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Contents

5 Individuals' Right to Property under International Succession Law: Reimbursement of Bank Deposits after the Collapse of the SFR Yugoslavia

Janja Hojnik[1]

Abstract

The article explores the most disputed succession issue of the former SFR Yugoslavia – the liability of successor States for the outstanding "old" foreign-currency bank deposits. Following the collapse of the SFR Yugoslavia, numerous depositors lost access to their foreign currency bank deposits. Although the successor States reimbursed some categories of depositors, several hundred thousand of them remained uncompensated. 25 years after the collapse of the SFR Yugoslavia and following the ECtHR pilot judgment in *Ališić* (*2014*), the solution to the issue finally seems to be in sight. The author submits that by establishing a direct legal obligation of Slovenia and Serbia for liabilities of banks outside their respective national territories, the ECtHR has established a new type of obligation under international law. The judgment is likely to become one of the leading cases in the field of succession law, particularly in respect of its synergies with the ECHR, and presents an important example of the fragmentation of international law in general.

Keywords: succession, territoriality principle, equity, local debt, sharing responsibility for debts, SFRY, Yugoslavia, successor states, liability, foreign currency deposits, ECHR, right to property, Ališić, fragmentation

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1 Introduction

In the shadow of the highly publicised banking stories of the last economic crisis, another banking saga of high economic, political and legal importance was simultaneously taking place before the European Court of Human Rights (hereinafter ECtHR or the Court) in Strasbourg. It concerns one of the central and most disputed succession issues of the former Socialist Federative Republic of Yugoslavia (hereinafter the SFRY or Yugoslavia), the liability of the SFRY successor States for outstanding "old" foreign-currency deposits (hereinafter OFCDs) – in other words, the savings deposited in banks on the territory of the SFRY prior to its dissolution. Following the collapse of the SFRY and its banking system, a great number of depositors lost access to their foreign currency deposits so deposited. The new successor States of the SFRY subsequently introduced different types of repayment schemes which made repayment subject to different conditions, such as territoriality of deposits or nationality of depositors. As a result, hundreds of thousands of depositors have not been compensated as the successor States were unable to reach an agreement on shared liability for these deposits, which were previously fully covered by the guarantees of the Yugoslav federation.

A quarter of a century after the collapse of the SFRY and following the ECtHR pilot judgment in *Ališić,*[2] the case seems to be getting its epilogue. The applicants of that case were nationals of Bosnia and Herzegovina who at the time of the proceeding lived in Germany and complained that they were unable to withdraw their foreign-currency savings deposited before the dissolution of the SFRY with two banks in what is now Bosnia and Herzegovina: the Ljubljanska Banka Sarajevo (a Slovenian-based bank) and the Tuzla branch of the Investbanka (a Serbian-based bank). The ECtHR found that there had been a violation of Article 1 of Protocol No. 1 (protection of property) and a violation of Article 13 (right to an effective remedy) of the European Convention on Human Rights (hereinafter the ECHR) by Serbia and Slovenia and no violation by the other

2 *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia*, *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia* App no 60642/08 (ECtHR Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia, Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia, Chamber judgment of 6 November 2012, Grand Chamber judgment of 16 July 2014).

succession states of the former Yugoslavia. As there were more than 1,650 similar applications pending before it, involving more than 8,000 applicants, the Court considered it appropriate to apply the pilot-judgment procedure. Since the Court significantly limited the States' margin of appreciation in respect of adequate compensation, the judgment represents one of the most significant cases in ECtHR's history considering its massive financial implications for the small successor States.[3]

The article clarifies the political and economic background of the subject-matter, the different legal approaches of successor States for the reimbursement of the OFCDs, and the attempts at interstate solution of the problem. This is important as the over-simplification of the complex historical developments, as adopted by the ECtHR, leaves out some important aspects. The article then turns to the implications of the Court's judgment in *Ališić*, where protection was granted to the human rights of the compromised depositors due to the fact that all successor States did not respect their international obligation to negotiate and thus failed to reach an agreement on all succession issues.

Although it is a positive development that the Court has cut the Gordian knot and laid the foundations for repayment of depositors, who are in fact the victims of the banking system of the SFRY, illusioned by promised high interest and federal guarantee, it is argued that the ECtHR's solution oversimplifies certain aspects of the case. In particular, the Court made inappropriate comparisons with the relations of branch-offices of banks in Western Europe to their head-offices, not considering fully that Yugoslav banking and commercial laws were completely different. The article therefore submits that the former Yugoslav banking system should not have been automatically translated into civil liabilities under the present system after the fall of the SFRY.

Moreover, it is submitted that the OFCDs were the joint liability of all the succession states, as the original deposits had already ceased to exist in "Yugoslav times", considering that one part of the OFCDs was transferred to the Yugoslav central bankto pay foreign debts of the SFRY, while the other part was used to finance imports and foreign services for regional clients of the banks, therefore not of the head office. Additionally, it was the joint former SFRY's policy that made it attractive for its citizens to deposit foreign currency with its banks. As noted by the ECtHR Judge

3 Ana Petrič Polak, 'Kaj pa odgovornost preostalih naslednic?' Delo – Sobotna priloga 26 July 2014 10. It should also not be overlooked that the case delivers a financial obligation of several hundred million Euros upon a population of two million.

Zupančič in *Ališić,* OFCDs were in effect part of a government-sponsored *"Communist Ponzi scheme"*.[4]

Finally, it is submitted that by adopting a civil law approach, instead of an interstate one as previously adopted by the ECtHR, the Court could not side-step its interstate setting, making the case a *de facto* interstate succession issue. In this respect, "equitable proportion" principle was applied, failing to examine the positive obligations of all the successor States against whom the applicants' complaint was directed. Accordingly, it is submitted that by establishing a direct legal obligation of Slovenia and Serbia for liabilities of banks outside their respective national territories, the ECtHR has through its ruling established a new type of obligation under international law. Although the Court emphasised that this obligation was created specifically for the case of dissolution of the SFRY, the judgment is nevertheless likely to become one of the leading cases in the field of international succession law, particularly with respect to the role of the ECHR in matters of succession. The case is thus put forward as an illustration of the fragmentation of international law, where principles of interstate succession law have been interpreted in light of individuals' human rights protection.[5]

2 The Financial System of the SFRY and its Dire Need for Hard Currency

The Yugoslav economy, including its financial and banking system, was different from a centrally-planned economy on the one hand, and from a market economy on the other.[6] International studies show that, despite its social context, in the period between 1960 (when a two-tier banking

4 *Ališić and Others*, cited above (fn 2), dissenting opinion of Judge Zupančič.

5 The term fragmentation refers to normative conflicts between general international law and its specialised branches as well as between those branches *inter se*. See C Wilfred Jenks, 'The Conflict of Law-Making Treaties' (1953) 30 Brit. YB Int'l L. 401; Martti Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 The Modern Law Review 1; Margaret A Young, *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press 2012); Andreas Fischer-Lescano and Gunther Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2003) 25 Mich. J. Int'l L. 999.

6 Ivan Ribnikar, 'Money and Finance in Yugoslavia' (1989) 11 Slovene Studies Journal 223.

system was introduced[7]) and 1980 the banking market in the SFRY was one of the most advanced in Central and Eastern Europe.[8] Regardless, the SFRY experienced several crises during the 1980s. The Dinar, the national currency, depreciated, making it difficult to repay foreign loans obtained in previous decades.[9] Due to its incapability of repaying external debt, in 1983 the SFRY turned to the International Monetary Fund (hereinafter IMF) for financial assistance.[10] The aid was granted, however under strict reform conditions, similar to the ones we have witnessed more recently in the Greek crisis. Consequently, the country was required to *inter alia* devaluate the Dinar, freeze wages, limit the consumption of fuel to 40 litres per month per vehicle. Low levels of international institutions' trust in the SFRY were being reported at the time and the Bank for International Settlements (hereinafter BIS) even demanded that Yugoslavia put up $200 million worth of its gold holdings as collateral for the loan. The latter was commented on by an Austrian banker with the following words: "Yugoslavia doesn't want to give up the gold because this is all they have left. ... Once it's gone, confidence in Yugoslavia would disappear, and no Gastarbeiter (…) would remit his savings into Yugoslav banks anymore".[11] The demand for gold collateral was made since international lenders feared that an increasing anti-austerity lobby in this charter member of the Non-Aligned movement "would like rescheduling without conditions, and would like to form a debtors' cartel", citing *inter alia* the Austrian banker, who claimed that "Yugoslavia is on the brink of catastrophe .... The situation is a mess, with the collective leadership. Nothing gets done."[12]

A further increase of the growing debt was put on hold by reaching an agreement with the Paris Club of creditor countries and the London Club of foreign commercial banks in 1988. A so-called New Financial Agreement was concluded with the latter, providing joint and several liabil-

7 Miloš Vučković, 'The Recent Development of the Money and Banking System of Yugoslavia' (1963) 71 Journal of Political Economy 363.

8 Jelena Radzic and Ayse Yuce, 'Banking Development in the Former Yugoslavian Republics' (2008) 7 International Business and Economic Research Journal 35.

9 The country's external debt rose from 6 billion dollars in 1976 to 17 billion dollars in 1982 – France Arhar, 'Tudi pravici je potrebna pomoč' Delo – Sobotna priloga, 26 July 2014 9.

10 See more on this in David A Dyker, *Yugoslavia: Socialism, Development and Debt* (Routledge 2013) chapter 6.

11 Luba George, 'Yugoslavia to Be Put under IMF Economic Policies Again?' (1983) 10 Executive Intelligence Review 10.

12 George, cited above (fn 11).

ity as well as cross-default for the Yugoslav central bank – the National Bank of Yugoslavia (NBY) and ten Yugoslav commercial banks for any individual debt under this agreement.[13] Nevertheless, as Jurgens found in his report for the Parliamentary Assembly of the Council of Europe, the Yugoslav banking system "was based on illusions and not on economic facts".[14] In the 1980s the banking system lacked any financial discipline needed in any economic system, be it centrally planned, market or *sui generis*. Banks were continually facing a loss of their assets while the opposite was true for their debtors. Due to rising inflation their debts were effectively written off, particularly for privately owned housing, which was built extensively during the 1970s.[15] Indexation was introduced which took inflation into account. However, the creative population continued to drain the system, particularly through the use of personal cheques. These were cashed in at a bank other than the "home" bank of the cheque holder while the cheque was mailed by regular post to the "home" bank. The latter only deducted the amount cashed in by the respective cheque from the holder's account on the date of receiving the cheque. Considering the monthly inflation of 200 percent[16] and the fact that cheques from banks in remote places took up to six months to reach the "home" bank, such behaviour understandably caused massive losses to businesses. Commercial banks kept the differences arising out of such cheque handling in their balance sheets which then accumulated in the central bank. Taking into account that banks were merely intermediaries, such a situation necessarily affected the lenders. Deposits in Dinars, for which the NBY offered a guarantee, were persistently decreasing in value because of inflation and depositors had to be persuaded, by force, to refrain from withdrawing their deposits. Deposits in foreign currencies, on the other hand, for which the Federation offered a guarantee, did not lose their value regardless of the inflation rate.[17] Consequently, while lost Dinar deposits remained unrecoverable, the depositors of hard cur-

13 Tai-Heng Cheng, *State Succession and Commercial Obligations* (BRILL 2006) 309; Mojmir Mrak, 'Mrak, M., Rojec, M., Silva-Jáuregui, C.(Eds.): Slovenia: From Yugoslavia to the European Union.' (2004) 11 Transition Studies Review 269.

14 Erik Jurgens, *Repayment of the deposits of foreign exchange made in the offices of the Ljubljanska Banka not on the territory of Slovenia*, 1977-1991, Report for Parliamentary Assembly, Council of Europe, 2004 (hereinafter Jurgens report) para 28.

15 Ribnikar, cited above (fn 6) 227.

16 In 1989 the estimated Yugoslav inflation was 2,700 per cent - Yugoslavia Economy – 1990, 1990 CIA World Factbook.

17 Ribnikar, cited above (fn 6) 227, Arhar, cited above (fn 9) 9.

rencies fought with the successor States for a period of 25 years following the collapse of the former Federation in order to recover their deposits in the Yugoslav banking system.

Foreign-currency deposits were of particular importance for the Yugoslav economy considering that the State needed foreign currency *inter alia* to maintain the external value of its currency, to meet its international payment obligations, and to finance imports. Since the SFRY had low export levels, low foreign investment in the country,[18] as well as difficulties in obtaining foreign-currency credits from international financial institutions, particularly after the IMF bailout, Yugoslav foreign-currency reserves were understandably very low. As found by the ECtHR in *Suljagić*:[19]

> It is a well-known fact that the global economic crisis of the 1970s hit the SFRY particularly hard. The SFRY turned to international capital markets and soon became one of the most indebted countries in the world. When the international community backed away from the loose lending practices of the 1970s, the SFRY resorted to foreign-currency savings of its citizens to pay foreign debts and finance imports.

Both individuals (predominantly expatriate workers) and legal persons (e.g. hotels, casinos) had the right to hold foreign-currency accounts in domestic commercial banks. While legal persons were bound by governmental decisions on what share of the foreign-currency they had to sell to the NBY for "common purposes",[20] natural persons could normally (at least until the mid-1980s) freely dispose of their assets on the foreign-currency accounts. However, with the occurrence of the Yugoslav debt crisis and the lack of hard currency, depositors were lulled into depositing their foreign-currency by unrealistically high interest rates (up to 12 per cent per annum) and later by the guarantee given by the SFRY government that deposits would be repaid with accumulated interest. This made it attractive for depositors to take part in this unsustainable scheme and to

18 Milica Uvalic, *Investment and Property Rights in Yugoslavia: The Long Transition to a Market Economy* (Cambridge University Press 1992) 69–96.

19 *Suljagić v. Bosnia and Herzegovina* App. no. 27912/02 (ECtHR, 3 November 2009) para 51.

20 Arhar, cited above (fn 9). See also H Marchie Sarvaas, 'The banking system of the former Socialist Federal Republic of Yugoslavia', appendix II to the Jurgens report, cited above (fn 14).

deposit their hard currency with the Yugoslav banking system. In reality, however, Yugoslav banks were actually bankrupt. The withdrawal of foreign currency was thus progressively restricted by legislation and in 1988 Ljubljanska Banka froze all its foreign-currency accounts. The majority of depositors' attempts to withdraw money from their accounts failed.

Where exactly the foreign currency from the Yugoslav banks disappeared to remains a mystery to this day as the balance sheets of the NBY have been misplaced in the chaotic disintegration of Yugoslavia. According to Jurgens report, however, some 20 per cent of this foreign currency was transferred to the NBY to be used as federal exchange reserves, the counter-value in Dinars being used by the banks to finance client loans within the regions where banks were operating.[21] The foreign currency that had not been transferred to the NBY was used to finance imports and foreign services for regional clients of the banks.[22] The Jurgens report concludes that "with the collapse of the SFRY and its economy, these assets must be regarded as mainly to be lost, bringing the banks into insolvency. The same applies to FE[23] de facto deposited with the NBY, as these FE reserves were used to pay foreign debts of the SFRY."[24] Jurgens thus found that the original deposits had, in 1991, in fact ceased to exist.[25] The government's guarantee naturally evaporated at the moment the SFRY was dissolved, unless and inasmuch as the successor States were willing to take this guarantee upon themselves.

In order to solve the banking crisis a new banking law was adopted in 1989 and to provide economic stabilisation the government started the so-called Marković anti-inflation program in 1990, allowing the establishment of privately-owned undertakings. A year later, all these reforms were interrupted by the break-up of the Yugoslav federation, beginning with the separation of Slovenia, which was followed by a ten-day war, and continuing with a much larger conflict which turned into war in Croatia and in Bosnia and Herzegovina (hereinafter B&H). Those military conflicts as well as hyperinflation, high unemployment rates, and a number of other reasons resulted in a slowdown of economic as well as political reform. It may thus be concluded that "from its favourable position in

21 See also Christopher Prout, *Market Socialism in Yugoslavia* (Oxford University Press 1985).

22 Jurgens report, cited above (fn 14) para 16.

23 Foreign exchange.

24 Jurgens report, cited above (fn 14) paras 17-18.

25 See also partly dissenting opinion of Judge Nußberger in Grand Chamber judgment in *Ališić*, cited above (fn 2).

the region, the situation dramatically changed for all the former Yugoslav republics"[26] and each started its own path to recovery.

3 Yugoslav Succession and Liability for Recovery of the OFCDs

3.1 *Yugoslav Succession Negotiations and Distribution of Financial Liabilities*

The Badinter Arbitration Commission issued an opinion in July 1992 declaring that the State known as the "Socialist Federal Republic of Yugoslavia" had ceased to exist.[27] There was hence a need to discuss the issues surrounding SFRY's succession. Any succession of a State is "a *par excellence* legal procedure that by definition must be conducted in very tense political conditions".[28] The former SFRY fell apart during long-lasting political and armed conflicts that created an unfriendly political and legal environment for the process of succession.[29]

Succession of States in international law consists of a set of rules and principles that define the legal consequences of changes in the territorial sovereignty of States.[30] Two Vienna Conventions define State succession as "the replacement of one State by another in the responsibility for the international relations of territory".[31] The two main principles governing State succession, as enshrined in the two aforementioned Conventions

26 Radzic and Yuce, cited above (fn 8) 35.

27 Conference for Peace in Yugoslavia, Arbitration Commission, Opinion No. 9, (1992) 31 International Legal Materials 1523.

28 Miloš Trifković, 'Fundamental Controversies in Succession to the Former SFR Yugoslavia', *Mojmir Mrak, Martinus Nijhoff Publishers, The Hague, London, Boston* (1999) 187.

29 Trifković, cited above (fn 28), 205.

30 DP O'Connell, *State Succession in Municipal Law and International Law. Volume II: International Relations* (Cambridge: Cambridge University Press 1967) 3; Miriam Škrk, Recognition of states and its (non-)implication on state succession: the case of successor states to the former Yugoslavia, in Mojmir Mrak, *Succession of States*, vol 33 (Martinus Nijhoff Publishers 1999) 6.

31 Vienna Convention on Succession of States in Respect of Treaties, (1978) 17 International Legal Materials 1488, Article 2.1.b; and Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, (1983) 22 International Legal Materials 306, Article 2.1.b. For a comment of the latter, which is particularly important for the topic of this article, see Rudolf Streinz, 'Succession of States in Assets and Liabilities-a New Regime: The 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts' (1983) 26 German YB Int'l L. 198.

and applicable also to the SFRY succession, are the principle of agreement and the principle of equity.[32] The former means that all succession issues should be settled first through a consensus among the interested parties.[33] In contrast to the dissolution of Czechoslovakia and the USSR, where succession was settled in peace, the chaotic and violent dissolution of the SFRY postponed the adoption of a succession agreement and particularly its enforcement for many years to come.[34] The principle of equity, on the other hand, means that a balance between the division of assets and debts must be undertaken by successors.[35] The concept of equity has been described as "the key… to the entire problem of State succession".[36] According to Hasani, equity in Yugoslav succession means taking three factors into account: the economic sustainability of the successor States, their population and the size of their territories.[37] Nevertheless, the determination of equitable distribution of liability in respect of recovery of the OFCDs was extremely challenging, particularly when assessed together with the so-called *"localised debt rule"*. It is recognised in practice that the successor State is liable for localised debt, i.e. debts contracted within the financial autonomy of a ceded part of a state, ex-

32 Rein Mullerson, 'The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia' (1993) 42 International & Comparative Law Quarterly 473; R Williams Paul, 'The Treaty Obligations of the Successor States of the Former Soviet Union, Yogoslavia, and Czechoslovakia: Do They Continue in Force' (1994) 23 Denv. J. Int'l L. & Pol'y 1.

33 In this respect the Badinter Commission's opinion states that "*the successor States to the SFRY must together settle all aspects of the succession by agreement.* " - Conference for Peace in Yugoslavia, Arbitration Commission, Opinion No. 9 (n 27) 1524.

34 Trifković, cited above (fn 28).

35 E Nathan, 'The Vienna Convention on Succession of States in Respect of State Property, Archives and Debts' in Yoram Dinstein (ed), *International Law at a Time of Perplexity:Essays in Honour of Shabtai Rosenne* (Springer Netherlands 1989) 496–498.. Stern speaks of a "*customary international rule requiring the equitable distribution of the national debts*" of the predecessor State – Brigitte Stern, *Dissolution, Continuation, and Succession in Eastern Europe* (Martinus Nijhoff Publishers 1998) 204. See also Patrick Dumberry, *State Succession to International Responsibility* (Brill 2007) 279; P Dumberry, *State Succession to International Responsibility* (Martinus Nijhoff Publishers 2007) 279; and W Czaplinski, 'Equity and Equitable Principles in the Law of State Succession' in Mrak, cited above (fn 30) 61–74.

36 Daniel P O'Connell, *The Law of State Succession*, vol 5 (Cambridge University Press 2015) 268.

37 Enver Hasani, 'The Evolution of the Succession Process in Former Yugoslavia' (2007) 4 Miskolc J. Int'l L. 12.

clusively in the interest of the ceded part of the state.[38] Yet, in respect of the OFCDs, it was (and still is) difficult to trace flows of foreign currency within the SFRY prior to its dissolution due to specific historical circumstances.

On the basis of the general guidelines of the Badinter Commission,[39] SFRY succession issues were officially discussed for the first time by the Working Group on Succession Issues at the International Conference on the Former Yugoslavia, established by the United Nations and the European Community, and continued to be discussed within the Conference on the Former Yugoslavia, held in Geneva and London from 1992 to 1995.[40] After the conclusion of the Dayton Peace Accords in 1995, no agreement was reached on the succession issues and the authority for this matter was transferred to the High Representative for B&H.[41] The main obstacle standing in the way of progress in the succession negotiations was the Serb position at the time that the Federal Republic of Yugoslavia (FRY) was the sole successor to the SFRY as the other Yugoslav republics seceded without consensus and consequently had no rights to equal succession to the rights and duties of their Predecessor State.[42] Following the fall of the FRY President, Slobodan Milošević, in October 2000, the negotiations continued and resulted in the signing of the Succession Agreement between the five sovereign and independent States that emerged from the dissolution of the SFRY in June 2001.[43] It has been

38 Alf Ross, *A Textbook of International Law: General Part* (The Lawbook Exchange, Ltd 2006) 139.

39 Opinions Nos. 13 and 14 of 16 July 1993 and 13 August 1993 – referring to the principles of international law embodied in the second Vienna Convention on State Succession, recommending a division of assets and liabilities based on quotas determined in accordance with the principle of equity.

40 Carsten Stahn, 'The Agreement on Succession Issues of the Former Socialist Federal Republic of Yugoslavia' (2002) 96 American Journal of International Law 379.

41 Peace Implementation Council, Conclusions of the 1995 London Meeting, 8 December 1995, http://www.ohr.int/?p=54189 (last accessed 10 January 2019).

42 Ana Stanič, 'Financial Aspects of State Succession: The Case of Yugoslavia' (2001) 12 European Journal of International Law 751, 754-755.

43 Agreement on Succession Issues Between the Five Successors of the Former State of Yugoslavia, 29 June 2001, (2002) 41 International Legal Materials (1) 3-36. The Succession Agreement entered into force on 2 June 2004 and has been ratified by all five successor States to the SFRY. For comments of the Succession Agreement see Mirjam Škrk, Ana Petrič Polak and Marko Rakovec, 'The Agreement on Succession Issues and Some Dilemmas Regarding Its Implementation' (2015) SSRN Scholarly Paper ID 2806803; Carsten Stahn, 'The Agreement on Succession Issues of the Former Socialist Federal Republic of Yugoslavia' (2002) 96 American Journal of

claimed that the Succession Agreement "closed, once and for all, the problem of State succession to the former Yugoslavia".[44] Although this may hold true for several succession issues, the same cannot be said for the matter of the OFCDs.[45]

In contrast to the Badinter Commission's proposal, the contracting parties agreed in the Succession Agreement to adopt an adjusted IMF key[46] as the general rule for the apportionment of assets and liabilities, while reaffirming the binding character of the agreements previously reached with the individual international actors.[47] Foreign lenders in particular were not prepared to wait for the adoption of a succession agreement in an unforeseeable future, while the successor States were in no position to postpone the adoption of these agreements for each of them had to stabilise its financial market and establish a new monetary policy.[48] Slovenia led the way by starting individual negotiations with the Paris and London club with a desire to settle its share of liabilities. Some foreign lenders advocated joint and several liability provided in the *"New Financial Agreement"*, holding each successor State liable for the entire debt.[49] However, after the international lenders realised the strong desire of the successor States to repay their share of the Yugoslav debt, the principle of proportionality was adopted that led to the conclusion of agreements in which successor States assumed parts of SFRY's official external debt based on proportions specified in the agreements.[50]

International Law 379; Hasani, cited above (fn 37).\\uco\\u8216{}The Agreement on Succession Issues of the Former Socialist Federal Republic of Yugoslavia\\uco\\u8217{} (2002

44 Hasani, cited above (fn 37) 12.

45 D Hočevar, 'Smo sodišču dali možnost, da bi odločilo drugače in ohranilo načela pravičnosti?, Evropsko sodišče za človekove pravice in varčevalci Ljubljanske banke' Delo, Sobotna priloga, 6 September 2014.

46 Adjusted in favour of FYRM and B&H, which opposed the use of the IMF key (based on economic criteria, such as social product and export earnings of individual republics) as the sole apportionment tool for assets and debts and pushed for more emphasis on additional criteria, such as the size of territory and population. The accepted key for financial assets was: B&H 15.50 percent; Croatia 23 percent; FYRM 7,50 percent; Slovenia 16 percent; Serbia and Montenegro 38 percent.

47 Article 3 of Annex C to the Succession Agreement.

48 See also Croatian Constitutional Court decision, Official Gazette RH, No. 67/2001, § 10.

49 Stefan Oeter, 'State Succession and the Struggle over Equity: Some Observations on the Laws of State Succession with Respect to State Property and Debts in Cases of Separation and Dissolution of States' (1995) 38 German YB Int'l L. 73, 89.

50 Mrak, cited above (fn 30) 166–167; Stanič, cited above (fn 42) 761-763.

3.2 *Different Repayment Schemes of the Successor States*

In contrast to the debts towards international lenders which had to be settled by mutual agreements if the successor States were to be able to ask for new international loans, the successor States were given a higher level of sovereignty in solving issues of private foreign-currency deposits in the accounts of domestic banks. Nevertheless, a particular problem turned out to be guarantees for OFCDs involving a newly established cross-border element – i.e. guarantees for domestically located branches of banks with head offices in other successor States and guarantees for branches of domestic banks located in other successor States. In this respect it is important to note the legal relationship between the banks' head offices and branches under Yugoslav law and how they operated in practice.

As found by Jurgens, until 1989/1990 bank offices within the SFRY were in fact "basic banks" operating within the region where they were located. Basic banks were allowed to establish associated banks for pursuing their *"joint interests and goals"*,[51] but the basic banks kept their legal personality. In 1989 the Marković government encouraged banks to put an end to the legal independence of regional offices, but the dissolution of the SFRY followed so quickly that it was in fact unclear what the consequences for the position of regional offices were and even less so what this dependency would have meant for the assets and liabilities incurred by the regional offices before that moment. Essentially, banks' branches continued to accept deposits and give loans within the region in which they were operating, independently of their head-office. Jurgens concludes that "comparisons with the relations of branch-offices of banks in Western Europe to their head-offices cannot be made, as the banking laws and the commercial law that existed were completely different."[52] According to him, the Yugoslav banking system thus "cannot automatically be translated into civil liabilities under the present system after the fall of the SFRY."[53]

In the absence of a common approach and in line with their newly established independence, each of the successor States to the SFRY adopted a different set of legislative rules with regard to the criteria which must be fulfilled for an account holder from another successor State to make

51 Franc Pernek, *Ekonomika Jugoslavije* (Časopisni zavod Uradni list SR Slovenije 1988) 108-109.

52 Jurgens report, cited above (fn 14) paras 26-28.

53 Jurgens report, cited above (fn 14) para 24.

an entitlement claim. The main problem may be seen with regard to the Slovenian based Ljubljanska Banka (hereinafter LB), an associated bank with subsidiaries (and in the last year branches) across the entire SFRY which held the largest part of foreign-currency deposits in the territory of the SFRY. LB banks (its subsidiaries and branches) in other republics were not owned by the Republic of Slovenia but by the socially owned companies of the Yugoslav republic where the respective bank subsidiary/branch was located. The latter preserved their separate legal personality until the year before the dissolution of the SFRY.[54] Yet, as the head office of LB was in Slovenia, after the dissolution of the former State, Slovenia was expected to take over the guarantees for foreign-currency deposits of all LB subsidiaries, including those in other successor States. Slovenia was, however, not willing to accept such broad guarantees.

Slovenia regulated the issue of guarantees regarding OFCDs already in its founding documents adopted on the day of its independence. The Constitutional Act Implementing the Basic Constitutional Charter on the Independence and Sovereignty of the Republic of Slovenia (so-called UZITUL) stipulated that the guarantee for OFCDs deposited in banks on Slovenian territory, previously guaranteed for by SFRY, was taken over by the newly established Republic of Slovenia.[55] In accordance with the law, OFCDs in banks on the territory of the Republic of Slovenia were transformed into public debt. In essence, Slovenia assumed obligations towards the banks which then paid the depositors, however, not under the terms of the initial deposit contract, but in a specific way (periodical repayment with interest or by negotiable instruments of the bank or in government bonds; the choice was in the hands of the depositor). The depositors were given another option – to receive negotiable bonds of the State. If they opted for this solution, on the one hand the debt of the Republic of Slovenia towards the respective bank was decreased for the amount concerned, and on the other, the claim of the depositor towards the bank ceased to exist. Only citizens, i.e. natural persons, could rely on this law. Slovenia thus adopted the territoriality principle for the recovery

54 For example, the founders of Ljubljanska Banka Sarajevo were 16 socially owned companies from B&H (such as Energoinvest Sarajevo, Gorenje Bira Bihać, Šipad Sarajevo, Velepromet Visoko, Đuro Salaj Mostar) and Pamučni kombinat Vranje from Serbia.

55 Article 19(3), Ustavni zakon za izvedbo temeljne ustavne listine o samostojnosti in neodvisnosti Republike Slovenije (UZITUL), Official Gazette RS, No. 1/91-I of 25 June 1991. See also section 1 of Zakon o poravnavanju obveznosti iz neizplačanih deviznih vlog (ZPONDV), Official Gazette RS, No. 7/93.

of OFCDs without discrimination – guaranteeing not only for Slovenian banks on domestic territory but also for foreign banks which operated on the territory of the SFRY and had their branches in Slovenia (e.g. Serbian Jugobanka, Beobanka, Investicijska Banka, Jugoslovanska Izvozna i Kreditna Banka and Croatian Riječka Banka). In February 1993 the Slovenian National Assembly adopted the Act on the Slovenian Succession Fund,[56] serving as the legal ground for the recovery of all liabilities of Slovenia under the succession procedures and gradually recovered all outstanding OFCDs with banks on the Slovenian territory – along with the foreign-currency created by the newly developing Slovenian economy on the international market.

Additionally, following unsuccessful attempts to register the Zagreb and Sarajevo branch of LB as a separate bank and under the threat of joint and several liability for all the debts of NBY and several Yugoslav commercial banks towards the London Club, Slovenia nationalised and then, in 1994, restructured LB Ljubljana itself to prevent the collapse of the Slovenian financial system. The balance sheet of the former LB Ljubljana was divided into the succession balance sheet, which remained with the old LB, and the non-succession balance sheet that was transferred to the new LB (Nova Ljubljanska Banka – NLB). The latter therefore took over LB Ljubljana's *domestic* assets and liabilities. The old bank retained the liability for OFCDs in its branches in the other successor States and for related claims against the NBY.[57]

Croatia, on the other hand, did not follow Slovenia's example, as stipulated in the latter's constitutional regulation with respect to foreign banks and in particular their OFCDs, despite the fact that the origin of the problem was the same – the Yugoslav sovereign debt crisis.[58] On 23 December 1991 the Croatian government adopted a regulation with legislative force on the transformation of OFCDs in banks on Croatian territory into public debt. This regulation, however, applied only to Croatian nationals, meaning that Croats of Serbian origin, who were forcibly expelled from the Krajina region, were excluded from this scheme, even though Croatia repaid OFCDs of B&H citizens in branches of Croatian banks in B&H that were considered as Croatian citizens. Croatia also repaid its citizens' OFCDs that were transferred from LB's branch in Zagreb to domestic banks

56 Zakon o Skladu Republike Slovenije za sukcesijo, Official Gazette RS, No. 10/93.

57 Ustavni zakon o dopolnitvah ustavnega zakona za izvedbo Temeljne ustavne listine o samostojnosti in neodvisnosti Republike Slovenije, Official Gazette RS, No. 45/94.

58 Arhar, cited above (fn 9) 9.

at the request of the depositors concerned.[59] Hence, about 60% of all depositors made use of this possibility, transferring their OFCDs at LB Zagreb into the Croatian public debt, while many other LB-depositors preferred to keep their claims towards the LB.

The Former Yugoslav Republic of Macedonia (*FYRM*) paid back the OFCDs deposited in domestic banks as well as local branches of foreign banks, such as the Skopje branch of LB, regardless of the citizenship of the depositor concerned.[60] The depositors were recompensed with long-term bonds (as public debt) that could *inter alia* be used to make certain payments. Consequently, it was the FYRM that executed the claims of the depositors. As follows from the 2004 Jurgens report, however, FYRM later regretted this decision by claiming that its compensation of OFCDs was disproportionally high and that under the Agreement for Economic Cooperation concluded between Macedonia and Slovenia in May 1992 the head office of LB, or the state of Slovenia, has undertaken to fulfil its guarantees.[61] Namely, on the basis of this Agreement, LB was allowed to continue its activities in Skopje under the name of Makedonska Banka. However, LB had sold its majority share in Makedonska Banka in 1994 to private individuals for an amount that was considered by the Macedonian authorities as not corresponding to fair market value.[62] This led Macedonian authorities to conclude that LB and Slovenia did not hold their fair share of responsibility for OFCDs on Macedonian territory.

In *Serbia,* OFCDs in domestic banks remained frozen while withdrawals were exceptionally allowed on humanitarian grounds, regardless of the citizenship of the depositor concerned.[63] Nevertheless, in 1998 and

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59 Section 14 of Zakon o poravnavanju obveznosti iz neizplačanih deviznih vlog (the Old Foreign-Currency Savings Act 1993), cited above (fn 55).

60 Zakon za prezemanje na deponiranite devizni vlogovi na graѓanite od strana na Republika Makedonija, Official Gazette of the Republic of Macedonia, No. 26/92; Zakon za garancija na Republika Makedonija za deponiranite devizni vlogovi na graѓanite i za obezbeduvanje na sredstva i način za isplata na deponiranite devizni vlogovi na graѓanite vo 1993 i 1994, Official Gazette, No. 31/93 as am.; and Zakon za načinot i postapkata na isplatuvanje na deponiranite devizni vlogovi na graѓanite po koi garant e Republika Makedonija, Official Gazette, No. 32/00 as am.

61 Article 8 of the Agreement provides: "In the field of banking, the States-Contracting Parties oblige themselves to guarantee the fulfilment of the agreed liabilities within the deadlines and currencies of the credits and the guaranteed agreements for the liabilities of the entities having their seat on their territories".

62 Jurgens, Addendum to the Introductory memorandum, December 2003.

63 Odluka o uslovima i načinu davanja kratkoročnih kredita bankama na osnovu definitivne prodaje deponovane devizne štednje građana, Official Gazette of the FRY, No. 42/93 as am.; Odluka o uslovima i načinu isplate dela devizne štednje građana

in 2002 Serbia agreed to repay the OFCDs of its citizens and of the citizens of all States other than the successor States of the SFRY deposited in domestic branches of domestic banks. All savings of citizens of the SFRY successor States and all deposits in domestic banks' branches located in those States remained frozen pending succession negotiations.

Bosnia and Herzegovina took over the statutory guarantee for OFCDs from the SFRY in 1992,[64] although only with regard to OFCDs in domestic banks. During the war all OFCDs remained frozen, with exceptions made on humanitarian grounds. After the war each of the Entities (the Federation of B&H (FBH) and Republika Srpska) enacted its own legislation on OFCDs. In 1997 the FBH assumed liability for OFCDs in banks and branches located on its territory.[65] Such savings remained frozen, but they could be used to purchase socially-owned apartments and companies. In 2004 the FBH enacted new legislation by which it accepted to repay OFCDs in domestic banks, regardless of the citizenship of the depositor concerned, however, its liability for OFCDs in the branches of LB and Investbanka were expressly excluded.[66] In 2006 the liability for OFCDs in domestic banks passed from the Entities to the State. Liability for such savings at the local branches of LB and Investbanka were again expressly excluded, but the State was obliged to help the clients of those branches to obtain the payment of their savings from Slovenia and Serbia.[67]

As a result of these varied approaches of the successor States towards compensation for OFCDs made before the dissolution of the former SFRY, several hundred thousand depositors were not compensated, causing year-long political as well as legal disputes before different national

koja je deponovana kod NBJ, Official Gazette, No. 42/94 as am.; Odluka o uslovima i načinu isplate dela devizne štednje građana koja je deponovana kod NBJ, Official Gazette, Nos. 10/95; and Odluka o privremenom obezbeđivanju i načinu i uslovima isplate sredstava ovlašćenim bankama na ime dinarske protivvrednosti dela devizne štednje deponovane kod NBJ isplaćene građanima za određene namene, Official Gazette, No. 41/96.

64 Uredba sa zakonskom snagom o preuzimanju i primjenjivanju saveznih zakona koji se u Bosni i Hercegovini primjenjuju kao republički zakoni, Official Gazette of the RBH, No. 2/92.

65 Odluka o načinu vođenja deviznog računa i deviznog štednog uloga domaćeg i stranog fizičkog lica, Official Gazette of the SFRY nos. 6/91, 30/91, 36/91 and 25/92; Uredba sa zakonskom snagom o preuzimanju i primjenjivanju saveznih zakona koji se u Bosni i Hercegovini primjenjuju kao republički zakoni, Official Gazette of the RBH, No. 2/92.

66 Zakon o utvrđivanju i načinu izmirenja unutrašnjih obaveza Federacije, Official Gazette of the FBH, No. 66/04 as am. – section 9(2).

67 *Ališić*, GC, cited above (fn 2), paras. 24-28.

and international fora. As found by Jurgens "the smaller and larger claims by some hundreds of thousands of depositors total several hundred millions German Marks, including a very high percentage of accumulated interest."[68] The core of the issue was that Slovenian authorities considered LB debts and claims arising from the time before the dissolution of Yugoslavia as a single issue – when/if LB would successfully enforce its claims against NBY and the other borrowers on the territory of other successor States, these assets could then in turn be used to compensate foreign-exchange depositors on the territory of these States. Other successor States, however, considered the claims and liabilities of LB on their territories as two separate issues.

3.3 *Interstate Attempts to Resolve the Matter of Outstanding OFCDs*

The issue caused most heated disputes between Croatia and Slovenia which strived to solve the problem bilaterally until 1998, although without success. Then in 1999, the prime ministers of Slovenia and Croatia, Drnovšek and Mateša, agreed to hand the case over to the IMF. While Slovenia sent comprehensive documentation to the IMF soon after the agreement was reached, Croatia remained unresponsive. In December 2001, under the auspices of the Bank for International Settlements (BIS), the first negotiations took place in Basel. Further negotiations were carried out in 2002, but with no result. The matter was also handed over to the Parliamentary Assembly of the Council of Europe and a Dutch representative, Erik Jurgens, was nominated as the rapporteur. On 19 September 2001, after having carried out numerous interviews on the territory of all successor States, Jurgens presented his draft resolution containing practical solution proposals to the Parliamentary Assembly.[69]

Jurgens found that the deposited foreign currency had either been used by the branch-offices to finance foreign currency loans to their clients or they had been transferred to the NBY in exchange for Dinars, which were in turn used as loans for clients. In both cases the foreign currency was, according to Jurgens, in fact not recoverable.[70] Jurgens claimed that it was not fair to keep the depositors waiting until the legal, economic

68 Jurgens report, cited above (fn 14) para 2.

69 The draft was finally adopted by the Standing Committee as Resolution 1410 (2004) of the Parliamentary Assembly of the Council of Europe, 'Repayment of the deposits of foreign exchange made in the offices of the Ljubljanska Banka not on the territory of Slovenia, 1977-1991', 23 November 2004.

70 Jurgens, cited above (fn 14) para 32.

and political questions had been resolved between the successor States which have guaranteed these deposits.[71] In this respect he proposed that the four countries concerned set up a collective fund under the auspices of the Council of Europe in order to compensate the depositors for the capital of their original foreign currency savings, as well as (to a certain extent) for inflation, in order to help the savers, who have been deprived of access to their life savings for a period of over ten years. The fund should, according to Jurgens, be financed by all four governments concerned, in principle proportionally to the amount of foreign exchange deposits made on the *territory* of each respective State. Additionally, Jurgens invited the European Union (EU) to examine the possibility of making a contribution to the collective fund.[72] In practice no such fund was ever established due to the irreconcilable differences in the views of the successor States. It is thus surprising that the Succession Agreement, adopted in June 2001 in Vienna, recognised the issue of the OFCDs as a succession issue at all.

3.4 *OFCDs under the Vienna Succession Agreement 2004*

The Succession Agreement states that the financial liabilities of the former SFRY include *inter alia* "guarantees by the SFRY or its National Bank of Yugoslavia of hard currency savings deposited in a commercial bank and any of its branches in any successor State before the date on which it proclaimed independence."[73] Furthermore, it is stipulated that "guarantees by the SFRY or its NBY of hard currency savings deposited in a commercial bank and any of its branches in any successor State before the date on which it proclaimed its independence shall be negotiated without delay taking into account in particular the necessity of protecting the hard currency savings of individuals. This negotiation shall take place under the auspices of The Bank for International Settlements."[74]

Although theoretically the fact that the matter of the OFCDs was recognised as a succession issue was a step in the right direction, it must on the other hand be noted that, unlike with other succession issues, no substantive solution was ever adopted in this regard, but merely an obligation of successor States to negotiate one (*pactum de negotiando*). Additionally, no time limit was set in this respect. The obligation to negotiate

71 Jurgens, cited above (fn 14) para 3.
72 Jurgens, cited above (fn 14) para 7.
73 Succession Agreement, Annex C, Article 2(3)(a).
74 Succession Agreement, Annex C, Article 7.

derives from the principle *pacta sunt servanda* as set in Article 26 of the Vienna Convention on the Law of the Treaties[75] which states that every treaty in force must be performed by the parties in good faith.[76] *Pactum de negotiando* in international law means that "both sides would make an effort, in good faith, to bring about a mutually satisfactory solution by way of a compromise, even if that meant the relinquishment of strongly held positions earlier taken. It implies a willingness for the purpose of negotiation to abandon earlier positions and to meet the other side part way."[77] Furthermore, as found by the International Court of Justice (hereinafter the ICJ), the obligation to negotiate does not only consist of an obligation "to enter into negotiations, but also to pursue them as far as possible, with a view to concluding agreements", considering that this obligation is not satisfied "where either of the parties insists upon its own position without contemplating and modification of it (…) or where they obstruct negotiations, for example, by interrupting communications or causing delays".[78]

Four meetings were held in the case of the OFCDs soon after the Succession Agreement was signed, but without reaching any agreement. Consequently, BIS terminated its involvement. It then took almost another decade before a mixed Slovenian-Croatian Commission at the governmental level met in March 2010 in order to discuss the details of negotiations under the auspices of BIS. In October 2010 the Croatian government officially agreed to settle the issue of OFCDs under BIS, as provided in the Succession Agreement, since this was a precondition for Slovenia's approval of the temporary closure of the Croatian-EU accession negotiations referring to the chapter regarding the free movement of capital. In November 2010 the Croatian government notified the Slovenian government that BIS was not competent to resolve the issues of LB. However, the ECtHR later found that Croatia was not willing to continue the negotiations under BIS and had thereby breached its obligation under the

75 Vienna Convention on the Law of Treaties, 1155 UNTS 331; 8 ILM 679 (1969); 63 AJIL 875 (1969).

76 *Hungary v Slovakia* (*Gabčikovo-Nagymaros Project*), ICJ General list, No. 92 (ICJ, 25 September 1997) para 142.

77 *Greece v Federal Republic of Germany*, Arbitral Tribunal for the Agreement on German External Debts, 1972 para 62.

78 *Former Yugoslav Republic of Macedonia v. Greece*, Application of the Interim Accord (ICJ, 5 December 2011, ICJ Reports 2011, para 132).

Succession Agreement.[79] In July 2012, the Slovenian and Croatian foreign ministers agreed to appoint financial experts to propose a solution to the matter.[80] No solution was reached, however.

In this respect it should also be pointed out that the Succession Agreement does not provide for an international forum for the resolution of disputes concerning its implementation or interpretation. Therefore, the agreement itself does not offer direct opportunities for the initiation of an international dispute against another successor State. However, successor States have the possibility to initiate such a procedure on the basis of Article 5(3) of the Succession Agreement which specifies that disagreements which arise in practice in the interpretation of the agreement may be submitted to an independent expert, who shall be appointed with the consent of the affected parties. In the absence of such a consensus, the President of the OSCE[81] Court of Conciliation and Arbitration shall appoint an independent expert. Instead of seeking to resolve the dispute regarding the SFRY guarantees for OFCDs by way of an independent expert or by an interstate forum, such as the ICJ,[82] the depositors themselves brought civil actions against banks in which they deposited their savings – at first before national courts of the successor States and ultimately before the ECtHR.

3.5 *Civil Law Procedures to Recover the OFCDs before National Courts*

As was the case with depositors' repayment rights, the national courts' competence to rule on this matter were also regulated diversely by the successor States. In Serbia all proceedings concerning OFCDs ceased by virtue of the Old Foreign-Currency Savings Act 1998[83] and the Old For-

79 *Ališić*, GC, cited above (fn 2), para. 63. See also partly dissenting opinion of Judge Nußberger, who noted that "all the respondent States had a positive obligation to negotiate over the issue of the OFCDs. In my view, Croatia breached this duty by refusing to continue the negotiations in 2002 (…), whereas all the other States were willing to take them up again." In this respect it is not surprising that Croatia was also the last successor State to ratify the Succession Agreement (in March 2004).

80 The Slovenian Government appointed the former Central Bank governor France Arhar, while the Croatian Government appointed the former vice-governor of its Central Bank Zdravko Rogić.

81 Organization for Security and Co-operation in Europe.

82 See concurring opinion of Judge Ress in *Kovačić and others v. Slovenia*, App. nos. 44574/98, 45133/98 and 48316/99 (ECtHR, 6 November 2006).

83 Zakon o izmirenju obaveza po osnovu devizne štednje građana, Official Gazette of the FRY, No. 59/98.

eign-Currency Savings Act 2002.[84] In January 2002 the court in Serbia issued a bankruptcy order against Investbanka. As a result, the State guarantee on OFCDs was activated.[85] 322 clients of Investbanka's branches in B&H applied unsuccessfully for compensation within the context of the bankruptcy proceedings; 20 of them then launched civil proceedings against Investbanka, but to no avail. Similarly, in B&H all proceedings concerning the OFCDs ceased by virtue of law. This was declared constitutional by the Constitutional Court of B&H[86] which examined numerous individual complaints regarding the failure of B&H and its entities to pay back the OFCDs at the domestic branches of LB and Investbanka, but held that neither B&H nor its entities were liable.[87] For Croatian courts it is reported that since 1995 Zagrebška Banka and Privredna Banka Zagreb brought actions against LB and NLB to enforce claims of up to 250 million EUR that had been paid by the latter to Croatian depositors of LB Zagreb after the transfer of deposits into public debt in 1991. The actions have been reversed by the Croatian Supreme Court in 2010.[88] Additionally, 63 depositors pursued civil proceedings against LB and obtained their deposits from a forced sale of assets of LB's branch in Zagreb.[89]

In the final stage of Croatian accession to the EU, the Slovenian and Croatian prime ministers, Janez Janša and Zoran Milanović, signed the Memorandum of Understanding between the two governments in Mokrice,[90] by which the governments agreed to solve the issue of OFCDs of LB within the context of succession and that the lawsuits against LB and NLB in Croatia would be stayed.[91] This agreement was a precondition for Slovenian ratification of Croatia's Accession Treaty with the EU. Slovenian National Assembly indeed ratified the Treaty on 2 April 2013 and Croatia acceded to the EU on 1 July 2013. Conversely, the Croatian

84 Zakon o regulisanju javnog duga Savezne Republike Jugoslavije po osnovu devizne štednje građana, Official Gazette of the FRY, No. 36/02.

85 Zakon o deviznom poslovanju, Official Gazette of the FRY, No. 12/95 as am.

86 Decision U13/06 of 28 March 2008, § 35

87 Decisions AP 164/04 of 1 April 2006, AP 423/07 of 14 October 2008 and AP 14/08 of 21 December 2010.

88 D Vodovnik, 'Bančni spor: tisoč strani dokumentov le v eni tožbi zoper (N)LB' Delo, 15 October 2012.

89 *Kovačić and Others*, cited above (fn 82), paras. 122-133.

90 Memorandum of Understanding between the Government of the Republic of Slovenia and the Government of the Republic of Croatia, signed on 11 March 2013 in Mokrice, Slovenia.

91 'Janša in Milanović s podpisom zapečatila memorandum', Slovenske novice, 11 March 2013.

Parliament (Sabor) never ratified the Memorandum of Mokrice[92] and procedures against LB and NLB before Croatian courts have continued for Croatian courts did not consider the Memorandum as a binding international treaty since it lacked parliamentary ratification.[93]

Additionally, a number of depositors of LB's branches in other successor States were pursuing civil proceedings against LB before Slovenian courts. According to the case law of the Slovenian Supreme Court, the place of depositing foreign exchange under the Slovenian Constitutional Act was considered as the place where actual payments were made and not where the head office of the main bank was located. Consequently, the Republic of Slovenia did not guarantee OFCDs in subsidiaries and branches located in the other republics of the former SFRY.[94] In Slovenia all proceedings concerning OFCDs in the old LB's branches in other successor States, with the exception of third-instance proceedings before the Supreme Court, were stayed pending the outcome of the succession negotiations.[95] On the basis of the 1996 Act, 110 actions and three enforcement proceedings against LB and NLB before the District Court of Ljubljana were stayed. However, in December 2009 the Constitutional Court of Slovenia, upon a constitutional petition of two Croatian savers, declared that the stay of all procedures raised by the depositors of LB in other successor States was unconstitutional as it breached Article 23 of the Slovenian Constitution which guarantees the right to effective legal remedy.[96] Thereafter the District Court of Ljubljana has issued numerous judgments ordering LB to pay OFCDs in its Sarajevo and Zagreb branches. Nevertheless, as LB had no assets on the territory of Slovenia, the depositors could not be and were not compensated. Due to this, they turned to the ECtHR for a remedy.[97]

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92 Slovenia has ratified the Memorandum Mokrice by a ratification decision of 15 March 2013, Official Gazette No. 22/2013.

93 'Slovenci optužuju 'Hrvatska ne poštuje međunarodne sporazume' MVEP uzvraća 'Nije istina'', Jutarnji list, 22 January 2014. There was only one exceptional case, where the court in Zagreb decided to stay the case due to the Agreement from Mokrice.

94 See decisions II Ips 613/96 and II Ips 614/96 of 1 April 1998. See also Supreme Court decision in case No. II Ips 395/99 of 12 April 2000.

95 Zakon o Skladu Republike Slovenije za nasledstvo in visokem predstavniku Republike Slovenije za nasledstvo, Article 23, Official Gazette RS, No. 29/06.

96 *Constitutional complaints by Andre Perić and Alan Perić*, Case U-I-161/07 (Slovenian Constitutional Court, 3 December 2009).

97 On procedures before the ECtHR see D Harris, M O'Boyle, E Bates, C Buckley, *Law of the European Convention on Human Rights* (Oxford University Press 2014).

4 Outstanding OFCDs as a Violation of the ECHR

The starting point for assessing the subject-matter in light of the protection of human rights is the fact that the successor States never denied that the depositors' human rights had been violated. As Jurgens noted in his report for the Parliamentary Assembly of the Council of Europe, "that many citizens in the four countries concerned have in fact lost in many cases substantial amounts of foreign exchange that they have deposited with banks in the SFRY (not only the LB) is for those concerned often nothing less than a tragedy. They have worked hard as expatriate workers in especially Germany and have sent this foreign exchange back home, or they have earned this money in the SFRY from activities like tourism, only to see it disappear at the moment the SFRY broke up."[98] The ECtHR thus had to decide not only if there had been human rights violations or not, but to whom to attribute those violations, which were rooted in the context of the dissolution of the SFRY and had lasted for more than twenty years. At this point it should also be remarked that the SFRY had never ratified the ECHR and that the successor States ratified it only after the majority of the concerned national repayment schemes for the OFCDs had already been adopted.[99]

4.1 *ECtHR Case-law on OFCDs before Ališić*

In a number of cases the Court had considered this subject-matter; however, in none of them were the circumstances so complex as in *Ališić*, in particular because these cases were directed against one of the successor States only and, except for *Kovačić*, they did not involve any cross-border situations which increased the interstate importance of the case. On the other hand, the *Ališić* case was directed against all successor States at once and facts of the case involved cross-border elements that required complex assessment of the whole Yugoslav banking system and division of competences within it. Some of the cases concerning individual successor States are thus briefly examined before turning to *Ališić*.

98 Jurgens, cited above (fn 14) para 12.

99 Slovenia 28 June 1994, the former Yugoslav Republic of Macedonia 10 April 1997, Croatia 5 November 1997, B&H 12 July 2002, Serbia 3 March 2004.

4.1.1 *Trajkovski v FYR of Macedonia*[100]

The first judgment in respect of the Yugoslav OFCDs was rendered in 2002 in the case *Tajkovski v Macedonia*. The applicant was a citizen of the FYRM. Before dissolution of the SFRY the applicant had deposited US Dollars, Deutsche Marks and minor amounts of other foreign currencies in a State-owned bank in Skopje (Komercijalna Banka Skopje). On the basis of the 2000 law regarding OFCDs, the applicant's deposits in foreign currencies were partly converted into Euros and for the remaining part he obtained government bonds.

Considering that the legal regulation had enabled the applicant to access his accounts under certain circumstances and that the funds had not been removed from the account, the Court concluded that the freezing of the applicants account did not constitute a deprivation of property. It assessed the measure as one of control of use pursuant to Article 1 of Protocol 1 to the ECHR. The Court held that the freezing of his account did not place a disproportionate burden on the applicant. It pointed out that the applicant had had the possibility to withdraw funds for certain purposes, that restrictions on withdrawing foreign currency had already been in place in the SFRY and that the applicant had accrued interest on his balance. In view of the difficult economic situation FYRM had faced at the time, the freezing of foreign currency accounts had, according to the ECtHR, been reasonable.

4.1.2 *Kovačić and others v Slovenia*[101]

In this case the applicants were three Croatian nationals, who had previously deposited foreign currencies in savings accounts with LB's office in Zagreb. The first and second applicant received full payment of their savings deposits, together with their legal costs, after successfully filing actions against LB in Zagreb. The ECtHR therefore concluded that the matter had been resolved. The third applicant did not bring proceedings in Croatia to recoup her foreign currency savings, although in 2007 her heir brought an action before Croatian courts during the time when the ECtHR's ruling was still pending in the Zagreb Municipal Court. Thus all three cases were struck out of the ECtHR list as provided in Article 37 of the ECHR.

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100 *Trajkovski v. the former Yugoslav Republic of Macedonia* App. no. 53320/99 (ECtHR, 7 March 2002).

101 *Kovačić and others v. Slovenia*, cited above (fn 82).

The Grand Chamber of the ECtHR nevertheless observed that it had received applications from individuals who had been affected by those matters and that several thousand such applications were pending against all of the SFRY successor States parties to the Convention. Even though such issues fell within the Court's jurisdiction, the Court subscribed to the view of the Parliamentary Assembly in Resolution 1410 (2004) that the matter of compensation for so many thousands of individuals had to be resolved by an agreement between the successor States. In that respect, the Court noted that several rounds of negotiations had already been held between the successor States, at different levels, with a view to reaching an agreement on the solution of the issues which remained unsettled. It called on the States concerned to proceed with these negotiations as a matter of urgency, with a view to reaching an early resolution of the problem.[102] As noted above, however, all that happened at the interstate level in respect of the OFCDs after the ruling in the *Kovačić* case was the fiasco of the Memorandum of Mokrice. This enabled the Croatian entry into the EU without providing a solution for depositors of the OFCDs in Yugoslav banks.

4.1.3 *Suljagić v Bosnia and Herzegovina*[103]

In November 2009 the ECtHR issued its judgment in *Suljagić* concerning a citizen of B&H who was working abroad in the 1970s and 1980s and had deposited foreign currency with a bank in Tuzla, a branch of Privredna Banka Sarajevo, before the dissolution of the SFRY. The bank was nationalised after B&H became independent and subsequently sold to a commercial bank in Slovenia. The relevant legislation did not allow withdrawal of the OFCDs but gave savers the possibility to use their deposits to purchase the state-owned flats in which they lived. Subsequent legislation provided for the re-compensation of original deposits in form of verification certificates that enabled a cash payment of up to 500 EUR and any remaining amount was to be reimbursed in government bonds. However, in the FBH bonds due in March 2008 have not been issued at the time of the ECtHR's judgment and the first instalment of the amortisation plan for the bonds was paid almost eight months after it was due.

The Court held that the applicant was entitled to receive the entire amount of his OFCDs in eight instalments. Given the effects of the war and the ongoing reforms of the economic structure, the Court considered

102 *Kovačić and others*, cited above (fn 82), para 256.
103 *Suljagić*, cited above (fn 18).

that the State could limit access to savings. Regarding the interest rate for the period from January 1992 to April 2006, the Court took note of the fact that the neighbouring countries, in which similar repayment schemes were set up, had agreed to pay considerably higher interest rates. Nevertheless, the Court did not consider this factor sufficient to render the current legislation contrary to Article 1 of Protocol No. 1, thereby following the argument of the Constitutional Court of B&H regarding the need to reconstruct the national economy following the war. Nevertheless, the Court agreed with the applicant that the implementation of the legislation was unsatisfactory. As a result of the fact that the bonds due in March 2008 had not been issued, the applicant was still unable to sell them on the Stock Exchange and thus obtain early cash payments. Moreover, there had been a delay in the payment of instalments. The Court therefore held unanimously that in view of the deficient implementation of the legislation, there had been a violation of Article 1 of Protocol No. 1 and B&H had to ensure that within six months government bonds were issued, outstanding instalments paid and, in case of late payments of forthcoming instalments, default interest paid at the statutory rate.[104]

4.1.4 *Molnar Gabor v Serbia*

On 8 December 2009 the Court issued its judgment in the case *Molnar Gabor*.[105] The applicant was a Serbian national who complained about the continuous refusal of the authorities to release all of his OFCDs in a bank and, in particular, about the non-enforcement of a domestic judicial decision rendered on this question in his favour. The Court held that Article 1 of Protocol No. 1 reserves the right of States to enact such laws as they deem necessary to control the use of property in accordance with the general interest. In order to implement economic policies, legislatures must have a wide margin of appreciation, both with regard to the existence of a problem of public concern warranting measures of control, and as to the choice of the detailed rules for the implementation of such measures.[106] The Court examined the provisions of the Serbian Old Foreign-Currency Savings Acts concerning those who qualified for the gradual repayment of their savings by the Serbian authorities. The

104 In respect of Bosnian liability for OFCDs of Bosnian nationals see also *Višnjevac v. Bosnia and Herzegovina* App. no. 2333/04 (ECtHR, 24 October 2006) and *Jeličić v. Bosnia and Herzegovina* App. no. 41183/02 (ECtHR, 31 October 2006).

105 *Molnar Gabor v. Serbia* App. no. 22762/05 (ECtHR, 8 December 2009).

106 *Suljagić*, cited above (fn 18), para 47.

Court held that given the dire reality of the Serbian economy at the time and the margin of appreciation afforded to the States in respect of matters involving economic policy, the impugned provisions had struck a fair balance between the general interest and the applicant's rights. Additionally, the Court considered that the said legislation extinguished the impact of the final judgment in question well before the respondent State's ratification. Thus the Court held that the applicant had clearly had no enforceable legal title which would allow him to seek judicial execution of the foreign currency award rendered in his favour. The Court thus found no violation of the ECHR.

4.2 *Pilot Judgment:* Ališić and Others v. five successor States of the former SFRY

In contrast to the preceding cases, the final case before the ECtHR, *Ališić and others,*[107] was brought against all five successor States of the former SFRY. The applicants were nationals of B&H who lived in Germany. Prior to the dissolution of the SFRY, two of them, Ms Ališić and Mr Sadžak, had deposited foreign currency in Ljubljanska Banka Sarajevo. Also prior to the dissolution of the SFRY, the third applicant, Mr Šahdanović, had deposited foreign currency in the Tuzla branch, located in B&H, of Investbanka, a Serbian bank. On 31 December 1991 the balance in Ms Ališić's and Mr Sadžak's accounts at the Sarajevo branch of LB was 4,715 Deutschmarks (DEM) and 129,874 DEM respectively, while the balance in Mr Šahdanović's accounts at the Tuzla branch of Investbanka was DEM 63,880, 4 Austrian schillings and 73 United States dollars (USD). They complained that they were unable to withdraw their OFCD and relying on Article 1 of Protocol No. 1 (protection of property), Article 13 (right to an effective remedy) and Article 14 (prohibition of discrimination), they complained about the delay in reaching compensation and lack of an effective remedy for their complaints in respect of any of the successor States.[108]

As the case was brought against all five successor States, this fact meant first of all that the first judgment was delivered by a Chamber of seven judges, in which, in respect of each applicant, four of the members, i.e., a simple majority, were from the creditor States, one of the members was from a fellow debtor State, and only two other members of the panel were not from the involved States. It was in line with the usual procedural

107 *Ališić and Others*, GC, cited above (fn 2).
108 *Ališić and Others,* GC, cited above (fn 2), paras 9-11.

logic of the ECHR in accordance with which the national Judge of the country concerned must in all cases be a member of the panel in order to facilitate the assessment of the case. As emphasised by Judge Zupančič in his dissenting opinion, however, "in a situation in which we have seven successor States addressing what is essentially a succession problem, the logic of the presence of the national Judge in each particular case will result in an *ad hoc* composition, as in the present one, in which the plaintiffs' 'representatives' have a clear majority over the influence of the defendants' 'representatives'." According to Zupančič, "this is absurd" and made "it obvious that such a panel will not, to the outside world, appear objective and impartial".[109] Notwithstanding this, however, the case was later adjudicated by the Grand Chamber of 17 judges[110] and the outcome was essentially the same.

On 6 November 2012 the Chamber held unanimously, that there had been a violation of Article 1 of Protocol No. 1 and a violation of Article 13 of the ECHR by Serbia, and by a majority (six votes to one), that there had been a violation of the said provisions by Slovenia. No violation by the other States had been found. Slovenia was therefore liable for OFCDs in LB's Sarajevo branch and Serbia for OFCDs in Investbanka's Tuzla branch.[111] After appeal the case was handed over to the Grand Chamber which issued its judgment on 16 July 2014.

The Grand Chamber confirmed that Slovenia and Serbia had been responsible for the debts owed to the applicants by the two banks, LB Sarajevo and the Tuzla branch of the Investbanka, and held that there had been no good reason for the applicants to have been kept waiting for so many years for repayment of their savings. It pointed out that this was *a special case*, as it was not a standard case of rehabilitation of an insolvent private bank, the banks in question having always been either State- or socially-owned and it was not disputed that the applicants' inability to withdraw their savings, at least since the dissolution of the SFRY, had a legal basis in domestic law.[112]

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109 *Ališić and Others*, GC, cited above (fn 2) dissenting opinion of Judge Zupančič.

110 Among them was not BM Zupančič, the judge elected in respect of Slovenia, since he decided to withdraw from the Grand Chamber (Rule 28) as the Croatian and Bosnian Government expressed doubts in respect of his impartiality. The Slovenian Government accordingly appointed Angelika Nußberger, the judge elected in respect of Germany, to sit in his place.

111 *Ališić and Others*, Chamber, cited above (fn 2), para 90.

112 *Ališić and others*, GC, cited above (fn 2), paras 125, 127.

The Court accepted that the aim pursued by the governments in this regard had been *legitimate* as they had to take measures to protect their respective banking systems following the dissolution of the SFRY. Given the wide margin of appreciation when it comes to the public interest issue, the Court was prepared to accept that following the dissolution of the SFRY and the subsequent armed conflicts, the respondent States had to take measures to protect their respective banking systems and national economies in general. In view of the overall size of the OFCDs, the Court agreed that none of the successor States was able to allow the uncontrolled withdrawal of such savings.[113]

The Court then examined whether the authorities had struck a fair balance between the general interest of the community and the protection of the applicants' property rights. The Grand Chamber first agreed with the Chamber's finding that LB and Investbanka had remained liable for the OFCDs in all their branches until the dissolution of the SFRY and that they had remained liable for these deposits in their branches in B&H since the dissolution of the SFRY. The Court agreed with the Chamber that the statutory guarantee of the SFRY in respect of the OFCDs in the banks had not been activated until the dissolution of the SFRY and that the relevant liability, therefore, had not shifted from those banks to the SFRY.[114] Furthermore, the Court noted that pursuant to the SFRY civil law and the companies register, all branches of LB and Investbanka had been acting on behalf and for the account of the parent banks at the time of the dissolution of the SFRY.[115] The Grand Chamber therefore confirmed that there had been sufficient grounds to deem Slovenia and Serbia respectively responsible for the two banks' debt to the applicants. According to the majority of the Grand Chamber members, the governments had disposed of these banks' assets as they had seen fit.[116]

The Grand Chamber finally examined whether there had been any *good reason for the failure* of the respective governments to repay the applicants for so many years. The States' response on this point was that the international law on State succession required only negotiation in good

113 *Ališić and others*, GC, cited above (fn 2), para 107.

114 *Ališić and others*, GC, cited above (fn 2), para 109.

115 *Ališić and others*, GC, cited above (fn 2), para 67. In contrast to this, Judge Nußberger held in her partially dissenting opinion that "even though the State guarantee under the civil law had not been activated before the dissolution of the SFRY (…), the consequences of the dysfunctioning of the system set up by the SFRY are to be regarded as the shared responsibility of the successor States."

116 *Ališić and others*, GC, cited above (fn 2), para 116.

faith, without any time limits. However, the Court found that succession negotiations had not prevented the States from adopting measures at national level to protect the interests of depositors, and that solutions had indeed been found in Slovenia and Serbia as regards some categories of OFCDs in the branches in question.[117]

The Court noted that whereas some delays might be justified in exceptional circumstances, *the applicants had been kept waiting too long* and, notwithstanding the governments' room for manoeuvre in social and economic policy making, Slovenia and Serbia had not struck a fair balance between the general interest of the community and the property rights of the applicants, who had borne a disproportionate burden.[118] The Court had therefore concluded that there had been a violation of Article 1 of Protocol No. 1 by Slovenia and Serbia,F but not by any of the other States.[119]

Concerning the *remedies* available to the applicants for their claims, the Grand Chamber noted that the Slovenian government had failed to demonstrate that at least one of the numerous decisions ordering the old LB to pay OFCDs in its Sarajevo branch had been enforced. As regards a civil action against that bank in the Croatian courts, the Court found that it offered the applicants no reasonable prospects of success, as the old LB no longer had any assets in Croatia.[120] The Court underlined that the applicants were not asking for a remedy to challenge laws before national authorities, but to obtain the repayment of their savings in one way or another. In the absence of remedies available to them to complain about the States' failure to ensure such repayment, the Court found that there had been a breach of Article 13 by Slovenia and by Serbia but, again, not by any of the other States.[121]

The Court had decided to apply the pilot-judgment procedure. The Grand Chamber agreed with the Chamber that it was appropriate to apply such a procedure, as there were more than 1,850 similar applications pending before it, introduced on behalf of more than 8,000 applicants. In view of the systemic problem identified, the Court considered that general measures at national level were undoubtedly called for in the implementation of its Grand Chamber judgment.[122] Serbia and Slovenia

117 *Ališić and others*, GC, cited above (fn 2), para 120.
118 *Ališić and others*, GC, cited above (fn 2), para 124.
119 *Ališić and others*, GC, cited above (fn 2), para 125.
120 *Ališić and others*, GC, cited above (fn 2), para 133.
121 *Ališić and others*, GC, cited above (fn 2), para 136.
122 *Ališić and others*, GC, cited above (fn 2), para 143.

must thus make all necessary arrangements, including legislative amendments, within one year and under the supervision of the Committee of Ministers, in order to allow the applicants and *all others in their position* to recover their OFCDs under the same conditions as Serbian and Slovenian citizens who had such savings in domestic branches of Serbian and Slovenian banks.[123] Persons who had already been paid their OFCDs should be excluded from the repayment schemes; however, where only a part of the savings had been repaid, Serbia and Slovenia were now responsible for the rest, regardless of the citizenship of the depositor and of the branch's location.[124]

The Court also pointed out that applicants must collaborate with any *verification procedures* to be set up by the States but their claim should not be rejected on the sole account of missing bank documents.[125] Furthermore, all verification decisions must be judicially reviewed.[126] While all persons affected by the inability to freely dispose of their OFCDs for more than 20 years undoubtedly suffered distress and frustration, the Court did not indicate that they should receive redress from Serbia and Slovenia as a general measure. It might however, reconsider this issue in an appropriate future case if Serbia or Slovenia failed to apply the general measures indicated by the Court.[127] Lastly, the Court adjourned its examination of similar cases against Serbia and Slovenia for one year. This decision was without prejudice to the Court's power at any moment to declare inadmissible any such case or to strike it out of its list in accordance with the Convention.[128] Each applicant was also awarded 4,000 EUR in respect of non-pecuniary damage.[129]

123 *Ališić and others*, GC, cited above (fn 2), para 146.
124 *Ališić and others*, GC, cited above (fn 2), para 147.
125 *Ališić and others*, GC, cited above (fn 2), para 148.
126 *Ališić and others*, GC, cited above (fn 2), para 148.
127 *Ališić and others*, GC, cited above (fn 2), para 155.
128 *Ališić and others*, GC, cited above (fn 2), para 150.
129 *Ališić and others*, GC, cited above (fn 2), para 155.

4.3 *Enforcing the* Ališić *Ruling: Finding a Systemic Solution for a Systemic Problem*

4.3.1 Cleft Sticks of Slovenia and Serbia in Respect of the Execution of the Judgment

Reactions to the judgment of the ECtHR were understandably mixed.[130] Negative comments were not spared, such as that the ECtHR repaired the injustice caused by Slovenia which robbed the depositors from the other republics of the former Yugoslavia of their savings, building its economic growth on their account.[131] The Slovenian government accepted this with disappointment, especially considering the large-scale humanitarian and other assistance granted to these republics both during and after the war.[132] Nevertheless, both Slovenia and Serbia showed their willingness to respect the judgment and find a systemic solution to a systemic problem as demanded by the ECtHR. This was not without numerous difficulties, however.

Firstly, in contrast to the established case-law, the ECtHR in *Ališić* did not recognise the condemned States' wide margin of appreciation in respect of adequate compensation. As noted by Judge Nußberger in her partly dissenting opinion, the Court is generally[133] very reluctant to condemn States for property violations committed before the Convention entered into force, as in this case. Whenever violations of Article 1 of Protocol No. 1 have related to events that took place before the Convention entered into force, on a mass scale, the Court has accepted models offering less than full compensation.[134] Especially in the context of a change of political and economic regime, such as fundamental changes of a country's constitutional system, the ECtHR had recognised a par-

130 See e.g. 'Štediše konačno odahnule nakon presude iz Strazbura' Slobodna Evropa, 25 July 2014; 'Slovenci razočarani jer moraju platiti odštetu štedišama' Buka, 17 July 2015.

131 D Romac, 'Kako je Slovenija opljačkala štediše u Hrvatskoj i BiH, Slučaj Ljubljanske banke: Još jedan istočni grijeh slovenske politike '90-ih' Novilist.hr, 19 July 2014.

132 Petrič, cited above (fn 3).

133 Referring to *Kopecký v. Slovakia* App no 44912/98 (ECtHR, 28 September 2004) paras 53-61; *Von Maltzan and Others v. Germany* App. Nos. 71916/01, 71917/01 and 10260/02 (ECtHR, 2 March 2005) paras 110-114; and *Jahn and Others v. Germany* App. Nos. 46720/99, 72203/01 and 72552/01 (ECtHR, 22 January 2004) paras 99-117.

134 *Broniowski v. Poland* App. no. 31443/96 (ECtHR, 22 June 2004) paras 31 and 43; *Hutten-Czapska v. Poland* App. no. 35014/97 (ECtHR, 28 April 2008) para 27; and *Vistiņš and Perepjolkins v. Latvia* App. no. 71243/01 (ECtHR, 25 October 2012) paras 115 and 118-131.

ticularly wide margin of appreciation[135] and accepted that less than full compensation was necessary. Nußberger thus concluded that "there is no convincing reason (…) to expect not only the amount lost to be repaid in full, but even the lost interest to be compensated for". Even in past cases concerning compensation for lost OFCDs, the ECtHR granted the respondent States a wide margin of appreciation and accepted considerable deductions in the amounts repaid.[136] In contrast to this case-law, however, the ECtHR in *Ališić* imposed upon the two States concerned strict and express requirements for determination of the amount of compensation to be paid for the OFCDs ascribable to them.[137]

In addition, there were several other practical problems with regard to the execution of the judgment. The first of such is how the Slovenian and Serbian authorities could obtain information about the outstanding balance of the bank accounts concerned.[138] Some depositors might still possess original contracts or bankbooks substantiating their claims. Given the lapse of time and the war in the region, many depositors might however not able to corroborate their claims with original deposit documents. The authorities of both countries were furthermore facing difficulties as regards the standard of proof to be applied in verification procedures. In particular, the Court indicated that no claim should be rejected due simply to the lack of original contracts or bankbooks. The depositors should, however, prove the validity of their claims by other means. The second issue facing the authorities was how to ensure that any double payment from the bank accounts concerned is avoided. Namely, as evident from the *Kovačić* case, some of the deposits have already been recovered in domestic bankruptcy proceedings or otherwise or they were used to buy socially-owned apartments or companies. Verification procedures were thus needed in order to prevent double payment of the deposits concerned. An additional challenge, as appears from the case of *Suljagić,*[139] derived from the fact that an unofficial market emerged on which such

135 *Kopecký v. Slovakia*, cited above (fn 133) para 35; *Jahn and Others*, cited above (fn 133) para 116 (a); *Suljagić*, cited above (fn 18) para 42; and *Former King of Greece and Others* App. no. 25701 (ECtHR 23 November 2000) para 87.

136 See chapter 4.1. above.

137 *Ališić and others*, GC, cited above (fn 2) para 48.

138 Concept paper of 24 April 2016 prepared by the Department for the Execution on the Round table on selected issues concerning execution of the Ališić Judgment, Strasbourg, 7 May 2015.

139 *Suljagić*, cited above (fn 18) para 19.

savings were at times sold for no more than 3% of their nominal value. The two States should have found solutions to deal with such cases.

4.3.2 Slovenian Act on the Execution of the *Ališić* Judgment

In line with the obligations imposed upon Slovenia by the ECtHR in *Ališić,* the Slovenian National Assembly adopted its Act on the Method of Execution of the European Court of Human Rights Judgement in case No. 60642/08 on 22 June 2015.[140] The Government of Slovenia, which proposed the adoption of the Act, estimated the financial consequences of the Act would amount to 385 million EUR. This amount represents the estimated amount of the principal and accrued interest of LB branches in Zagreb and Sarajevo until 31 December 2015, including administrative and other costs associated with the implementation of the verification procedure and the execution of payments.[141] With respect to the unpaid OFCDs, the Act provided the takeover of the fulfilment of LB's obligations to beneficiaries,[142] meaning that the Republic of Slovenia has not considered the debts and obligations towards the depositors of OFCDs in LB Sarajevo and LB Zagreb as its own. Under the Act the OFCD was defined as the status of the outstanding claims of natural persons towards branches of LB in Sarajevo and Zagreb on their foreign-exchange accounts on the day of 31 December 1991, including contractual interest, accrued to that date, minus any payments by the bank or anyone else after that date with respect to the unpaid obligations of the depositor towards the bank and for paid or otherwise settled amounts after 31 December 1991 on any basis.[143] An outstanding OFCD, however, is not an OFCD, or a part thereof, which has been transferred to another legal entity or special account for the purpose of specific use based on the provisions of either State in which both branches operated. These deposits are, *inter alia*, OFCDs of LB's branch in Zagreb which were transferred to another legal entity in line with Croatian regulation on guarantees for OFCDs, and OFCDs

140 Zakon o načinu izvršitve sodbe evropskega sodišča za človekove pravice v zadevi številka 60642/08, Official Gazette RS, No. 48/15. The Act was published in the Official Gazette on 3 July 2015 and entered into force the next day. This means that Slovenia implemented the Court's judgment within a year of its delivery and the Act was sent for approval to the Committee of Ministers of the Council of Europe.

141 Vlada RS, Predlog zakona o načinu izvršitve sodbe Evropskega sodišča za človekove pravice v zadevi številka 60642/08, 28.5.2015, p. 5.

142 Zakon o načinu izvršitve sodbe evropskega sodišča za človekove pravice v zadevi številka 60642/08, cited above (fn 140) Article 5.

143 Zakon o načinu izvršitve sodbe evropskega sodišča za človekove pravice v zadevi številka 60642/08, cited above (fn 140) Article 2(1).

transferred to special accounts for the purpose of privatisation according to the regulations of B&H.[144]

With the aforementioned Act the Republic of Slovenia additionally took upon itself the obligation to pay interest on OFCDs, namely in the amount of 6% for the year 1992, 1.79% per year since the beginning of 1993 till the end of 2015, as well as interest at the level of interest rates for over-night households deposits, as published in the monthly bulletin of the Bank of Slovenia for the period from 1 January 2016 onwards.[145] The conversion of currencies into euros was made according to the exchange rate applicable on the date of 1 January 1999, and the remainder according to the relevant exchange rate valid on the date the current Act entered into force.[146] Beneficiaries of payments were defined as natural persons who were in possession of OFCDs in both branches of LB on the date of 31 December 1991, including their heirs, and under certain conditions, also natural persons who acquired the claims on the basis of valid legal transactions, all under the precondition that the OFCD was not transferred, paid or used on any basis.[147]

The verification procedure took place according to a simple administrative procedure with certain modifications (issuance of indicative calculations of the claims that, in the absence of a complaint, became final decisions). The verification procedure was led by the Succession Fund, for the purpose of which significant human resources were required. Information support and decision making was based on the data of LB, provided from its branch in Zagreb. In order to obtain data for the main branch in Sarajevo, however, intense efforts with the authorities of B&H were in place[148] and only after this information was provided by the latter, thereby enabling access to the archives of the former LB branch in

144 Zakon o načinu izvršitve sodbe evropskega sodišča za človekove pravice v zadevi številka 60642/08, cited above (fn 140) Article 2(2).

145 Zakon o načinu izvršitve sodbe evropskega sodišča za človekove pravice v zadevi številka 60642/08, cited above (fn 140) Article 3.

146 Zakon o načinu izvršitve sodbe evropskega sodišča za človekove pravice v zadevi številka 60642/08, cited above (fn 140) Article 4.

147 Zakon o načinu izvršitve sodbe evropskega sodišča za človekove pravice v zadevi številka 60642/08, cited above (fn 140) Article 6.

148 See the letter of Metod Dragonja, Slovenian State Secretary to the Department for the Execution of Judgments of the ECHR, dated 19 May 2015, attached to the Communication from the authorities (additional information) (19/05/2015) concerning the case of Ališić and Others against Slovenia (Application No. 60642/08), DH-DD(2015)561, dated 28 May 2015.

Sarajevo, the verification procedures with respect to the Bosnian depositors were able to commence.[149]

Due to the need for prior establishment of the entire infrastructure and organisational structure for decision-making in the verification process, the call for the submission of claims was posted on 2 November 2015 and the deadline for the submission of claims began on 1 December 2015. The time limit for decision making was three months from the receipt of a complete application and payments were effected 30 days after the final decision was given on the transaction or personal account of the beneficiary, his/her legal or duly authorised representative.[150] Interest paid in the Republic of Slovenia wasexempt from income tax or corporation tax.[151] Judicial protection was provided by the possibility of filing an action before the administrative court.[152] In this respect, around 1500 claims have been filed before the Slovenian administrative court, the vast majority in relation to the declined claims by the depositors, who had transferred their deposits to privatisation accounts in B&H.[153] Since these depositors were not considered to be in the same position as claimants in the *Ališić* case, in March 2018 the Council of Europe Committee of Ministers' Deputies adopted a Resolution,[154] in which the Committee

149 Zakon o načinu izvršitve sodbe evropskega sodišča za človekove pravice v zadevi številka 60642/08, cited above (fn 140) Articles 7-10. See also Odredba o objavi datuma pridobitve podatkov iz četrtega odstavka 9. člena Zakona o načinu izvršitve sodbe Evropskega sodišča za človekove pravice v zadevi številka 60642/08, p. 9214, Official Gazette RS, 21 October 2016.

150 Zakon o načinu izvršitve sodbe evropskega sodišča za človekove pravice v zadevi številka 60642/08, cited above (fn 140) Articles 11-15.

151 Zakon o načinu izvršitve sodbe evropskega sodišča za človekove pravice v zadevi številka 60642/08, cited above (fn 140) Article 19.

152 Zakon o načinu izvršitve sodbe evropskega sodišča za človekove pravice v zadevi številka 60642/08, cited above (fn 140) Article 20.

153 See e.g. case *Said Kulovac v Sklad RS za nasledstvo, IU 1545/2017-11*, judgment of the Administrative Court of Republic of Slovenia, 21 May 2018. In contrast, some depositors, who have transferred their deposits to the privatisation accounts of B&H have succeeded in claims against the Slovenian Succession Fund – see e.g. case *Luka Krezić v Sklad RS za nasledstvo, IU 323/2017-13*, judgment of the Administrative Court of Republic of Slovenia, 28 May 2018. In this respect see also ECtHR judgment in case *Zeljković* v Slovenia (33805/17, 5 September 2017). Several cases have also been filed before the Slovenian Constitutional Court – see. e.g. U-I-44/17-10; U-I-10/18-6, I-U-7/18-9 and U-I-32/18-7.

154 Resolution CM/ResDH(2018)111, Execution of the judgment of the European Court of Human Rights Ališić against Serbia and Slovenia, adopted by the Committee of Ministers on 15 March 2018 at the 1310th *meeting of the Ministers› Deputies, https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680793598* (*last*

decided that all the measures required of Slovenia under the *Ališić* judgment in view of Article 46(1) ECHR had been adopted and decided to close the examination thereof in respect of Slovenia.

4.3.3 Serbian Implementation of the *Ališić* Judgment

The Serbian implementation of the *Ališić* judgment is based on the pilot case of depositor Šahdanović that held OFCDs in B&H branch of the Serbian Investbank in Tuzla. In response to the ECtHR judgment, the Serbian Ministry of Finance prepared a draft law aimed at introducing a repayment scheme for the OFCDs. On 28 December 2016, the Serbian Parliament adopted the law,[155] introducing the repayment scheme for outstanding OFCDs for two categories of depositors – firstly, nationals of the successor States in branches of Serbian banks inside or outside Serbia, and secondly, Serbian nationals in Serbian branches of the banks with head offices in other former Yugoslav Republics. The law entered into force on 30 December 2016. The Serbian government estimated that the savings concerned amount up to 310 million EUR. It was provided that liabilities of Serbia towards foreign currency savers would be settled in ten equal semi-annual instalments within the period from August 2019 to February 2024.[156] According to the adopted law, within the period from 1998 to 31 May 2016, an annual interest rate of 2% would be applied, while for the following period, that is from May 2016 until February 2024, an annual interest rate of 0.5% would be applied.[157] It further derives from the law that Serbia will settle this liability by issuing securities – bonds de-

accessed 10 January 2019), based on Action report (26/10/2017) - Communication from Slovenia concerning the case of ALISIC AND OTHERS v. Serbia and Slovenia (Application No. 60642/08), https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680765 48a (last accessed 10 January 2019). As of 31 August 2017 Slovenia received approximately 32.500 requests and made payments in the amount of nearly 300 million EUR. Objections to indicative calculations were filed in less than 1% of the cases.

155 Zakon o regulisanju javnog duga Republike Srbije po osnovu neisplaćene devizne štednje građana položene kod banaka čije je sedište na teritoriji Republike Srbije i njihovim filijalama na teritorijama bivših republika SFRJ, Sl. glasnik RS, No. 108/2016 and 113/2017.

156 Zakon o regulisanju javnog duga Republike Srbije, cited above (fn 155) Article 5.

157 Zakon o regulisanju javnog duga Republike Srbije, cited above (fn 155) Article 4. The Council of Europe Committee of Ministers noted that the repayment scheme satisfied the conditions set by the ECtHR in that it envisaged the repayment of deposits at the same interest rates as were applied to Serbian citizens who had such savings in domestic branches of Serbian banks (see the Committee's decision adopted at the 1230th meeting (CM/Del/Dec(2015)1230/19) (June 2015) (DH)

nominated in euros, without coupons, issued on the name of the owner and registered with the Central Securities Depository and Clearing House a.d. Beograd.[158]

On 3 February 2017 the government adopted the Regulation governing the procedure for establishment of the right to payment of foreign-currency savings. The Regulation prescribed, *inter alia*, an application form for claims and the procedure to be followed when registering claims and processing the documentation to be attached to the application.[159] On 23 February 2017 the Ministry of Finance, in charge of the application of the law, issued a public call inviting depositors to lodge their claims with the Public Debt Administration. This public call was published in a major daily news outlet in each of the former Yugoslav Republics as well as on the official webpage of the Ministry of Finances. This public call was also published in the Official Gazette of the Republic of Serbia. This public call included the necessary information concerning the method of registration, the documentation to be attached to the application, and the deadline for registration of claims. The Serbian Government has also noted that the Public Debt Administration will establish the amount of the OFCDs payable the administrative procedure upon a proposal of an ad hoc committee, including representatives of the Ministry of Finance, the Public Debt Administration, the Deposit Insurance Agency, the National Bank of Serbia and State Attorney's Office. Moreover, the Ministry of Finance and the Public Debt Administration have also taken measures to secure adequate premises and staff to handle the applications for repayment of the deposits concerned.

In the *Muratović v Serbia*[160] inadmissibility decision the ECtHR found that the law introducing the repayment scheme met the criteria set out in the *Ališić* pilot judgment, while underlining that it was ready to change its approach as to the potential effectiveness of the remedy should the practice of the domestic authorities show, in the long run, that savers were being refused on formalistic grounds, that verification proceedings were excessively long or that the domestic case law was not in compliance with the requirements of the Convention. Consequently, the Committee of

as well as the decision adopted at the 1273rd meeting (CM/Del/Dec(2016)1273/H46-28) (December 2016) (DH).

158 Zakon o regulisanju javnog duga Republike Srbije, cited above (fn 155) Article 6.

159 Communication from Serbia concerning the case of ALISIC AND OTHERS v. Serbia and Slovenia (Application No. 60642/08), 31 March 2017, https://rm.coe.int/native/0900001680703ef2 (last accessed 10 January 2019).

160 *Muratović v. Serbia* App no 41698/06 (ECtHR 21 March 2017).

Ministers encouraged the authorities to sustain their efforts to ensure the proper functioning of the repayment scheme, and invited them to keep the Committee updated regularly on the implementation of the verification procedure and the functioning of the repayment scheme in practice.

5 Interstate Implications of the *Ališić* Judgment

5.1 *Impact of the* Ališić *Ruling upon the Yugoslav Succession Agreement*

The ECtHR had two main options in respect of how to approach the case – an interstate approach, that was advocated by the Slovenian and Serbian Government and had previously been adopted by the ECtHR in *Kovačić*, or a civil law approach, advocated by the Croatian and Bosnian Government, according to which the legal relationship between a depositor and the respective bank is the main premise upon which to determine the outcome of the case, without touching on broader succession issues. In his dissenting opinion to the Chamber's judgment in *Ališić* Judge Zupančič noted that "the atypical private law issue would in the interstate adversary backdrop have rightly developed into an expected, natural, and logical interstate succession issue. This would result in a far clearer perspective on the case." Nevertheless, the Court emphasised that "the Convention is intended to safeguard rights that are "practical and effective"[161] and was thus eager to find a practical solution for the applicants. The Court's decision in *Kovačić* in 2008, where the Court called upon the successor States to find a solution to the problem by mutual agreement within succession negotiationsproved to be too theoretical. By establishing the liability of the States where the seat of the head bank was located, the Court in fact found a practical solution for compensating depositors of outstanding OFCDs that were invested in Yugoslav banks before the dissolution of the former State.

On the other hand, Judge Nußberger noted in her partly dissenting opinion that this solution "is based on an over-simplification of the complex historical developments and leaves out some important aspects. While it might be tempting to find a clear-cut and "easy" solution, a more differentiated approach should have been adopted." For this reason, Nußberger suggested that Croatia and B&H should also have been found

161 *Ališić and others*, GC, cited above (fn 2) para 108.

liable for all these States failed to settle the matter for a long period of time under the succession negotiations.

Although the ECtHR in *Ališić* concentrated on solving the case before it and therefore delivered its judgment based on civil law relations between depositors and banks, for which the States where the head seat of the bank was located were held liable, it cannot be overlooked that the judgment affects the succession of the SFRY in general. Despite the civil law approach adopted by the majority of the Grand Chamber, the Court did apply general principles of international law in respect of succession, recognising that both the territoriality and equity principles are recognised principles of international succession law. The Court also acknowledged that "the equitable distribution of the debt at issue in the present case would require a global assessment of the property and debts of the former State and the size of the portions so far attributed to each of the successor States".[162] This question can understandably only be considered under the succession negotiations and the Court thus concluded that "that question is far beyond the scope of the present case and outside the Court's competence".[163] Nevertheless, the Court found that national schemes for repayment of the OFCDs, which were adopted outside succession negotiations, should have been such as to repay all the depositors and not just certain categories.[164] What particularly troubled the Court was that the applicants were made to wait too long and thus had to bear a disproportionate burden.[165] For this reason the Court ruled that Slovenia and Serbia should compensate the applicants and all others in the same situation. From the Court's point of view this is an equitable solution for the depositors, while it at the same time does not necessarily present an equitable distribution of SFRY's debt among the successor States as this would require a much more complex assessment. As found by Judge Ziemele in her concurring opinion, "given the limited scope of the present case, the Court does not (…) enter full speed into the question of equitable apportionment of debts as such."

The judgment thus affects the vertical relation between the depositors and the successor States, but not also the horizontal relations, at least not directly, between the successor States themselves that are regulated by the Succession Agreement. The execution of the *Ališić* judgment and the

162 *Ališić and others*, GC, cited above (fn 2) para 122.
163 *Ališić and others*, GC, cited above (fn 2) para 122.
164 *Ališić and others*, GC, cited above (fn 2) para 123.
165 *Ališić and others*, GC, cited above (fn 2) para 124.

succession negotiations that are foreseen under the Succession Agreement are two separate issues, as also found by Judge Nußberger in her partly dissenting opinion, where she concludes that "the majority of the Grand Chamber have failed to scrutinise the positive obligations of all the respondent States against whom the applicants' complaint was directed."

In this respect Judge Ziemele points out that the Grand Chamber judgment "does not reflect on the unjust enrichment principle, which (…) might also be relevant to the facts of the case". This point was further elaborated by Judge Nußberger, emphasising that "as it is undisputed that not all money "ended up" in Slovenia and Serbia (…), it is inadequate to request full repayment of the "old" foreign deposits by Slovenia and Serbia alone. In socialist times the associated banks in Slovenia and Serbia had transferred back some of the funds they had received to meet the liquidity needs of the basic banks (…). As dinar loans (initially interest-free) were granted by the NBY to domestic companies on the basis of the re-deposited foreign currency and thus benefitted the local economy, the rule of international law concerning local debts (…) is not "evidently" inapplicable, as deemed by the majority of the Grand Chamber". The latter namely held that the applicants' savings evidently did not belong in the category of local debts, although Nußberger found that it was not contested that re-depositing payments were made to the NBY in Belgrade. As already concluded by Jurgens in his report for the Parliamentary Assembly of the Council of Europe, Nußberger also found that "it is highly likely that most of the money was already lost in "Yugoslav times"." Additionally, as noted by Degan, in the course of the war there was no way of preventing Serbia from spending the monetary gold and hard currency reserves for military purposes and other successor States had no control or evidence of the fate of these assets.[166]

In contrast to its judgment in *Suljagić*, where the Court expressly referred to such findings of the Parliamentary Assembly Resolution, in *Ališić* it did not make a detailed analysis in this respect.[167] Judge Ress also noted in his concurring opinion in *Kovačić and others* that "the contracting states concerned are under a clear duty to solve this question urgently by way of agreement and if necessary by interstate settlement procedures", referring to the provisions of the Succession Agreement. "There is

166 VD Degan, 'Disagreements over the definition of state property in the process of state succession to the former Yugoslavia' in Mrak, cited above (fn 30) 34.

167 *Suljagić,* cited above (fn 18) para 51.

not only a duty to negotiate (*pactum de negotiando*) but also a *pactum de contrahendo*", Judge Ress additionally noted, concluding that "here, the problem cannot be solved unilaterally but only by agreement between the successor States (since) this case has features of an interstate procedure rather than of an individual claim."

In this light the Slovenian Act on the execution of the *Ališić* judgment provides in Article 23 that the obligations recognised on the basis of the ECtHR judgment shall be enforced under the Succession Agreement (Article 7, Annex c) with a view to achieving an equitable distribution of the NBY guarantees for OFCDs recognised as financial liabilities of the SFRY under the Succession Agreement (Article 2(3) (a) of Annex C). In line with the *Ališić* judgment, Slovenia is required to compensate, in addition to the foreign exchange depositors of foreign banks in its territory in the early 1990s, the depositors of LB's branches in Zagreb and Sarajevo, which, in the opinion of Slovenia, is not in conformity with the principle of equitable distribution of debts and even less so with the principle of territoriality, as recognised under the law of succession of States. This sharpens the complexity of the overall division of property between the successor States of the SFRY and for successful closure of this issue the cooperation of all of them shall be required, as provided under the Succession Agreement, which also provides the key for equitable allocation of assets and liabilities between them. Chances are, however, that no political will for this will exist in the future. After all, if the creditors' successor States were open to an interstate solution of the matter, they could all have pursued interstate proceedings against Slovenia before the ECtHR. But since such a case would most likely have been decided differently than in *Ališić and others,* taking broader circumstances of the issue than merely the situation of depositors into account, this never happened and the successor States preferred to only support their nationals in their individual complaints.

5.2 Ališić *Reversed:* LB v Croatia

These relevant circumstances, which would need to have been considered in depth had the ECtHR decided the matter in an interstate proceeding, refer not only to the issues of localised debt, redepositing of foreign currency from commercial banks to the NBY for its own purposes, and the probable spending of the remaining part by Serbia in the course of the war, but also, notably, to the conditions under which banks from successor States were (not) allowed to continue their activities on the markets of other successor States. Depositors of OFCDs cannot be held at

fault for these facts and perhaps this was the reason why the ECtHR in *Ališić and others* decided to overlook these issues.

In respect of LB, B&H intervened in the business activities of LB Sarajevo immediately after the dissolution of SFRY. In 1993 the B&H government authorised the transformation of LB's branch in Sarajevo into a new company – LB Sarajevo, to which all assets, rights and obligation of the former branch were transferred. This in effect meant the nationalisation of LB Sarajevo.[168] Accordingly, the newly established branch continued to administer the savings of its clients, which were eventually used in the process of privatisation of FBH. In one case, the domestic court ordered LB Sarajevo to repay those savings.[169] In November 2004 the Sarajevo Municipal Court decided that the new LB Sarajevo was not the successor of the old Sarajevo branch of the foreign LB based in Ljubljana and was therefore not liable for OFCDs of that branch. It additionally ruled that as a result, the 1993 entry of the new LB Sarajevo branch into the companies register stating otherwise, must retroactively be deleted.[170] LB brought several legal proceedings before the courts in B&H which lasted for years, but all of them were decided to its detriment.

As a result of the open OFCD issues, Croatian authorities have on the other hand, been hindering the business activities of LB on its territory since 1991. In this year, the governor of the Croatian National Bank (NBH) issued a notice declaring that LB, present on the territory of Croatia, may not have branches and disallowing its transformation into a separate branch of the bank as its legal successor. Other measures were also taken by NBH with the aim of (negatively) affecting the operations of LB Zagreb in relation to its savers, including blocking its account in 1996 and finally its closure in 2000, terminating LB Zagreb's business altogether. Against this background and due to the fact that LB was unable to recover its debts from Croatian companies, a number of problematic, lengthy, time-consuming and largely unsuccessful proceedings were held in Croatia. In April 2014, the Croatian Constitutional Court rejected three appeals of LB related to this issue.[171] The Court took the stance that due to the transfer of the rights and obligations of LB to NLB in 1994, the former does not have active *locus standi* for the recovery of claims towards Croatian

168 LB Sarajevo was *de facto* nationalised already at the end of 1991 – see Arhar, cited above (fn 9) 9.

169 *Višnjevac*, cited above (fn 104).

170 *Ališić and others*, GC, cited above (fn 2) para 113.

171 Ustavni sud Republike Hrvatske, U-III-64884/2009 of 3 April 2014.

companies. On the other hand, Croatian courts consistently recognised the passive legal standing of LB in cases where the question of LB's debts towards savers was concerned.

The political dimension of the unsuccessful court procedures for the recovery of debts by LB Zagreb in Croatia was expressly confirmed by the former vice president of the Croatian government, Linić, who admitted to influencing the courts' decisions in this regard.[172] The Slovenian government stands by the position, however, that if it were possible for LB Zagreb to repay the loans to entities on the territory of Croatia, LB could also settle its liabilities to foreign depositors, as was already done in a couple of cases in the past.[173] For this reason LB initiated legal proceedings against Croatia before the ECtHR in 2007[174] due to the non-enforcement of two writs of execution in its favour, arising from the debt of a Croatian sugar factory towards the Slovenian based LB. On 4 June 2015, the Court unanimously declared the application inadmissible. The Court reiterated its rule that Governmental bodies or public companies under the strict control of a State are not entitled to bring individual applications before the ECtHR. Referring to its findings in *Ališić,* the Court found that although LB was a separate legal entity, it did not have sufficient institutional and operational independence from the State and therefore had to be regarded as a governmental organisation. As such, the bank had no standing to lodge an individual application before the ECtHR. This was regardless of the fact that LB was not a governmental organisation of Croatia, the defending State in the present case. Croatian treatment of LB thus has characteristics of a *societas leonina*, a term coined by the Roman lawyers, that refers to an attempted partnership in which one party was to bear all the losses and have no share in the profits.[175] This was a void partnership under Roman law and is normally void also in contemporary legal orders – unless an imperfect system of legal remedies under international law may lead to legitimation of such situations.

In these circumstances the Government of Slovenia lodged an inter-State application against the Republic of Croatia before the ECtHR in September 2016, related to the claims of LB towards Croatian companies. Pursuant to Article 33 ECHR, the Republic of Slovenia informed

172 See Neobičajno priznanje bivšeg potprijedsjednika vlade, Linić: utjecao sam na sud, Slobodna Dalmacija, 3 November 2006, p. 9.

173 See ECtHR decision in *Kovačić,* cited above (fn 101).

174 *Ljubljanska banka d.d. v. Croatia* App. No. 29003/07 (ECtHR, 4 June 2015).

175 Dig. 17, 2, 29, 2; Poth.

the Court that the Republic of Croatia had violated the provisions of the Convention when the latter's judicial and executive authorities systematically undertook actions to unlawfully deny LB the right to property. This case presents the first inter-State case before the ECtHR between two EU Member States, which potentially raises the question of the concurrence of jurisdiction between the ECtHR and the CJEU (a topic much debated under the EU's accession to the ECHR negotiations).[176] Moreover, the application of Slovenia's government against Croatia is also of importance as it is an unusual case in the sense that Article 33 ECHR is being applied for the protection of interests of a legal, rather than a natural, person. The new inter-State procedure between Slovenia and Croatia is – similar to *Ališić* – the result of the impossibility of performing succession negotiations between the successor States. Considering that the case brings difficult issues arising from the dissolution of the SFRY to the ECtHR, as well as imposing a heavy burden on political relations in general,[177] it is difficult to assess whether the new court procedure will improve or worsen the relations between the two States.

5.3 *Implications of the* Ališić *Ruling for International Succession Law in General*

In addition to the implications for the Yugoslav succession process, the *Ališić* ruling also has important implications for international law in general. By establishing a direct legal obligation of States for liabilities of banks outside their respective territories, the ECtHR created a new obligation under international law, non-existant until now. As noted by Judge Ziemele in her concurring opinion, the judgment will "become one of the leading cases dealing with the specific context of State succession and the application of the European Convention on Human Rights in a particularly sensitive area: that of the sharing of responsibility for debts."

176 Although current EU Member States have in the past been involved in mutual disputes before the ECtHR, both contracting parties have never been EU Member States at the time of those proceedings (application by *Austria* v. *Italy was lodged in 1960* (App no 788/60); Denmark and Sweden filed an application against Greece in 1967 (App no 3321/67 and 3323/67); while two cases of Ireland v. UK date back to 1971 and 1972 (App nos 5310/71 and 5451/72)).

177 Keeping in mind also the contentious arbitration procedure for determining the maritime border, which lead to the Slovenian action against Croatia under Article 259 of the Treaty on the Functioning of the EU before the Court of Justice of the EU (case C-457/18, pending).

Since Slovenia and Serbia advocated for the application of the territoriality principle, judgments of the Chamber and the Grand Chamber, including the separate opinions of Judges, offer valuable considerations on the legal significance of this principle under international law. The Court disagreed that the territoriality principle should be applied to the applicants' savings and found that the "equitable proportion" principle is the governing principle in so far as State debts are concerned, particularly as it refused to apply the localised debt rule in the case at hand.[178] The Court recognised that, during succession negotiations, successor States could also agree on the territoriality principle, but in absence of such an agreement the Court gave preference to equitable division of debt. Judge Ziemele supported these findings by agreeing with the Court's standpoint that the principle of territoriality is only one relevant element out of many which need to be taken into account in determining the respective responsibilities of the States concerned. On the other hand, Judge Ress in his concurring opinion in *Kovačić and others*[179] noticed that "under the normal rules of state succession, territoriality is the first criterion to divide claims and to justify any entitlement, not so nationality".[180] Accordingly, Judge Ress found "good reasons to conclude that the Slovenian legislation is more in harmony with these normal succession rules than the Croatian legislation. Debts that cannot be apportioned in accordance with the territoriality principle should be apportioned equitably." This opinion was endorsed by Judge Zupančič in his dissenting opinion to the Chamber judgment in *Ališić*, where he held that in banking and similar succession situations, the territorial principle should be applied in order to reimburse debts owed in a particular country.[181] According to Zupančič, this mirrors the well-known economic consideration that money received from the depositors' deposits is invested in the very *territory* in which the bank had been functioning as a debtor vis-à-vis the bank's depositors, but especially as a creditor vis-à-vis numerous enterprises that the same bank had concurrently financed through its loans.[182] He thus concluded that the majority judgment of the Court was in violation of the territorial principle, although it may also be argued that the

178 *Ališić and others*, GC, cited above (fn 2) para 121.

179 *Kovačić and others*, cited above (fn 101).

180 Referring to (2001) 69 Yearbook of the Institute of International Law, Session of Vancouver 712-742, Resolution on 'State Succession in Matters of Property and Debts', in particular Article 11.

181 *Ališić and Others*, cited above (fn 2), dissenting opinion of Judge Zupančič.

182 Referring to Stahn, cited above (fn 43).

Court only refused to apply the territoriality principle in the context of its civil law approach to solving the unjust situation of depositors and that it does not affect the territoriality principle under general international law on succession.

Nevertheless, according to the Court, its conclusions were *limited to the circumstances* of the *Ališić and others* case. The Court did not imply that no State would ever be able to rehabilitate a failed bank without incurring direct responsibility under Article 1 of Protocol No. 1 for the bank's debt. Nor does that provision require that foreign branches of domestic banks always be included in domestic deposit-guarantee schemes. The Court considered the present case to be special as the branches in question were not foreign branches at the time when the applicants deposited their money and because it was different from standard cases of rehabilitation of insolvent private banks (the banks in question had always been either State- or socially-owned).[183] It thus remains to be seen how the judgment in *Ališić* will affect general rules on the rehabilitation of failed banks.

In this respect the ECtHR failed to follow the EFTA Court ruling in the *Icesave* case,[184] where the EFTA Surveillance Authority brought an action against Iceland because the latter did not ensure payment of the minimum amount of compensation to Landsbanki depositors in the Netherlands and the UK as it did to domestic depositors. The Authority claimed that Iceland should not have discriminated against foreign depositors who had savings in overseas branches. The EFTA Court, however, ruled that different methodology for reimbursement of depositors on domestic (by nationalisation of the bank and establishment of a Depositors Guarantee Fund) as opposed to foreign territory (insolvency proceedings and priority reimbursement of depositors) did not represent discrimination prohibited by the European Economic Area (EEA) Agreement.[185] The EFTA Court ruled that these situations were not comparable and they could in any event be justified by economic policy reasons and systemic financial crisis.[186] It also found no breach of Directive 94/19/EC on de-

183 *Ališić and others*, GC, cited above (fn 2) para 118.

184 *EFTA Surveillance Authority v Commission v. Iceland* (*Icesave*), Case E-16/11 (EFTA Court, 28 January 2013).

185 OJ 1993, L1. The EEA Agreement extends the internal market and several other important EU policies to EFTA countries - Iceland, Norway and Liechtenstein.

186 *Icesave*, cited above (fn 184) paras 216, 226, and 229.

posit guarantee schemes.[187] Notably, it held that the Directive did not oblige States and their authorities to ensure compensation if a deposit-guarantee scheme was unable to cope with its obligations in the event of a systemic crisis. The EFTA Court held that "EEA States enjoy a wide margin of discretion in making fundamental choices of economic policy in the specific event of a systemic crisis (… which) have to be taken into consideration as a possible ground for justification."[188] It pointed to the concept of moral hazard and concluded that in the field of financial services, individuals and companies must not be provided with automatic public insurance, which acts as an incentive to avoid bearing the full consequences of their actions.[189] Priority was thus given to the sovereign economic independence of a nation defined by its territorial limits and human and capital resources.[190] In contrast, the ECtHR held in *Ališić and others* that the EFTA Court judgment is of little relevance in the present case as it concerned the rehabilitation of a failed private bank in a particular legal framework applicable to Iceland. Moreover, the Dutch and British savers, unlike Yugoslav claimants of OFCDs, had already been repaid by the Dutch and United Kingdom authorities.[191]

6 Concluding Remarks: Who was the true "Yugoslav Madoff"?

The *Ališić case* intervenes into both the chaotic Yugoslav economic situation in the decade before its dissolution, as well as to the even more confusing situation in the territory after the collapse of the former State. The latter gave rise to an unfriendly political and legal environment for all entities involved – primarily for individuals, many of whom lost their lives and propery during the aggression and many more of them lost their employment which could have guaranteed for a life of dignity, but also for the successor States which had to stabilise their markets and bring succession processes to a close. These complex circumstances led to numerous injustices and violations of fundamental human rights, but the

187 Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes, O. J. L 135, 31 May 1994, p. 5-14.

188 *Icesave*, cited above (fn 184) para 227. See also Sigmarsson, case E-3/111 (EFTA Court, 14 December 2011).

189 Icesave, cited above (fn 184) para 167.

190 See M Elvira Méndez-Pinedo, 'The Icesave Saga: Iceland Wins the Battle before the EFTA Court' (2013) 1 MJIL Emerging Scholarship Project 101.

191 *Ališić and others*, GC, cited above (fn 184) para 118.

factual background they present makes it difficult to apply legal provisions that have been developed for normal, everyday life situations.

In this respect the ECtHR indeed often oversimplified reality, as found by Judge Nußberger in her partly dissenting opinion. The Court, for example, did not effectively distinguish between state- and socially-owned property.[192] Socialist self-management was not state property and in the absence of a market economy, there was consequently no commercial (normal) banking.[193] It was furthermore decisive for the Court that foreign branches of banks were registered as such in company registers, whereas it disregarded what this actually meant in practice, i.e. what autonomy the head offices had and what the role of the central Yugoslav Government and the NBY was in this respect. In any case, a number of deposits were made well before the Marković bank reform. On this basis the Court briefly concluded that the other successor States, apart from Slovenia and Serbia, are not responsible for the situation in which depositors have found themselves, without clarifying this conclusion in much detail.

Additionally, the Court emphasised the States' obligation to negotiate; however, it did not attribute any legal consequences to potential delay or rejection of negotiations. The Slovenian government criticised Croatia for having refused to resolve the issue before the IMF arbitration in 1999; for having refused to discuss it in the standing joint committee of the Council of Europe; for having agreed to continue BIS negotiations, but having defaulted on that offer after the closure of the EU accession negotiations in 2011; and, lastly, for making it impossible for LB's branch in Zagreb to engage in regular banking activities and thus generate additional assets from which depositors in Croatia could have been reimbursed. In light of this, Judge Zupančič concluded that "the villain in this story is not Slovenia, because Slovenia has tried at least five times to decently negotiate this succession problem with Croatia – but to no avail."[194] Nevertheless, the Court did not address this matter. Its final decision was based on the argument that depositors had been waiting too long to be reimbursed. If the States that were not willing to negotiate on this issue are not to blame, then who is? The Court's ruling may thus be perceived as a reward for the States that refused to negotiate. The Court found that the legitimate aim principle was respected by Slovenia and Serbia – i.e. to protect the liquidity of State funds in light of the difficult economic situa-

192 More on this see *Trifković*, cited above (fn 28).

193 Mirjam Škrk, Ališić proti Sloveniji, 'Uvodnik' (2014) Pravna praksa, 24 July 2014 3.

194 *Ališić and Others*, cited above (fn 2), dissenting opinion of Judge Zupančič.

tion and financial collapse the countries were going through.[195] This economic situation and financial collapse was surely no less significant than the one in Iceland after the collapse of Landsbanki in autumn 2008. The Court never therefore said that Slovenia was wrong to apply the territoriality principle in respect of bank guarantees in its constitutional documents. Had all the successor States adopted this principle, problems with OFCDs would never have arisen. Instead, the Court was critical towards the delay in solving these issues, which were recognised by the successor States in the Succession Agreement as succession issue that needed to be solved by them. Considering that certain successor States advocated a different standpoint before the ECtHR, one may ask whether the Succession Agreement was in fact concluded against their wills or with some other fault in *animus contrahendi.*

The Court noted that equitable distribution of debt among successor States is outside its competence, however, it nevertheless ruled on what equitable distribution of debt should be and that such distribution should not be based on the principle of territoriality. It seems as if the Court was unaware of its direct prejudice to succession negotiations, although it had all the necessary indicators that after its judgement any future "global assessment of the property and debts of the former State and the size of the portions so far attributed to each of the successor States"[196] was very unlikely to happen. In this situation, the Court should at least have delineated the effects of this judgment on the horizontal succession relationship between the successor States and encouraged them to find answers to the questions that are "far beyond the scope of the present case and outside the Court's competence".[197]

On the other hand, however, it is important that the ECtHR untangled the Gordian knot and laid the foundations for repayment of depositors. The latter are in fact the victims of the banking system of the SFRY, of the illusion created by the SFRY that high interest rates in foreign currency could be paid on foreign currency deposits, and of the difference of opinion, which still exists, as to which the government should fulfil the guarantees to depositors given by the former SFRY.[198] It cannot be denied, however, that depositors can be accused of moral hazard, taking

195 *Ališić and others*, GC, cited above (fn 2) para 107. Similar to the other cases concerning OFCDs – *Trajkovski,* cited above (fn 100), *Suljagić,* cited above (fn 18) and *Molnar Gabor*, cited above (fn 105).

196 *Ališić and others*, GC, cited above (fn 2) para 107.

197 *Ališić and others*, GC, cited above (fn 2) para 107.

198 Jurgens, cited above (fn 14) para 37.

high risks while expecting someone else to bear the burden of those risks. In contrast to the EFTA Court decision in *Icesave*, where it was found that public insurance in the field of financial services may not act as an incentive to avoid bearing the full consequences of one's actions, the ECtHR judgment in *Ališić* may be understood as if Slovenian or Serbian authorities alone made up this Ponzi scheme for which they should be fully liable. Conversely, Judge Zupančič emphasises that "the Communist state-run pyramid scheme of state-wide proportions (…) had been set up by the now defunct Yugoslav regime".[199] The creators of the devastating economic policy of the former State are thus the true "Yugoslav Madoffs" and not the individual commercial banks operating on the territory of the SFRY or any individual successor State. The creators of this economic policy, which led to record inflation rates, also brought harm to numerous depositors of Yugoslav domestic currency that lost their deposits and, in contrast to the depositors of foreign currency, never acquired any right of compensation.

199 *Ališić and Others*, cited above (fn 2), dissenting opinion of Judge Zupančič.