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Milena Sterio

Cleveland-Marshall College of Law, Cleveland State University, m.sterio@csuohio.edu

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IMPLICATIONS OF THE *ALTMANN* DECISION ON FORMER YUGOSLAV STATES

*Milena Sterio**

INTRODUCTION

The law of state succession is one of the most complicated areas of law.¹ Scholars and politicians have seldom reached a consensus on the exact public international law rules in this area. The recent breakup of former Yugoslavia² exemplifies some of the difficulties relating to, inter alia, the distinction between dissolution and secession, the allocation of debt and assets among successor states, and more particularly, the resolution of individual disputes among citizens of former Yugoslav republics. The latter issue has been particularly important, as numerous individuals have lost their life savings and immovable property during the internal war that ravaged former Yugoslavia in the 1990s. These individuals are now seeking restitution from successor states. However, the question of liability for former Yugoslavia's republics has not been fully resolved even though individuals may begin bringing their claims to international tribunals.

It is possible that such individuals will start looking toward other jurisdictions, including the United States. A recent U.S. Supreme Court decision³ expands the applicability of the Foreign Sovereign Immunity Act ("FSIA")⁴ by allowing private individuals to sue foreign states under the FSIA for conduct that occurred prior to its enactment in 1976. This decision might indicate a willingness on behalf of American courts to hear more claims against foreign sovereigns for violations of international law. Thus, claimholders from former Yugoslavia could now be more inclined to bring their grievances to U.S. district courts under the FSIA.

In order to address this issue, Part I of this article will describe the breakup of former Yugoslavia, by first addressing general succession issues before concentrating on the more specific questions of property allocation among successor states. Part II will present the recent Supreme Court decision by outlining its holding and its limitations. Finally, Part III will discuss the

* Associate, New York City law firm. This Article represents the views of the author only and not those of her law firm. B.A., Rutgers College; J.D., Cornell Law School; Maîtrise en Droit, Université Paris I-Panthéon-Sorbonne; D.E.A. Private International Law, Université Paris I-Panthéon-Sorbonne.

1. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 654 (4th ed. 1990).

2. Before its breakup, former Yugoslavia was known as Socialist Federal Republic of Yugoslavia ("SFRY"). See *The Agreement on Succession Issues Between the Five Successor States of the Former State of Yugoslavia*, June 29, 2001, 41 I.L.M. 3 (2002) [hereinafter *Vienna Agreement*].

3. *Republic of Austria v. Altmann*, 124 S.Ct. 2240 (2004).

4. 28 U.S.C. § 1602 (2000).

implications of this recent decision on former Yugoslavia's claimholders' prospects of introducing successful FSIA-based claims to American tribunals. Part III will end with a discussion regarding the utility and fairness of allowing more claims against foreign sovereigns, such as the former Yugoslav republics, to be litigated in U.S. courts.⁵

I. THE BREAKUP OF FORMER YUGOSLAVIA

The dismantlement of former Yugoslavia in the early 1990s was not an easy process. Besides the internal wars and atrocious human rights violations throughout the country, numerous state succession issues plagued the dissolution process. Because of the sensitive political context and tension among former republics, negotiations have been difficult and even when a final agreement was reached in Vienna in 2003,⁶ the most sensitive issues were deliberately left out. Thus, it is now up to the new states to bilaterally resolve such issues, which involve restitution to citizens of former Yugoslavia who lost their property during the wars, as well as the allocation of successor states' responsibility regarding the wrongdoings of the post-World War II communist regime. Since successor states' governments might be slow and inefficient in providing a solution to these issues, private plaintiffs with pending claims could bring their disputes to international tribunals in hope of faster relief. No international forums have yet ruled on the merits of any such claims, but recent developments in European and American jurisprudence might indicate the international community's willingness to deal with former Yugoslavia's succession issues.

A. *General Context*

When former Yugoslavia ceased to exist in the early 1990s, its dismantlement caused many legal problems regarding the allocation of the country's property. In particular, the issue of debt and asset distribution has plagued succession negotiations among successor states.⁷ The difficulty underlying the issue of property allocation is both legal and political, as the country has been torn apart by violence and internal wars. Deciding whether the country's breakup amounted to secession or to dissolution carries important consequences regarding debt and asset distribution because this determination affects successor states' legal and political rights in a crucial manner. With the help of the international community, an agreement was finally reached among successor states in Vienna in 2001.⁸

5. In fact, this article uses former Yugoslavia as an example, but the same reasoning, regarding jurisdiction in U.S. courts under the FSIA over a foreign sovereign, can be equally applied to other recently dismantled states, such as the former USSR and the former Czechoslovakia.

6. See Part I.A.3 *infra* for a full discussion of this Agreement.

7. Milos Trifkovic, *Fundamental Controversies in Succession to the Former SFR Yugoslavia*, in 33 SUCCESSION OF STATES: DEVELOPMENTS IN INTERNATIONAL LAW 187, 188 (Mojmir Mrak ed.).

8. See Vienna Agreement, *supra* note 2.

However, while this agreement resolved some of the outstanding issues, other problems still exist among former Yugoslav republics.

1. The Conflict and Crisis in Former Yugoslavia

In the late 1980s, the Socialist Federal Republic of Yugoslavia ("SFRY") suffered a financial crisis.⁹ Because of poor economic planning and populist promises, the Yugoslav federation experienced such a staggering inflation rate that the federal government launched a "shock therapy" plan intended to curb inflation and to boost foreign investment.¹⁰ The country's political situation paralleled the economic debacle. In 1990, new nationalistic movements started forming in Croatia, Slovenia, and Bosnia and Herzegovina. The new political pluralism was clearly anti-communist and anti-federation, and new nationalist parties won elections throughout the year.¹¹ In Serbia, Slobodan Milosevic was elected president with 65% popular vote.¹² Thereafter, the Serbian Assembly suspended Kosovo's government and parliament, signaling rising nationalism and a rejection of decentralization of the political and economic systems.¹³

Several political forces emerged thereon. On one side, Milosevic advocated a "strong Serbia" as the leading force in a "strong Yugoslavia." On the other side, the newly elected governments of Croatia, Slovenia, and Bosnia and Herzegovina were fighting for decentralization and independence from the Yugoslav federation. Several other factors contributed to this troubling internal situation. First, the military was seen as mostly Serbian in its higher cadres and as strongly pro-federation, which caused suspicion about the role of the army within the other republics.¹⁴ Second, the Serbian leadership's attempt to maintain a centralizing policy came at a time of great distress. In fact, the 1990 economic package, launched under an International Monetary Fund ("IMF") Stand-by Agreement and a World Bank Structural Adjustment Loan, "required large budget cuts and redirection of federal revenues toward debt servicing."¹⁵ In order to implement this requirement, the federal government suspended transfer payments to the

9. See Valerie Bunce, *The Elusive Peace in the Former Yugoslavia*, 28 CORNELL INT'L L.J. 709, 712 (1995) on the economical situation of Yugoslavia.

10. Guido Acquaviva, *The Dissolution of Yugoslavia and the Fate of its Financial Obligations*, 30 DENV. J. INT'L L. & POL'Y 173, 174 (2002).

11. See Konrad G. Buhler, *State Succession, Identity/Continuity and Membership in the United Nations*, in LA SUCCESSION D'ETATS: LA CODIFICATION A L'EPREUVE DES FAITS - STATE SUCCESSION: CODIFICATION TESTED AGAINST THE FACTS 187, 274-78 (Pierre Michel Eisemann & Martti Koskenniemi eds., 2000).

12. Acquaviva, *supra* note 10, at 174.

13. See Buhler, *supra* note 11, at 274-78.

14. For an interesting analysis of the spreading of Yugoslav nationalism(s), see OLIVIER LADISLAV KUBLI, *DU NATIONALISME YUGOSLAVE AUX NATIONALISMES POST-YUGOSLAVES* (1998); see also LAURA SILBER & ALLAN LITTLE, *YUGOSLAVIA: DEATH OF A NATION* (1996).

15. Acquaviva, *supra* note 10, at 175.

government of the republics and autonomous provinces, thereby creating more discomfort and distrust toward the federal authorities.¹⁶

The international community was mostly unwilling to deal with this troubling situation.¹⁷ While the international focus of the world in 1991 remained on the Gulf War and on Moscow,¹⁸ the first military outbreaks took place in Croatia. Serbs from the Krajina region declared their willingness to remain part of Yugoslavia in a local referendum. Franjo Tudjman, the Croatian leader, and Milosevic secretly met to discuss possible partition of Bosnia and Herzegovina.¹⁹ Slovenia and Croatia declared their sovereignty at the end of June, followed by Macedonia²⁰ in September. The European Community ("EC") began an arms embargo in July, in an effort to ease the situation.²¹ Furthermore, the EC established a "Peace Conference" on Yugoslavia²², and the United Nations Security Council adopted a resolution for an embargo on arms sales to Yugoslavia.²³ However, these efforts remained virtually useless regarding conflict resolution in Yugoslavia and the international community did little to propose any real action or diplomatic solution for the developing crisis.

In October 1991, Croatia, Slovenia, Bosnia and Herzegovina, and Macedonia were on the verge of becoming independent states, leaving Serbia and Montenegro as the two remaining constituents of the Yugoslav federation. On April 27, 1992, Serbia and Montenegro declared the Federal Republic of Yugoslavia ("FRY") to be the "continuation" of the dismantled SFRY.²⁴ In the meantime, the EC decided to take a bold stand: it would only recognize newly independent countries in Eastern

16. MICHEL CHOSSUDOVSKY, *THE GLOBALISATION OF POVERTY* 246 (1997). See also SUSAN WOODWARD, *BALKAN TRAGEDY: CHAOS AND DISSOLUTION AFTER THE COLD WAR* 40 (1995).

17. The United States, the European Community, the Conference on Security and Cooperation in Europe, and Russia seemed to support the idea of maintaining the territorial integrity of the Yugoslav federation. This attitude strengthened the perception of the Yugoslav and Serbian leaderships that independence for Slovenia, Croatia, and any other republic was not supported internationally. See Marc Weller, *The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 AM. J. INT'L L. 569, 570 (1992).

18. In one of the strangest coups in history, the leader of the former USSR, Mikhail Gorbachev, was declared "sick" and then promptly came back under the protective wing of Boris Yeltsin. Acquaviva, *supra* note 10, at 175-76.

19. Acquaviva, *supra* note 10, at 175.

20. Macedonia is now recognized under the name of "Former Yugoslav Republic of Macedonia" and it was admitted to the United Nations in April of 1993. See Susan Woodward, *Are International Institutions Doing Their Job?*, 90 AM. SOC'Y INT'L L. PROC. 471, 473 (1996). For the purpose of this article, the denomination of "Macedonia" will be adopted.

21. Acquaviva, *supra* note 10, at 176.

22. The EC agreed to convene a peace conference on Yugoslavia at a meeting held in Brussels on August 27, 1991. The peace conference was also to establish an arbitration procedure to enhance the rule of law in the settlement of disputes. After many disagreements, an Arbitration Commission was formed with Mr. Badinter as Chairman. The Commission [hereinafter Badinter Commission] received full support from the United States and the USSR, but was replaced by the UN/EC International Conference on Yugoslavia in August of 1992. For more information on the Badinter Commission, see Maurizio Ragazzi, *Introductory Note, Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising From the Dissolution of Yugoslavia*, 31 I.L.M. 1488, 1488-90 (1992).

23. S.C. Res. 713, U.N. SCOR, U.N. Doc. S/RES/713 (1991), available at www.un.org (last visited Oct. 30, 2004).

24. Acquaviva, *supra* note 10, at 178.

Europe if they were able to meet stringent criteria,²⁵ new to the international law on state recognition.²⁶ While these new standards, had they been followed by the EC itself and other major countries, such as the United States, non-aligned countries, and the newly independent Russia, could have promoted a more coherent approach toward state recognition, they remained short-lived. At the end of 1991, Germany decided to unilaterally recognize Slovenia and Croatia as independent countries, choosing not to adhere to the previously agreed-on substantive standards.²⁷ The rest of the EC followed on January 15, 1992, recognizing the same two former Yugoslav republics without following the proposed standards. The EC then recognized Bosnia and Herzegovina on April 6, 1992,²⁸ but refused to do so regarding Macedonia.²⁹ The United States, too, recognized Slovenia, Croatia, and Bosnia and Herzegovina on April 7, 1992.³⁰ The recognition of these new countries happened while horrific war crimes and human rights violations were taking place

25. See The Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, available at <http://ejil.org/journal/Vol14/No1/art6.html> [hereinafter Guidelines]. The Guidelines were issued at the Extraordinary Ministerial Meeting in Brussels, on December 16, 1991, as part of the Declaration on Yugoslavia. In the Guidelines, member states agreed to “recognize, subject to the normal standards of international practice and the political realities in each case, those new states which, following the historic changes in the region, have constituted themselves on a democratic basis, have accepted the appropriate international obligations and have committed themselves in good faith to a peaceful process and to negotiations.” See Thomas Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46, 90-91 (1992). The Guidelines explained that the process of recognition required, *inter alia*, “commitment to settle by agreement [...] all questions regarding state succession and regional disputes.” For a discussion regarding the relevance of this specification, see European Community: Declaration on Yugoslavia and on the Guidelines on the Recognition of New States, 31 I.L.M. 1485, 1487 (1992).

26. Scholars in international law generally agree that an entity satisfying the four criteria of statehood (territory, permanent population, government and capacity to conduct international relations) does not need any kind of recognition by the international community to become a member. See generally P.K. MENON, *THE LAW OF RECOGNITION IN INTERNATIONAL LAW* (1994).

27. See Badinter Commission, Opinion No. 5, On the Recognition of the Republic of Croatia by the European Community and its Member States, Jan. 11, 1992, 31 I.L.M. 1503, 1505 [hereinafter Badinter Commission, Opinion No. 5] (suggesting Croatia was not fully “ready” to be recognized because the Constitution of December 4, 1991 did not sufficiently incorporate the suggested provision on the autonomy of minorities; however, written reiteration by President Tudjman of the commitment to protect minorities was deemed sufficient). As for Slovenia, see Badinter Commission, Opinion No. 7, On International Recognition of the Republic of Slovenia by the European Community and its Member States, Jan. 11, 1992, 31 I.L.M. 1512, 1512-17 (declaring that Slovenia met the requirements). On the question of legality of secession by Croatia and Slovenia, see Richard Iglar, Comment, *The Constitutional Crisis in Yugoslavia and the International Law of Self-Determination: Slovenia’s and Croatia’s Right to Secede*, 15 B.C. INT’L & COMP. L. REV. 213, 228 (1992).

28. See Badinter Commission, Opinion No. 4, On International Recognition of the Socialist Republic of Bosnia-Herzegovina by the European Community and its Member States, Jan. 11, 1992, 31 I.L.M. 1501, 1503. On the particular international situation of Bosnia and Herzegovina, see Matthew Craven, *The European Community Arbitration Commission on Yugoslavia*, 66 BRIT. Y.B. INT’L L. 333, 375 (1995).

29. Badinter Commission, Opinion No. 6, On International Recognition of the Socialist Republic of Macedonia by the European Community and its Member States, Jan. 11, 1992, 31 I.L.M. 1507. The EC decided not to recognize Macedonia despite the Badinter Commission’s opinion that it should, because of the Greek veto. See Acquaviva, *supra* note 1, at 178.

30. Acquaviva, *supra* note 1, at 178 n. 20 (citing The United Nations recognized Slovenia, Croatia and Bosnia and Herzegovina on May 22, 1992 (U.N. Press Release, ORG/1156, Jan. 19, 1993)).

in Bosnia and Herzegovina and Croatia.³¹ The political environment throughout the former Yugoslav states was one of hostility and violence, thus preventing effective negotiations among parties from taking place.

2. Dissolution Versus Secession and Related Succession Issues

According to the Vienna Convention on Succession of States in Respect of Treaties³² and the Vienna Convention in Respect of State Property, Archives and Debts,³³ the succession of states is defined as “the replacement of one State by another in the responsibility for the international relations of territory.”³⁴ In cases of universal succession, the predecessor state ceases to exist. For example, when Zanzibar and Tanganyika decided to unite in 1964, they ceased to exist and a new state, Tanzania, was formed.³⁵ In other cases, however, the predecessor state can remain in existence. When the Thirteen colonies seceded from Great Britain, the latter was not affected in its existence.³⁶ This principle does not mean, however, that all of the obligations of the predecessor state remain in force as if nothing had happened: some may be passed on to the successor state, some may remain in the realm of the predecessor state, some may be transformed, and some may cease to exist. Thus, the modification of a state does not automatically entail the modification of its obligations.³⁷

In the context of former Yugoslavia, neither one of the simple hypotheses applies. On the contrary, there is significant debate about whether the state succession that occurred represented “dissolution” or “secession.”³⁸ The terminology, far from causing purely semantic issues, implies important legal consequences and differing conclusions regarding debt and asset allocation among the former Yugoslav states.³⁹

31. See S.C. Res. 752, U.N. SCOR, U.N. Doc. S/RES/752 (1992), reprinted in 31 I.L.M. 1451, 1452 (demanding compliance with the April 12, 1992 cease-fire and urging to stop “violent deterioration” of the situation) and S.C. Res. 757, U.N. SCOR, U.N. Doc. S/RES/757 (1992), reprinted in 31 I.L.M. 1453, 1454 (calling for “immediate cessation of forcible expulsions and attempts to change the ethnic composition of the populace”).

32. Vienna Convention on Succession of States in Respect of Treaties, August 23, 1978, 17 I.L.M. 1488, 1490.

33. Vienna Convention in Respect of State Property, Archives and Debts, April 8, 1983, 22 I.L.M. 298, 308. However, this Convention has never entered into force and it is largely thought not to reflect customary international law. See Eli Nathan, *The Vienna Convention on Succession of States in Respect of State Property, Archives and Debts*, in INTERNATIONAL LAW AT A TIME OF PERPLEXITY: ESSAYS IN HONOUR OF SHABATI ROSENNE 489 (Yoram Dinstein & Mala Tabory eds., 1989).

34. Vienna Convention on Succession of States in Respect of Treaties, *supra* note 32, at 1490; Vienna Convention in Respect of State Property, Archives and Debts, *supra* note 33, at 308.

35. See DANIEL PATRICK O'CONNELL, STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW 77 (1967); The Acts of Union of Tanganyika and Zanzibar, Apr. 27, 1964, 3 I.L.M. 763, 764.

36. See O'Connell, *supra* note 35, at 88-91.

37. See Acquaviva, *supra* note 10, at 185.

38. Trifkovic, *supra* note 7, at 188-89.

39. For a more detailed discussion on dissolution v. secession in general as well as in the context of former Yugoslavia, see Acquaviva, *supra* note 10, at 185-94.

If the former SFRY fell apart through decay of its institutions and through transfer of sovereign powers from the federation back to the republics, then the dismantlement process would be one of dissolution. Furthermore, the armed conflict in Croatia and in Bosnia and Herzegovina could be deemed an aggression. On the other hand, if the SFRY disappeared by the secession of several republics, then the conflict would amount to a civil war because the “act of secession violated the right to self-determination” of the Serb minorities living in the seceding republics.⁴⁰

The legal consequences of the above distinction are crucial. If SFRY fell apart because of dissolution, all emerging states founded from its former republics would have the same position in the succession process. The question of war reparations could also arise. In the case of secession, however, FRY would retain the international personality of the former SFRY and its position would be politically and juridically strengthened, thus excluding the issue of war damages. The Badinter Commission solved this legal dilemma.⁴¹ In Opinion No. 1, dated November 29, 1991, the Commission stated “the Socialist Federal Republic of Yugoslavia is in the process of dissolution.”⁴² Furthermore, Opinion No. 8, dated July 4, 1992, confirmed this conclusion, by stating “the process of dissolution of the SFRY referred to in Opinion No. 1 of 29 November 1991 is now complete and ... the SFRY no longer exists.”⁴³ Finally, in Opinion No. 10 the Badinter Commission affirmed that “the FRY (Serbia and Montenegro) is a new state which cannot be considered the sole successor to the SFRY.”⁴⁴ Because FRY contested the binding character of these opinions while the other successor states adhered to them, compromise was greatly needed regarding the most contentious issues. Thus, all participants agreed to “refrain from using the terms ‘dissolution’ and ‘secession,’ the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts of 1978 should not be quoted by titles and articles, and the technical rules of the Vienna Convention should be interpreted so as to encompass rules common to both dissolution and secession ... when feasible.”⁴⁵

The issue of debt and asset allocation among the successor states required more negotiations. A fundamental rule that resulted from the Badinter Commission required successor states to consult with each other to achieve an equitable result.⁴⁶ According to Opinion No. 13, there was no need to divide assets and liabilities proportionally, but the overall result should be an equitable division.⁴⁷

40. See Trifkovic, *supra* note 7, at 188.

41. See Badinter Commission, Opinion No. 1, reprinted in Alain Pellet, *The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples*, 3 EUR. J. INT’L L. 178, app. 182-83 (1992).

42. *Id.* at 183.

43. See Badinter Commission, Opinion No. 8, reprinted in Danilo Turk, *Recognition of States: A Comment*, 4 EUROP. J. INT’L L. 66, 74 Annex 3 (1993); Badinter Commission, Opinion No. 1, *supra* note 41, at 182.

44. Badinter Commission, Opinion No. 10, reprinted in Danilo Turk, *Recognition of States: A Comment*, 4 EUROP. J. INT’L L. 66, 74 Annex 3 (1993).

45. See Trifkovic, *supra* note 7, at 188-89.

46. Badinter Commission, Opinion No. 9, July 4, 1992, 31 I.L.M. 1523, 1523-25.

47. Badinter Commission, Opinion No. 13, July 16, 1992, 32 I.L.M. 1591, 1591-92.

Furthermore, all successor states had an obligation to cooperate actively and in good faith; if they were to refuse, they would encounter state responsibility toward other successor states for damages.⁴⁸ Because of already heightened regional tensions among successor states, and because of the violent and disputed breakup of former Yugoslavia, peaceful negotiations regarding debt and asset allocation were impossible among the new states. Thus, Slovenia adopted a different solution, consisting of dealing with creditors on a bilateral basis, thereby excluding the other successors from the procedure. Other republics started to follow the same approach shortly thereafter.⁴⁹ Consequently, an agreement among all successor states was much needed to provide an efficient overall solution to the issue of property allocation.

3. Allocation of Debts – The Vienna Agreement

The newly formed states of the former Yugoslavia faced many challenges regarding property issues. First, successor states had to reschedule and eventually pay dues to international creditors.⁵⁰ In order to do so, FRY had to reach an effective and feasible apportionment of the unallocated debts of former Yugoslavia, which required its government to give up the claim of being the sole successor of the SRFY.⁵¹ Thus, an important agreement was signed in Vienna on June 29, 2001 (the “Vienna Agreement”).⁵² The Vienna Agreement built upon the deals already entered by Slovenia, Croatia, Bosnia and Herzegovina, and Macedonia, trying to reach a consensus acceptable to the FRY, which had acted as the “rogue” state until that moment.⁵³ In particular, the Vienna Agreement divided the financial liabilities of the former Yugoslavia into three main categories. First, allocated debt, external debt whose beneficiary was located in the territory of a specific successor state or group of states, remains with the successor state where the final beneficiary is located.⁵⁴ Second, SFRY’s external official unallocated debt to members of the Paris and London Clubs is to be dealt with according to already negotiated deals by Slovenia, Croatia, Bosnia and Herzegovina, and Macedonia, whereas FRY is to assume responsibility for all of its unallocated debt by negotiating directly with the members of the two clubs.⁵⁵ The corollary of this rule is that successor states are to “terminate any existing legal proceedings or financial claims among each other and

48. Badinter Commission, Opinion No. 12, July, 16, 1992, 32 I.L.M. 1589, 1590.

49. See Acquaviva, *supra* note 10, at 206.

50. See Acquaviva, *supra* note 10, at 212.

51. The new FRY government headed by Vojislav Kostunica seemed to have already given up the previous position, held by Slobodan Milosevic, thus facilitating the road to negotiations. See *IMF Approves Yugoslavia's Membership in Fund*, AGENCE FRANCE-PRESSE, Dec. 20, 2000.

52. Vienna Agreement, *supra* note 2, at 3. In May of 2001, the central bankers of former Yugoslav republics met with the international mediator, Sir Arthur Watts, to agree on the apportionment of assets of former Yugoslavia according to the IMF key with some minor variations. The consensus reached at this meeting is reflected in the Vienna Agreement.

53. Acquaviva, *supra* note 10, at 212.

54. Vienna Agreement, *supra* note 2, at 25 Annex C.

55. Acquaviva, *supra* note 10, at 212.

avoid instituting new proceedings or claims.”⁵⁶ Finally, the third category of financial liabilities is comprised of all claims against the SFRY not otherwise covered by the Vienna Agreement. These claims are to be raised by each successor state and to be subsequently considered by the Joint Committee established under the Vienna Agreement itself.⁵⁷

Although the Vienna Agreement resolved some of the problems related to debt and asset allocation among former Yugoslav republics, several contentious issues have plagued the negotiation process. In particular, the division of former Yugoslavia’s assets rekindled political and historical disputes among successor states.

B. Specific Succession Disputes: Division of State Assets

In February of 1993, a tentative inventory made by independent consultants estimated the net assets of the SFRY as of December 31, 1990 at \$60 billion.⁵⁸ Military assets represented 75 per cent of the above sum, immovable assets 3.4 % and financial assets 21.6 %.⁵⁹ The division of these assets proved to be a daunting task.

1. Six Points of Contention Among Successor States

In fact, six sticking points in the negotiations regarding asset division evolved. First, the scope and definition of state property was a major point of contention between the FRY and the other successor states.⁶⁰ While all parties agreed that the definition of state property set out in Article 8 of the Vienna Convention in Respect of State Property, Archives and Debts (“Vienna Convention”)⁶¹ applied, “the four successor states regard[ed] this definition as a rule of international law, while the FRY’s view was not clear.”⁶² In fact, the Vienna Convention defines state property in terms of the municipal law of the predecessor state as of the date of succession.⁶³ Thus, one must look into domestic law of the predecessor state to determine the scope of the concept of state property. The dispute between the FRY and the other

56. *Id.* at 212-13.

57. Vienna Agreement, *supra* note 2, at 35 Annex F.

58. See Ana Stanic, *Financial Aspects of State Succession: The Case of Yugoslavia*, 12 *EUROP. J. INTL. L.* 751, 755 (2001) (citing Working Groups on Economic Succession Issues of the International Conference, “Single Inventory of Assets and Liabilities of the SFRY as of 31 December 1990”, February 28, 1993). The figure is in U.S. dollars.

59. In comparison, as of the end of 1991, the total medium-term and long-term debt of former Yugoslavia amounted to US \$15.99 billion, of which US \$3.79 billion was unallocated and US \$12.2 billion was allocated debt. See Stanic, *supra* note 58, at 758.

60. See Stanic, *supra* note 58, at 763. The four other successor states include Croatia, Slovenia, Bosnia and Herzegovina, and Macedonia.

61. Article 8 provides that state property means “property, rights and interest which, at the date of the succession of States, were, according to the internal law of the predecessor State, owned by that State.” Vienna Convention in Respect of State Property, Archives and Debts, *supra* note 33, at 310.

62. Stanic, *supra* note 58, at 763.

63. Vienna Convention in Respect of State Property, Archives and Debts, *supra* note 33, at 310.

four successor states relates to the scope of state property under SFRY's domestic law.⁶⁴ According to the FRY, "nothing similar to state property existed in the SFRY and ... what constituted state property could only be determined by looking at investments and loans made by the federal state authorities and other federal funds since 1945."⁶⁵ The FRY had therefore rejected the legal approach in defining state property in favor of an economic approach. This approach was rejected by all four successor states and by the Badinter Commission.⁶⁶ According to the four successor states, a legal approach could and had to be taken to define the SFRY's property, by reference to federal laws in force at the date of succession. Furthermore, the four successor states contended that the past investment approach was unworkable as too long and burdensome.⁶⁷ Thus, the concept of state property remained a troubling as it related to asset allocation among former Yugoslav states.

Second, the issue of internal financial assets and whether these constitute state property has been problematic in succession negotiations. "The FRY has argued that internal net financial assets also form part of the SFRY's state property."⁶⁸ In other words, according to the FRY, the net credit position of each republic regarding the federal government must be determined, and the financial capital flows between the federal government and the republics, corporations and natural persons located in them must be calculated. However, because the FRY claimed that as the sole successor of the SFRY it represented the federal government, its contention was that only the creditor position of the four successor states vis-à-vis the federal government should have been determined.⁶⁹ Thus, under this approach, all other republics, except for Slovenia, would have owed money to the federal government, or the FRY.⁷⁰ The four successor states rejected this approach. They argued that such an approach was unprecedented under relevant international state practice and that the adoption of such an approach would have amounted to double counting in accounting terms.⁷¹ Furthermore, assuming that the internal assets method was adopted, the FRY's net position vis-à-vis the federal government should have also been taken into account, as it was one of the successor states. Finally, the four successor states have argued that the "internal financial assets approach is unnecessary" and almost "impossible to carry out."⁷² Instead, the four successor states argued that it would have been simpler to divide the federal

64. Stanic, *supra* note 58, at 763-64.

65. *Id.* at 764 (citing Article 20 of the FRY's Draft Agreement Between the FRY and the Successor States, May 4, 1993; Mihajlovic, *Ozbiljnije o sukcesiji* [Seriously About Succession], VREME, March 2001 (letter from Mihajlovic, the head of the FRY's negotiating team, to a Serbian newspaper, "Vreme").

66. *Id.* (citing Badinter Commission, Opinion No. 11, 32 I.L.M. 1586, 1587).

67. The four successor states also contended that many loan documents had been lost or destroyed since some of them dated as far back as 1945. *See id.* at 764-65.

68. *Id.* at 765.

69. However, since the FRY has since conceded that it is not the sole successor of the SFRY, it has abandoned this position. *See Vienna Agreement, supra* note 2; *see also supra* note 51 and accompanying text.

70. *See Stanic, supra* note 58, at 765.

71. *Id.* at 765-66.

72. *Id.* at 766.

balance sheet for the last budget, on December 31, 1990, "by reference to net external financial assets."⁷³

The third sticking point in the negotiations was that the FRY's historic claim to certain state property undermined the negotiations process regarding asset division. The FRY has claimed "that property of the Kingdoms of Serbia and Montenegro and the parts of former Austro-Hungarian monarchy as at the date of the establishment of the Kingdom of Yugoslavia in 1918 should not be included in the definition of the SFRY's property."⁷⁴ As part of this historic claim, the FRY has argued that it is the only successor to the SFRY's shares in, and gold reserves held at, the Bank for International Settlements ("BIS").⁷⁵ In fact, according to the FRY, the gold deposited in the BIS belonged to the Kingdom of Serbia because it was the Kingdom of Serbia that was allocated shares in the BIS upon its creation as war reparation for the damage suffered by this Kingdom in the First World War and because the FRY is the sole successor of the Kingdom of Serbia.⁷⁶ The BIS rejected the FRY's claim as sole successor to the gold and shares mentioned above. It froze all of the SFRY's gold reserves and shares.⁷⁷ In 1997, the BIS invited the central banks of Bosnia, Croatia, Macedonia and Slovenia to subscribe for a nominal number of new shares, thereby enabling them to become members of the BIS.⁷⁸ The old SFRY shares were finally apportioned using the key method agreed upon by all successor states in the Vienna Agreement.⁷⁹

The fourth issue in asset distribution among former Yugoslav republics was whether equitable compensation must be made by the FRY to other successor states as a consequence of it becoming the owner of most of the SFRY's immovable property.⁸⁰ According to customary international law, immovable property within the territory of a successor state passes to that state in case of dissolution or secession.⁸¹ In the case of former Yugoslavia, most of the federal organs, institutions, research institutions of the federal army, military installations and factories were located in Serbia. Thus, the adoption of the territorial principle would have resulted in an inequitable distribution of the SFRY's net assets because the FRY would have received a larger portion of SFRY's assets than liabilities.⁸² The four successor states have argued that the rule of equitable compensation is a

73. *Id.*

74. *Id.*

75. *Id.*

76. However, for the FRY to be the successor of the Kingdoms of Serbia and Montenegro, these Kingdoms would have to have continued to exist as separate entities throughout the existence of both the Kingdom of Yugoslavia and the SFRY. The FRY's argument is similar to the one invoked by the Baltic States regarding their absorption into the USSR. It should be noted, though, that the case of the Kingdom of Serbia is different because this Kingdom voluntarily entered into the Kingdom of Yugoslavia after the First World War and thus ceased to exist upon the latter country's foundation. *Id.*

77. *Id.* at 767.

78. See Press Release, Bank for International Settlements, Fifth issue of shares in the third tranche of the BIS's capital, (May 12, 1997), available at <http://www.bis.org/press/p970512b.htm>.

79. See *infra*, note 97 regarding specific asset distribution key of the Vienna Agreement.

80. Stanic, *supra* note 58, at 767.

81. See Brownlie, *supra* note 1, at 658.

82. See Stanic, *supra* note 58, at 767-68.

rule of international law and is an application of the principle of equity.⁸³ The FRY has rejected this contention and has argued that the principle of equitable compensation has no basis in international law.⁸⁴

Fifth, the issue of division of immovable assets situated abroad has been contentious in the negotiations process.⁸⁵ These assets include the diplomatic and consular missions abroad, which were mostly in the hands of the FRY. Initially, the FRY objected to the apportionment of immovable assets located abroad. It claimed that as the continuing state, it should be entitled to all immovable assets abroad under international law.⁸⁶ However, in 1992 the FRY indicated that it would agree to divide immovable assets among successor states.⁸⁷ Thus, the issue between the parties turned to what key method should be used to divide such assets. As early as 1993, the four successor states agreed to an equitable division under international law⁸⁸ using the following key: Bosnia 13 %, Croatia 27.2 %, the FRY 35.3 %, Macedonia 8.5 %, and Slovenia 16 %.⁸⁹ However, because the FRY did not initially agree to the above-mentioned key method proposed in 1993, the issue was not fully resolved until the Vienna Agreement.

The issue, of movable property division proved to be the sixth and final sticking point. "Financial assets represented the major share of the SFRY's movable property and 21.6 % of its total assets. The foreign exchange reserves of [the National Bank of Yugoslavia] stood at U.S. \$6 billion as [of] December 31, 1990. Other assets included quotas accorded to the SFRY as a member of the BIS, the IMF, and the World Bank."⁹⁰ Under international law, in the case of dissolution all movable property should be apportioned proportionately between the successor states.⁹¹ However, international law on the apportionment of movable property

83. *Id.* at 768.

84. *Id.*

85. *Id.*

86. The rule of public international law in case of secession regarding succession to such assets is not completely settled. Some authors argue that because no rule covering such property is spelled out in Article 17 of the Geneva Convention, a different rule applies in the case of secession. Other authors argue that there is no rule of customary international law on this point. See Daniel Desjardins & Claude Gendron, *Legal Issues Concerning the Division of Assets and Debt in State Succession: The Canada-Quebec Debate*, in *CLOSING THE BOOKS: DIVIDING FEDERAL ASSETS AND DEBT IF CANADA BREAKS UP* 11 (John McCallum, ed., 1991). However, the USSR case of secession where ex-USSR property abroad was to be apportioned between Russia and other successor states on an equitable basis is evidence of recent state practice pointing to the same rule on the division of immovable assets as in the case of dissolution. See Stanic, *supra* note 58, at 769, n.91.

87. *Id.* at 769, n.92 (citing Cedic, *Cija je imovina u inostranstvu [Whose Property is Abroad]*, *POLITIKA*, February 1, 1997, at 3).

88. State practice and doctrine seem to support the view that under international law immovable assets situated abroad should be apportioned to the successor states in the case of dissolution. See *id.* at 768, n.88; O'Connell, *supra* note 35, at 207. This rule is confirmed as customary international law in Article 18(1)(b) of the Convention. Other examples of state practice confirm this view: (1) the case of the dissolution of the Federation of Rhodesia and Nyasaland in 1963; and (2) the agreement between Norway and Sweden of March 23, 1906. Stanic, *supra* note 58, at 768, n.88.

89. Stanic, *supra* note 58, at 768-69.

90. *Id.*

91. See O'Connell, *supra* note 35, at 204.

held abroad in the case of secession seems unsettled.⁹² Before the FRY conceded its claim to be the sole successor to the SFRY, the division of such assets would have been difficult because of the differing international law rules regarding dissolution and secession.⁹³ However, even after the FRY agreed to divide movable property among all successor states, the process turned out to be complicated because most such assets were in the hands of the FRY. "In fact, the FRY ha[d] spent almost all of the above-mentioned foreign currency reserves of the SFRY to finance its war machine."⁹⁴ Furthermore, some of the loans owed by the former Soviet Union and Iraq to the SFRY seem to have been settled by Milosevic in return for oil and gas supplies.⁹⁵ Finally, almost all military assets had been under the control of the FRY since 1990 and had been destroyed by the time the Vienna agreement was reached.⁹⁶ Thus, the actual division of such movable assets was no longer possible and another division key method had to be agreed upon.

While the Vienna Agreement provided some solutions to the division of former Yugoslavia's assets,⁹⁷ its reach may be of limited importance regarding individual property disputes.

92. Under one doctrinal proposition, the territorial principle governs the succession of such movables and all movable property passes to the successor state in which it is situated. See Malcolm N. Shaw, *The Succession Revisited*, 5 FINNISH Y.B. OF INT'L L. 34, 93 (1994). According to a second proposition, there should be a distinction between the case of dissolution and secession. Only movable assets which can be identified with immovables in the seceding territory pass to that successor state in the case of secession while others remain the property of the predecessor state. In the case of dissolution, all movable property is apportioned proportionately between the successor states. See O'Connell, *supra* note 35, at 204. Finally, Articles 17(1)(c) and 18(1)(d) of the Vienna Convention adopt the principle of equitable apportionment in the case of movables irrespective of their location and with no distinction based on the nature of the state succession. See Vienna Convention in Respect of State Property, Archives and Debts, *supra* note 33, at 314-15. State practice in this area of law does not seem to support fully any of the above propositions. However, in the cases of Syria and Czechoslovakia, financial assets held in international organizations were apportioned according to Articles 17 and 18 of the Vienna Convention. Stanic, *supra* note 58, at 770, n.96.

93. In fact, while the FRY claimed to be the sole successor to the SFRY, it claimed that the breakup of former Yugoslavia amounted to secession by other successor states. However, this view was unsupported by the Badinter Commission, and by all other successor states. See *infra*, Part I.A.2 for a full discussion on the difference between secession and dissolution.

94. Stanic, *supra* note 58, at 771.

95. *Id.*

96. *Id.*

97. The Vienna Agreement apportioned the assets of former Yugoslavia according to the IMF key with minor variations. The assets held by the BIS are apportioned as follows under the Vienna Agreement: FRY 36.52 per cent; Croatia 28.49 per cent; Slovenia 16.33 per cent; Bosnia and Herzegovina 13.26 per cent; Macedonia 5.40 per cent. Vienna Agreement, *supra* note 2, at 7. Immovable assets abroad were divided under a different key: FRY 39.5 per cent; Croatia 23.5 per cent; Slovenia 14.0 per cent; Bosnia and Herzegovina 15.0 per cent. Vienna Agreement, *supra* note 2, at 9-10. Other financial assets (including gold deposits, various foreign currency deposits, and securities) whether held by the SFRY or the National Bank of Yugoslavia were apportioned as follows: Bosnia and Herzegovina 15.5 per cent; Croatia 23.0 per cent; Macedonia 7.5 per cent; Slovenia 16.0 per cent; FRY 38.0 per cent. Vienna Agreement, *supra* note 2, at 27. Immovable property located within the territory of the SFRY shall pass to the successor state on whose territory that property is situated, except for tangible movable property of great importance to the cultural heritage of one of the successor states and which originated from the territory of that state. See the Vienna Agreement, *supra* note 2, for the full text regarding asset division.

2. Individual Disputes Regarding Debt and Asset Division in Former Yugoslavia

Many citizens of former Yugoslavia have lost property as a result of the country's violent breakup and the terrible financial situation that has plagued most successor states. Furthermore, as a result of the SFRY's geographical and political decomposition, some citizens' historic claims dating to the Second World War might now be extremely difficult to adjudicate. While the Vienna Agreement provides an overall asset allocation key, it does not address any of the individual grievances resulting from the former Yugoslavia's dismantlement. Thus, such individuals might be inclined to turn to foreign jurisdictions for efficient relief and substantial remedies.

Let us address two of the many possible scenarios. First, suppose that Mr. X is Serbian⁹⁸ but that he lived and worked in Croatia until the early 1990s. Mr. X owned a house, as well as other movable assets, in his hometown. As the internal war erupted in his region, Mr. X, fearing his safety in Croatia, fled his home and moved to Serbia. Mr. X lost his house and all other assets and has been living with relatives in Serbia, without money or any other belongings. Mr. X would like to bring his lost property claim to some forum, but has so far been unsuccessful in doing so. For one, the Croatian courts rejected his claim arguing that Mr. X's house was actually destroyed during bombings by the Serbian army and that Mr. X should thus turn to the Serbian government for reparations. Second, the Serbian courts have denied the Croatian courts' argument and claim that Mr. X's property was illegally confiscated by the Croatian government. According to the Serbian courts, Mr. X should seek monetary restitution from the government of Croatia. In this situation, what other remedies could Mr. X seek? The Vienna Agreement provides limited, if any, solutions to this problem.⁹⁹ The former Yugoslavia's judicial systems have rejected Mr. X's plight. It seems that the only possible solution for Mr. X would be to seek redress in a foreign jurisdiction.

Second, suppose that Mr. Y is Serbian, but that during World War II, he lived in Croatia, where he owned property. His property was confiscated by the communist regime immediately following World War II. Mr. Y decides to seek restitution for this property loss in 2000, after the SFRY's breakup, and brings a claim in Serbian courts. The Serbian courts reject Mr. Y's claim because his property is located in Croatia, thus now outside of the FRY's territory. Mr. Y then turns to Croatian courts, but they also reject him, stating that as a non-Croatian citizen, he cannot seek restitution in Croatia, and that he should turn to his own government for monetary compensation. Just like the above example of Mr. X, Mr. Y seems to be in dire straits when it comes to the former Yugoslavia's judicial system. Similarly, the Vienna Agreement is of limited utility in this situation.

98. The term "Serbian" in this context means that Mr. X is ethnically Serbian; also, Mr. X in this context has become a citizen of the FRY after former Yugoslavia's breakup.

99. Note the difficulty of the issue of war reparations, which is linked to this fact pattern and which is discussed above, *see supra* Part I.A.2. Furthermore, note that this issue is not addressed by the Vienna Agreement.

Thus, Mr. *Y* might, exactly like Mr. *X*, decide to seek the help of foreign courts and judicial bodies.

As of the date of this article, only one international tribunal has claimed jurisdiction over claims held by citizens of former Yugoslav republics.¹⁰⁰ Its future decision on the merits will certainly shed more light on complicated succession issues. However, its acceptance of jurisdiction might instigate more former Yugoslav states and more private litigants to bring their claims before other international fora.

Republics might sue other republics in the ICJ, arbitration panels might conduct proceedings among governments, and private litigants might also turn to specific tribunals seeking relief. Whether the United States will prove to be an attractive forum for former Yugoslav states and private plaintiffs may turn on the judicial implementation of a recent U.S. Supreme Court case, *Republic of Austria v. Altmann*.¹⁰¹

II. THE *ALTMANN* DECISION

In a recent decision, the U.S. Supreme Court expanded the jurisdictional reach of the FSIA of 1976.¹⁰² The FSIA authorizes federal civil suits against foreign states “as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity”¹⁰³ under another section of the FSIA or under an international agreement. Under the *Altmann* holding, the FSIA also applies to conduct or alleged wrongdoing that occurred prior to the FSIA’s 1976 enactment and even prior to the United States’ 1952 adoption of the so-called “restrictive theory” of sovereign immunity.

A. *The FSIA and Its History in American Courts*

The U.S. Supreme Court traditionally deferred sovereign immunity decisions to the executive branch.¹⁰⁴ Until 1952, executive policy was to automatically request immunity in all proceedings against friendly sovereigns.¹⁰⁵ However, in that year, the State Department began applying the “restrictive theory,”¹⁰⁶ whereby

100. The first international tribunal which has claimed jurisdiction over such a dispute is the European Court of Human Rights. See Kovacic, Mrkonjic & Golubovic, Decision on Admissibility of Application Nos. 44574/98, 45133/98 & 48316/99 (April 1st, 2004), available at <http://hudoc.echr.coe.int/hudoc/>.

101. 124 S. Ct. 2240 (2004). At the time of this article, full cite for this decision to the official Supreme Court reporter was not available.

102. 28 U.S.C. §§ 1330, 1602-1611 (2000).

103. 28 U.S.C. § 1330(a) (2000).

104. *Altmann*, 124 S. Ct. at 2248.

105. *Id.*

106. See Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dept. of State, to Acting U.S. Attorney General Philip B. Perlman (May 19, 1952), reprinted in 26 DEPT. STATE BULL. 984-85 (1952) [hereinafter Tate Letter]. Under the Tate Letter, “According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*) [I]t will hereafter be the

immunity is recognized with respect to a foreign sovereign for public acts, but not for its private acts.

Even though the change had little impact on federal courts' approach to immunity analysis,¹⁰⁷ the new policy caused havoc regarding immunity determinations. Foreign nations exercised diplomatic pressure to prompt the State Department to file suggestions of immunity in cases where immunity would not have been available under the restrictive theory, whereas when foreign countries failed to ask the State Department for immunity, the courts had to determine themselves whether immunity existed. Thus, responsibility for such determinations existed with two different government branches.¹⁰⁸ In order to remedy this problem, the FSIA codified the restrictive theory and transferred primary responsibility for immunity decisions to the judicial branch.¹⁰⁹ Federal courts have jurisdiction under the FSIA over civil actions against foreign states.¹¹⁰ Foreign states are generally granted immunity but the FSIA carves out specific exceptions under which immunity is denied. In other words, the district court's subject matter jurisdiction depends on the availability of one of those exceptions.

While the FSIA's substantive provisions seem relatively clear, its applicability to pre-enactment conduct is not. The U. S. Supreme Court addressed this issue in the *Altmann* decision by responding to the following issue: does the FSIA apply to conduct which occurred prior to its enactment in 1976, and more specifically, prior to the State Department's 1952 adoption of the restrictive theory of sovereign immunity?

B. *The Altmann Holding*

The respondent in this case, Maria Altmann, discovered that certain of her uncle's valuable pieces of art work had either been seized by the Nazis or expropriated by Austria after World War II. She filed an action in Federal District Court against the petitioners, the Republic of Austria and the Austrian Gallery, an instrumentality of the Republic of Austria, asserting jurisdiction under Section 2 of the FSIA,¹¹¹ which generally authorizes federal civil suits against foreign states. She also claimed that petitioners were not entitled to immunity under the FSIA's expropriation exception,¹¹² which expressly exempts from immunity certain cases involving "rights in property taken in violation of international law."¹¹³ Petitioners

Department's policy to follow the restrictive theory... in the consideration of requests of foreign governments for a grant of sovereign immunity." *Id.*

107. See *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 487 (1983) (noting that because "[a]s in the past, initial responsibility for deciding questions of sovereign immunity fell primarily upon the Executive acting through the State Department," courts thus continued to abide by the State Department's suggestions of immunity).

108. *Altmann*, 124 S. Ct. at 2248-49.

109. 28 U.S.C. § 1602 (2000).

110. 28 U.S.C. § 1330(a) (2000).

111. *Id.*

112. 28 U.S.C. § 1605(a)(3) (2000).

113. *Id.*

moved to dismiss the case based on a two-part claim. First, according to the petitioners, as of 1948, when the alleged wrongdoing took place, they would have enjoyed absolute sovereign immunity from suit in the U.S. courts because the United States did not adopt the restrictive theory of immunity until 1952.¹¹⁴ Second, nothing in the FSIA retroactively divests them of immunity. The District Court rejected this argument by concluding, *inter alia*, that the FSIA applies retroactively to pre-1976 actions.¹¹⁵ The U.S. Court of Appeals for the Ninth Circuit affirmed,¹¹⁶ and the Supreme Court granted certiorari.¹¹⁷ The Supreme Court, which limited its holding to one issue of law,¹¹⁸ held that the FSIA applies to conduct that occurred prior to the Act's 1976 enactment as well as conduct prior to the United States' 1952 adoption of the restrictive theory of sovereign immunity.¹¹⁹

The Supreme Court began its analysis by distinguishing this decision from an earlier case, *Landgraf v. USI Film Products*.¹²⁰ In *Landgraf*, the Supreme Court described the general presumption against retroactive application of a statute. It declared that if a federal law enacted after the events in suit does not expressly prescribe its own proper reach but does operate retroactively, "it does not govern absent clear congressional intent favoring such a result."¹²¹ In other words, if a statute would impair rights that a party possessed when she acted, if it would "increase her liability for past conduct," or if it would "impose new duties with respect to transactions already completed, such a statute is not to be applied to pre-enactment conduct absent clear congressional intent to the contrary."¹²² According to the Supreme Court, none of the categories in *Landgraf* can be applied to foreign sovereign immunity law under the FSIA.¹²³ However, the FSIA is not simply a jurisdictional rule, but a codification of "the standards governing foreign sovereign immunity as an aspect of substantive federal law."¹²⁴ While the FSIA's preamble suggests that the statute applies to pre-enactment conduct,¹²⁵ the statement falls short of the requisite express congressional prescription. Therefore, the *Landgraf*'s default rule does not resolve this case.¹²⁶

114. *Republic of Austria v. Altmann*, 124 S. Ct. 2240, 2243 (2004).

115. *Altmann v. Republic of Austria*, 142 F. Supp. 2d 1187, 1199-01 (C.D. Cal. 2001).

116. *Altmann v. Republic of Austria*, 317 F.3d 954 (9th Cir. 2002), *amended by* *Altmann v. Republic of Austria*, 327 F.3d 1246 (9th Cir. 2003).

117. For a full discussion on the factual background and procedural posture of the *Altmann* case, see *Altmann*, 124 S. Ct. 2240, 2243-45 (2004) (factual background) and 2245-47 (procedural posture).

118. *Id.* at 2243. The Supreme Court granted certiorari limited to the question of whether the FSIA "applies to claims that, like respondent's, are based on conduct that occurred before the Act's enactment, and even before the United States adopted the restrictive theory of sovereign immunity in 1952." *Id.*

119. Thus, the Supreme Court affirmed the Ninth Circuit's ruling but on different grounds. For a discussion of the Ninth Circuit's reasoning, see *id.* at 2247.

120. 511 U.S. 244 (1994). *Altmann*, 124 S. Ct. at 2249-50.

121. *Altmann* 124 S. Ct. at 2250-2251.

122. *Id.* at 2250-51 (quoting *Landgraf*, 511 U.S. at 280).

123. *Id.* at 2251-52.

124. *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 497 (1983).

125. The FSIA preamble states that "henceforth" both federal and state courts should decide claims of sovereign immunity in conformity with FSIA's principles. 28 U.S.C. § 1602 (2000).

126. *Altmann*, 124 S. Ct. at 2252.

Furthermore, the Supreme Court emphasized the particular nature of foreign sovereign immunity law, the purpose of which is to give foreign states some present protection from the inconvenience of a lawsuit.¹²⁷ It is thus more appropriate, in this context, to defer to the most recent decisions of the political branches on whether to accept jurisdiction than to presume that political decision inapplicable just because it postdates the conduct in question.¹²⁸ According to the Supreme Court, nothing in the FSIA or the circumstances surrounding its enactment suggests that it should not be applied to pre-enactment actions. In fact, the Supreme Court relied on the FSIA's preamble language that "henceforth", foreign states' immunity claims should be decided by American courts in conformity with the statute's principles.¹²⁹ Thus, assertions of immunity by foreign states to lawsuits arising from actions protected by immunity are the relevant conduct regulated by the FSIA and are henceforth to be decided by the U.S. courts. Congress intended courts to resolve all such claims under the FSIA principles regardless of when the underlying conduct occurred.¹³⁰

The FSIA's overall structure also supports this conclusion. First, many of its provisions "apply to cases arising out of conduct that occurred before 1976,"¹³¹ and its procedural provisions apply to *all* pending cases. "It would [thus] be anomalous to presume that an isolated provision (such as the expropriation exception at stake in this case) is of purely prospective application absent any statutory language to that effect."¹³² Second, the FSIA's applicability to "all pending cases regardless of when the underlying conduct occurred is most consistent with two of the [statute's] principal purposes: clarifying the rules that judges should apply in resolving sovereign immunity claims and eliminating political participation in the resolution of such claims."¹³³ Finally, the Supreme Court noted that nothing in its holding prevented the State Department from "filing statements of interest suggesting that courts decline to exercise jurisdiction in particular cases implicating foreign sovereign immunity."¹³⁴

Justice Scalia concurred with the majority opinion, emphasizing FSIA's jurisdictional nature. According to Justice Scalia, "the FSIA affects substantive rights only accidentally, and not as a necessary and intended consequence of the law."¹³⁵ Justice Breyer also concurred with the majority opinion, while pointing out that the legal concept of sovereign immunity was "about a defendant's *status* at the

127. *Dole Food Co. v. Patrickson*, 538 U.S. 468, 479 (2003).

128. According to the Supreme Court, "the principal purpose of foreign sovereign immunity has never been to permit foreign states and their instrumentalities to shape their conduct in reliance on the promise of future immunity from suit in United States Courts. Rather, such immunity reflects current political realities and relationships, and aims to give foreign states and their instrumentalities some *present* protection from the inconvenience of suit as a gesture of comity." *Altmann*, 124 S. Ct. at 2252 (quoting *Dole Food Co.*, 538 U.S. at 479).

129. *See supra* note 124 and accompanying text.

130. *Altmann*, 124 S. Ct. at 2253.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 2255.

135. *Id.* at 2556 (Scalia, J., concurring).

time of suit,” and not necessarily “about a defendant’s *conduct* before the suit.”¹³⁶ Thus, an expropriating nation cannot rely at the time of taking, when other countries applied absolute foreign sovereign immunity, “that other nations will continue to protect it from future lawsuits by continuing to apply the same unrestricted sovereign immunity doctrine.”¹³⁷

Justices Kennedy, Rehnquist, and Thomas dissented from the majority opinion. According to the dissent, written by Justice Kennedy, the Supreme Court had to weaken its reasoning and to diminish the rule against the retroactivity of statutes.¹³⁸ Furthermore, the majority opinion weakened the rule against retroactivity in the area of foreign sovereign immunity, where numerous treaties and agreements had been reached to the contrary.¹³⁹ According to the dissent, the majority opinion also injected further insecurity into this area of law, by suggesting that the executive branch has power to intervene regarding sovereign immunity determinations. In fact, the dissent found that the majority opinion’s “reasoning also implies a problematic answer to a separation-of-powers question” that the majority opinion seems to avoid.¹⁴⁰ According to the dissent, the ultimate result of the ruling will be to invite foreign nations to pressure the executive, thereby risking “inconsistent results” for private citizens “based on changes and nuances in foreign affairs.”¹⁴¹

The FSIA’s temporal application has thus been expanded by the majority holding in the *Altmann* decision. While the ruling of this case remains extremely narrow,¹⁴² its implications for potential claims against foreign states, such as former Yugoslav republics, in U.S. courts are particularly important.

III. THE IMPLICATIONS OF *ALTMANN* ON FORMER YUGOSLAV STATES

In light of the *Altmann* decision, more litigants with outstanding claims against foreign sovereigns may be attracted to American courts. For one, foreign states’ possible defenses under the FSIA will be limited under the *Altmann* precedent. Also, this decision might indicate that the Supreme Court’s view of foreign immunity has changed, and that it is less willing to excuse foreign states’ behavior in order to shield them from suit in the United States. The *Altmann* precedent might thus encourage plaintiffs from former Yugoslavia, especially ones with illegal expropriation claims, to seek relief in U.S. district courts.

The implications of the *Altmann* decision for former Yugoslav states remain uncertain, especially in light of other jurisdictional and substantive defenses that have not been altered by the case’s holding and that such states will be able to assert. Nonetheless, while one might wonder about the justification and the utility

136. *Id.* at 2559 (Breyer, J., concurring).

137. *Id.* at 2260 (Breyer, J., concurring).

138. *Id.* at 2263 (Kennedy, J., dissenting).

139. *Id.*

140. *Id.*

141. *Id.*

142. *See infra* part III(B).

of a multiplication of claims against former Yugoslav republics in U.S. courts, this outcome seems reasonable and fair in certain circumstances.

A. *FSIA – New Jurisdictional Basis against Former Yugoslav Republics?*

Potential litigants and claimholders against foreign states, in particular against the former Yugoslav republics, might turn to international tribunals in order to seek relief instead of going through their own countries' often slow and inefficient judicial systems. Such litigants might also be attracted to U.S. courts where prospects of efficient monetary recovery might seem better. In light of the *Altmann* decision, the foreign sovereigns, including former Yugoslav states, might be more limited in exercising their FSIA-based defenses. Furthermore, regardless of the availability of defenses under the FSIA, the *Altmann* decision might indicate a new willingness of U.S. courts to hear *all* reasonable claims against foreign sovereigns.

Let us imagine the following scenario: Mr. Z is a national of Macedonia, but immigrated to the United States during the 1990s following Yugoslavia's internal wars and dismantlement. Mr. Z owned property in Croatia, which was confiscated by the pro-Nazi Croatian regime during World War II. Immediately before the breakup of the former Yugoslavia, Mr. Z sought monetary restitution from the Macedonian government for his confiscated property.¹⁴³ Macedonia, which did not reach a decision until *after* its separation from former Yugoslavia, refused to reimburse Mr. Z according to its territorial policy because Mr. Z's property was located in Croatia. Mr. Z then decides to sue the government of Croatia for unlawful expropriation in the U.S. courts.¹⁴⁴ Mr. Z asserts subject-matter jurisdiction, like Ms. Altmann, under 28 U.S.C. Section 1330(a) of the FSIA. Assuming that the U.S. court has personal jurisdiction over the defendant, and that venue is proper, what jurisdictional defenses can Croatia raise in order to defeat this claim before it reaches the merits?

Prior to the *Altmann* decision, Croatia could have argued that FSIA does not apply to any pre-enactment conduct, and that it is immune from suit in U.S. courts for its conduct, which occurred prior to 1976, and even prior to the United States' adoption of the restrictive theory of immunity. After *Altmann*, however, this defense is no longer available: according to the U.S. Supreme Court, the FSIA applies to conduct which occurred prior to its 1976 enactment and foreign sovereigns cannot expect to be protected from suit in American courts simply because their alleged wrongdoing would have been protected under the absolute immunity theory at the time of its occurrence.¹⁴⁵ Thus, Mr. Z could not have sued

143. Prior to former Yugoslavia's breakup, Macedonia was a part of SFRY. The fact that Mr. Z's property was located in Croatia would have been irrelevant because Croatia, too, was a part of the SFRY. The federal government of the SFRY would have been responsible for restitution, regardless of the fact that Mr. Z applied to his "local" government in Macedonia for alleged expropriation that occurred in Croatia.

144. Let us assume that Mr. Z has decided not to pursue restitution in Croatian courts because he now lives in the U.S. and because he has heard that, because Croatian court proceedings are slow and inefficient, he would have a better chance of recovery in American courts.

145. See *Altmann*, 124 S. Ct. at 2260-61 (Breyer, J., concurring).

Croatia for unlawful expropriation in U.S. courts before 1952¹⁴⁶ because Croatia would have enjoyed absolute sovereign immunity. However, under *Altmann*, Mr. Z can sue Croatia now, in 2004, for the same unlawful expropriation under the FSIA. Croatia's conduct will not be immune, even though it occurred before the FSIA's enactment and before the 1952 adoption of the restrictive theory of immunity.

Let us, however, imagine another scenario, more similar to the above-mentioned case of Mr. X.¹⁴⁷ What if Mr. X also decided to sue the Republic of Croatia in U.S. courts for unlawful expropriation under the FSIA, assuming that the U.S. court has personal jurisdiction over Croatia and that venue is proper? Arguably, this scenario has nothing to do with the *Altmann* ruling regarding the applicability of the FSIA to pre-enactment conduct, because the alleged wrongdoing in Mr. X's case occurred well after the FSIA came into force in 1976. However, the *Altmann* decision might affect the jurisdictional outcome of a Mr. X-like case. In *Altmann*, the U.S. Supreme Court indicated its willingness to hear cases against foreign sovereigns, when such cases involve violations of international law for which the sovereign could not have expected to be immune forever in U.S. courts. According to Justice Breyer in his concurring opinion:

What taking in violation of international norms is likely to have been influenced, not by politics or revolution, but by knowledge of, or speculation about, the likely future shape of America's law of foreign sovereign immunity? To suggest any such possibility, in respect to the expropriations carried out by the Nazi or Communist regimes, or any other such as I am aware, would approach the realm of fantasy.¹⁴⁸

This approach might suggest that the Supreme Court is not willing to allow foreign sovereigns to use the FSIA as a shield, when their conduct was in violation of superior norms, such as international law, and when jurisdiction of U.S. courts does not seem entirely unreasonable or unfair.¹⁴⁹ Thus, the U.S. courts might turn out to be a new alternative forum for claims against former Yugoslav republics, and in particular, for claims involving the issue of restitution for unlawful expropriation.

146. Assuming, of course, the availability of another statute other than the FSIA providing subject-matter jurisdiction in U.S. courts, as FSIA was not enacted until 1976.

147. See *supra* Part I(B)(2).

148. *Altmann*, 124 S. Ct. at 2260 (Breyer, J., concurring).

149. In fact, if the foreign government is being sued for violations of international law, the U.S. courts' jurisdiction is also founded under the universal jurisdiction principle. Even though this type of jurisdiction has only been used for heinous violations of international law, such as terrorism or genocide, see e.g. K. Roth, *The Case for Universal Jurisdiction*, FOREIGN AFFAIRS, Sept./Oct. 2001, at 150; but see H. Kissinger, *The Pitfalls of Universal Jurisdiction: Risking Judicial Tyranny*, FOREIGN AFFAIRS, July/Aug. 2001, at 86, the Supreme Court's reasoning in *Altmann* might suggest a "rapprochement" between universal jurisdiction and jurisdiction under the FSIA for less heinous international law violations.

B. Limitations of the Altmann Holding

Despite the potential implications of the *Altmann* decision, namely the possibility for former Yugoslav republics to use the FSIA in order to "win" jurisdiction of U.S. courts, the case's holding remains extremely narrow.

First, the Supreme Court declined to comment on the issue of the "act of state" doctrine.

Unlike a claim of sovereign immunity, which merely raises a jurisdictional defense, the act of state doctrine provides foreign states a substantive defense on the merits. Under that doctrine, courts of one state will not question the validity of public acts performed by other sovereigns within their own borders, even when such courts have jurisdiction over a controversy in which one of the litigants has standing to challenge those acts.¹⁵⁰

Instead, redress of grievances arising from such acts is to be obtained through diplomatic channels.¹⁵¹ According to the Supreme Court, its determination that the FSIA applies in this case in no way affects the application of the act of state doctrine.¹⁵² Thus, in a potential lawsuit by a Croatian national against the FRY or by a Serbian national against Croatia, a plaintiff might well be able to win jurisdiction under the FSIA, but the defendant government will then be able to resort to the act of state doctrine as a substantive defense on the merits.

Second, the Supreme Court rejected the United States' recommendation to bar application of the FSIA to pre-enactment conduct, but specifically stated that the State Department is free to file statements of interest regarding immunity determinations in particular cases.¹⁵³ Because the issue in the case was one of statutory construction, well within the realm of the judiciary branch, the State Department's "views on such an issue ... merit no special deference."¹⁵⁴ However, should the State Department choose to file a statement of interest regarding the exercise of jurisdiction over a particular sovereign, "that opinion might well be entitled to deference as" an executive judgment "on a particular question of foreign policy."¹⁵⁵ For example, should the State Department file a statement of interest advising against taking jurisdiction in one of the above succession issues among former Yugoslav states, courts might be reluctant to go against the executive branch and thus less inclined to accept jurisdiction over such disputes.

150. *Altmann*, 124 S. Ct. at 2254.

151. *See Underhill v. Hernandez*, 168 U.S. 250, 252-53 (1897); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964) ("The act of state doctrine in its traditional formulation precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory").

152. *See Altmann*, 124 S. Ct. at 2254-55.

153. *Id.*

154. *Id.*

155. *Id.*

Third, the Supreme Court refused to review the lower courts' determination that the FSIA's expropriation exception¹⁵⁶ applied.¹⁵⁷ In the case of former Yugoslav republics, a court might find that jurisdiction could be available under the FSIA, but that the taking in question did not amount to expropriation and that the FSIA expropriation exception is thus not available. This conclusion would in fact render the foreign government immune from suit under the FSIA, provided that no other FSIA exceptions to immunity are available. Fourth, nothing in the ruling suggests that foreign sovereigns will not be able to raise other jurisdictional defenses such as statutes of limitations, personal jurisdiction, improper venue, failure to join indispensable parties, or *forum non conveniens*.¹⁵⁸ Thus, many such defenses will remain available to potential defendant governments from former Yugoslav states. Fifth, the number of lawsuits will also be limited by the lower courts' consensus that FSIA's reference to "violation of international law" does not cover expropriations of property belonging to a country's own nationals.¹⁵⁹ Here, it is worth noting that a national of Croatia would not be able to sue the Republic of Croatia under the FSIA, because even if there had been a taking amounting to expropriation, this violation would remain a purely domestic matter and the FSIA would fail to provide jurisdictional grounds. Finally, even assuming that a plaintiff is able to overcome all jurisdictional obstacles, her claim will remain subject to substantive defenses, such as the above-mentioned act of state doctrine, which might effectively prevent recovery from foreign sovereigns in U.S. courts. Thus, a plaintiff suing one of the former Yugoslav republics would have numerous obstacles to overcome even after successfully establishing jurisdiction under the FSIA.

C. *Utility and Fairness of the Altmann Decision*

One might wonder about the utility of the Supreme Court's decision in *Altmann*. Why did the supreme jurisdiction of the United States decide to limit foreign sovereign immunity and to possibly multiply the number of lawsuits against foreign states in U.S. courts? Was this a smart decision? Should the U.S. courts be hearing claims against former Yugoslav republics and is there a better forum for such claims?

Assuming that the private plaintiff, a national or former national of one of former Yugoslav republics, lives in the United States, his use of American courts does not seem unreasonable. To force such plaintiffs to litigate their claims in

156. 28 U.S.C. § 1605(a)(3) (2000). According to this exception, a foreign state shall not be immune from suit in U.S. courts in any case "in which rights in property taken in violation of international law are in issue ...". *Id.*

157. *Altmann*, 124 S. Ct. at 2247, at 8, n.8.

158. In fact, respondents in *Altmann* raised several such defenses, including *forum non conveniens*, failure to join indispensable parties, and improper venue. *Id.* at 2246 n.6.

159. See 28 U.S.C. § 1605(a)(3) (2000); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 (1986). Thus, neither Mr. X nor Mr. Y would be able to sue the FRY for the same alleged expropriation because they are citizens of the FRY and because the alleged wrongdoing was a purely domestic dispute not in violation of international law.

other human rights tribunals or one of the “domestic” courts in some former Yugoslav republic, would be unfair and would effectively prevent a number of such claims from ever being litigated. First, it would be extremely expensive and time-consuming for such plaintiffs to travel abroad, to the human rights tribunal’s location, or back to former Yugoslavia. Second, such plaintiffs might not be able to obtain adequate representation in order to litigate abroad, either because they do not know anybody, or because they are not familiar anymore with the judicial systems. Third, either one of the former Yugoslav republics will certainly have more resources to litigate in the United States and it seems entirely more fair to force either one of them to U.S. courts than to tell the private plaintiff, living and residing in the United States, that his claim in this country is precluded because of foreign sovereign immunity. Finally, proceedings in most human rights tribunals and former Yugoslavia are extremely slow and the prospects of execution remain uncertain.¹⁶⁰

Furthermore, foreign sovereign immunity is a principle of comity and is aimed to avoid embarrassment to foreign nations when they are dragged to American courts over some alleged wrongdoings.¹⁶¹ However, since 1952 it has been well settled in American law that foreign sovereigns are immune from suit in U.S. courts only for their public acts, but not for private acts.¹⁶² Expropriation doubtlessly amounts to a private act, and an expropriating nation can no longer expect absolute immunity in the United States. The alleged expropriation in all three above-mentioned scenarios represents a private act. Thus, nothing in the foreign sovereign immunity concept, as applied and implemented today, suggests that Mr. X, Mr. Y, and Mr. Z should be denied access to American courts because of comity or other diplomatic concerns.

Whether such arguments are equally strong regarding plaintiffs living and residing abroad remains doubtful.¹⁶³ For one, none of the convenience, fairness, and judicial economy arguments mentioned above applies in the case of abroad-domiciled plaintiffs. It would be equally expensive, time-consuming and difficult for a plaintiff residing abroad to litigate in the United States as it would be to litigate in another foreign country, be it the plaintiff’s residence or not. Second, the United States appears as a *forum non conveniens* in such a scenario, with no real ties to the litigation or to the plaintiff.¹⁶⁴ Third, personal jurisdiction in civil proceedings in the United States rests upon due process notions of “nexus,”

160. Note that most international tribunals’ rulings cannot force a country to provide effective recovery to a plaintiff, as such plaintiff must still go through his country’s judicial system to execute the international decision.

161. *Altmann* 124 S. Ct. at 2259 (Breyer, J., concurring).

162. *Id.* at 2269 (Kennedy, J., dissenting).

163. If a plaintiff living and residing abroad were to bring a FSIA-based claim to U.S. courts, arguments against taking jurisdiction based on improper venue, *forum non conveniens*, and pure judicial economy become far more important.

164. For examples of cases that were dismissed under the *forum non conveniens* theory, mainly because alleged wrongdoings occurred abroad, see *Piper Aircraft Co. v. Reyno*, 454 US 235, 238 (1981) and *In re Union Carbide Corp.*, 634 F.Supp. 842, 867 (S.D.N.Y. 1986).

“reasonableness,” and “minimum contacts.”¹⁶⁵ If a plaintiff domiciled abroad wants to sue a foreign government for alleged expropriation that occurred abroad, it seems that there is neither nexus nor minimum contacts with the United States, and that such a lawsuit would be unreasonable.¹⁶⁶ Finally, in case of a U.S. domiciled plaintiff, it seems reasonable to overcome comity and foreign policy concerns in order to provide the individual plaintiff with an efficient forum and prospects of recovery. On the other hand, in case of a plaintiff with no ties to the United States, comity or this country’s foreign relations policy might be sufficient to trump such individual fairness concerns. In other words, the United States should not risk embarrassment related to trying a foreign sovereign in an American court because it should not have to protect plaintiffs domiciled abroad, with no substantial links to this country.

It should be noted, however, that American courts are not likely to be “flooded” with unreasonable claims by plaintiffs with no nexus with the United States. Plaintiffs domiciled abroad are far less likely to turn to American courts because of all the inconveniences described above related to the idea of litigating abroad. Accordingly, the *Altmann* holding seems fair to private plaintiffs and justified for at least those plaintiffs who are presently residing in the United States.

IV. CONCLUSION

It is clear that former Yugoslavia’s succession issues cannot be resolved internally and that some international involvement is necessary in order to provide a neutral forum for such discussions and negotiation.¹⁶⁷ The same remains true for claims held by private parties against successor states. One international court has already accepted to act as a forum for dispute resolution among such litigants. A recent U.S. Supreme Court decision might facilitate access to American courts as well for the same claims. The utility and fairness of this decision, as has been argued above, seem fully justified at least for those potential plaintiffs who are residing in the United States. The doctrine of foreign sovereign immunity, which has long ceased to be absolute, should not shield foreign governments from liability for violations of international law. If American courts can remedy some of the wrongdoings from former Yugoslavia, the Supreme Court is correct in allowing them to do so.

165. See, e.g., *Int’l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945), *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987).

166. Even though it is not clear whether “minimum contacts,” like personal jurisdiction, is also required under the FSIA, it doesn’t seem unreasonable to draw an analogy using this requirement in order to discuss the reasonableness of asserting jurisdiction over a foreign sovereign under the FSIA.

167. For example, an agreement on succession issues was not reached until 2001. This agreement was negotiated with help of the international community and was signed in Vienna, Austria. See Vienna Agreement, *supra* note 2.



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