia continued to attempt to reach an agreement with the other Yugoslav republics on a negotiated settlement leading to a confederated Yugoslavia, or a loose association of states. After the European Community provided for the impending recognition of Slovenia and Croatia, Bosnia determined that it had no choice but to seek international recognition.

On December 20, 1991, Bosnia requested recognition of its independence by the European Community and the United States. In its letter of request, Bosnia provided the assurances sought from the European Community in the *Guidelines on Recognition* and the *Declaration on Yugoslavia*. On January 11, 1992, the Arbitration Commission found that Bosnia and Herzegovina fulfilled all the criteria for recognition by the European Community, but recommended that such recognition be delayed until Bosnia held a referendum confirming the will of its citizens for independence.⁵

As required by the European Community, Bosnia held a referendum on independence from February 29-March 2, 1992, wherein 63% of the population voted, with 99.4% voting for independence. Bosnia then declared full independence on March 3, 1992. In response, the Bosnian Serb nationalists declared the creation of the Serbian Republic of Bosnia on March 27, 1992, and although only representing one-third of Bosnia's population, laid claim to over two-thirds of its territory.⁶

The European Community continued negotiations through March in an attempt to agree upon the canonisation of Bosnia. These efforts were to no avail, and on April 6, 1992 the European Community recognised Bosnia as an independent State, with the United States recognising Bosnia as independent on April 7, 1992.⁷ The member states of the European Community as well as the United States then established diplomatic relations with the Republic of Bosnia.

C. The status of the Republic of Bosnia from 1992-1995/6.

Subsequent to its international recognition, the Republic of Bosnia attained membership in the United Nations, its specialised agencies, and a substantial number of other international organisations. The Republic of Bosnia, with Macedonia, Slovenia, and Croatia, also succeed to the membership of the former Yugoslavia in the World Bank and IMF, and assumed an equitable share

⁴ Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising From the Dissolution of Yugoslavia, Opinion No. 8 of July 4, 1992, 31 ILM 1521, at 1522-23 (1992).

⁵ Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising From the Dissolution of Yugoslavia, Opinion No. 4 *On the Recognition of the Republic of Bosnia and Herzegovina by the European Community and its Member States* of January 11, 1992, 31 ILM 1501 (1992). (Application for recognition submitted on December 20, 1991).

⁶ The Bosnian Serb nationalist had set up their Autonomous Regions in May 1991, and established a parliament in October of 1991. Malcolm, at 232.

⁷ See European Community Declaration on Yugoslavia (Luxembourg, April 6, 1992).

of the debt and assets of the former Yugoslavia held by the World Bank and IMF.

From the winter of 1992 until the implementation of the Dayton Accords in the winter of 1996, the Republic of Bosnia functioned in the international arena as a unitary state, with due recognition of the internal existence of the Bosnian-Croat Federation from the summer of 1994. Since the implementation of the Dayton Accords, Bosnia continues to function in the international arena as a federal state, with the recognition that its internal political structure comprises a central government and the two sub-state political entities of the Bosnian-Croat Federation and the Republika Srpska.

D. The status of the Federation and the Republika Srpska.

On November 10, 1991 the “Serbian People of Bosnia” voted for a common Yugoslav State, established an Assembly of the Serbian People of Bosnia and Herzegovina, and called for the formation of a Serbian Republic of Bosnia and Herzegovina within a federal Yugoslavia. In March of 1992, the Bosnian Serb nationalists declared the establishment of the Republika Srpska. Until the adoption of the Dayton Accords in December 1995, the Republika Srpska remained unrecognised as a sub-state entity. And despite periodic proclamations of independence from March of 1992, the Republika Srpska received no recognition as an independent state

The Federation of Bosnia and Herzegovina came into being in the summer of 1994 with the signing of the Federation treaty, and was broadly accepted by the international community as a sub-state entity of the Republic of Bosnia. Like the Republika Srpska, the Federation was formally recognised in the Dayton Accords as a sub-state entity of the state of Bosnia. The Federation has not to date sought international recognition as an independent state.

Under the Dayton Accords the sub-state entities of the Federation and the Republika Srpska were clearly ascribed the status of non-international entities subject to the sovereign authority of Bosnia, which was deemed to be the sole political body possessing the rights to territorial integrity, political independence and sovereignty.⁸ The entities were, however, entitled to a large degree of internal autonomy, a sizeable share of authority to regulate key internal activities, and a limited right to establish parallel special relationships with neighbouring states.⁹

III. ANALYSIS OF PUBLIC INTERNATIONAL LAW ISSUES

In determining the question of whether the Bosnian central government or the Bosnian sub-state entities succeed to and may properly regulate the immovable assets of the former Yugoslavia located on the territory of Bosnia, the first question to be addressed is whether, under public international law, states or sub-state entities generally succeed to the rights and obligations of predecessor states. More specifically the question is whether sub-state entities are considered to have the capacity to succeed to the debts and assets of the predecessor state.

⁸ General Framework Agreement for Peace in Bosnia and Herzegovina, art. 1 (November/December 1995); Preamble to the Constitution of Bosnia and Herzegovina (November/December 1995).

⁹ Constitution of Bosnia and Herzegovina, art. 3 (November/December 1995).

A review of traditional state practice, the 1983 Vienna Convention and recent state practice indicates unanimous consent for the view that states and not sub-state entities properly succeed to the rights and obligations of the predecessor states. The examination of the question of capacity is somewhat difficult as there is seldom an articulation of why sub-state entities are not considered to succeed to the rights and obligations of the predecessor state. This section will therefore attempt where possible to infer from state practice the legal rationale, as opposed to mere pragmatic reasons, for state as opposed to sub-state succession to debts and assets.

A. Whether states or sub-state entities generally succeed to the predecessor state's territorial assets?

Traditional state practice, the 1983 Vienna Convention, and the opinion of the Legal Advisers of the Council of Europe indicate only state entities possess the necessary capacity to succeed to the rights and obligations of the predecessor state.

1. Traditional state practice

Traditional state practice draws a distinction between territorial assets and national assets, with territorial assets being those assets associated with the territory of a particular successor state, and not those held by the federal body, such as currency accounts, gold reserves, and diplomatic and state property located abroad.¹⁰ According to traditional state practice, a successor state is entitled to the moveable and non-moveable assets located within its territory.¹¹ The status of a succession of states as either following the continuity or dissolution model has no impact on the application of this principle. Similarly, the lack of an agreement amongst the successor states as to the precise allocation of debts and assets may not affect the assumption of title to territorial assets, as it may national assets.

A review of traditional state practice indicates that in no instance has the international community recognised an assumption of territorial assets by sub-state entities.¹² In addition, state practice indicates that third-party states are not obliged to acknowledge the claim to assets by a successor state unless the third-party states have recognised those states as sovereign, and thereby entitled to those assets.¹³ Third-party states would therefore presumably not be obliged to recognise the claim to assets of non-sovereign sub-state entities

¹⁰ D.P. O'Connell, *State Succession in Municipal and International Law*, at 199-206 (1967).

¹¹ D.P. O'Connell, at 199-206.

¹² *See* the secession of Panama from Columbia; the secession of Belgium from the Netherlands; the secession of Finland from Russia; the secession of Poland and Czechoslovakia from the Austro-Hungarian Empire; the secession of Ireland from the United Kingdom; the secession of Pakistan from India; the secession of Singapore from the Federation of Malaysia; the dissolution of Greater Columbia; the dissolution of Union of Norway and Sweden; the dissolution of the Austro-Hungarian Empire; the dissolution of the United Arab Republic; the dissolution of the Union of Iceland and Denmark; the dissolution of the Federation of Mali; the dissolution of British India into India and Pakistan; the dissolution of the Federation of Rhodesia and Nyasaland; the dissolution of the United Arab Republic into Egypt and Syria; the dissolution of Rwanda-Urundi into Rwanda and Burundi; the transformation of British Singapore into Singapore; and the dissolution of .Pakistan into Pakistan and Bangladesh.

¹³ D.P. O'Connell, at 211-220.

2. The 1983 Vienna Convention

The 1983 Vienna Convention, which although not in force is broadly considered to accurately reflect traditional state practice, addresses the allocation of state property among successor states. Specifically, the 1983 Convention defines state property as “property, rights and interests which, at the date of the succession of states, were, according to the internal law of the predecessor state, owned by that state.”¹⁴ Consistent with traditional state practice, the 1983 Vienna Convention draws a distinction between the treatment of national assets and territorial assets, providing that unless the successor states otherwise agree, non-moveable and movable state property connected with the territory of a particular successor state shall pass to that state.¹⁵ While movable state property not connected with the territory of a particular successor state shall pass to the successor states in equitable proportions.¹⁶

Throughout its detailed codification of the various formulas for succession to the different types and categories of assets, the 1983 Convention does not codify nor mention any process, obligation or possibility for the devolution of state property, territorial or otherwise, to sub-state entities. Under the 1983 Convention, it thus appears that only states possess the legal capacity to succeed to the assets of the predecessor state.

3. The opinion of the Legal Advisers of the Council of Europe.

In January and September of 1992, the Committee of Legal Advisers of the Council of Europe held a series of special meetings to discuss matters of state succession. With respect to succession to debts and assets, the Committee of Legal Advisers concluded that the distribution of the debts and assets of a predecessor state was a matter to be determined by the successor states without the intervention of other states.

Specifically, the Legal Advisers generally assumed the successor states held an obligation to reach a fair agreement on a formula for dividing the debt and assets of the predecessor state, and that it would be improper for third-party states to interfere in the allocation of assets as this would infringe upon the newly acquired sovereignty of the successor states.¹⁷ Third-party states could, however, properly influence the distribution of debts in order to ensure repayment obligations were honoured.¹⁸

Consistent with traditional state practice and the 1983 Vienna Convention, the Committee of Legal Advisers did not countenance the participation of sub-state entities in agreements relating to an allocation of the predecessor state’s assets, nor the ability of sub-state entities to succeed to those assets.

¹⁴ 1983 Vienna Convention, at art. 8.

¹⁵ 1983 Vienna Convention, at art. 17.

¹⁶ 1983 Vienna Convention, at art. 17 and 18. Unfortunately, the 1983 Vienna Convention does not define or provide criteria for determining what constitutes an equitable proportion of the predecessor States’ assets.

¹⁷ Committee of Legal Advisers on Public International Law for the Council of Europe, 4th Meeting (September 14-15, 1992).

¹⁸ Committee of Legal Advisers on Public International Law for the Council of Europe, Extraordinary Meeting (January 21, 1992).

B. Whether there exists a precedent in recent state practice for sub-state succession to a predecessor's territorial assets?

Recent state practice in the case of the former Soviet Union, Czechoslovakia and Yugoslavia indicates only state entities possess the necessary capacity to succeed to the rights and obligations of the predecessor state.

1. The former Soviet Union

As it became apparent in the autumn of 1991 that the former USSR would soon undergo a constitutional transformation, its creditor states began to pressure the future successor states for an agreement on the succession to the debts of the soon to be former USSR. The future successor states responded to this pressure and convened a meeting from October 27-28, 1991, to discuss the question of allocation and servicing of the debt of the USSR in the event of its break-up. At this meeting, the creditor states insisted the debt be temporarily serviced through the Soviet Foreign Exchange Bank (VEB), and the successor states agree to be jointly and severally liable for the debt of the USSR. The successor states agreed to these conditions, and agreed amongst themselves to reach further agreement on the amount each successor state would be obligated to contribute to the servicing of the debt, and the share of assets to which they would be entitled.¹⁹

Soon after achieving international recognition, the successor states attempted to reach further agreement on the actual distribution of the debt obligations and assets of the former USSR. As Russia frustrated the distribution of assets by issuing a Decree bringing the economic ministries, including the VEB, under its authority, and by seizing foreign currency, gold and diamond reserves, as well as diplomatic property abroad, the other successor states objected to paying their share of the debt. At this time, the creditor states reminded the successor states they had agreed to joint and several liability for the debt of the former USSR.

Russia, and all of the successor states except Ukraine, eventually entered into Zero-Option agreements whereby Russia assumed the respective successor state's share of the debts in return for its share of the assets. The creditor states consented to these agreements, but informed the successor states they would still be held jointly and severally liable if Russia defaulted on the debt obligations. Ukraine attempted to persuade the creditor states to preserve the assets of the former USSR abroad from seizure by Russia, and to reach a separate agreement with Ukraine to service its debt independently.²⁰ The creditor states declined this request on the basis that the allocation of assets was a matter to be determined by the successor states without the interference of third-party states.

The case of the former Soviet Union indicates that sub-state entities may participate in the preparatory stages of the allocation of debts and assets, but only in the case where they hold the position of soon to be

¹⁹ Memorandum of Understanding on the Debt to Foreign Creditors of the Union of Soviet Socialist Republics and its Succession (October 28, 1991); Treaty on Succession with Respect to the State Foreign Debt and Assets of the USSR (December 1991).

²⁰ Letter from Ukraine Prime Minister Vitold P. Fokin to the World Financial Circles (January 29, 1992).

internationally recognised states which will be in fact assuming the obligations of the predecessor state. State practice with respect to the dissolution of the Soviet Union also reaffirms the principle of non-intervention by third-party states in the distribution of assets.

2. The former Czechoslovakia

In the case of the former Czechoslovakia, the soon to be successor states initiated early discussions to determine the question of succession to debts and assets, and adopted a federal constitutional law providing a detailed set of criteria and principles for allocating both the debts and assets.²¹ The basic principles adopted by the successor states were consistent with international law and provided the territorial debts and assets would be allocated to the successor state on whose territory they existed, and the national debts and assets would be allocated on a two-to-one proportional basis. The consent of the creditor states to this allocation was then sought and received.

In the case of the dissolution of Czechoslovakia, like the case of the former USSR, sub-state entities participated in negotiations relating to the future allocation of debts and assets, but on the basis they were soon to be internationally recognised successor states responsible for those debts and assets. Notably, despite the highly decentralised political structure of the former Czechoslovakia, it was deemed necessary for the federal legislative body, and not the Republic level body, to establish regulations pertaining to the distribution of the former Czechoslovakia's debts and assets.

3. State practice in the case of the former Yugoslavia

In the case of the former Yugoslavia, the successor states engaged in preliminary negotiations, under the auspices of the European Community, on an allocation of the debts and assets of the former Yugoslavia. For a variety of reasons, these negotiations made little progress, even despite the creation of a working group of the International Conference on the Former Yugoslavia for the specific purpose of facilitating an agreement on the assumption of debts and assets.

The primary difficulty with reaching an agreement revolved around Serbia/Montenegro's claim to be the continuity of the former Yugoslavia, its seizure of the former Yugoslav national property, occupation of its diplomatic property abroad,²² and transfer of some of the territorial property of the other successor states to Serbia/Montenegro. Despite significant efforts, the other Yugoslav successor states were unable to prevent the seizure of property, or to persuade third-party states to timely freeze or allocate the assets in their possession.

In order to allocate the debt of the former Yugoslavia, the creditor states employed the territorial principle and assigned most of the debt of the

²¹ Constitutional Law on the Division of CSFR Property, enacted by the Czechoslovakian Federal Parliament (November 13, 1992).

²² Diplomatic Note No. 8/I.92 from the Embassy of the S.F.R. Yugoslavia (Federal Republic of Yugoslavia) to the United States Department of State (April 27, 1992).

former Yugoslavia to specific successor states on the basis that this debt could be identified with specific projects or borrowers on their territory. The creditor states then allocated the national debt of the former Yugoslavia based on each successor state's share of the territorial debt. As a pre-condition for participation in the international financial community, the successor states were required to agree to their allocation of debt. To date, the successor states have not reached agreement on the assumption of assets, other than to exercise control over immovable territorial assets.

The sub-state entities of the successor states of the former Yugoslavia were not granted standing to participate in discussions relating to the allocation of debts and assets. In addition, the international creditors did not seek to hold any sub-state entities responsible for the territorial debt of the former Yugoslavia located within their territory, nor to a proportional share of the unidentifiable national debt.

C. Whether in the case of the former Yugoslavia, the Republika Srpska participated in the process of succession to territorial assets?

Throughout the course of the dissolution of Yugoslavia, the sub-state entities of the Republika Srpska, the Republic of Krajina, and the Bosnian Federation attempted without success to participate in public forums and diplomatic conferences addressing state succession issues.

Specifically, the Republika Srpska, the Republic of Krajina, and/or the Bosnian Federation attempted to and were denied participation in the London Conference of 1992, representations before the Arbitration Commission (except in narrowly defined circumstances), participation in or representations to the meetings of the Council of Europe's Committee of Legal Advisers, and the proceedings of the state succession working group of the International Conference on the Former Yugoslavia.

During the course of the Dayton Peace negotiations, the interests of the Bosnian Federation were represented by the delegation of the Republic of Bosnia (which included officials of the Federation), while the interests of the Republika Srpska were represented through the delegation of the Republic of Serbia (which included officials of the Republika Srpska). Notably, the Federation and the Republika Srpska signed the annexes to the Dayton Accords which related directly to the internal matters of Bosnia, but did not sign the General Framework Agreement which in addition to the internal matters of Bosnia also related to Bosnia's external rights and obligations.

In addition, while the United States and some western European states have sought to clarify a number of state succession issues with the central governments of various successor states to the former Yugoslavia, Czechoslovakia and Soviet Union, they have not established a similar dialogue with Bosnia's sub-state entities, nor with the sub-state entities of any other successor state.

In three notable exceptions the Assembly of the Serbian People of Bosnia and Herzegovina were permitted to make written representations before the

Arbitration Commission.²³ In the first two cases, the President of the Assembly submitted opinions relating to questions put forth by the Republic of Serbia regarding whether the Serbian population in Croatia and Bosnia, as one of the constituent peoples of Yugoslavia, had the right to self-determination, and whether the internal boundaries between Croatia and Serbia and between Bosnia and Serbia should be regarded as international frontiers in terms of public international law. In the third case, the President of the Assembly submitted two letters responding to the Republic of Bosnia's application for recognition.

The Assembly of the Serbian People of Bosnia did not, however, make representations to the Arbitration Commission with respect to issues of state succession relating to debts and assets. Similarly, the Arbitration Commission declined to consider applications for recognition by the sub-state entities of the Republic of Krajina and Kosovo. Neither the Republika Srpska nor the Federation made such an application.

The participation of the Assembly of the Serbian People of Bosnia in matters relating to self-determination, boundaries, and recognition of Bosnia may be reconciled with its lack of participation in questions relating to succession to debts and assets on the basis that the outcome of the answers to the former questions directly relate to interests of the sub-state entity, for instance whether or not the population represented by the sub-state entity may claim a right of self-determination, or whether the international boundary of the new state may be drawn such that the population is included in one state or another, whereas in the case of the latter questions, the sub-state entity has no direct interest, and no capacity to affect the outcome, i.e. it could not succeed to the international obligations of the predecessor state.

Similarly, the Assembly of the Serbian People may be considered to have represented the interests of the Serbian ethnic group and not a Serbian sub-state entity. This rationale would be consistent with representations before the Commission on matters relating to self-determination, whether the Serbs of Bosnia would be included within the state of Bosnia or Serbia, and whether the state of Bosnia, of which the Serbs were a constituent population, should be considered to be an independent state under international law.

D. Whether the decisions of the Arbitration Commission relating to matters of state succession support the assumption of territorial assets by states or sub-state entities?

In an attempt to establish a set of guiding principles for the succession to the former Yugoslavia's debts and assets, the Co-Chairmen of the International Conference for the Former Yugoslavia, at the request of some of the successor states, submitted three sets of questions to the Arbitration Commission.²⁴

The first set of questions posed by the Co-Chairmen inquired: 1) What should be the disposition of property located on the territory of third-party states, and of property located on the territory of the individual successor states? 2) On what conditions can states, within whose jurisdiction property of the former Yugoslavia is situated, block the free disposal of that property or take other protective measures? And, 3) on what conditions and under what circumstances would

²³ Conference on Yugoslavia Arbitration Commission, Opinions Nos. 2, 3, & 4 (January 11, 1992).

²⁴ Conference on Yugoslavia Arbitration Commission, Opinion No. 12 (July 16, 1993).

states be required to take such action? The Commission received opinions on these matters from Slovenia, Croatia, Bosnia and Macedonia. Serbia/Montenegro objected to the competence of the Commission to render a determination.²⁵

In formulating its opinion, the Arbitration Commission recalled that in Opinion No. 9 it had found that there are few well-established principles of state succession, but that the fundamental rule was that rights and obligations should be equitably assumed by the successor states as the result of a negotiated process. Successor states refusing to cooperate would be considered in breach of that fundamental principle, and thus states sustaining loss as a result of this non-participation would be entitled to take non-forcible counter-measures in accordance with international law. Those states which did cooperate in an allocation should determine an equitable allocation amongst themselves, but also reserve the rights of the states which refused to cooperate.²⁶

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

The second set of questions to the Arbitration Commission inquired as to whether any amounts owed by one or more states in the form of war damages may affect the distribution of the debts and assets the former Yugoslavia in connection with the succession process? The Commission received opinions on this matter from Slovenia, Croatia, Bosnia and Macedonia. Serbia/Montenegro again objected to the competence of the Commission to render a determination.²⁷

In answering this question, the Arbitration Commission noted that although the 1983 Vienna Convention required an equitable division of the debts and assets, it did not require that each particular category of the debts and assets be equitable, but that the overall settlement be equitable. The Commission then determined that the questions of state succession to debts and assets, and reparations for war damages were governed by separate fields of international law (the law of state succession, and law of state responsibility respectively), and that questions of war reparations could not be permitted to interfere in the resolution of issues of state succession, unless the parties unanimously consented to such an arrangement. The Commission then, however, concluded that “the possibility cannot be excluded in particular of setting off assets and liabilities to be transferred under the rules of state succession on the one hand against war damages on the other.”²⁸

Notably, the Arbitration Commission did not address the issue of whether the sub-state entities were entitled to participate in negotiations relating to the

²⁵ Conference on Yugoslavia Arbitration Commission, Opinion No. 12.

²⁶ Conference on Yugoslavia Arbitration Commission, Opinion No. 12.

²⁷ Conference on Yugoslavia Arbitration Commission, Opinion No. 13 (July 16, 1993).

²⁸ Conference on Yugoslavia Arbitration Commission, Opinion No. 13.

distribution of debts and assets, whether they were entitled to their own equitable share of the assets, or whether they had to consent to their distribution. With respect to the behaviour of third-party states, the Commission rightly assumed that sub-state entities would not possess the necessary sovereignty to make requests to third-party states to freeze or allocate the assets of the predecessor state.

The absence of a reference to sub-state entities in the decision relating to war reparations is particularly telling as the sub-state entity of the Republika Srpska was responsible for significant damages suffered by Bosnia and the sub-state entity of the Republic of Krajina for damages suffered by Croatia. As properly assumed by the Arbitration Commission, it would have been inappropriate to discuss the possibility of an offset of these damages against the assets of the former Yugoslavia as although the sub-state entities may be ultimately held liable for war damages, they are not entitled to a share of the assets, and thereby it is not possible to structure an offset.

The third question relating to state succession sought to have the Arbitration Commission render a determination as to whether certain assets and liabilities set forth in an inventory report prepared by the Working Group on Economic Issues should be divided between the Yugoslav successor states.²⁹ Notably, the allocation of liabilities and assets contained in the inventory was ascribed only to the successor states and did not include in the listing any reference to sub-state entities.³⁰ Although the Arbitration Commission declined to affirm the allocation of liabilities and assets contained in the inventory it again declared that the principle governing state succession to assets was that “immovable property situated on the territory of a successor state passes exclusively to that state.” The Commission also noted that such property would pass to the successor state regardless of the origin and initial financing of the property.³¹

E. Whether World Bank, IMF and other lender institution practice supports the assumption of territorial assets by states or sub-state entities?

In the case of both the World Bank and the IMF, Yugoslav successor states were entitled to conditional succession to the membership, debts and assets of the former Yugoslavia.³² Consistent with this approach all of the successor states, except Serbia/Montenegro succeeded to the rights and obligations of the former Yugoslavia in the autumn and winter of 1993. In order to allocate the debts and assets, the World Bank and IMF charged the successor states with liability for identifiable projects, and then calculated the remainder of their liability on a pro-rata basis using the formula for the calculation of state quota's.³³

In the case of the United States Export-Import Bank (EXIM Bank), the Bank identified the entire \$750 million in loans to the former Yugoslavia on the basis of specific projects and assigned the liabilities according to the geographic location

²⁹ Conference on Yugoslavia Arbitration Commission, Opinion No. 14, (July 16, 1993).

³⁰ See the Working Group on Economic Issues' Inventory of February 26, 1993.

³¹ Conference on Yugoslavia Arbitration Commission, Opinion No. 14.

³² World Bank, Socialist Federal Republic of Yugoslavia Termination of Membership and Succession to Membership, Executive Director's Resolution No. 93-2 (February 25, 1993), see also World Bank Press Release No. 93/S43 (February 26, 1993), and IMF Press Release 92/92 (1992).

³³ International Monetary Fund, Socialist Federal Republic of Yugoslavia Cessation of Membership, Allocation of Assets and Liabilities in the Fund, and Succession to Membership in the Fund 1-2 (December 7, 1992).

of the projects. In the case of the Paris Club all but \$3.2 billion of the \$14.5 billion external debt of the former Yugoslavia could be allocated among the successor states on the basis of identifiable projects. The remainder of the debt was allocated according to the successor state's proportional liability for the identifiable debt.³⁴

The limitation on succession to assets held by the World Bank and IMF and the assignment of liability to states despite the geographically identifiable nature of much of the debt supports the perspective that only states, and not sub-state entities, may succeed to both the territorial debts and assets of the predecessor state. Although not specifically articulated by the World Bank or IMF, a primary rationale for limiting succession to states are that only states may hold membership in the World Bank and IMF, and that it would not be in the financial interest of either the institutions or the states to allocate debt obligations to a state, while permitting a sub-state entity to hold title to the assets brought into existence via the original loan. Similarly, in the case of the debt owed to the EXIM Bank and the members of the Paris Club, an allocation of assets to the sub-state entities might significantly diminish the ability of the central government to service the debt obligations accrued during the process of constructing those assets.

F. Whether the constitution of Bosnia and Herzegovina adopted as an Annex of the Dayton Accords intended to transfer ownership of territorial assets to the sub-state entities?

Under international law, it is the sovereign right of states to decide for themselves whether and how to allocate ownership and control of public property between central and sub-state governmental entities. It is therefore possible that the Constitution of Bosnia and Herzegovina (the Bosnian Constitution) could cause the transfer of ownership of territorial assets (i.e., the assets to whose ownership the Bosnian central government had succeeded under international law) to the sub-state entities, or the retention of ownership with the Bosnian central government.

Despite its authority to do so, the Bosnian Constitution does not, however, explicitly address the issue of the ownership of territorial assets and/or public property. In fact, the Constitution contains no provisions which specifically mention the transfer of ownership of the public assets to the sub-state entities or the retention of ownership by the Bosnian central government.

In light of the absence of a specific provision relating to the ownership or transfer of public property, some commentators have suggested that Article III(3)(a) of the Bosnian Constitution might constitute an implicit transfer of ownership of the public assets to the sub-state entities. Article III(3)(a) states:

All governmental functions and powers not expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities.

These commentators argue that since the Constitution does not expressly provide that the Bosnian central government retains ownership of public assets

³⁴ Treatment of the Debt of the Former Socialist Federal Republic of Yugoslavia (July 13, 1992), (submitted by Germany for review at the Paris Club meeting on July 22, 1992).

owned by the previous government, Article III(3)(a) must be considered to implicitly transfer ownership of the assets to the sub-state entities.

This argument is legally unsatisfactory for two major reasons. First, Article III(5)(a) of the Constitution may equally be read to implicitly confirm title of the public assets in the central government. Article III(5)(a) states:

Bosnia and Herzegovina shall assume responsibility for such other matters as . . . are necessary to preserve the sovereignty, territorial integrity, political independence, and international personality of Bosnia and Herzegovina, in accordance with the division of responsibilities between the institutions of Bosnia and Herzegovina.

The authority vested by the scope of this language is potentially very broad, and is certainly sufficiently broad to give the Bosnian central government the authority to retain ownership of the territorial assets of the former Yugoslavia, since such ownership may be considered to be “necessary to preserve” its sovereignty, political independence, and international personality.

Second, even in the absence of this article, a necessary implicit constitutional power of the central government would have to be that it has the authority to hold title to territorial assets. The opposite conclusion -- that because the Bosnian Constitution does not explicitly provide for the ownership of territorial assets by the central government, only the sub-state entities may own public assets—would lead to impertinent results. For example, under this approach the Bosnian central government would have to lease its own offices from the sub-state entities.

Notably, a select survey of other federal constitutions indicates that there is seldom an express provision granting the federal government the right to maintain territorial assets or hold public property. Examples of federal states where the central government holds title to significant territorial assets and public property without an express right to do so under their domestic constitutional authority include Australia, Canada, the Federal Republic of Germany, the Russian Federation, and the United States of America.³⁵ These states thus appear to consider the ability of the central government to hold title to public assets to be one of the implicit powers necessary to administer a government.³⁶

Given the fact that the successor state central government succeeds to the territorial assets of a predecessor state, it would naturally be expected that a transfer of ownership to sub-state entities would be explicitly stated and would describe in some detail exactly what property was to be transferred.³⁷ The German Constitution, for example, explicitly provides for the transfer of certain Reich property to the Lander. Somewhat similarly, the drafters of the Yugoslav

³⁵ See *Constitutions of the Countries of the World* (Blaustein, Flatz, eds.); *Finer et al., Comparing Constitutions* (1995). The German Constitution does, however, list specific types of property, including the former Reich waterways and highways, that are the property of the Federation, and generally provides for federal ownership of other former Reich property. Basic Law for the Federal Republic of Germany, arts. 89, 90, 134.

³⁶ See MacKinnon, *Comparative Federalism*, p. 123 (1964) (“Some of the most basic principles of a constitutional system of government may have no more specific foundation than inference or implication, even where the constitution is a written one.”).

³⁷ Basic Law for the Federal Republic of Germany, art. 134.

Constitution of 1974 felt it necessary to specifically articulate which public property was owned by the Republic level governments.³⁸ The absence of such an explicit transfer provision may therefore be considered to indicate the central government retains the Constitutional authority to own the territorial assets of the former Yugoslavia located on Bosnian territory.

IV. CONCLUSION

A review of traditional state practice, the 1983 Vienna Convention, the opinion of the Legal Advisers of the Council of Europe, recent state practice, and the opinions of the Arbitration Commission indicate that the exclusion of sub-state entities in matters of state succession relates to their lack of international recognition as states, lack of sovereignty, and their lack of legal capacity to adequately succeed to the rights and obligations of the predecessor state. As such, from 1992 until 1995/96 the Republic of Bosnia may be considered to have held title to the territorial assets of the former Yugoslavia located on Bosnian territory. Absent the articulation of an express transfer of this title from the state of Bosnia to its sub-state entities, title may properly be considered to continue to rest with the central government of Bosnia.

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³⁸ 1974 Constitution of the Socialist Federal Republic of Yugoslavia.

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“We want to head off crises before they develop,
rather than react to crises after they happen.”

Senator George Mitchell, ICG Board Chair

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