

INTERNATIONAL LAW ASSOCIATION

BERLIN CONFERENCE (2004)

ASPECTS OF THE LAW OF STATE SUCCESSION

Members of the Committee:

Professor Gerhard Hafner (Austria): Chair
Professor Wladyslaw Czaplinski (Poland): Rapporteur
Professor Marcelo Kohen (Argentina): Co-Rapporteur

Professor Vladimir-Duro Degan (Croatia)

Alternate: Professor Nina Vajic

Professor Kaj Hober (Sweden)

Professor Keun-Gwan Lee (Korea)

Professor M H Mendelson QC (UK)

Professor Rein Mullerson (Estonia)

Professor Stefan Oeter (Germany)

Alternate: Professor Dietrich Rauschnig

Professor Juan Miguel Ortega Terol (Spain)

Dr O M Ribbelink (Netherlands)

Professor Theodor Schweisfurth (Germany)

Professor Mirjam Skrk (Slovenia)

Professor Brigitte Stern (France)

Professor Renata Szafarz (Poland)

Sir Arthur Watts KCMG QC (UK)

Provisional Report

The present report has been devoted to some economic aspects of State succession, i.e. the succession with respect to State property and State debts. The scheme of the report corresponds with the previous activities of the Committee, and it should answer to the question whether a recent practice concerning the succession has confirmed the solutions proposed in the codification convention: the Vienna Convention of 8 April 1983. The Rapporteurs concentrated upon three main issues: State practice before the adoption of the 1983 Convention, solutions proposed in that instrument, and (the largest part) practice of successor States in the recent cases of State succession. It is important to stress two important issues. Firstly, since a significant element of State practice in the area of the succession in respect of State property and debts has a conventional character, it has been partially covered by the report on the State succession in respect of treaties, as presented at the New Delhi Conference in 2002. In any case, State succession with regard to State property and debts rules possess a specific character and do not necessarily coincide with the regulations concerning treaties. Secondly, although the main recent cases of succession occurred some 10 years ago and more, a number of questions concerning the economic aspects of succession have been resolved recently, or are not resolved yet.

1. State practice concerning the succession with respect to State property and debts before the Vienna Convention of 1983.

The practice concerning the State property was homogenous in all the cases of succession preceding the conclusion of the Convention of 1983, a fact that is very rare. The rule applied in all the types and forms of succession in which the predecessor State continues to exist (cession, dismemberment of States, unification of States through incorporation of one of them into the other) was that in all cases in which succession with respect to State property occurs, the property of the predecessor State became the property of the successor State on the basis of international law and without any indemnity. As a matter of course, the same rule applies in cases in which the predecessor State does not exist any more (dissolution, unification through merger). The principle of territoriality was generally acknowledged to govern the succession with regard to State property. Since there is no universally accepted definition of state property in international law, different definitions were elaborated in specific treaties, other international instruments dealing with the succession of States¹, and in the international jurisprudence. The notion of state property, rights and interests, applied in the Vienna Convention of 1983, was primarily used in the Versailles Peace Treaty after the 1st World War. In some cases it was interpreted widely to cover a so-called para-statal property,² if such a solution was found justified and there was no possibility to draw

¹ Cf. UNGA Resolutions 388(V) concerning Abyssinia and 530(VI) concerning Eritrea.

² The property of the German Emperor in the Treaty of Versailles or the property of the fascist party in Italy in the Peace Treaty of 1947.

distinction between the property of the State and one of specific organizations. Examples of the transfer of property rights from the predecessor State to the successor State include: Art.256 of the Treaty of Versailles, Art.60 of the Peace Treaty with Turkey of 1923, Art. 208 of the Treaty of Saint Germain,³ and numerous others.

Special solutions were usually adopted in respect of State archives. The necessity of introducing specific rules governing the archives – comparing to the general regulations dealing with the State property – is strictly connected with the content of the archives which is decisive for their importance for the States concerned. The general principle is that the archives⁴ concerning exclusively the territory transferred to a new sovereign should be passed to that sovereign, while those pertaining partially or incidentally to the new sovereign should be kept by the predecessor State, although access should be guaranteed also to the successor State (if the predecessor State still exists). Such a solution is consistent with the general rules concerning the status of archives, according to which the principle of provenience (origin) should be additionally completed by the principle of pertinence (functional importance). The rules governing the archives in cases of state succession were consistently confirmed in numerous treaties of cession beginning from the Middle Ages. Particular examples are Art. 38 and 52 of the Treaty of Versailles, Art. 274 of the Treaty of Saint Germain supplemented by the Agreement between Government of Austria and the Kingdom of Serbs, Croats and Slovenes concerning the implementation of Articles 93, and 191 to 196 of the State Treaty of St. Germain, BGBl. Nr. 602/1923), Art. 7 and 12 of the Peace Treaty with Italy of 1947, British-Israeli agreement of 30 March 1950 concerning the mandate archives in Palestine, and the agreement concluded on 1 December 1947 between India and Pakistan on the division of archives of the former British Indies. Those rules were also reflected in other international instruments including a resolution of the 6th International Round Table Conference concerning Archives (Warsaw May 1961), and recommendations of the UNESCO of 1976-1979. It is important to emphasize two more issues. Firstly, distinction can be drawn between historical and administrative archives, the latter category concerning the archives necessary for an effective administration of the territory and therefore of utmost importance for the successor State. Secondly, the rules governing the fate of the archives in the cases of State succession do not relate to libraries and works of art, the status of which is unclear under the State succession law.

As the rules concerning the succession in respect of State property and archives are relatively clear and well established, the problem of succession in respect of state debts is disputable, the practice is extremely differentiated, and – as a consequence- the formulating of conclusions as to the possible customary nature of respective rules is highly difficult. In different types of the State succession we face either a total transfer of debts to the successor State, or a total rejection of the transfer, or all the intermediate solutions. There are several rules that seem to be generally applicable. Firstly, a classification of the State debts into general, local and localized debts. General debts are those owed by the central government. Local debts are debts owed by local communities, and localized debts are those created by the central government in the exclusive interest of local communities. The last two categories of debts are usually not covered by general regulations concerning the succession of States, but by special regulations). Secondly, there is a general agreement in practice that so-called odious debts (i.e. debts of the State which do not relate to any interest of the population of the territory concerned or having been taken pursuing illegal aims, like aggression) are not subject to the succession. As to the examples of State practice, the acceptance of the debts of the predecessor State can be found in Art. 254 of the Treaty of Versailles, in the secession of Ireland from the UK, in the agreement between India and Pakistan of 1 December 1947, concerning the partition of the debt of former British Indies; on the other hand, the rejection of the debts by the predecessor State took place in the Annex X to the Peace Treaty with Italy of 1947 or in the Treaty of Saint Germain with Austria, excluding the localized debts).

2. The Vienna Convention of 1983 – general outline.

The Convention on the Succession of States in Respect of State Property, Archives and State Debts was opened for signature in Vienna on 8 April 1983. It was drafted on the basis of 13 reports elaborated by Mr. Mohammed Bedjaoui, the special rapporteur. The Convention was adopted with 54 votes in favor (mainly socialist and developing States), with 11 votes against and 11 abstentions (Western States). It has not entered into force, as it obtained only 6 accessions out of the fifteen required. Six other States have signed the Convention. Significantly,

³ The solution applied in the case of Austria was complicated. Austria and Hungary first renounced their property in relation to the successor States, and subsequently the successor States concluded among them bilateral agreements specifying the partition of property.

⁴ Archive is a collection of documents classified as such by the predecessor State.

States having deposited their instrument of accession are all emerged from the disintegration of the USSR and the SFRY.⁵

General provisions of the Convention (Art.1-6, concerning definitions, non-retroactivity of the Convention, requirement of conformity of succession with international law, general clause concerning guarantees of rights of third parties and individuals, etc.) correspond with the respective provisions of the Vienna Convention of 1978 on the succession of States in respect of treaties. Substantive provisions of the Convention can be divided into two groups: general provisions concerning all the types of succession, and specific regulations dealing with particular types of succession. The State property was defined as all kinds of property, rights, and interests that, at the date of the succession of States, belonged to the predecessor State in accordance with its domestic law. During the codification conference a special provision was added in order to guarantee the integrity of the predecessor's property before its transfer to the successor State (Art.13).⁶ The effects of the transfer of State property were defined in Art.9 of the Convention, according to which the property rights of the predecessor State expire and they are replaced by the equal (as to the scope) rights of the successor State. The transfer of the property cannot influence any possible rights and interests of third parties. The predecessor State is not entitled to any indemnity. Finally, a general rule providing for the priority of an agreement between the predecessor State and successor State (so called devolution agreement) as to the partition of State property was confirmed.

In all the types of State succession the transfer of an immobile property to the successor was confirmed. Specific regulations concern a destiny of mobile property in particular types of succession. In the case of cession, the successor State acquires the part of the mobile property connected with the predecessor's activities in the ceded part of the territory. In the case of the uniting of States, clearly and manifestly logical solution provides that the successor State acquires the whole property of the predecessor State or States. According to Art.17 and 18 of the Convention, in cases of separation and dissolution of States the successor State acquires the immobile property situated in its part of the territory, the mobile property related to the activities of the predecessor State in the respective part of the territory, and -in the case of dissolution only- an equitable share of the remaining mobile property as well as of the property of the predecessor State situated abroad (both mobile and immobile). Finally, special provision of Art.15 dealt with the position of the newly independent States (i.e. former colonies). Those States should receive not only the whole property of the predecessor State situated in the territory of the new State, but also property having belonged to the territory of the successor State and situated outside it and having become property of the predecessor State during the period of dependence. In particular, the proviso of Article 15, paragraph 4, as well as Art. 38, paragraph 2, with regard to debts, establishing that the devolution agreements with newly independent States shall not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources lead to the rejection of the Convention by the Western States.

Art.19-31 of the Convention dealt with the succession in respect of State archives and constitute *leges speciales* in relation to the provisions concerning the State property. General provisions of that chapter correspond with the regulations concerning the State property. Specific regulations relating to the respective types of succession provide for the primacy of the devolution agreement. If no agreement was concluded, in the case of cession the successor State should receive the part of the archives necessary for an efficient administration of the acquired territory, as well all the documents relating fully or mostly to the ceded territory. Other documents should be reproduced upon request, at the expense of the successor State. The provisions concerning secession and dismemberment provide for the partition of the archives of the predecessor State in accordance to the model elaborated in the case of cession. Finally, in the case of the unification of States the successor State acquire all the archives of the predecessor State – in most cases all the archives are situated in its territory anyhow. Special provisions guaranteed also a privileged position of the newly independent States, which should obtain a part of all the archives of the former metropolis. The solution would seem contrary to Art. 25 of the Convention, proclaiming the principle of the unity of archives. Nevertheless, the fact that part of the archives obtained is closely related to the newly independent State, in particular to its territory, explains that choice.

According to Art. 33, the Convention regulated the succession of financial obligations of States towards other States, international organizations and other subjects of international law, then excluding private parties. The Convention did not refer to any classification of debts mentioned above. Another important provision of the Convention reads that the succession of States itself does not infringe any rights of the creditor. That clause is important in the light of the general provision that the succession cannot infringe rights and duties of third parties. The rights of the creditor cannot be changed by a mere devolution agreement. In all cases in which a

⁵ Croatia, Estonia, Georgia, Slovenia, the former Yugoslav Republic of Macedonia and Ukraine. On 12 March 2001, Serbia and Montenegro made a declaration of succession to the signature of the former Yugoslavia of 24 October 1983. Status as 17 May 2004 (available at <http://untreaty.un.org>)

⁶ The issue was decided by the PCIJ in the *Chorzow factory* case, PCIJ Publ. Series A, No.7, at 30.

partition is required, the criterion generally adopted by the Convention was that the debt passes to the successor State in an equitable proportion. The exception was the situation of the newly independent States, for which no debts pass to them, unless an agreement provides otherwise, provided that this agreement does not infringe the principle of sovereignty of peoples over wealth and natural resources (Article 38). Again, this solution was one that provoked the rejection of the Convention by Western States. As to other particular types of succession, in the case of the cession the primacy of the agreement between the parties was emphasized. If there was no such agreement, the successor State should pay an equitable share of the debt of the predecessor State debt. Similar solutions were applied in cases of secession and dismemberment of the predecessor State (Art.40 and 41) – the debt should be divided into proportional shares. With the exception that the property, rights and interests that pass to the successor State shall be taken into consideration for the determination of an equitable proportion, the Convention did not indicate any other criteria of equitable partition. Finally, in the case of unification of States, the debt should be paid by the successor State.

3. The international practice in recent cases of State succession as confronted with the codification Convention of 1983.

3.1. Yugoslavia

3.1.1. State Property.

The case of Yugoslavia confirmed the view that the regulation of issues connected with the succession could be difficult if there were differing opinions as to the international legal status of the States concerned. Major difficulty arises when the determination of the situation as being one of the secession or of dissolution is subject of controversy. In this case in particular, as well as in the case of secession in general, the conclusion of an agreement regulating the effects of the succession can be extremely difficult.

Certain proposals concerning the partition of the property and debts of the former Socialist Federal Republic of Yugoslavia were made by the International Conference for the former Yugoslavia, and in particular by the Badinter Commission and by the Working Group for the Succession of States. The property of former Yugoslavia should be partitioned according to the principle of equity. The property situated in the territories of the respective republics should become property of the new States without any further formalities. Remaining issues should be governed by an agreement concluded between the States concerned. As long as it was not concluded, the successor States administering the property of former Yugoslavia were responsible for that property. The partition of the property should be done in accordance with the rules precised in the 1983 Vienna Convention.⁷

On the other hand, the successor States declared the taking over of the property of the former SFRY situated in their territories, as well as presented their claims to a proportional share of immobile and mobile property situated in the territory of “new” Yugoslavia and outside the former Yugoslavia (i.e. Yugoslav property abroad). The successor States declared simultaneously their readiness to pay corresponding parts of Yugoslav foreign debts.⁸ In particular the claims concerned: property of Yugoslav diplomatic representations abroad, active of the Yugoslav National Bank including monetary reserve and gold deposit, equipment and military material of the Yugoslav Army, property of public enterprises, especially railways, telecommunication and energy sector, as well as all the archives including non-state archives. The government of the FRY (Serbia-Montenegro) declared that it did not recognize the new States as they illegally seceded. Consequently, according to it the FRY remained the owner of the property of the SFRY, but it was ready to offer a share of the property on the *ex gratia* basis.

Such a position was rejected by the Badinter Commission as contrary to international law. The Commission devoted four opinions to the status of the state property of the former SFRY. Opinion No.9 of 4 July 1992 emphasized that all the successor States should be interested in obtaining the aim – a balance between actives and passives resulting out of the succession. The conclusion of the devolution agreement would be desirable to resolve all the disputable problems. Opinion No.12 of 16 July 1993 stressed again that the equitable

⁷ J.M.Ortega Terol, *The Bursting of Yugoslavia: An Approach to Practice regarding State Succession*, The Hague Academy of International Law Research Center [1996], at 36 ff.

⁸ S.Trifunovska, *Yugoslavia through Documents: From its Creation to its Dissolution*, Amsterdam 1994, presents at p.292 the Constitutional Law of Slovenia concerning the Implementation of the Constitutional Charter on the Independence of Slovenia. That document in paras 9-12 contains the claims against FRY. Similar claims were presented by Croatia in her Declaration of independence.

redistribution of actives and passives was the most important aim of all the regulations connected with the succession. A State opposing to the conclusion of the agreement or refusing effective cooperation committed an international delict. The refusal could not, however, constitute basis of the use of force. Opinion No.14 of 13 August 1993 declared that the list of the state property of the SFRY prepared by the Working Group on 1993 should constitute a basis for the defining of the Yugoslav state property. The list was composed of two parts. The first one contained those elements of the property, the nature and purpose of which were undisputable among the successor States. The second list enumerated disputable property. Finally, the Opinion No.15 of 13 August 1993 limited the rights of the National Bank of Yugoslavia to undertake any activities disposing of financial rights and obligations of the former Yugoslavia; in particular the opinion emphasized that the major part of those rights and obligations was previously *de facto* overtaken by the central banks of the new successor States.

As to the state property, the FRY proposed on 4 May 1993 the concluding of a convention between the new Yugoslavia and other successor States. The convention should cover both state and "social" property, i.e. the property belonging to so-called "associated organizations of labor" (specific form of property in the SFRY). The latter covered i.a. measures of production (including equipment and raw materials), certain categories of state property (including the property of police and armed forces), property of diplomatic representations abroad, and natural resources including rivers, sea and seashore which normally are treated as *rebus extra commercium*.⁹ That stance was rejected by the remaining successor States, which were of the opinion that the said approach to the notion of state property was ill-founded, as international law was limited exclusively to state property. Corresponding view was expressed by the Badinter Committee in the Opinion No.14 quoted above. It stated that in accordance with the Yugoslav Constitution of 1974 many actives were transferred to the republics, so that they could not be treated as state property at the time of succession (critical date). The property of the "associated organizations of labor" was also controlled by the respective republics. The FRY denied any cooperation in elaborating of that opinion, rejected it, and subsequently decided to withdraw unilaterally from further negotiations.

The defining of State property was particularly important in the context of the draft convention on the regulation of issues resulting from the secession of the parts of the SFRY, proposed by the FRY in June 1996. The draft referred i.a. to the property of the former Kingdom of Yugoslavia, without any specific historical reference. It seemed that by presenting those claims the FRY tried to avoid serious negotiations on property questions.

After the signing of the peace settlements of Dayton, the International Conference on former Yugoslavia was replaced by the Council supervising the implementation of the agreements (a decision in this respect was taken in London on 8-9 December 1995). The activity of certain working groups including the group for State succession should, however, be continued. It seemed that it was unable to achieve any result, or even certain progress could be noticed. Initially the FRY rejected a possibility of concluding the agreement on the partition of property and debts, but it was eager to accept arbitration. After 1995, she denied also a possibility of arbitration.

In March 1996, Slovenia, Croatia, Bosnia and Herzegovina and the former Yugoslav Republic of Macedonia published a common declaration stating that they would initiate a judicial proceeding against every subject infringing their property rights and interests by releasing any piece of ex-Yugoslav state property from sequestration. Such course of action lead to an important decision of the Supreme Court of Austria in the *Republic of Croatia et al. v. Girocredit Bank AG Der Sparkassen* case. The Court applied the notion of dissolution to the case of the SFRY, thus denying the claim of the FRY's National Bank to be the exclusive owner of the funds deposited by the SFRY's National Bank in Austrian banks. According to the Court, the SFRY's National Bank, as a "socialized company", could not be treated as a private person. Indeed, it ceased to exist with the dissolution of the SFRY. Consequently, its assets must be distributed according to the principle of equity amongst all the successor States, the FRY (Serbia and Montenegro) being one of them. Pending that equitable distribution, the assets constitute *communio incidens* (joint-ownership property) of all successor States.¹⁰

⁹ V.D.Degan, Disagreements over the Definition of State Property in the Process of State Succession iof the former Yugoslavia, DID 12(1996), No.23, at 121-122.

¹⁰ Decision of 17 December 1996. See 36 I.L.M. 1520 (1997).

3.1.2. Debts.

In accordance with the principle of equity, the partition of state property between the post-Yugoslav States should correspond with the partition of financial obligations. In the case of Yugoslavia, certain solutions were elaborated under the auspices of the international financial organizations.

General issues concerning the membership and obligations in respect of international financial institutions were resolved in a memorandum of the IBRD of 25 March 1974,¹¹ and in a similar document by the IMF of 15 July 1992.¹² Both instruments adopted as a general solution the succession of new States to membership, rights and debts of the predecessor State in cases of dissolution, and no succession in the cases of secession. The organization concerned can either propose the accession of the new State or the succession. In the latter case, however, all the States concerned should conclude an agreement on the partition of rights and debts of the predecessor State.

The IMF declared in December 1992 that the SFRY ceased to exist, five States: Slovenia, Croatia, Bosnia and Herzegovina, Macedonia, and Serbia-Montenegro, being the successors. All the rights, interests and debts of the former Yugoslavia were divided into shares corresponding with the relation of the economic potential of the specific republics to the SFRY as a whole (FRY – 36.52%, Slovenia – 16.39%, Croatia – 28.49%, Bosnia and Herzegovina – 13.20%, Macedonia – 5.40%). On 25-27 February 1992, the World Bank concluded agreements with Slovenia, Croatia, and Yugoslavia (still composed of the remaining republics) on the payment of localized debts. Yugoslavia confirmed the payment of the loans serving the needs of the four remaining and two structural loans, while Slovenia and Croatia declared their responsibility for debts connected with the investment in their territories, respectively. In line with a continuous disintegration of Yugoslavia, on 10 August 1993 two further agreements were concluded (with Bosnia and Herzegovina, and Montenegro). They correspond with the previous agreements with Slovenia and Croatia.¹³ The difference between the agreements concluded by the IMF and those by the WB was strictly connected with different nature of loans granted by both institutions – the former are general, and the latter – localized.

After the political changes occurred in Yugoslavia, the way to a solution of the pending succession issues between the former Yugoslav States opened in the framework of the mediation procedure. An agreement concerning the distribution of gold and reserves held by the SFRY with the Bank of International Investments was reached on 10 April 2001. That distribution was determined on the same basis as that applied by the IMF. The Agreement on succession issues solving the remaining elements was concluded in Vienna on 29 June 2001.¹⁴ It will enter into force on 2 June 2004, 30 days after the deposit of the last instrument of ratification required (Croatia). It refers to the equitable distribution of rights, obligations, assets and liabilities of the predecessor State. The principle of territoriality was confirmed with regard to the immovable State property as well as tangible movable State property, the latter with the exception to those of great importance to the cultural heritage of one of the successor States. Movable military property is subject to special arrangements. Diplomatic and consular properties were subject to concrete attributions amongst the parties. The foreign financial assets shall be distributed according to the following proportions: Bosnia and Herzegovina 15.50%, Croatia 23.00%, Macedonia 7.50%, Serbia and Montenegro 38.00% and Slovenia 16.00. Archives are distributed according to the "principle of functional pertinence", irrespective of where those archives are located. Other SFRY State archives are subject to a further agreement to be reached 6 months after the entry into force of the Agreement, either for an equitable distribution or to their retention as common heritage of the parties. If no agreement is reached, those archives will become common heritage. Republic or other archives are the property of the corresponding State.

¹¹ Materials on Succession of States in Respect of Matters other than Treaties, UNLS, New York 1978, at 545.

¹² IMF. *Secession of Territories and Dissolution of Members in the Fund*. Cf. A.Gioia, *State Succession and International Financial Organizations*, Research Center of the Hague Academy of International Law [1996].

¹³ See I.F.I. Shihata, *Matters of State Succession in the World Bank's Practice*, in M. Mrak (ed.), *Succession of States* (1999), pp.90-91.

¹⁴ ILM 41(2001), pp. 3-36.

3.2. Germany

The legal regulation concerning the succession in respect of the property and debts of the former GDR was relatively simple. According to Art.21 and 22 of the Unification Treaty (Einigungsvertrag) the whole property of the GDR including the property situated abroad became on the day of uniting of the two German States the federal property. The said provisions covered the administrative property, i.e. the property directly connected with the use of State power by the agencies of the GDR.¹⁵ Special provisions (Art.26 and 27 of the Treaty) regulated the destiny of East German railways (Deutsche Reichsbahn) and post (Deutsche Reichspost). They became state property of the FRG, but were automatically incorporated into the separate property of the federal railways and post.

After the transfer of sovereignty a repartition of property between the Federation and federal States (Bundesländer) in accordance with the federal legislation took place. Special solutions were adopted in connection with the necessity of restitution of the property illegally confiscated by the GDR. They were however based upon the domestic legislation of the FRG and they won't be covered by the present study.

The problem of the property of the GDR abroad in fact did not exist. The taking over of the property of the former GDR by the FRG was in no case put in question by third States. The only problem was caused by the fact that some States regulated the rights of the GDR to the property of diplomatic and consular representations on the basis of reciprocity. As the representations of those States were partially closed in connection with the disappearance of the GDR, the issue of property rights was resolved by bilateral negotiations.¹⁶

Problems of internal and external debt of the GDR were regulated in Art.23, 24, 26(6) and 27(1) of the Unification Treaty. The FRG took over all the assets and debts of the GDR (including debts towards private persons). Specific regulation of Art.24 empowered the Minister of Finance of the FRG to regulate the issue of the debts of the GDR owed to the FRG and third States, and existing before 1 July 1990. In fact the scope of that regulation was limited to the service of the debts resulting out of the foreign trade monopoly, and connected with the executing of State power by the GDR agencies. Special regulation concerned the obligations of the GDR towards other member States of the Comecon, which should be negotiated directly between the States concerned.¹⁷ The FRG agreed also to take over the debts of the GDR railways and post.

The regulation of the foreign debt of the GDR was relatively simple, as the FRG was the most important creditor of the East Germany. On the other hand, the FRG refused to accept any financial obligations resulting out of the foreign debt of the GDR. In particular there was an interesting dispute between the FRG and UN Secretary General concerning the payment of overdue contributions and shares of maintenance costs of the peace operations of the UN (UNIFIL, UNDOF). In the former matter there was an exchange of notes between the UNSG and the FRG (November 1990-February 1991). The SG stated that according to international law the incorporation of the GDR by the FRG should result in the taking over of the financial obligations of the GDR by the Federal Government. The German Government presented the opinion that the GDR ceased to exist as a subject of international law on 3 October 1990, and on that day all its financial obligations expired. The succession did not mean that the FRG succeeded also to the debts of the GDR nor that they were automatically recognized by the FRG.¹⁸ Finally the German Government agreed to pay the contributions but it emphasized the *ex gratia* nature of the payments. In the latter matter the FRG stated (by the note of 21 August 1992) that although it did not recognize the obligation to pay the East German share of operations, it would make a voluntary payment in the required amount.¹⁹

¹⁵ The administrative property of the GDR was much larger than the property of the former FRG, as the administrative functions were performed not only by the state agencies, but also other organs and enterprises. Cf. G.Gornig, *Staatenachfolge und die Einigung Deutschlands, Part Two: Staatsvermögen und Staatsschulden*, Berlin 1992, at 52.

¹⁶ H.Beemelmans, *Die Staatenachfolge in Staatsvermögen in Drittstaaten, Auslandsschulden, gebietsbezogene rechtliche Regelungen und Staatsangehörigkeit – eine Problemskizze*, OEuR 4191995), at 81.

¹⁷ After having calculated all the accounts, the FRG directed to all the Comecon States financial claims amounting to 27.6 Billion DM. The system of accounts was complicated, but finally the GDR proved a credit balance in relations with all partners. In principle those claims were accepted. Cf. M.Silagi, *Staatsuntergang und Staatenachfolge mit besonderer Berücksichtigung des Untergangs der DDR*, Frankfurt/M. 1996, p.313, referring to the information obtained from the German Bundestag.

¹⁸ Council of Europe. Pilot Project on Succession of States, doc. D/62.

¹⁹ Ibidem, doc. D/83.

3.3. Czechoslovakia

The partition of the property of the former C-SFR took place even before the dismemberment of the federation, on the basis of the constitutional law of 13 November 1992 on the partition of property and its transfer to the Czech and Slovak Republics. The property comprised all immobile and mobile property including financial rights, interests, and obligations, belonging to the State or State organizations, situated both in the territory of Czechoslovakia and abroad. The rules governing the partition were formulated in Art.3. According to the principle of territoriality, respective republics acquired the immobile property situated in their territories, as well as a part of the mobile property connected with the activities of the State in those territories. In all questions not resolved in accordance with the territorial rule, the property should be divided in proportionally to the populations of the two republics (2:1 in favor of the Czech Republic). Most of the financial assets of the C-SFR were divided in that way, in particular the assets in the IBRD and other financial institutions. All the disputes concerning the implementation of the agreement should be resolved by a special commission consisting of the representatives nominated by both countries (Art.9 of the agreement).

The solution adopted in the federal constitutional law was confirmed by Art.4 of the Czech constitutional law of 15 December 1992. According to that provision, all rights and duties defined in the said federal law passed to the Czech Republic.

In December 1992 competent agencies of the IMF and WB accepted the agreement between the Czech Republic and Slovakia, and divided the actives and passives in proportion 2/3 for the Czech Republic and 1/3 for Slovakia. Similar solution was applied in respect of Czechoslovak funds in the EBRD.

3.4. Soviet Union

The first step to resolve the question of property and foreign debt of the USSR was a concluding of a memorandum on the foreign debt of 28 October 1991. The signatories of the memorandum (Armenia, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan) declared themselves as successors to the USSR and expressed the will to take over *jointly and severally* the liability for the debts existing on the day of the conclusion and recognized by the Soviet Government or any other competent State agency. Significantly, the debt envisaged covered not only debts to other States, international organizations and other subjects of international law (as depicted in the 1983 Vienna Convention), but also the debts to any other foreign creditor (i.e. private creditors as well). Subsequently, on 4 December 1991 an agreement on the succession of States in respect of state property and debts of the USSR was signed.²⁰ The parties to the agreement should be all the 15 successor States on one hand, and the USSR (still existing at that time) on the other hand. Finally, 8 States, including Ukraine and Georgia, with Moldova and Turkmenistan deciding not to become parties, concluded the agreement. The preamble referred to the Vienna Convention of 1983. Art.3 obligated the parties to pay shares of the foreign debt of the USSR, although a possibility to conclude further agreements concerning a solidary liability of specific debtors was not excluded. The parties guaranteed mutually respective shares in the assets of the former USSR. Art.4 established the criteria of partition of the property and liabilities of the USSR: the shares of respective republics in creating of the GNP, participation in exportation and import of goods, and the number of population. The shares agreed were: Russia 61.34%; Ukraine 16.37%, Belarus 4.13%, Kazakhstan 3.86%, Uzbekistan 3.27%, Azerbaijan 1.64%, Georgia 1.62%, Lithuania 1.41%, Moldova 1.29%, Latvia 1.14%, Kyrgyzstan 0.95%, Armenia 0.86%, Tajikistan 0.82%, Turkmenistan 0.70%, Estonia 0.62%. The foreign debt should be serviced by Vneshekonbank, and all the parties should effectuate their payments at the accounts with that bank. The agreement never became effective, as Ukraine, Georgia and the Baltic States did not adhere to it. As it is known, the Baltic States did not consider themselves as successors, given their illegal annexation by the USSR in 1940.

Several instruments concerned the partition of the post-Soviet property abroad. According to the presidential order of 18 December 1991 the possession and administration of that property was taken by Russia. On 30 December 1991, all former States of the USSR with the exception of Georgia and the Baltic States concluded an agreement on the property of the former USSR abroad. Under Art. 1, the parties recognized that each of them was entitled to an equitable share of that property. This sharing, however, was not implemented. In March 1992 president of Ukraine, A. Kravtchuk, proposed a partition of the property abroad in accordance with the input of respective republics in its creation. Specific claims by Ukraine were paid off on the basis of a bilateral agreement

²⁰ Unpublished. Commented by Th.Schweisfurth, *Das Recht der Staatensukzession*, *Berichte der DtGVR* 35(1995), p.147, and A.Reinisch, G.Hafner, *Staatensukzession und Schuldübernahme beim „Zerfall“ der Sowjetunion*, Wien 1995, p.8 ff.

of 23 June 1992 on the further development of bilateral relations; Russia agreed to transfer to Ukraine a part of the former Soviet property abroad. Negotiations are still under way.

A general agreement on the partition of the property was concluded in Moscow on 6 July 1992. It covered all the immobile and mobile assets of the USSR abroad, all the foreign investments of the USSR abroad, as well as the property of the Soviet State Bank, Vneshekonbank, International Bank for Economic Cooperation, International Investment Bank, Soviet banks abroad, and Ministry of Finance. The agreement should be implemented by a special committee for state succession. The shares were established according to the same pattern as applied in the agreement of 4 December 1991 mentioned above. Another provision established the right of all parties to the allocation of the property in kind.

Subsequently, the Russian Government concluded a series of bilateral agreements with the other successor States, aiming at the acquiring by Russia of the whole property of the former USSR. Two kinds of agreements were concluded. Some of them provided for a so-called Option Zero; Russia acquired the former Soviet property owned by the respective successor State, and agreed to pay off the corresponding share of state debt. The agreements of that kind were concluded with Turkmenistan (31 July 1992), Belarus (20 July 1992), Kyrgyzstan (25 August 1992), Armenia (7 September 1993), and Ukraine (9 December 1994). On the other hand, some agreements were of temporary nature, provided for the transfer of the property concerned under Russian administration, and for the concluding of final agreements on the transfer of property in future. Those agreements were concluded with Tajikistan, Kazakhstan, and Moldova (all on 13 November 1992). It should be stressed that Russia led a special policy towards the property of the former USSR. On 8 February 1993, the President of Russia passed a decree declaring the take over of the whole Soviet property abroad by Russia as identical with the USSR. The decree declared also a will to conclude bilateral agreements regulating all the matters connected with the succession. In the period between 1993 and 1995, Ukraine sent three diplomatic notes to the States where the immovable property of the former USSR was situated with the request not to register it as it were property of the Russian Federation. Some litigation is under way in different countries, i.e. Denmark. Generally, the immovable property of the former USSR situated in various European States is still "frozen" so that no legal transaction can be performed relating to this property.

Immovable property as well as gold belonging to the Baltic States prior to their annexation by the USSR in 1940 has been the object of some judicial practice. In some cases, Baltic diplomatic or consular locals had been transferred to the USSR after the Second World War. Attempts by Lithuania to obtain the restitution of his legation in Paris acquired in 1925 failed before French judicial instances. Gold belonging to the Baltic States in the hands of Sweden had been transferred to the USSR. However, Sweden consented to partly reimburse this gold in 1992.²¹

A treaty concluded during the Summit of the CIS in Bishkek on 9 October 1992 recognized the rights of respective successor States to the assets of the former USSR situated in their respective territories. In fact, the agreement sanctioned a status quo existing after the August putsch in Moscow in 1991. Some of the republics including Russia attempted to take over a control over the federal property in their territory, including agencies and assets of the Soviet State Bank. Russia started to exercise control over the exportation of oil and exploitation of gold and diamonds.²² The treaty suspended the activities of the prior committee for the partition of state property. It was not signed by Ukraine and Turkmenistan; however, the former concluded subsequently a number of bilateral agreements with the other successor States confirming the Bishkek regulations.

The mobile property was portioned on the basis of a number of bilateral agreements concluded in the framework of the CIS. The partition of rolling stock and railway equipment (of general and special use) took place by an agreement of 22 January 1993 according to the established percentage, and taking into account the stocks exploited by respective new states' railways after 1 March 1992. Aeroflot planes were passed to new States in accordance with the place of registration. Finally, an agreement of 16 March 1994 provided for the partition of fishing vessels in the way of consultations and negotiations between the parties concerned; however, there is no accessible information concerning any formal agreement in that respect.

On 6 July 1992 an agreement on the succession in respect to archives was concluded. Integrity and territoriality of the archives were confirmed. Some time earlier, on 14 February 1992, the CIS States signed another

²¹ Cf. B. Stern, *La succession d'Etats*, RCADI 262 (1996), pp. 411-412.

²² Cf. N.Dronova, *The Division of State Property in Case of State Succession in the former Soviet Union*, a study prepared in the framework of the Research Center of the Hague Academy of International Law (1996), at 16.

agreement on a return of cultural and artistic objects to their places of origin.²³ Although that agreement referred to the principles adopted in the 1970 UNESCO Convention on the ban on illegal importation, exportation and transfer of cultural goods, it did not accept certain important regulations like the requirement of conformity of return with domestic legislation of respective States, and defining of the value of the objects (works of art) in the place of their storage. The agreement defined neither time nor procedure of return. It established only a common committee with a task to precise the object of the agreement.

Taking into account possible difficulties for the Russian space research project arising out from the fact that the only Soviet space center had been constructed in Kazakhstan, the two States concerned concluded several agreements on a leasing of Baikonur. The most important and detailed one – of 28 March 1994, provided for the use by Russia of the center for 20 years with a possible option for another 10 years. Costs of exploitation should be deduced from the Kazakh debt owed to Russia. Immobile and mobile property established before 1991 should belong to Kazakhstan, while any property constructed since that time should belong to an investor.

Special problems were connected with the Soviet military assets. Special solutions concerning the nuclear forces were dealt with in the Report on the succession in respect of treaties. As to conventional forces, they were divided into armed forces of respective States, and CIS strategic forces under common command (agreement of 14 February 1992). Declaration by the Heads of States of the CIS of the same day recognized a right of the respective States to military equipment in their territories, asking also for co-financing of the strategic forces according to shares agreed. Multilateral agreements were completed by bilateral agreements, like the treaty of 11 January 1992 on conventional forces in Ukraine, and the treaty of 15 May 1992 on the rights of Ukraine to a part of tanks and combat aircrafts of the former Soviet Army. Problems of immobile military property in the respective States were resolved also by bilateral agreements (like treaties on a withdrawal of the armed forces from Latvia and Estonia, of 30 April and 26 July 1994, respectively, although they could be considered as not being related to succession; or an agreement of 25 May 1993 on military cooperation between Russia and Tajikistan). In some cases Russia attempted to obtain an indemnity for the property left in the territory of another successor State (e.g. Georgia), but that attempt was rejected as contrary to international law.²⁴

The dispute between Russia and Ukraine concerning the partition of the Black Sea Fleet is well known.²⁵ It became important in connection with territorial issues, in particular Russian claims and separatist movements in Crimea.²⁶ The object of the dispute was whether the Black Sea Fleet should belong to the strategic forces of the CIS, and whether it should remain property of one State (Russia) or should be divided between both States. Two agreements signed at Dagomys in June 1992 and Yalta on 3 August 1992 provided for a transitional period of double jurisdiction, involving common use, recruitment of troops, and an oath taken by the State of nationality of the soldiers, respectively. Subsequent agreement of 15 April 1994 provided for the partition of the fleet and transfer of 15-20% of vessels and other equipment to Ukraine; it provided also for a right of Russia to maintain a military (naval) base on the Ukrainian territory. Finally, on 9 June 1995 another agreement concluded in Sochi guaranteed to Ukraine the right to receive 18.3% of the vessels and 50% of other material. Both navies (Russian and Ukrainian) should be stationed in separate bases. The agreement was never implemented, as difficulties with the evaluation of ships by experts of both parties occurred. Beginning from 1996, Georgia also claimed a share of the Black Sea Fleet, as a part of it stationed in Georgian harbors before 1991. Final agreement was reached in 1997. The ships were partitioned between Russia and Ukraine, and Russia kept her right to use the naval base in Sevastopol for the next 20 years.

The solutions reported concerned primarily the former Soviet state property. The takeover of the property was however followed by the transfer of liabilities as to the state debts of the former USSR. As that was done by an agreement between the successor States, and the Vienna Convention of 1983 provides for primacy of this kind of agreements, the solution applied could not necessarily constitute any basis for an evaluation of the form of succession (series of secessions with the identity of Russia with the USSR preserved v. dissolution).²⁷

Nowadays, the problem of a typology of the Soviet Union succession/continuity with regards to economic aspects seems to be resolved in favor of the identity of Russia with the USSR, as was the case for the law of treaties and membership to international organizations. The steps undertaken by Russia in respect of the Soviet

²³ Critically on that agreement V.V.Pustogarov, *Mezhdunarodno-pravovoi status Sodruzhestva Nezavisimyykh Gosudarstv*, GPr 2/1993, p.35, and M.M.Boguslavsky, *Sovremennyye voprosy vozvrashcheniya kulturnykh tsennostey v stranu ikh proiskhozhdeniya*, ibidem 11/1993, p.129.

²⁴ Cf. Th.Schweisfurth, *Das Recht ...*, p.159.

²⁵ N.Dronova, *op.cit.*, p.27; Th.Schweisfurth, *op.cit.*, p.157; K.Butterworth, *Successor States – Property Rights – Russia and Ukraine Agree to Share Control of the Former Soviet Union’s Black Sea Fleet*, *GaJILCL* 22(1992), p.659 ff.

²⁶ R.Yakemtchouk, *Les conflits de territoire et de frontière dans les Etats de l’ex-URSS*, *AFDI* 39(1993), pp.398-408.

²⁷ See the dilemma discussed in that context by A.Reinisch, G.Hafner, *Staatensukzession*, *op.cit.*, at 96-99.

debt seem to confirm its position in favor of continuity to the legal personality of the USSR. First of all, Russia became member of the IMF as from 1 July 1992, what played an important role by a consolidation of the debt. The accession was followed by other successor States. After having concluded first agreements on the takeover of the shares of the debt, on the meeting of the Paris Club on 2 April 1993 Russia recognized a responsibility for the service of the ex-Soviet state debt. It was interesting that at the beginning the Club insisted upon Ukraine to accept a solidary responsibility for the debt; that position was, however, abandoned in the course of 1992. Subsequently the Russian declaration was acknowledged by the Club who stated that the agreement of 4 December 1992 on the partition of assets and liabilities of the ex-USSR was in fact inoperative. Under those circumstances the problem should be resolved by concluding bilateral agreements between the States concerned. The creditors obligated themselves not to present any claims against the successor States that concluded with Russia the bilateral agreements on the transfer of debts.²⁸ The solution adopted amounted to an acceptance of the status of Russia as a unique subject of assets and liabilities of the former USSR abroad.²⁹

Another solution was elaborated by the EBRD, the only international financial institution the USSR used to be a member. The USSR had a right to obtain 60000 shares of the bank; the payments should be effectuated in 5 consecutive installments. Only the first installment was paid before the dissolution of the USSR. The governing body of the Bank recognized the right of all the successor States to become members of the Bank. It also denied the right of Russia to the said shares stating that the quantity of all the shares owned by Russia and the successor States should not exceed a quota granted to the USSR. The first installment was partitioned proportionally among all the States concerned.³⁰

An additional interesting topic is the possible succession of the Baltic States in respect to assets and liabilities of the former USSR. In general, Lithuania, Latvia and Estonia rejected any links with the USSR, according to their thesis of an illegal annexation by the USSR in 1940. Those States rejected any participation in the payment of the shares of the Soviet debt.³¹ On the other hand, they did not hesitate to takeover of the Soviet property situated in their territories. Moreover, in the agreements on the withdrawal of the Soviet armed forces they reserved a right to retain military equipment and materials without indemnity.³² The Baltic States also undertook steps to obtain property rights in respect to their prewar assets abroad, taken over by the USSR after the annexation of 1940, as well as to defreeze their rights to other prewar property in the third States. At least in some instances those efforts succeeded. By the decision of the Berlin court of 23 September 1991 Estonia was granted rights to a sequestered after WWII building of a former Estonian embassy in Germany.³³ Similarly, the British Government passed on 10 December 1990 a certificate of executive stating that the UK never recognized the annexation of the Baltic States by the USSR, so it could not recognize any Soviet rights to the immobile property of those States situated in the territory of the UK. After a resuscitation of Estonia the prewar property should be returned to a legitimate Estonian government.³⁴ France decided to return to the Baltic State 2-3 ton of gold deposited in 1932-1936; nearly 2.5 ton of gold was returned to Lithuania. UK and USA decided also to return gold deposits, and Sweden agreed to pay an equivalent of the gold deposited by the Baltic States after the annexation by the USSR, and subsequently transferred to the Soviet government.

Conclusions

Summing up, the general provisions of the 1983 Convention, as well as those related to cession, separation, dissolution and unification can be generally considered as reflecting customary law and are not subject of much controversy. However, the abstract solutions proposed by the Convention, i.e. the "equitable proportion" rule, and the lack of elements capable of helping to establish criteria for reaching that result, has not encouraged States to accept the Convention. The *Institut de droit international* adopted guiding principles relating to the

²⁸ H.Beemelmans, *Die Staatennachfolge* ..., p.89.

²⁹ On 18 September 1997 Russia became member of the Paris Club, what should have enabled her to recuperate debts owed to the USSR by third States.

³⁰ A.Gioia, *State Succession*, op.cit., at 35.

³¹ Cf. R.Mullerson, *The Continuity and Succession of States. By Reference to the former USSR and Yugoslavia*, ICLQ 42(1993), at 483.

³² Agreements with Latvia of 30 April 1994, and Estonia of 26 July 1994; cf. Th.Schweisfurth, *Das Recht ...* op.cit., p.159.

The agreement with Latvia provided one exception: Russia retained a right to operate a Scrunda radar installation till 31 August 1998; afterwards it was disassembled and taken to Russia.

³³ Pilot Project, op.cit., doc. D/52.

³⁴ Pilot Project, op.cit., doc. UK/56.

succession of States in respect of property and debts aiming at filling this gap.³⁵ It can be wondered, nevertheless, whether an extremely casuistic determination upon what must be considered equitable in all cases does not risk promoting further difficulties. The narrow interpretation of State debts adopted by the 1983 Vienna Convention was superseded in order to extend it to debts contracted with private subjects.

In fact, it was the extremely privileged position of the newly independent States and the favorable solutions adopted with regard to them that constituted a major obstacle for its acceptance. In order to reject them as not having reflecting the status of customary law, careful consideration of the practice related to State property and debts in the cases of the last dependent territories having become newly independent States (Namibia, the former trust territories of the Pacific and East Timor) is needed. The final report of this Committee intends to deal with this question. At any rate, if one takes into account that the Convention could not be applied retroactively (unless the State concerned made a special declaration in that respect, and the declaration was opposable to other interested States), the reason of its failure as such becomes apparent.

³⁵ Adopted on 26 August 2001, rapporteur was Mr. Georg Ress, *Annuaire de l'Institut de Droit international* 69 (2000-2001), 712-741.