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## STATE SUCCESSION AND THE INTERNATIONAL FINANCIAL INSTITUTIONS: POLITICAL CRITERIA v. PROTECTION OF OUTSTANDING FINANCIAL OBLIGATIONS

PAUL R. WILLIAMS\*

WITH the dissolution of the former Socialist Federal Republic of Yugoslavia (Yugoslavia) and the former Czech and Slovak Federal Republic (Czechoslovakia), the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (World Bank) were forced to confront enigmatic questions of State succession concerning the continuing membership of Yugoslavia and Czechoslovakia, and the competing claims for that membership by a variety of successor States. The typically intricate questions of State succession were further complicated by the international pariah status of Serbia/Montenegro, the State with the best claim to Yugoslavia's inheritance, and the combined outstanding obligations of Yugoslavia and Czechoslovakia to the financial institutions totalling over \$3.5 billion.

The primary questions faced by the IMF and World Bank as a result of the break-up of Yugoslavia and Czechoslovakia were:

- (1) What should become of the predecessor State's membership?
- (2) Could certain successor States be temporarily excluded from participation?
- (3) How could payment of the outstanding obligations and arrears of the predecessor States be best guaranteed?
- (4) How could the predecessor State's assets be preserved and allocated among the successor States?

In their attempt to grapple with the questions of State succession, the IMF and World Bank were required to balance the competing influences of the political interests of their members with their need to protect themselves from default on the outstanding loan obligations of the former Yugoslavia and Czechoslovakia. This article examines how the IMF and

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World Bank answered the questions of State succession by balancing these competing interests and navigating through the complex law of State succession to arrive at a new precedent for the "conditional succession" of member States. This article also identifies the dangers involved in the adoption of this new conditional succession approach.

### I. BACKGROUND

BEFORE discussing the above questions, it will be useful to outline briefly the nature of the IMF and World Bank, the history of Yugoslavia's and Czechoslovakia's membership in the financial institutions, and an account of the dissolution of those States.

#### A. *The Creation of the IMF and World Bank*

The IMF and World Bank were established in 1944 as a result of the UN Monetary and Financial Conference for the purpose of providing a key-stone for the rebuilding of the world economy after the termination of the Second World War.<sup>1</sup> The IMF was established to provide a mechanism to maintain an orderly system of currency payments between international States by lending currency to members facing balance of payments deficits.<sup>2</sup> The World Bank was created to provide the necessary international capital for financing the physical reconstruction of those countries devastated by the Second World War, and for financing the industrial development of lesser-developed countries.<sup>3</sup>

In order to attain membership in the World Bank, a State must first be a member of the IMF.<sup>4</sup> Membership of the IMF was originally open to those

1. The Bretton Woods Agreements (1972), pp.11–35; see also World Bank, *The International Bank for Reconstruction and Development 1946–1953* (1954), pp.4–7; and World Bank, *The World Bank, Policies and Operations* (1958), pp.2–4.

2. Bretton Woods, *idem*, pp.539–540. More specifically the purposes of the IMF include promoting international monetary co-operation, facilitating the expansion and balanced growth of international trade, promoting exchange stability, assisting in the establishment of a multilateral system of payments and eliminating foreign exchange restrictions, and providing member States with the opportunity to correct maladjustments in their balance of payments: IMF Articles of Agreement, Art.I (as amended effective 11 Nov. 1992). The IMF's organisation consists of a board of governors, one governor appointed from each member State; an executive board, five members appointed by the five member States having the largest contributions, and 15 appointed by the other member States; a managing director, selected by the executive board; and staff of the managing director: *idem*, Art. XII.

3. World Bank (1954), *op. cit. supra* n.1, at p.4. More specifically the purposes of the World Bank are to assist in the reconstruction and development of member States, promote private foreign investments, and promote the long-range balanced growth of international trade and the maintenance of equilibrium in balances of payments. World Bank Articles of Agreement, Art.I (as amended effective 16 Feb. 1989). The organisation of the World Bank consists of a board of governors, executive directors, a bank president, and staff appointed in the same manner as their counterparts in the IMF: *idem*, Art.V.

4. World Bank Articles of Agreement, Art.II(1)(b). This requirement is significant as the manner in which the IMF addresses the issue of succession to membership can substantially affect the membership of successor States in the World Bank.

States attending the UN Monetary and Financial Conference in 1944.<sup>5</sup> Subsequent membership is open to any State seeking it, subject to such terms and conditions as may be prescribed by the Board of Governors.<sup>6</sup> If a member State of the World Bank ceases to continue its membership in the IMF, that State's membership of the World Bank terminates three months after its IMF membership, unless the Board of Governors decides by a three-fourths majority vote to permit the State to maintain its membership.<sup>7</sup>

#### *B. The Creation of Yugoslavia and Czechoslovakia and Their Membership in the IMF and World Bank*

The Federal People's Republic of Yugoslavia was created on 31 January 1946, following the conclusion of the Second World War. The Yugoslav Federation consisted of the republics of Bosnia-Herzegovina, Croatia, Macedonia, Montenegro, Serbia, and Slovenia. In 1974 the Yugoslav Federation adopted a new constitution and reconstituted itself as the Socialist Federal Republic of Yugoslavia. The 1920 Peace Treaty of Trianon, conceived by the victorious powers in the First World War, created the State of Czechoslovakia out of the Austro-Hungarian Empire.<sup>8</sup> The Czech and Slovak Republics constituted the administrative divisions of this new State.<sup>9</sup>

Both Yugoslavia and Czechoslovakia were original members of the IMF and World Bank.<sup>10</sup> Czechoslovakia's membership was terminated in 1954, for failure to pay the full share of its capital subscription as required by the Articles of Agreement.<sup>11</sup> Czechoslovakia was readmitted in September 1990.<sup>12</sup> During the course of Yugoslavia's membership of the IMF, it accumulated outstanding financial obligations in the amount of \$216.76 million (155.59 million SDRs).<sup>13</sup> In the course of its membership of the

5. IMF Articles of Agreement, Art.II(1). All the States represented at the UN Conference became members of the IMF and World Bank except the former USSR, Liberia and New Zealand: World Bank (1954), *op. cit. supra* n.1, at p.12.

6. IMF Articles of Agreement, Art.II(2).

7. World Bank Articles of Agreement, Art.VI(3).

8. Peace Treaty of Trianon: *Treaties, Conventions, International Acts, Protocols, and Agreements between the United States of America and Other Powers, 1910-1923* (1923), p.3558.

9. For an examination of the origins of Czechoslovakia see W. V. Wallace, *Czecho-Slovakia* (1976).

10. Bretton Woods, *supra* n.1, App.C, at pp.800-802.

11. *Idem*, p.171.

12. World Bank, *Czech Republic and Slovak Republic—Succession to Membership Status of the Czech and Slovak Federal Republic* (23 Dec. 1992), p.3.

13. IMF Press Release No.92/92 (15 Dec. 1992), p.2. SDRs (Special Drawing Rights) are international reserve assets created by the IMF and allocated to members to supplement their existing reserve assets.

World Bank, Yugoslavia actively borrowed and acquired \$4.8 billion in loans, with \$1.977 billion disbursed and outstanding.<sup>14</sup>

During the course of Czechoslovakia's membership of the IMF, it accumulated outstanding financial obligations in the amount of \$1,562.41 million (1,121.50 million SDRs).<sup>15</sup> Czechoslovakia acquired a \$450-million structural adjustment loan during the course of its membership of the World Bank, half of which had been paid out by June 1991, and a second loan for the purposes of financing a power and environmental improvement project located within the territory of the Czech Republic.<sup>16</sup>

### C. *The Dissolution of Yugoslavia*

Seeking the transformation of Yugoslavia into a confederation of the republics of Yugoslavia, Slovenia conducted a referendum on 23 December 1990, in which 88.4 per cent of the population voted in favour of declaring Slovenia a sovereign and independent State.<sup>17</sup> Croatia joined with Slovenia and the republics issued a joint statement in February 1991, invalidating Yugoslav laws on their territory and demanding the formation of a confederation of republics. Yugoslavia resisted these attempts to transform the relationship of the Yugoslav republics. Finding no satisfaction from Yugoslavia, Slovenia and Croatia issued proclamations of independence on 25 June 1991.<sup>18</sup> By December 1991 Slovenia and Croatia introduced their own currencies and adopted new constitutions.<sup>19</sup> The Eu-

14. World Bank, *Socialist Federal Republic of Yugoslavia Cessation of Membership and Succession to Membership* (11 Feb. 1993), p.3. In a separate World Bank document, the figure for aggregate loan amounts equals \$4.1 billion with \$2.1 billion outstanding: World Bank, *Bank Portfolio of Loans in the Former Yugoslav Republics* (25 Nov. 1992), p.1. See also statement by Mr Johannes Linn, Vice President, Financial Policy and Risk Management, to the IMF executive board meeting (4 Dec. 1992), p.1. On the basis of interim agreements with the Yugoslav successor States and the physical location of World Bank projects, the World Bank apportioned the outstanding debts of the former Yugoslavia as follows: Macedonia—\$153.98 million (7.5%); Croatia—\$155.19 million (7.6%); Slovenia—\$160.59 million (7.8%); Bosnia-Herzegovina—\$439.24 million (21.4%); Serbia/Montenegro—\$1,141.05 million (55.7%): *Bank Portfolio*, *ibid.*

15. World Bank, *Staff Report for Review Under Stand-By Arrangement* (14 Oct. 1992), p.1.

16. World Bank, *op. cit. supra* n.12, at p.2. In order to receive the power and environment loan, the Czech Republic "agreed to fully guarantee the loan after the dissolution of Czechoslovakia": *ibid.*

17. Conference on Yugoslavia Arbitration Committee Opinion No.7, *On Recognition of Slovenia by the EC and its Member States* (1992) 31 I.L.M. 1512, 1513.

18. Slovenia Country Report on Human Rights Practices for 1992 (report submitted to the Committee on Foreign Relations US Senate and the Committee on Foreign Affairs US House of Representatives by the Department of State) (Feb. 1993), p.907; and Croatia Country Report on Human Rights Practices for 1992 (report submitted to the same two committees by the Department of State) (Feb. 1993), p.740.

19. Arbitration Commission Opinion No.7, *supra* n.17, at p.1512; and Conference on Yugoslavia Arbitration Committee Opinion No.5, *On Recognition of Croatia by the EC and its Member States* (1992) 31 I.L.M. 1503, 1504.

ropean Community recognised Slovenia and Croatia as independent States on 15 January 1992,<sup>20</sup> with the United States recognising these States on 7 April 1992.<sup>21</sup> The United Nations admitted Slovenia and Croatia as new members on 22 May 1992.<sup>22</sup>

The Republic of Bosnia-Herzegovina conducted a referendum on 29 February and 1 March 1992, in which 63 per cent of the electorate voted to pursue independence from Yugoslavia.<sup>23</sup> The European Community<sup>24</sup> and the United States<sup>25</sup> recognised Bosnia-Herzegovina on 7 April 1992, with the United Nations admitting it as a new member on 22 May 1992.<sup>26</sup>

The Republic of Macedonia conducted a referendum on 8 September 1991 on the subject of independence,<sup>27</sup> and adopted a new constitution and declared independence in November 1991.<sup>28</sup> Macedonia attained UN membership on 8 April 1993,<sup>29</sup> and is recognised by a number of nations, including Russia, Bulgaria, Turkey, Albania,<sup>30</sup> Slovenia, Croatia, Bosnia-Herzegovina,<sup>31</sup> 11 member States of the European Community,<sup>32</sup> and the United States. The United States has, however, refused to establish diplomatic relations with Macedonia, at the request of Greece.<sup>33</sup>

The remaining two Yugoslav republics, Serbia and Montenegro, declared the formation of a joint State named the Federal Republic of Yugoslavia (Serbia/Montenegro) on 27 April 1992.<sup>34</sup> This joint State has not been recognised by the European Community or the United States.

20. *Keesing's Record of World Events*, Vol.38, No.1, p.38703 (Jan. 1992).

21. White House Press Release (7 Apr. 1992).

22. *Keesing's*, *supra* n.20, Vol.38, Nos.7-8, at p.39033 (July 1992).

23. *Bosnia-Herzegovina Country Report on Human Rights Practices for 1992* (report submitted to the two committees *supra* n.18 by the Department of State) (Feb. 1993), p.719.

24. *Keesing's*, *supra* n.20, Vol.38, No.1, at p.38848 (Jan. 1992).

25. White House Press Release, *supra* n.21, at p.1.

26. *Keesing's*, *loc. cit. supra* n.22.

27. Conference on Yugoslavia Arbitration Committee Opinion No.6, *On Recognition of Macedonia by the EC and its Member States* (1992) 31 I.L.M. 1507, 1508.

28. *Macedonia Country Report on Human Rights Practices for 1992* (report submitted to the two committees *supra* n.18 by the Department of State) (Feb. 1993), p.839.

29. For UN purposes, Macedonia is required to use the name the Former Yugoslav Republic of Macedonia until the name controversy between Macedonia and Greece is resolved.

30. *Keesing's*, *supra* n.20, Vol.38, Nos.7-8, at p.39036 (Aug. 1992).

31. *Idem*, Vol.38, No.4, p.38850 (Apr. 1992).

32. Originally, the EC member States had decided they would not recognise Macedonia under any title which included the name "Macedonia": *Lisbon Declaration of 26-27 June*, in *Keesing's*, *idem*, Vol.38, No.6, p.38943 (June 1992).

33. Greece believes that the use of the name Macedonia implies territorial claims by Macedonia on the northern province of Greece, which is also named Macedonia. See *Macedonia Report*, *loc. cit. supra* n.28.

34. *Serbia/Montenegro Country Report on Human Rights Practices for 1992* (report submitted to the two committees *supra* n.18 by the Department of State) (Feb. 1993), p.897.

### 1. *Claims of continuity*

The break-up of a State can generally be characterised as either a continuation or a dissolution. In the case of continuation, one or more sub-State entities breaks away from the predecessor State and forms an independent State. What remains of the predecessor State is referred to as the continuing State (or continuity of the predecessor State), and generally retains the rights and obligations of the predecessor State.<sup>35</sup> The break-away States are referred to as successor States. In the case of dissolution, the predecessor State dissolves into a number of successor States, with none of them being considered the continuing State.<sup>36</sup>

The characterisation of the break-up of a state as a continuation or a dissolution has a variety of consequences for the continuation of that State's international rights and obligations.<sup>37</sup> The extent of those consequences is, of course, subject to various interpretations. The consequences of these alternative models of break-up will be discussed below in the context of the membership of the Yugoslavian and Czechoslovakian successor States in the IMF and World Bank, and their responsibility for the debt obligations of their predecessor States.

Serbia/Montenegro claims that the break-up of Yugoslavia follows the model of continuation, and that it is the continuing State of the former Yugoslavia, and thereby entitled to all the rights and obligations of Yugoslavia.<sup>38</sup> Slovenia, Croatia and Bosnia-Herzegovina explicitly contest Serbia/Montenegro's claim to be the continuing State of Yugoslavia and

35. The case of continuation is most frequently associated with the independence of colonies, where the colonial power maintains its status as the continuing State and the ex-colony is granted status as a newly independent State.

36. The case of dissolution is most frequently associated with the devolution of joint States or empires, examples being the dissolution of the United Arab Republic into Egypt and Syria, and the dissolution of Greater Colombia into Panama, Colombia and Venezuela, where all the successor States are treated as equal.

37. The Vienna Convention on State Succession in Respect to Treaties (contained in the Report of the International Law Commission to the General Assembly on the Work of its 20th Session, UN Doc.A/9610/Rev.1, p.260 (July 1974)) takes the position that if a State breaks up, all its successor States are generally bound by the treaty rights and obligations of the predecessor State, whether or not the predecessor State continues. The Convention also takes the position (*ibid*) that if a treaty relates only to a portion of the territory of a predecessor State, the successor State having authority over that territory will be bound by the treaty, while the other successor States will not be. The US restatement of the law of foreign relations, on the other hand, takes the position that none of the successor States are bound by the treaty rights and obligations of the predecessor State if the State dissolves: *Restatement (Third) of Foreign Relations* (1987), s.210. However, in the case of a continuation, the predecessor State is bound by the treaty and other obligations but the breakaway State is not: *ibid*.

38. Diplomatic Note No.8/I/92 to the US Department of State from the Embassy of the SFR of Yugoslavia (Federal Republic of Yugoslavia). Serbia/Montenegro's position might be supported by the ICJ's judgment on the genocide application by Bosnia-Herzegovina of 8 Apr. 1993, wherein it held the Genocide Convention provided a *prima facie* basis for its jurisdiction to indicate provisional measures because the SFRY was a party to the Convention, and Serbia/Montenegro filed a declaration to know those obligations.

assert in the alternative that Yugoslavia has dissolved, and all the successor States should be treated equally.<sup>39</sup> The United States also rejects Serbia/Montenegro's claim to be the continuing State of Yugoslavia.<sup>40</sup> The States of the European Community similarly take the position that Yugoslavia has dissolved, and thereby Serbia/Montenegro may not claim to be the continuing State.<sup>41</sup>

In the United Nations, while Slovenia, Croatia, Bosnia-Herzegovina and Macedonia have applied for and received new membership, Serbia/Montenegro refuses to apply for new membership and insists it is entitled to assume the membership of the former Yugoslavia. In response to Serbia/Montenegro's claim to assume the seat of Yugoslavia, the United Nations passed Security Council Resolution 757, stating in part: "the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations has not been generally accepted".<sup>42</sup> Subsequently, the UN Security Council passed Resolution 777, which effectively excluded Serbia/Montenegro from participating in the United Nations as the continuation of Yugoslavia.<sup>43</sup>

## 2. *Economic sanctions against Serbia/Montenegro*

In order to deter Serbia/Montenegro from continuing its aggression and interference in Bosnia-Herzegovina, the UN Security Council imposed

39. Letter from Dimitrij Rupel, Foreign Minister of the Republic of Slovenia, to Peter Hohenfelner, President of the UN Security Council and Permanent Representative of Austria to the UN; and Note Verbale from Republic of Croatia to US Mission to the UN (30 June 1992).

40. US Mission to the UN Press Release USUN 36-(92) (30 May 1992), stating in part: "[The US government] has already informed both the Security Council and the General Assembly that it does not believe that the authorities in Belgrade represent the continuation of the former Socialist Federal Republic of Yugoslavia. I note that many other countries have reserved their position on the continuity issue and quite a few have adopted the same view as we have on this matter."

41. EC Declaration on Yugoslavia, done at Brussels on 20 June 1992. See also *Keesing's*, *supra* n.20, Vol.38, Nos.7-8, at p.39013 (July 1992).

42. UN Doc.S/RES/757 (30 May 1992).

43. Security Council Res.777 states in part: "Recalling the state formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist, and realizing that the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations has not been generally accepted; considering that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the Socialist Federal Republic of Yugoslavia in the United Nations; and therefore recommends to the General Assembly that it decide that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly": UN Doc.S/RES/777 (1992). The Resolution, although designed to exclude Serbia/Montenegro from participation in the UN, is subject to substantial criticism as it also provides that the placard of Yugoslavia shall remain in the UN, Serbia/Montenegro may continue to occupy the Yugoslav Mission to the UN, and the Security Council will consider the matter of Serbian/Montenegrin participation at the end of the

economic sanctions on it.<sup>44</sup> The economic sanctions constituted a comprehensive embargo on imports from, or exports to, Serbia/Montenegro, with the purpose of substantially disrupting its economy.<sup>45</sup>

#### *D. The Dissolution of Czechoslovakia*

On 25 November 1992 the Federal Assembly of the Czech and Slovak Federal Republic adopted a constitutional law providing that, as of 1 January 1993, the State of Czechoslovakia would cease to exist, and would be succeeded by the independent States of the Czech Republic and the Slovak Republic (Slovakia).<sup>46</sup> Both the Czech Republic and Slovakia were immediately recognised by the European Community and the United States.<sup>47</sup>

Immediately prior to the dissolution of Czechoslovakia, the Czech Republic and Slovakia entered into a devolution agreement concerning the allocation of membership in international organisations.<sup>48</sup> This agreement provided that the Czech Republic and Slovakia would alternate the continuity of Czechoslovakia for purposes of membership in international organisations depending upon the nature of the organisation.<sup>49</sup>

Despite the existence of the devolution agreement, neither the Czech Republic nor Slovakia continued the membership of Czechoslovakia in the United Nations, but, rather, both States applied and were admitted as new members on 19 January 1993.<sup>50</sup> The United Nations did, however, allocate the membership of Czechoslovakia in the UN subsidiary organisations to the Czech Republic and Slovakia in the manner set out in the devolution agreement.<sup>51</sup>

47th session of the General Assembly: *ibid*; and Legal Opinion from Carl-August Fleischauer, Under-Secretary for Legal Affairs, to Kenneth Dadzie, Under-Secretary-General for the UN Conference on Trade and Development (29 Sept. 1992).

44. US General Accounting Office Draft Report, "Serbia-Montenegro; Implementation of UN Economic Sanctions" (Mar. 1993).

45. Scharf and Dorsin, "Interpreting UN Sanctions: The Rulings and Role of the Yugoslavia Sanctions Committee" (1993) 19 Brooklyn J.Int.L. 771.

46. Czech and Slovak Republic Country Report on Human Rights Practices for 1992 (report submitted to the two committees *supra* n.18 by the Department of State) (Feb. 1993); and Constitutional Law on the Termination of the Czech and Slovak Federal Republic (25 Nov. 1992), Art.1.

47. Statement by White House Press Secretary Marlin Fitzwater, Washington D.C. (1 Jan. 1993).

48. Agreement on Membership in International Governmental Organisations, signed in Prague, 12 Dec. 1992, by the Minister of Foreign Affairs for the Czech and Slovak Federal Republic, the Minister of Foreign Relations for the Czech Republic, and the Minister of Foreign Affairs for the Slovak Republic.

49. *Ibid.*

50. "Czech Republic, Slovakia Admitted to the United Nations", in FIBIS-EEU-93-013 (22 Jan. 1993), p.2; and statement of the President on the Special Session of the General Assembly on the Admission of Membership of the Czech Republic and the Slovak Republic (19 Jan. 1993).

51. *Journal of the UN*, No.1993/13 (part 1) (20 Jan. 1993).

## II. THE INTERNATIONAL LAW OF STATE SUCCESSION PERTAINING TO INTERNATIONAL ORGANISATIONS, AND THE PAST PRACTICE OF THE IMF AND WORLD BANK

THE primary questions faced by an international organisation upon the break-up of one of its member States are: what becomes of the membership of the predecessor State, and what becomes of the assets and debts of the predecessor State? As this article will discuss later, the IMF and World Bank were faced with additional questions that arose out of the political circumstances surrounding the break-up of Yugoslavia and Czechoslovakia.

Before discussing the application of the international law of State succession by the IMF and World Bank to the dissolution of Yugoslavia and Czechoslovakia, it is necessary to give a brief account of the international law of State succession regarding membership of international organisations and the assumption of assets and debts, and the past practice of the IMF and World Bank in this area.

### A. *Public International Law*

Although issues of State succession have a long history in public international law, there is scant precedent regarding the specific issues of succession to membership in international organisations, and the allocation of the assets and debts of a predecessor State.

#### 1. *Membership of international organisations*

Under the general rules of public international law, it is generally assumed that upon the break-up of a State, the continuing State, if it exists, will assume the membership of the predecessor State in international organisations, and the newly independent State or States must seek new membership.<sup>52</sup> In the case of a dissolution it is at best unclear as to which States may inherit the membership of the predecessor State.<sup>53</sup> The uncertainty over whether which successor States, if any, may inherit the membership of the predecessor State upon break-up of that State is further complicated by the fact that, until recently, no clear precedent existed, outside the arena of decolonisation,<sup>54</sup> as to how to determine whether the break-up of a State is a continuation or dissolution.

The break-up of British India into the States of India and Pakistan was generally considered as a case of continuation, with India being treated as

52. This principle has been applied almost exclusively in the case of decolonisation: D. P. O'Connell, *State Succession in Municipal Law & International Law*, Vol.II (1967), pp.184–187.

53. *Idem*, pp.198–200.

54. For an examination of the issue of treaty succession in the context of decolonisation, see McNair, *The Law of Treaties* (1986), pp.640–654.

the continuity of British India.<sup>55</sup> In the case of the break-up of the Union of Soviet Socialist Republics, Russia was generally considered to be the continuation of the Soviet Union.<sup>56</sup> Although the case of the former Yugoslavia is still outstanding in many international organisations, it is generally considered that no successor State is the continuation but, rather, that the former Yugoslavia dissolved and all successor States are treated equally.<sup>57</sup> And although the case of the dissolution of Czechoslovakia is also outstanding in many international organisations, neither the Czech Republic nor Slovakia is considered to be the continuing State.

One consistency that can be found among these precedents is that the continuing State, if one exists, retains a substantial portion of the predecessor State's population, territory and resources.<sup>58</sup> The determination of continuity has also been affected by the existence of a devolution agreement between the successor States indicating that a particular successor State should assume the predecessor State's membership in international organisations.<sup>59</sup>

55. *Idem*, pp.648–649 (citing UN Press Release, P.M.473 (12 Aug. 1947)).

56. Edwin D. Williamson, Legal Adviser for the US Department of State, "Remarks at the Proceedings of the 86th Annual Meeting of the American Society of International Law" (1992) Am.Soc.Int.L. 10, 13–14.

57. On 22 May 1992, on the occasion of the admission of Slovenia, Croatia and Bosnia-Herzegovina to the UN, the US Permanent Representative to the UN stated: "If Serbia and Montenegro desire to sit in the United Nations, they should be required to apply for membership and be held to the same standards as all other applicants": US Mission to the UN Press Release USUN 35–(92) (22 May 1992).

58. In connection with the creation of Pakistan, the UN determined that India possessed the characteristics necessary to constitute the continuation of British India in 1947: Legal Opinion of the Assistant Secretary-General for Legal Affairs, 17 UN GAOR Supp. No.9, para.72; UN Doc.A/5209; A/CN, 4/149, p.2. This determination is consistent with the fact that India retained 80% of the former population of British India, 75% of the territory and a substantial portion of the resources. In the more recent case of the break-up of the Soviet Union, the Russian Federation has been generally viewed, particularly by several European countries, as the continuation of the former Soviet Union, and permitted to occupy its seat in the UN General Assembly, the Security Council and other bodies within the UN system. After the dissolution of the Soviet Union, Russia retained over 55% of the population, 77% of the territory and a significant portion of the resources. Unlike India and Russia, Serbia and Montenegro did not constitute a substantial majority of the population, territory or resources of the former Yugoslavia. Serbia and Montenegro constitutes approximately 39.1% of the territory, 43% of the population and 36.7% of the GNP of the former Yugoslavia: *Keesing's*, *supra* n.20, Vol.38, Nos.7–8, at R130 (Aug. 1992). In US Mission to the UN Press Release USUN 83–(92) the US declared: "We find ourselves in an unprecedented situation. For the first time, the United Nations is facing the dissolution of one of its members without agreement by the successor states on the status of the original UN seat. Moreover, none of the former republics of the former Yugoslavia is so clearly a predominant portion of the original State so as to be entitled to be treated as the continuation of that state." The contradictory case is that of Czechoslovakia, where the break-up was treated as a dissolution in the UN despite the fact that the Czech Republic appears to retain 66% of the former Czechoslovakia's population, 62% of the territory and 71% of the resources: "Little Joy as Czechs Slovaks Split", *Washington Post*, 1 Jan. 1993, Sec.A21.

59. India and Pakistan entered into a devolution agreement stating that India would maintain the membership of British India in all international organisations: Indian Independ-

## 2. *The assumption of assets and debts*

(a) *Debts.* Under international law State debt obligations are generally divided into the categories of “debts contracted in the general interest by the national government of the state” (national debt), “debts contracted by the national government of the state for identifiable projects in a specific region” (territorial debt), and “debts of local government entities”.<sup>60</sup> The debts of Yugoslavia and Czechoslovakia to the IMF and World Bank are both national debt and territorial debt.

The international law governing State succession to international debt is governed both by State practice and the 1983 Vienna Convention on Succession of States in Respect of State Property and Debts (1983 Vienna Convention).<sup>61</sup> The State practice with regard to national debt in the circumstances of a continuation of a State is that the continuing State is obligated to the full amount of the predecessor State’s national debt,<sup>62</sup> unless there is agreement between the continuing State and the breakaway State as to the allocation of the national debt, or unless the breakaway State agrees with the creditors to be obligated to a certain portion of the debt.<sup>63</sup>

Although there is virtually no clear State practice with regard to the assumption of debts by successor States in the case of a dissolution,<sup>64</sup> inter-

dence (International Agreements) Order, quoted in 2 UN GAOR Sixth Committee, Annex 6c, pp.308–310; Doc.A/C.6/161. In the Alma Ata Accords, Russia obtained formal agreement by all the members of the Commonwealth of Independent States that it should be permitted to occupy the seat of the former Soviet Union in UN bodies: “Text of Accords by Former Soviet Republics Setting Up a Commonwealth”, *New York Times*, 23 Dec. 1991, sec.1, p.10. Russia was also most likely permitted to retain the UN seat of the former Soviet Union because of circumstances such as two of the larger Soviet republics, Ukraine and Byelorussia, having through historical anomaly been members of the UN since its inception, and therefore the residual Soviet Union for UN purposes has always constituted Russia. Additionally, Russia continued as one of the five nuclear weapon States under the Non-Proliferation Treaty and it was thus consistent for Russia to occupy the Security Council seat of the Soviet Union along with the other four nuclear weapon States. Unlike India and Russia, no devolution agreement exists among the republics of the former Yugoslavia. In fact, each of the now independent Yugoslav republics has asserted that the former Yugoslavia has dissolved, and that no individual State is entitled to assume the continuity of Yugoslavia.

60. US Department of State, Memorandum of Law: Obligations of Predecessor and Successor States for Public Debts (1972), p.1.

61. Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, UN Doc.A/CONF.117/14 (7 Apr. 1983). The Convention has not entered into force, and is not generally considered to be a codification of customary international law.

62. The continuing State is generally considered to be obligated to the predecessor’s debts under the doctrine of *pacta sunt servanda* (an agreement must be kept): State Department Memorandum, *supra* n.60, at p.3.

63. *Idem*, pp.2–4. In most circumstances of State succession, the breakaway States have consented to being obligated by a portion of the national debt of the predecessor State: *idem*, p.11, citing Keith, *Theory of State Succession* (1907), p.490. For a detailed listing of successor State assumption of national debt see Phillipson, *Termination of War and Treaties of Peace* (1961), pp.323–326. For a discussion of the history of the assumption of assets and debts by successor States in the period of decolonisation see Feilchenfeld, *Public Debts and State Succession* (1931).

64. O’Connell, *op. cit. supra* n.52, at pp.387–394. The following cases of dissolution emit

national law would be likely to apply the same doctrine of *pacta sunt servanda*, which holds a continuing State liable in the case of continuation, to hold the individual successor States liable where a State has dissolved and there is no continuing State.<sup>65</sup>

With regard to territorial debt, State practice is for successor States to assume liability for any debt associated with the acquisition of specific property or benefits within a particular successor State's territory.<sup>66</sup> The obligation of the successor States arises from the doctrines of unjust enrichment and acquired rights.<sup>67</sup> In this instance, State practice does not draw a distinction between cases of continuation or dissolution. Finally, State practice provides that the creditor must consent to any agreement between the successor States allocating the debt. This practice exists to prevent the successor States from allocating the debt in such a manner that it is unlikely to be repaid.

The 1983 Vienna Convention does not draw a distinction between the cases of continuation or dissolution.<sup>68</sup> Neither does the Convention draw a distinction between national and territorial debt.<sup>69</sup> The primary principle underlying the Convention is that the rights of the creditor States or entities should not be prejudiced by the dissolution of the debtor State.<sup>70</sup>

The 1983 Vienna Convention therefore provides that in the case of the break-up of a State, unless the successor States otherwise agree, "the State debt of the predecessor State shall pass to the successor States in an equitable proportion, taking into account, in particular, the property, rights and interests which pass to the successor States in relation to that State debt".<sup>71</sup> Although the Convention provides for the equitable allocation of debt, it does not establish any criteria for determining what is an equitable amount, nor does it permit creditor States to dictate to successor States a determination of an equitable amount. As with State practice, the Convention does not, however, require creditor States to accept an allocation

the highly general principle that all successor States are obliged to assume some portion of the debts of the predecessor State: United Netherlands (1830), Union of Colombia (1824), Czechoslovakia (1939), Yugoslavia (1941), Rwanda-Urundi (1962), and the Federation of Rhodesia and Nyasaland (1963); *ibid.*

65. *Idem*, Vol.I, p.387.

66. State Department Memorandum, *supra* n.60, at p.5. See also *Hall's International Law* (4th edn, 1907); the 1972 Report of the International Law Commission on the Work of its 24th Session, UNGA A/8710 (22 July 1972), p.20; and O'Connell, *op. cit. supra* n.52, at p.387.

67. State Department Memorandum, *ibid.* Some commentators have suggested that creditor States may acquire "incorporeal rights to repayment which run with specific territorial project": *ibid.*, referring to O'Connell, *idem*, p.58.

68. The 1983 Vienna Convention, *supra* n.61, contains separate articles for continuity and dissolution, but the text of each article is identical.

69. *Idem*, Art.33 defines State debt as "any financial obligation of a predecessor State arising in conformity with international law towards another State, an international organization or any other subject of international law".

70. *Idem*, Art.36.

71. *Idem*, Arts.40 and 41.

of debt decided upon by the debtor States which might prejudice the rights of the creditor States.

The discussion above generates the general conclusion that successor States are obligated in some manner to accept an equitable share of the national and territorial debt<sup>72</sup> of the predecessor State. This obligation is subject, however, to the consent of the successor States. The precise allocation of the debt is determined by the successor States, subject to the final consent of the creditor States.

(b) *Assets.* The 1983 Vienna Convention addresses the allocation of State property among successor States. Although more specifically orientated towards physical property, the 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".<sup>73</sup> Unlike the case of debts, the Convention draws a distinction between the treatment of national assets and territorial assets. The Convention provides that, unless the successor States agree otherwise, movable State property<sup>74</sup> connected with the territory of a particular successor State passes to that State, while movable State property not connected with the territory of a particular successor State passes to the successor States in equitable proportions.<sup>75</sup>

#### *B. The Past Practice of the IMF and World Bank Regarding Successor State Membership, and the Assumption of the Predecessor State's Assets and Debts*

On a number of previous occasions, the IMF and World Bank have been faced with the break-up of one of their member States.

##### *1. The break-up of British India into India and Pakistan*

In 1947 British India broke up into the States of India and Pakistan. India was permitted to retain the seat of British India, with Pakistan being admitted as a new member in July 1950.<sup>76</sup> The question of allocation of

72. With the territorial debt being assumed by the successor State which controls the territory where the product of the debt is located.

73. 1983 Vienna Convention, *supra* n.61, Art.8.

74. *Idem*, Art.17 divides property into the categories of immovable and movable. Assets held by the IMF or World Bank which are liquid are traditionally categorised as movable property.

75. *Idem*, Arts.17 and 18.

76. O'Connell, *op. cit. supra* n.52, at p.189; and World Bank, *The Bank's Practice with Respect to State Succession* (25 Nov. 1992). Although the latter deals almost exclusively with membership questions in the IMF, the resolution of the membership question in the IMF will dictate the resolution of membership questions in the World Bank. See *supra* nn.4-7 and accompanying text.

debts was not addressed during the break-up of British India as at the time of break-up no loans had been made to British India.<sup>77</sup>

## 2. *The union of Southern Rhodesia, Northern Rhodesia and Nyasaland into the Federation of Rhodesia and Nyasaland, and its subsequent dissolution*

In 1953 the British colonies of Northern Rhodesia, Southern Rhodesia and Nyasaland joined together to form the Federation of Rhodesia and Nyasaland. The Federation then dissolved in 1964. Neither the colonies nor the Federation had been granted membership in the IMF or World Bank during this period.

Prior to the creation of the Federation, the World Bank had made one loan to Southern Rhodesia for a power project, and one to Northern Rhodesia for a railway project.<sup>78</sup> After its creation the Federation agreed to assume the liabilities of Southern Rhodesia and Northern Rhodesia in respect of their World Bank loans.<sup>79</sup> Upon dissolution of the Federation, the World Bank notified Southern Rhodesia and Northern Rhodesia that it considered them obligated by the terms of the pre-Federation loan agreement.<sup>80</sup> The World Bank did not hold Nyasaland responsible for either of the loans.<sup>81</sup>

In 1958, during the existence of the Federation, the World Bank made three sets of loans to the Federation in the amount of £140 million.<sup>82</sup> The first loan package, for the development of a railway project for the benefit of both Southern Rhodesia and Northern Rhodesia but not Nyasaland, was assumed by both Southern Rhodesia and Northern Rhodesia upon the dissolution of the Federation.<sup>83</sup> The second loan package was made to the Federal Power Board of the Federation for the development of a power project for the benefit of both Southern Rhodesia and Northern Rhodesia but not Nyasaland, and was guaranteed by the Federation.<sup>84</sup> Upon dissolution of the Federation, the Central African Power Corporation, which was the successor corporate entity to the Federal Power Board, assumed the loan, with Southern Rhodesia and Northern Rhode-

77. World Bank, *idem*, p.2.

78. Both these loans were guaranteed by the UK: *idem*, pp.3–4.

79. *Idem*, p.3.

80. The World Bank also notified the UK that it considered the UK to be bound by its previous guarantee of the loans: *idem*, pp.3–4.

81. *Ibid.*

82. O'Connell, *op. cit. supra* n.52, at pp.393 and 447.

83. Each State assumed responsibility for 50% of the loan amount: World Bank, *op. cit. supra* n.76, at p.4.

84. O'Connell, *op. cit. supra* n.52, at p.393. The UK also agreed to guarantee the loan under a separate agreement: World Bank, *ibid.*

sia each agreeing to guarantee 50 per cent of the loan amount.<sup>85</sup> The third loan, for the development of an agricultural project in Southern Rhodesia, was assumed by Southern Rhodesia upon the dissolution of the Federation.<sup>86</sup>

### *3. The union of Egypt and Syria into the United Arab Republic, and its subsequent dissolution*

In 1958 Egypt and Syria, both members of the IMF and World Bank, merged into the unitary State of the United Arab Republic (UAR). The UAR was permitted to realise membership of both financial institutions without seeking new membership. It is unclear whether the UAR continued the membership of Egypt, Syria, or both States. When in 1961 Syria separated from the UAR, it was permitted to retain its previous membership on the rationale that "Syria's identity had been preserved throughout its merger with Egypt, and the UAR was not disputing the reemergence of Syria as a separate country".<sup>87</sup> Syria was nonetheless obliged to confirm that it accepted the Articles of Agreement of the IMF and World Bank, and all the obligations arising under them since the date of Syria's original admission.<sup>88</sup>

The unification of Egypt and Syria did not raise any questions of debt succession since neither had borrowed from the Bank or guaranteed any loans.<sup>89</sup> Upon the dissolution of the UAR there was, however, the question of a World Bank loan to the Suez Canal Authority. The World Bank did not take a formal decision as to the responsibility of the successor States for this loan but, rather, regarded it as guaranteed by Egypt.<sup>90</sup> It is unclear whether this loan was regarded as guaranteed by Egypt because the Suez Canal was located in the territory of Egypt or because Egypt retained the name UAR until 1971.<sup>91</sup>

### *4. The dissolution of Rwanda-Urundi into Rwanda and Burundi*

In 1962 the Belgian trust territory of Rwanda-Urundi dissolved into the States of Rwanda and Burundi.<sup>92</sup> As a trust territory, Rwanda-Urundi did not hold membership of the IMF or World Bank. However, during the

85. World Bank, *ibid*. The UK also agreed to continue its guarantee of the loan obligation: *ibid*.

86. *Idem*, p.5. The UK acted as the guarantor of the original loan, and agreed to continue as guarantor after Southern Rhodesia's assumption of the loan obligations: *ibid*.

87. *Ibid*.

88. *Ibid*.

89. *Idem*, p.1.

90. *Idem*, p.2.

91. *Ibid* suggests that the loan was guaranteed by Egypt on the rationale that Egypt maintained the name UAR; however, this would appear to be a weak rationale given the history of State practice relating to territorial debt.

92. Both States subsequently became members of the IMF and World Bank.

course of Rwanda-Urundi's existence as a trust territory of Belgium, it received a highway and port project loan of \$4.8 million from the World Bank.<sup>93</sup> Upon the dissolution of the State, the World Bank sought to hold both successor States jointly and severally liable for the loan. Rwanda refused to accept any liability for the loan on the ground that the benefits from the highway and port project accrued entirely within the territory of Burundi. The disagreement was settled by Belgium agreeing to be held liable for the loan.<sup>94</sup>

##### *5. The transformation of British Singapore into Singapore*

Singapore ceased to be part of the British Commonwealth and joined with the Malaysian Federation in 1963, a member of the IMF and World Bank. At the time of Singapore's separation from the British Commonwealth, Singapore held one loan from the World Bank which was guaranteed by the United Kingdom. After the separation, the United Kingdom continued as the guarantor of the loan.<sup>95</sup>

In 1965 Singapore separated from the Malaysian Federation and became a member of the Bank in its own right in 1966. At the time of Singapore's association with the Malaysian Federation, Singapore held a second loan, to the Public Utilities Board of Singapore. After separation Singapore assumed the obligations under the guarantee agreement, and the Malaysian Federation was released from future obligations on this loan.<sup>96</sup> Singapore was apparently not held liable for any of the Malaysian Federation's national debt that had accrued during the time of its association.<sup>97</sup>

##### *6. The separation of Bangladesh from Pakistan*

In 1971 Bangladesh (then East Pakistan) separated from Pakistan. Pakistan was permitted to retain its membership, with Bangladesh being admitted as a new member in August 1972.<sup>98</sup>

At the time of Bangladesh's separation from Pakistan, the World Bank had made a number of loans to Pakistan for development projects. Upon the separation of Bangladesh, Pakistan announced to the World Bank that it would not service the debt of Bangladesh for projects located within Bangladesh.<sup>99</sup> Although denying the legitimacy of Pakistan's assertion, the Bank persuaded Bangladesh to assume liability for projects which

93. O'Connell, *op. cit. supra* n.52, at p.448.

94. World Bank, *op. cit. supra* n.76, at p.2.

95. *Ibid.*

96. *Ibid.*

97. *Ibid.*

98. *Idem*, p.1.

99. *Idem*, p.3.

were wholly located within its territory.<sup>100</sup> The World Bank was unable to persuade Bangladesh to accept what it had calculated to be an equitable share of Pakistan's pre-separation national debt.<sup>101</sup> As a result, the World Bank notified Pakistan that it would continue to be held liable for the national debt. Pakistan agreed to this arrangement and serviced the debt.<sup>102</sup>

### *7. The union of South Yemen and North Yemen into Yemen*

South Yemen and North Yemen, both members of the Bank, merged into the Republic of Yemen in 1990. The new joint State was not required to apply for membership, but succeeded to the memberships of South and North Yemen.<sup>103</sup>

### *8. Conclusions*

Based on the past practice described above, the following general conclusions may be drawn about the practice of the IMF and World Bank in cases of State succession.

With regard to membership: in the case of continuation the continuing State retains the membership, with the separating State seeking new membership;<sup>104</sup> and in the case of dissolution, both successor States assume the membership of the predecessor State.<sup>105</sup> This conclusion with regard to dissolution is diluted by the fact that both Egypt and Syria were members prior to the formation of the UAR and its subsequent dissolution.

With regard to assumption of debt obligations: in the case of continuation, the continuing State is held liable for the national obligations of the predecessor State,<sup>106</sup> with the separating State being held liable for territorial debt;<sup>107</sup> and in the case of dissolution, the successor States assume their respective territorial debt.<sup>108</sup> No precedent has been established with

100. *Ibid.* In order to persuade Bangladesh to accept liability for projects within its territory that had remained unfinished, the World Bank agreed to provide Bangladesh with 11 "reactivation" credits to finance the completion of those projects: *ibid.*

101. *Ibid.* Pakistan's pre-separation national debt to the World Bank consisted of two loans for industrial imports and two loans to the Agricultural Development Bank of Pakistan: *ibid.*

102. *Ibid.*

103. *Idem*, p.1.

104. See the separation of Pakistan from India, *supra* n.76 and accompanying text; and the separation of Bangladesh from Pakistan, *supra* n.87 and accompanying text.

105. See the dissolution of the UAR, *supra* n.87 and accompanying text.

106. See separation of Bangladesh from Pakistan, *supra* n.98 and accompanying text.

107. *Ibid.*, and the separation of Singapore from the Malaysian Federation, *supra* n.96 and accompanying text, but see the separation of Singapore from the UK, *supra* n.95 and accompanying text.

108. See the dissolution of the UAR, *supra* n.87 and accompanying text; of Rwanda-Urundi, *supra* n.92 and accompanying text; and of the Federation of Rhodesia and Nyasaland, *supra* n.78 and accompanying text.

regard to the allocation of national debt in the circumstances of dissolution.<sup>109</sup>

It is important to note that these consistent precedents developed along the lines of State practice and the principles set forth in the 1983 Vienna Convention discussed above, although the primary motivation of the IMF and World Bank has been to ensure that all outstanding obligations of the predecessor State are assumed by one or more successor States.<sup>110</sup>

### III. THE PRACTICE OF THE IMF AND WORLD BANK IN THE CASE OF THE DISSOLUTION OF YUGOSLAVIA

THIS article will now turn to the question of how the IMF and World Bank addressed issues of State succession arising from the break-up of Yugoslavia. Section IV will examine the break-up of Czechoslovakia. In addition to the questions of what should become of the membership of the former Yugoslavia, and how Yugoslavia's IMF and World Bank assets and debts should be allocated, the financial institutions were also faced with the problems of how to guarantee the payment of Yugoslavia's outstanding debt and arrears, and how to exclude Serbia/Montenegro temporarily from participation in the financial institutions.<sup>111</sup>

#### A. *Claims of the Successor States and Interests of Member States*

As noted above, Serbia/Montenegro claimed to be the continuation of the former Yugoslavia and thereby entitled to its rights and obligations. In the case of the IMF and World Bank such a claim included a claim to continue the membership of Yugoslavia, be entitled to its assets, and be obligated by its liabilities. Serbia/Montenegro's claim of continuity would naturally preclude Slovenia, Croatia, Bosnia-Herzegovina, and Macedonia from succession to membership and any share of Yugoslavia's assets. These successor States of course asserted that Yugoslavia had dissolved and that they were equally entitled to succeed to the membership of Yugoslavia and share in the allocation of its assets.

109. It will be recalled that the UAR had no national debt. See *supra* n.87 and accompanying text.

110. Cf. the failed World Bank attempt to hold Rwanda and Burundi jointly and severally liable for territorial debt in Burundi (but settling for assumption by Belgium), with willingness to permit Southern Rhodesia and Northern Rhodesia each to assume a 50% liability for joint territorial debt (and, appropriately, no liability for Nyasaland). Further cf. the willingness of the World Bank to permit the UK to continue to guarantee the obligations of Singapore, but to release the Malaysian Federation from its obligations to guarantee a similar loan to Singapore. See the failed World Bank attempt to hold Bangladesh liable for the national debt of the continuing State of Pakistan.

111. Other international financial institutions such as the Paris Club and the European Bank for Reconstruction and Development were faced with similar questions arising from the dissolution of Yugoslavia and Czechoslovakia, as well as the dissolution of the Soviet Union. An examination of the practice of these institutions is beyond the scope of this article.

The United States, and most of the members of the European Community, took the position that Yugoslavia had dissolved for purposes of the IMF and World Bank, and that Serbia/Montenegro should be temporarily excluded from membership, as part of the multilateral effort to punish Serbia/Montenegro for its territorial oppression against Bosnia-Herzegovina.<sup>112</sup>

### *B. Interim Arrangements*

During the early phases of the dissolution of Yugoslavia, the World Bank sought to ensure payment of Yugoslavia's outstanding loan obligations by entering into interim agreements with the Yugoslav successor States as they achieved independence. Thus, in February 1992 the World Bank persuaded Slovenia to agree to service the loans disbursed for projects located within the territory of the Republic of Slovenia.<sup>113</sup> A similar agreement was concluded with Croatia.<sup>114</sup> Prior to the separation of Macedonia and Bosnia-Herzegovina from Yugoslavia, the World Bank entered into an interim agreement with what remained of Yugoslavia to service outstanding loans identified with projects in that territory.<sup>115</sup> Upon the separation of Macedonia and Bosnia-Herzegovina, the World Bank concluded additional agreements covering the outstanding obligations identified with the territory of these successor States.<sup>116</sup>

### *C. Consideration of the Consequences of Continuation v. Dissolution*

As a first step to addressing the questions of State succession, the IMF and World Bank made the following determinations regarding the effect of characterising the break-up of Yugoslavia as either a continuation or a dissolution.

#### *1. Continuation*

Consistent with State practice and the past practice of the financial institutions, the IMF and World Bank determined that, in the case of continuation, the former Yugoslavia would continue to exist in the form of

112. IMF Memorandum: Informal Board Meeting on Yugoslavia (13 Nov. 1992), pp.1-2.

113. World Bank, *Portfolio of Loans*, *op. cit. supra* n.14, at p.2. This agreement provided assurances for \$161 million in outstanding loans: *ibid*. See also World Bank, *Effects of the Territorial Disintegration of the Socialist Federal Republic of Yugoslavia (SFRY)* (25 Nov. 1992), pp.1-2.

114. World Bank, *Portfolio of Loans*, *ibid*. This agreement provided assurances for \$155 million in outstanding loans: *ibid*.

115. *Ibid*. This agreement provided for assurances covering \$1.7 billion in outstanding loan obligations: *ibid*.

116. *Ibid*. The agreement with Bosnia-Herzegovina covered \$439 million in outstanding loans, and the agreement with Macedonia \$154 million: *ibid*.

Serbia/Montenegro.<sup>117</sup> Serbia/Montenegro would be obliged to fulfil the liabilities of Yugoslavia to the IMF and World Bank, but would also retain all Yugoslavia's assets.<sup>118</sup> The breakaway republics would retain no liability for the debt of Yugoslavia, and not be entitled to any share of its assets.<sup>119</sup> Serbia/Montenegro would also be entitled to continue the membership of Yugoslavia, with the breakaway republics being required to apply for new membership.<sup>120</sup>

## 2. *Dissolution*

The IMF and World Bank determined that, in the case of dissolution, the former Yugoslavia would no longer exist and therefore cease to be a member of the IMF and World Bank.<sup>121</sup> The assets and liabilities of Yugoslavia would be divided among the successor States,<sup>122</sup> with membership of the successor States being determined either through admission or by succession.<sup>123</sup>

### D. *Options for Succession*

Taking into consideration the consequences associated with the two theories of State succession, the IMF and World Bank developed and considered two possible options for dealing with the question of membership of the Yugoslav successor States and the allocation of assets and debts: admission to membership, and succession to membership.<sup>124</sup> Considering that the international community had rejected Serbia/Montenegro's claim to be the continuation, the proposals considered by the financial institutions under the admission and succession options, except one, were premised on the dissolution of Yugoslavia.

117. IMF, *Secession of Territories and Dissolution of Members in the Fund* (14 July 1992), p.4; and IMF, *Issues of State Succession Concerning Yugoslavia in the Fund* (20 Nov. 1992), p.1.

118. *Ibid.*

119. *Ibid.* Serbia/Montenegro and the breakaway republics would be free to agree among themselves to an allocation of the debts and assets of Yugoslavia, but the IMF would continue to hold Serbia/Montenegro solely liable for the debts, and solely entitled to the assets: *Secession*, *ibid.*

120. *Secession*, *ibid.* Serbia/Montenegro would retain the quota allocation of Yugoslavia despite Serbia/Montenegro's reduced size. The breakaway republics would be allocated new quotas: *idem*, pp.4–5.

121. *Ibid.*; and IMF, *Issues of State Succession*, *op. cit. supra* n.117, at p.1.

122. The IMF would be entitled to allocate the debts and assets of Yugoslavia among the successor States; however, if a successor State objected to its allocation, that State would be permitted under Art. XXIX(c) of the IMF Articles of Agreement to submit the dispute to arbitration: *Secession*, *idem*, p.6.

123. *Ibid.*

124. These options arise only in the case of dissolution since, in the case of separation, Serbia/Montenegro, as the continuing State, would have retained the membership of Yugoslavia, with the successor States seeking membership anew.

Because the issue of membership first arose in the IMF, the IMF developed the options for addressing the question of successor State membership. The World Bank, although not obliged to follow the lead of the IMF on questions of succession, provided substantial comment since, as discussed above, a State may not be a member of the World Bank unless it is a member of the IMF.<sup>125</sup>

### *1. Admission to membership*

The admission to membership option entailed a determination by the IMF and World Bank that Yugoslavia had dissolved, and that none of the successor States would be entitled to assume the seat of the former Yugoslavia.<sup>126</sup> Each of the successor States would be required to apply to the IMF and World Bank as new members in accordance with their standard membership procedures and conditions.<sup>127</sup>

Because under this option Yugoslavia's membership would terminate, the IMF and World Bank would be required to settle accounts with the successor States. Since the Articles of Agreement do not provide for the settlement of accounts with dissolved member States, the IMF reasoned by analogy that the Fund's rules on settlement of accounts with withdrawing members would apply.<sup>128</sup> Under this procedure, the successor States would be required to redeem the shares of Yugoslavia in the SDR department, minus Yugoslavia's SDR shares still held by the department.<sup>129</sup> The successor States would also lose Yugoslavia's entitlement to share in any potential capital gains that would result from the disposal of the Fund's gold reserve through a sale of that gold, or liquidation of the Fund.<sup>130</sup> And, since the SDRs allocated to Yugoslavia would be cancelled, when the successor States became members they would be entitled to SDRs only in proportion to their quotas.<sup>131</sup>

The World Bank suggested a modified version of this membership approach which would have permitted the continuation of the membership of Yugoslavia with individual successor States applying for membership at will.<sup>132</sup> This approach would have permitted Serbia/Montenegro to

125. See *supra* n.4 and accompanying text.

126. IMF, *Secession*, *op. cit. supra* n.117, at p.7, and *Issues of State Succession*, *op. cit. supra* n.117, at p.6.

127. *Ibid.* See IMF Articles of Agreement, Art.II(2); and World Bank Articles of Agreement, Art.II(2).

128. *Secession*, *ibid.*

129. *Ibid.* This would amount to a debt obligation of \$216.76 million to the IMF, and \$1.977 billion to the World Bank between the five successor States. See *supra* nn.13–14 and accompanying text. It is unlikely that the successor States would have been able to redeem the SDRs as Serbia/Montenegro was under UN economic sanction, Croatia and Bosnia-Herzegovina were in the midst of civil war, and Macedonia remained an unrecognised State.

130. *Ibid.*

131. *Idem*, p.8.

132. World Bank, *Effects of Disintegration*, *op. cit. supra* n.113, at p.7.

retain the membership of Yugoslavia, complete with Yugoslavia's assets, while requiring the other successor States to apply anew and forgo any access to those assets.

## 2. *Succession to membership*

The alternative option to new membership for the successor States was to permit the successor States to succeed to the membership of Yugoslavia. Succession to the membership of Yugoslavia would entail a finding that Yugoslavia had dissolved and that each successor State was entitled to succeed to its membership.<sup>133</sup> The succeeding States would be assigned a share of Yugoslavia's quota equal to each State's share of Yugoslavia's assets and liabilities.<sup>134</sup> The succeeding States would therefore be permitted to retain a share of Yugoslavia's SDRs in proportion to their quota, and would retain the right to any capital gains that might result from the future disposal of the Fund's gold.<sup>135</sup>

The IMF and World Bank developed three alternative scenarios for succession: complete, partial and conditional.<sup>136</sup> The primary variables motivating the IMF and World Bank to create these options were twofold. First, there was the concern whether the IMF and World Bank would be exposed to outstanding liabilities if the successor States did not unanimously agree upon the allocation of debt owed to the IMF and World Bank. Second, was the political desire to exclude Serbia/Montenegro from participation in the IMF and World Bank.

(a) *Complete succession.* The option of complete succession provided that the IMF and World Bank would make a determination of the allocation of quotas, assets and liabilities and present this determination with an offer of automatic succession of membership to the successor States.<sup>137</sup> When all the successor States had agreed to their respective allocations,<sup>138</sup> they would be entitled as a group to succeed to membership. If any one

133. This approach treated all the successor States as equal continuing parts of the former Yugoslavia, which would replace Yugoslavia's membership with their own.

134. IMF, *Secession*, *op. cit. supra* n.117, at p.6. The respective financial institution would be responsible for determining the share of Yugoslavia's quota to be allocated to each successor State.

135. *Ibid.* and IMF, *Issues of State Succession*, *op. cit. supra* n.117, at p.8.

136. The IMF first developed the approaches of complete, partial and conditional succession with the World Bank providing comments on these approaches. See generally IMF, *Secession*, *op. cit. supra* n.117, and World Bank, *Effects of Disintegration*, *op. cit. supra* n.113.

137. *Idem*, pp.8 and 7 respectively. Under this option, the IMF would be permitted to make the membership offer conditional on certain prerequisites that may be necessary for traditional membership purposes. These prerequisites could include the adoption of necessary domestic legislation, and payment of the successor State's share of Yugoslavia's arrears: *Secession*, *ibid.*

138. And demonstrated that they had enacted sufficient domestic legislation to carry out membership of the financial institutions, which was considered a standard prerequisite for membership: *Secession*, *ibid.*

successor State refused to agree to the allocation, none of the successor States would be entitled to membership. After succession to membership, the IMF and World Bank could suspend the membership of any successor State that did not meet its obligations under the financial institutions' respective Articles of Agreement.<sup>139</sup>

The benefit of this approach was that the debt obligations of the predecessor State would be fully obligated prior to any of the successor States assuming membership. The disadvantages were that it permitted one State to frustrate, intentionally or unintentionally,<sup>140</sup> the membership of the other successor States. And it provided for the membership of Serbia/Montenegro.

(b) *Partial succession.* The partial succession approach provided that each individual successor State could succeed to the membership of Yugoslavia as soon as it agreed to its allocation of the quota, assets and liabilities, and met the necessary prerequisites.<sup>141</sup>

The advantage of this approach was that the membership of an individual successor State could not be frustrated by one of its fellow successor States. The primary disadvantages were that it permitted successor States to assume membership without the full amount of debt to the IMF and World Bank being accounted for, and without all the successor States agreeing among themselves on the allocation of the quota, assets and liabilities.<sup>142</sup> And, like the complete succession approach, permitted Serbia/Montenegro to attain membership.

(c) *Conditional succession.* The conditional succession approach developed by the IMF and opposed by the World Bank provided that the successor States would be entitled to succeed to the membership of Yugoslavia if they were able to meet specific conditions of succession set by the IMF.<sup>143</sup> The intent of the conditional succession approach was

139. *Ibid*; and World Bank, *Effects of Disintegration*, *op. cit. supra* n.113, at p.7.

140. The financial institutions were concerned with Serbia/Montenegro's possible intentional frustration, and Bosnia-Herzegovina's unintentional frustration through an inability to agree to service its share of the allocation of debt.

141. IMF, *Secession*, *op. cit. supra* n.117, at pp.9–10. Each successor State would also have to meet the standard prerequisites for membership, which included the enactment of domestic legislation necessary for carrying out the obligations of membership of the financial institutions: *ibid*.

142. This would occur where a successor State either did not obtain membership, and could therefore not be held accountable for the debts of the predecessor State; or where a successor State objected to the allocation of its share of quota, assets or liabilities and pursued arbitration under Art.XXIX(c) of the IMF Articles of Agreement. The IMF attempted to circumvent this problem by proposing in its description of the partial succession approach that the offer of succession to each successor State stipulate that the succession would be subject to the agreement of all the successor States as to the allocation of assets and liabilities: *Secession*, *idem*, p.10. Such a stipulation would, however, transform the partial succession approach into the complete succession approach and permit a single successor State to frustrate the membership of the other successor States by not agreeing to the allocation.

143. IMF, *Issues of State Succession*, *op. cit. supra* n.117, at p.7.

specifically both to develop a succession model whereby all the successor States with the exclusion of Serbia/Montenegro could succeed to membership and to condition the succession to membership on an agreement of each particular State's allocation of Yugoslavia's debt and assets. The two proposals for conditions developed by the IMF were as follows.

(c)(i) *Succession as deemed appropriate.* The first proposal made succession to membership conditional upon a finding by the IMF that an offer of succession would be appropriate at a particular time, with an offer of succession being deemed inappropriate if there were strong opposition among the members of the IMF to the membership of a particular State.<sup>144</sup> The IMF suggested this condition derived from Article II, section 2 of the IMF Articles of Agreement, which provides that membership shall be open to States at such times and in accordance with such terms as may be stipulated by the IMF.<sup>145</sup> Although disguised as a timing condition, this condition basically sets forth the requirement that a State may be denied an offer of succession if such an offer would be opposed by a significant number of the IMF member States.

Two separate cases of precedent within the IMF constrained its ability to pursue this condition of appropriateness. The first arose from previous findings by the IMF, in the context of admission of small States, that although it could delay membership applications for a period of time until the criteria for membership had been met,<sup>146</sup> it could not delay applications indefinitely with the purpose of frustrating membership.<sup>147</sup> Although delays frequently occurred between submission of a membership application and admission, these delays were directly related to the applicant's ability to meet the criteria for membership, and did not occur after the State had met those criteria.<sup>148</sup>

The second restraining precedent also occurred in the context of the admission of small States. Relying on the International Court of Justice's *Advisory Opinion on the Conditions of Admission of a State to Membership in the United Nations*,<sup>149</sup> the IMF had previously determined that it could impose only criteria for membership that were directly derived from the IMF Articles of Agreement.<sup>150</sup> And that, once an applicant had met the criteria for membership, it was entitled to membership.<sup>151</sup>

144. *Idem*, pp.7–12.

145. *Idem*, p.8.

146. The criteria for membership are that the State seeking membership must be a sovereign State able and willing to fulfil the obligations of membership: *idem*, p.9.

147. *Ibid.*

148. *Ibid.*

149. I.C.J. Rep. 1948, 57.

150. IMF, *Issues of State Succession*, *op. cit. supra* n.117, at p.10.

151. *Ibid.* Despite the IMF's keen reluctance to create new criteria for membership, it readily adopted the view that requiring all the successor States to agree to the allocation of responsibility for shares of liabilities and assets prior to the succession of any one successor

The IMF also reasoned that the discretionary condition of “appropriateness” would have the effect of negating the offer of succession, as “an offer that remains subject to the entire discretion of the offeror is not a conditional offer; it is not an offer at all”.<sup>152</sup> From this premise, the IMF reasoned that a conditional offer based on “appropriateness” would not constitute a valid offer, and the absence of a valid offer at the time of dissolution would result in the requirement that all successor States apply for membership anew.<sup>153</sup>

(c)(ii) *Succession based on ability to meet the obligations of the Articles of Agreement.* The second proposal made succession to membership conditional upon the ability and willingness of the successor States to fulfil the obligations of membership as set forth in the Articles of Agreement. This condition derives from the IMF’s implicit authority to require that a State is capable of carrying out its obligations to the IMF before membership is granted.<sup>154</sup>

In order to transform this implicit requirement into an explicit requirement capable of excluding Serbia/Montenegro, the IMF developed the additional condition that the IMF affirmatively determine that the successor State is “able to meet its obligations under the Articles”.<sup>155</sup> Relieving any doubt that this criterion was intended to exclude Serbia/Montenegro from membership, the IMF noted in proposing the condition that the finding of ability would include “an assessment of the probability that the successor state is, and will remain in the foreseeable future, able to fulfil its obligations, including its financial obligations to the

State would be consistent with the Articles of Agreement in the context of succession of membership: *idem*, pp.10–11.

152. *Idem*, p.11. The IMF also reasoned that the condition of appropriateness to be determined by the membership of the IMF would have the effect of transferring the authority for membership decisions from the executive board to the members and that this would be inconsistent with its Articles of Agreement: *ibid*.

153. *Idem*, p.12.

154. *Idem*, p.7.

155. *Idem*, pp.7–8. During development of this condition, representatives of the US, the EC and the Organisation of Islamic States agreed that: “It would be made clear in the accompanying Board discussion that the Board regarded the existence of UN sanctions as precluding ‘reasonable assurance’ that IMF obligations could be fulfilled. The Board’s view on this latter point would then provide the means of excluding Serbia/Montenegro from membership, without explicitly predicated the Fund’s actions on those of the UN”: IMF Memorandum, *supra* n.112, at p.1. In carrying through on this promise, the IMF executive board agreed that its managing director would make, *inter alia*, the following statement at the 14 Dec. 1992 meeting concerning the succession to membership of the Yugoslav republics: “In assessing the ability of each successor to meet its membership obligations, the Fund will take into account all relevant factors, and particular attention will be given to the effect of sanctions imposed by the Security Council of the United Nations”: IMF, Statement by the Managing Director on the SFR Yugoslavia (11 Dec. 1992). A similar statement was made yet again by the chairman of the executive board of the IMF on 14 Dec. 1992 immediately before the board agreed to pursue the conditional succession approach: IMF, Statement by the Chairman of the Executive Board.

Fund. In this respect, the expected effect on the country of international sanctions would be relevant.”<sup>156</sup>

In addition to the “willing and able” condition, the IMF also proposed that succession be conditional on the requirement that the successor State “be current with the Fund at the time of succession”.<sup>157</sup> And, in order to disguise the subjectivity of the first condition, the IMF proposed that succession also be conditional on the successor State adopting “any necessary legislation to accept the offer and to carry out its membership obligations”.<sup>158</sup>

The World Bank’s General Counsel voiced criticism with this conditional succession approach and characterised it as “at best legally questionable” on the grounds that it was inconsistent with past practice and would expose the financial institutions to the possibility of non-assumption of a significant portion of Yugoslavia’s outstanding obligations.<sup>159</sup>

The General Counsel first objected to the conditional approach on the ground that it blurs the line between admission and succession by making the succession of member States conditional on discretionary case-by-case determinations to be made by the financial institutions.<sup>160</sup> The World Bank views membership questions as subject to criteria, while succession is an automatic occurrence. Thus, conditions might be appropriate in the case of new membership, but in the case of succession a State is either a successor State or it is not. If the World Bank therefore treats a succession issue as a membership issue, an excluded State might successfully claim before a board of arbitration that the World Bank’s inappropriate exclusion of that State provides cause for the excluded State to be relieved of the obligation to pay its share of the predecessor State’s liabilities.<sup>161</sup>

The General Counsel also objected to the specific condition that the IMF make a determination that the individual successor States are willing and able to carry out the obligations of membership.<sup>162</sup> Recognising that this condition was politically motivated and would provide the tool to exclude Serbia/Montenegro, the General Counsel considered that an arbitral tribunal might find the question to be fraught with subjectivity and that the executive directors of the Bank might act inappropriately as representatives of the political will of their sponsoring countries, and not as unbiased determiners of ability and willingness.<sup>163</sup>

156. IMF, *Issues of State Succession*, *op. cit. supra* n.117, at p.8.

157. *Idem*, pp.7–8.

158. *Ibid.* In the proposals of complete succession and partial succession discussed above, the IMF treats the “necessary legislation” requirement as a prerequisite to membership, but not as an explicit condition.

159. World Bank, *Effects of Disintegration*, *op. cit. supra* n.113, at p.5.

160. World Bank, *Comments on the “Conditional Succession” Approach Envisaged in the Fund’s Paper* (25 Nov. 1992), pp.1–2.

161. *Idem*, p.2; and World Bank, *Effects of Disintegration*, *op. cit. supra* n.113, at pp.5–6.

162. *Comments, ibid.*

163. *Ibid.* Although the World Bank correctly identifies the “ability and willingness” deter-

Finally, the General Counsel objected to the IMF's conditional approach on the ground that it did not make the succession of the member States conditional on their unanimous agreement on the apportionment of Yugoslavia's assets in and obligations to the financial institutions.<sup>164</sup> The General Counsel contended that lack of agreement might subject the Bank to arbitration by a successor State not agreeing to its allocation of responsibility. The concerns of the General Counsel here are inconsistent with his argument that succession may not be conditional, and that either a. succession of membership occurs as a matter of law or the States must seek new membership.<sup>165</sup>

As a result of these criticisms, the World Bank's General Counsel found that only three approaches to succession would be legally defensible:<sup>166</sup>

- (1) assume the dissolution of Yugoslavia and require the successor States to seek membership anew;
- (2) delay action on the membership of Yugoslavia and permit the individual successor States to apply for membership anew; and
- (3) permit the automatic succession of all the successor States simultaneously.

Despite the reservations of the World Bank, the IMF pursued the conditional succession approach.

#### *E. Decision of the IMF and World Bank*

##### *1. IMF*

On 15 December 1992 the IMF announced that it "found that [Yugoslavia] has ceased to exist and has therefore ceased to be a member of the IMF".<sup>167</sup> The IMF considered the States of Slovenia, Croatia, Bosnia-Herzegovina, Macedonia, and Serbia/Montenegro to be the successors to the assets and liabilities of Yugoslavia in the IMF, and had allocated those assets and liabilities among the successor States, as well as the quota of the former Yugoslavia.<sup>168</sup>

mination as a political question, the fervour of the Bank's opposition to the condition is disproportionate as the Bank confuses the "ability and willingness" determination with the alternative condition of "as appropriate".

164. *Ibid.*

165. *Ibid.* The General Counsel here argues that succession may be conditional on an acceptance of the allocation of responsibility for assets and debts, and that if this acceptance is not unanimous the succession model should be abandoned and the States should seek membership anew: *idem*, pp.3–4.

166. World Bank, *Effects of Disintegration*, *op. cit. supra* n.113, at pp.6–7.

167. IMF Press Release, *supra* n.13.

168. The IMF allocated the shares in the following manner: Slovenia 16.39%, Croatia 28.49%, Bosnia-Herzegovina 13.20%, Macedonia 5.40% and Serbia/Montenegro 36.52%: *idem*, p.2. The determination of the allocation of assets and liabilities was based on the determination of each successor State's share in Yugoslavia's quota: IMF, *Socialist Federal Republic of Yugoslavia Cessation of Membership, Allocation of Assets and Liabilities in the*

The successor States were permitted to notify the IMF within one month whether they agreed to their allocations of assets and liabilities. The IMF provided that if a particular successor successfully challenged its allocation of assets and liabilities, the shares of the other successor States would be adjusted on a pro rata basis.<sup>169</sup>

Formal succession to membership of Yugoslavia in the IMF would be open to all successor States at such time as they met the following conditions:<sup>170</sup>

- (1) notification to the IMF that the State agrees to the allocation of its share in the assets and liabilities of Yugoslavia;
- (2) notification to the IMF that the State agrees "in accordance with its law, to succeed to the membership in accordance with the terms and conditions specified by the IMF and has taken all the necessary steps to enable it to succeed to such membership and carry out all of its obligations under the Articles of Agreement";
- (3) it has been determined by the IMF that the State is "able to meet its obligations under the Articles"; and
- (4) the State has no overdue financial obligations to the IMF.

The IMF provided that the successor States would have a period of up to six months within which to meet these conditions.<sup>171</sup>

Subsequent to this decision of the IMF, Slovenia, Croatia, Bosnia-Herzegovina, and Macedonia have succeeded to membership of the IMF. Serbia/Montenegro's request for succession has been denied, and the six-month period has expired.

## 2. *World Bank*

On 25 February 1993 the executive directors of the World Bank determined that Yugoslavia had ceased to exist and that the shares of Yugoslavia's assets and liabilities in the Bank would pass to the successor States, with those States being permitted to succeed to the membership of Yugoslavia upon the satisfaction of certain conditions.<sup>172</sup>

The World Bank's determination of dissolution and opportunity for succession differed from the IMF's in two important respects. First, the World Bank secured agreement among all the successor States regarding

*Fund, and Succession to Membership in the Fund* (7 Dec. 1992), pp.1-2. The quota was determined on the basis of each new State's economic size in relation to the other successor States and the former Yugoslavia: IMF, *Quota Calculations for the Successor Republics of Yugoslavia* (7 Dec. 1992), p.1.

169. IMF Press Release, *supra* n.13, at p.1.

170. *Idem*, pp.1-2.

171. *Idem*, p.1.

172. World Bank, *Socialist Federal Republic of Yugoslavia Termination of Membership and Succession to Membership*, Executive Directors' Res. No.93-2 (25 Feb. 1993); see also World Bank Press Release No.93/S43 (26 Feb. 1993).

their allocations of assets prior to announcing the dissolution of Yugoslavia.<sup>173</sup> And, although attaching conditions to the succession of membership,<sup>174</sup> the World Bank did not require a specific finding that a particular successor State would be able to carry out the obligations required under the Articles of Agreement. The World Bank was able to forgo the requirement of a finding of ability in order to exclude Serbia/Montenegro as Serbia/Montenegro could not succeed to membership in the World Bank until it had succeeded to membership in the IMF.<sup>175</sup>

Subsequent to the decision of the World Bank, Slovenia, Croatia, Bosnia-Herzegovina, and Macedonia have succeeded to membership in the World Bank, with Serbia/Montenegro being prohibited from seeking succession until it has attained membership in the IMF.

#### IV. THE PRACTICE OF THE IMF AND WORLD BANK IN THE CASE OF THE DISSOLUTION OF CZECHOSLOVAKIA

TURNING to the dissolution of Czechoslovakia, the IMF and World Bank attempted to deal with the issues of succession along the same lines as Yugoslavia, with a couple of significant exceptions.

##### A. *Claims of the Successor States*

One month prior to the scheduled dissolution of Czechoslovakia, the respective Finance Ministers from Czechoslovakia, the Czech Republic and Slovakia requested that the IMF and World Bank permit the Czech Republic and Slovakia to succeed to the membership of Czechoslova-

173. World Bank Res., *idem*, p.1.

174. The World Bank provided (*idem*, p.2) that upon succession to the IMF, a successor State may succeed to membership of the World Bank provided it has: "(a) notified the Bank that: (1) it has accepted, in accordance with its law, as successor to the SFRY, the Articles of Agreement and the terms and conditions relating to the subscription of Yugoslavia to the capital stock of the Bank with respect to the shares assumed by the said successor Republic; and (2) it has taken all steps necessary to carry out these obligations; and the successor Republic has furnished to the Bank such information in respect of the notification as the Bank shall have requested; (b) made such payments as are necessary with respect to the shares of the Bank's capital stock to be allocated to it, taking into account payments already made by the SFRY and allocated to such Republic; (c) entered into a final agreement with the Bank on the loans made by the Bank to or with the guarantee of Yugoslavia which the said Republic assumes; and (d) eliminated, or agreed with the Bank on a plan to eliminate, arrears, if any, in the servicing of Bank loans made to or with the guarantee of the SFRY assumed by the successor Republic."

175. See *supra* n.4 and accompanying text.

kia.<sup>176</sup> The Finance Ministers also notified the IMF and World Bank that the republics had agreed to divide the assets and liabilities pursuant to the territorial principle for territorial debt, and on the basis of the population ratio in each republic (two to one) for national debt.<sup>177</sup>

#### *B. Consideration of the Czech and Slovak Republics' Claim for Continuation of Membership*

In the case of the dissolution of Czechoslovakia, the General Counsel of the IMF did not propose the potential application of complete succession or partial succession, or the modalities of conditional succession, but, rather, simply considered that the case of Czechoslovakia should follow the model of conditional succession.<sup>178</sup> The proposed conditions to be placed on the succession of the Czech Republic and Slovakia were identical with those placed on the successor States to Yugoslavia, with two exceptions.<sup>179</sup>

With the dissolution of Czechoslovakia, the IMF deemed it unnecessary to make succession conditional on a finding by the IMF that a particular successor State is willing and able to carry out the obligations of membership.<sup>180</sup> The IMF reasoned that such a finding is "normally made implicitly by the Fund in the context of applications for membership and it does not appear necessary to require an explicit finding in the present case".<sup>181</sup>

However, unlike in the case of the former Yugoslavia, the IMF provided that succession had to take place simultaneously.<sup>182</sup> The condition of simultaneous membership approach combines the conditional succession model and the complete succession model, and represents a condition not

176. Letter from Jan Klak, Minister of Finance of the CSFR, Ivan Kacarnik, Deputy Prime Minister and Minister of Finance of the Czech Republic, and Julius Toth, Minister of Finance of the Slovak Republic, to Lewis Preston, President of the World Bank Group (4 Dec. 1992).

177. *Ibid.*

178. IMF, *Czech and Slovak Federal Republic Cessation of Membership, Allocation of Assets and Liabilities in the Fund, and Succession to Membership in the Fund* (21 Dec. 1992), pp.1–3.

179. The IMF (*idem*, p.3) proposed that the Czech and Slovak Republics should be entitled to succeed to the membership of Czechoslovakia simultaneously when they had: (1) consented to the allocation of assets and liabilities as determined by the fund; (2) agreed to become "members in accordance with the terms and conditions of membership specified in the decision" and "taken all the necessary steps to that effect and to carry out their obligations under the Articles"; and (3) cleared any arrears owed to the IMF.

180. *Ibid.*, pp.1–3.

181. *Ibid.*

182. World Bank, *Yugoslavia Cessation*, *op. cit. supra* n.14, at p.5.

found in prior practice of the financial institutions, or based on their Articles of Agreement. The probable rationale for this combination is that the IMF wished to use the political influence of the successor States over each other if either of them objected to its share of the allocation of assets and liabilities.

The World Bank found no objection to the position of the IMF and proposed to proceed along the same lines.<sup>183</sup> In concurring with the position of the IMF the World Bank noted that this approach did not suffer from the defect of being "legally questionable" as none of the proposed conditions "required judgments on the part of the Bank's Management or Executive Directors".<sup>184</sup>

### C. Decision of the IMF and World Bank

Prior to the decision of the IMF and World Bank on the question of membership succession of the Czech Republic and Slovakia, the Prime Ministers of both republics notified the IMF and World Bank that they accepted the respective allocation of the assets and liabilities of the former Czechoslovakia as proposed by the financial institutions, and had enacted all necessary legislation to carry out the obligations of membership.<sup>185</sup>

#### 1. IMF

Subsequent to the dissolution of Czechoslovakia, the IMF permitted the Czech Republic and Slovakia to succeed to the membership of the former Czechoslovakia simultaneously and under the conditions mentioned above.<sup>186</sup>

#### 2. World Bank

On 4 January 1993 the World Bank passed Executive Directors' Resolution 93-1, which provided that the membership of the Czech Republic and Slovakia was to be substituted for Czechoslovakia's membership of the World Bank.<sup>187</sup> The resolution also allocated the assets and liabilities of the former Czechoslovakia among the successor States, and provided that the membership would be subject to similar conditions as required by the IMF.<sup>188</sup>

183. World Bank, *Czech Republic and Slovak Republic Succession to Membership Status of the Czech and Slovak Federal Republic* (23 Dec. 1992), p.2.

184. *Ibid.*

185. Letter from Dr Vaclav Klaus, Prime Minister of Czech Republic, to Michael Camdessus, IMF Managing Director (21 Dec. 1992); and letter from Vladimir Meciar, Prime Minister of the Slovak Republic to Camdessus (17 Dec. 1992).

186. See *supra* n.179 and accompanying text.

187. *Czech Republic and Slovak Republic—Succession to the Membership of the Czech and Slovak Federal Republic*, World Bank Res. No.93-1 (4 Jan. 1993).

188. *Idem*, pp.3-5. In this case the mention of conditions served merely a procedural role as both successor States had already complied with them.

#### V. CONCLUSION

As a result of the break-up of Yugoslavia and Czechoslovakia, the IMF and World Bank have for the first time developed a conditional succession approach to address the questions posed by the break-up of a member State. The succession aspect of the approach was born out of the desire to preserve the assets of successor States, while the conditional aspect was born out of the political desire to exclude the participation of Serbia/Montenegro, and the financial desire to provide for complete assumption of the debt obligations of the predecessor States. This approach adopted by the IMF and opposed by the World Bank derived its basis from the international law of succession, and the past practice of the IMF and World Bank, but quickly moved beyond the basic principles established therein.

The desire to provide the successor States with a mechanism to succeed to the membership of the predecessor State, and to assume the assets and debts of the predecessor State, is well founded in international law and past practice. However, the addition of political criteria, no matter how disguised, finds no basis in either international law or the past practice of the financial institutions.

Nonetheless, the mere fact that making succession conditional on political criteria has no basis in international law or past practice does not invalidate such conditions. What does, however, weaken the authority to impose political conditions is the arbitrary and inconsistent approach taken by the IMF and World Bank with regard to the imposition of those conditions. The condition that a State must be found by the IMF to be capable of carrying out its rights and obligations, although established for political reasons, has some basis in the IMF's Articles of Agreement. Yet, if the true motive for the financial institutions was to ensure succession consistent with the Articles of Agreement, then the World Bank should also have imposed that condition on the Yugoslav successor States,<sup>189</sup> and both the IMF and World Bank should have made the succession of the Czech Republic and Slovakia conditional on a similar finding.

Similarly, despite the World Bank's view that the imposition of conditions was legally questionable, it imposed the condition that the successor States must unanimously agree to the allocation of the predecessor's assets and debts. The IMF and World Bank also imposed the condition of simultaneous succession of the Czech Republic and Slovakia, which has no basis in international law or past practice.

Once the reservations against conditional succession had been overcome or disregarded, the IMF and World Bank proceeded to attach con-

189. Although the World Bank was afforded the luxury of not having to impose this condition since Serbia/Montenegro could not become a member of the World Bank until it had achieved membership of the IMF, the imposition of that condition would have demonstrated the consistency and objectivity of the IMF's and World Bank's approach.

ditions on a case-by-case basis, with little concern for consistency. The dangers involved in this approach are that Serbia/Montenegro, or any future successor State faced with similarly inconsistent conditions, might successfully contend before an arbitration tribunal that it has been unjustly precluded from the right to succeed to the membership and assets of the predecessor State, and therefore should not be deemed liable for any portion of the debts of the predecessor State.

In adjudicating such a claim, the arbitral tribunal would look to the rational basis for the imposition of the specific conditions. Although the tribunal might be able to determine a rational basis for the particular condition imposed on Serbia/Montenegro, the immediate practice of the IMF and World Bank would threaten such a determination by casting doubt on the entire practice of conditional succession, and the true motivation of the financial institutions for the imposition of particular conditions, regardless of their apparently rational basis.