INTERNATIONAL CONFERENCE ON THE FORMER YUGOSLAVIA DOCUMENTATION ON THE ARBITRATION COMMISSION UNDER THE UN/EC (GENEVA) CONFERENCE: QUESTIONS SUBMITTED TO THE ARBITRATION COMMISSION AND STATEMENTS RELATING TO THEIR SUBMISSION*

[April 20-July 2, 1993]
+Cite as 32 I.L.M. 1579 (1993)+

I.L.M. Content Summary

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[The note on the composition and terms of reference of the Arbitration Commission (January 27, 1993), the note on the reconstitution of the Arbitration Commission (February 19, 1993) and its Rules of Procedure (April 26, 1993) appear at 32 I.L.M. 1572 (1993). Advisory Opinions Nos. 11-15, issued on July 16 and August 13, 1993, in response to the six questions, appear at 32 I.L.M. 1586 (1993).

[The ten opinions of the earlier Arbitration Commission, constituted in 1991 by the European Community, appear at 31 I.L.M. 1488 (1992).]

INTERNATIONAL CONFERENCE ON THE FORMER YUGOSLAVIA

Palais des Nations, 1211 Geneva 10

Geneva, 20 April 1993

ENGLISH TRANSLATION

Six Questions to be Submitted to the Arbitration Commission by the Co-Chairmen of the Steering Committee of the International Conference on the Former Yugoslavia

1) In the light of the inventory in the report by the Chairman of the Working Group on Economic Issues, what assets and liabilities should be divided between the successor States to the former Socialist Federal Republic of Yugoslavia during the succession process?

2) On what date(s) did succession of States occur for the various States that have emerged from the Socialist Federal Republic of Yugoslavia?

3a) What legal principles apply to the division of State property, archives and debts of the Socialist Federal Republic of Yugoslavia in connection with the succession of States when one or more of the parties concerned refuse(s) to cooperate?

b) In particular, what should happen to property
- not located on the territory of any of the States concerned, or
- situated on the territory of the States taking part in the negotiations?

4) Under the legal principles that apply, might any amounts owed by one or more parties in the form of war damages affect the distribution of State property, archives and debts in connection with the succession process?

5a) In view of the dissolution of the Socialist Federal Republic of Yugoslavia, is the National Bank of Yugoslavia entitled to take decisions affecting property, rights and interests that should be divided between the successor States to the Socialist Federal Republic of Yugoslavia in connection with the succession of States?

b) Have the central banks of the States emerging from the dissolution of the Socialist Federal Republic of Yugoslavia succeeded to the rights and obligations of the National Bank of Yugoslavia deriving from international agreements concluded by the latter, in particular the 1988 Financial Agreement with foreign commercial banks?

6a) On what conditions can States, within whose jurisdiction property formerly belonging to the Socialist Federal Republic of Yugoslavia is situated, oppose the free disposal of that property or take other protective measures?

b) On what conditions and under what circumstances would such States be required to take such steps?

Statement of 30 April 1993 by the Government of the Federal Republic of Yugoslavia

As stated by the delegation of the Federal Republic of Yugoslavia at the Brussels meeting of the Conference on Yugoslavia and at the London Conference on Yugoslavia, the Federal Republic of Yugoslavia does not recognize the jurisdiction of the Arbitration Commission, known as the Badinter Commission, in the assets and liabilities division procedure and is not agreed that the Commission issue advisory opinions on the principles on the basis of which succession of States would be effected between the Socialist Federal Republic of Yugoslavia, as the predecessor State, on the one hand, and the secessionist former Yugoslav republics, as successor States, on the other.

The Government of the Federal Republic of Yugoslavia also deems unacceptable that the question of principles relevant for the succession procedure be discussed before any body, prior to substantial discussion of these principles within the Succession Group of the Conference on Yugoslavia.

The Government of the Federal Republic of Yugoslavia wishes to recall that in the sense of international law the Arbitration Commission was not established or composed for arbitration purposes, while in its work within the Conference on Yugoslavia so far it has been seriously in breach of both the law of procedure and the implementation of material law.

The Federal Government reiterates the position of the Federal Republic of Yugoslavia presented at the meeting of the Conference on Yugoslavia in Brussels and at the London Conference that all disputes that may arise vis-à-vis the division of assets and liabilities should be referred by agreement either to the Permanent Court of Arbitration in The Hague or to an ad hoc arbitration court.

The Government of the Federal Republic of Yugoslavia considers arbitration proceedings in the settlement of the contentious issues that may arise in the work of the Conference on Yugoslavia as proceedings before a court of law in the sense of general international law and not as proceedings before the Arbitration Commission presided by Mr. Badinter.

We recall in its reply to the letter of Mr. Badinter, President of the Commission, of 3 June 1992, that it considers the opinions of the Commission doctrinary in the sense of article 38 (d) of the Statute of the International Court of Justice, which do not constitute a legal ground for any valid decision. The Federal Republic of Yugoslavia shall consider null and void and non-binding any opinion of the Commission adopted in the procedure to which it has not agreed.

Reactions of the members of the Arbitration Commission of the International Conference on the Former Yugoslavia to the statement made by the FRY Government on its competence

1. By a letter dated 11 May 1993, the Co-Chairmen of the International Conference on the Former Yugoslavia forwarded to the Chairman of the Arbitration Commission a copy of a letter from the deputy head of the delegation of the Federal Republic of Yugoslavia (FRY) to the Conference, dated 5 May 1993, to which was attached a statement by the FRY Government regarding the referral to the Arbitration Commission.

2. In this statement, the FRY authorities raise a number of objections to the referral to the Commission by means of a letter from the Co-Chairmen of the Conference dated 20 April 1993, to which was attached a paper containing six questions relating to State succession in the Former Yugoslavia.

3. Although the FRY authorities did not send this statement to the Arbitration Commission itself, the members of the Commission considered this an appropriate opportunity to set out the scope and limits of its competence.

4. The competence of the Arbitration Commission is defined by its terms of reference dated 27 January 1993. These stipulate that the Commission is competent to:

> "(a) Decide, with binding force for the parties concerned, any dispute submitted to it by the parties thereto upon authorization by the Co-Chairmen of the Steering Committee of the Conference;
>
> (b) Give its advice as to any legal question submitted to it by Co-Chairmen of the Steering Committee of the Conference."

It is clear that, by their letter of 20 April 1993, the Co-Chairmen of the Conference referred the matter to the Arbitration Commission on the basis of paragraph 3 (b) above.

5. This has major implications:

- firstly, as the very terms of this provision make clear, the competence of the Arbitration Commission as an advisory body stems not from the consent of the parties concerned but from the mere fact of referral to it by the Co-Chairmen of the Conference;
- secondly, the reply given by the Commission to a question put before it in this context "is only of an advisory character: as such, it has no binding force" (cf. ICJ, advisory opinion of 30 March 1950, Interpretation of Peace Treaties, ICJ Reports 1950, p. 71).

6. As a consequence, it is for the Co-Chairmen, and for them alone, to evaluate the desirability of a request for an opinion, and the States participating in the Conference are not qualified to prevent them from doing so. The opinion is given by the Arbitration Commission not to the States, but to the Co-Chairmen, in order to furnish them with information needed to take decisions. The reply to such a request constitutes the Commission's participation in the working of the Conference. In that regard it may be recognized that, as the FRY Government writes, such advisory opinions form part of the "subsidiary means for the determination of rules of law" referred to in article 38, paragraph 1 (d) of the Statute of the ICJ.

7. It also follows that, if the negotiations between the parties concerned, for which the opinions of the Commission are not binding but may serve as points of reference, do not reach a conclusion, it is open to them to refer the dispute either to the Arbitration Commission on the basis of paragraph 3 (a) above of its terms of reference, or to any other adjudicatory or arbitral body of their choice.

8. While it is not their intention to enter into an argument with the FRY authorities, the members of the Arbitration Commission cannot accept the passage in the statement which claims that the Commission "in its work within the Conference on Yugoslavia so far ... has been seriously in breach both [of] the law of procedure and the implementation of material law". The Commission has always acted in a completely impartial manner, strictly following the adversary method which guarantees equality between the parties concerned. The Commission wishes to recall that it was only because the FRY declined to present its viewpoint during consideration of the questions which gave rise to

opinions Nos. 8-10 that the Commission was obliged to respond to these questions without being able to take account of the FRY's position.

9. The members of the Arbitration Commission wish to point out that the present clarification in no way prejudges either the competence of the Commission in this matter if it is challenged on grounds which they deem justified, nor the replies it may be led to give on the substance of the questions posed by the Co-Chairmen of the Conference on 20 April 1993.

TEXT OF LETTER DATED 2 JULY 1993 FROM THE DEPUTY PRIME MINISTER AND MINISTER FOR FOREIGN AFFAIRS OF THE FRY ADDRESSED TO THE ICFY CO-CHAIRMEN

I wish, first of all, to express my satisfaction at our recent meeting in Geneva within the International Conference on the Former Yugoslavia and its successful outcome, to which you made a significant contribution.

According to the practice of an open and sincere exchange of views, I take this opportunity to bring to your attention the serious problem we are facing concerning the Working Group on Succession Issues, owing to the renewed activity of the so-called Badinter Commission.

In this connection, I wish to inform you about the decision of the Government of the Federal Republic of Yugoslavia to withdraw its representatives from and to discontinue, on a temporary basis, its participation in the Working Group on Succession Issues of the International Conference on the Former Yugoslavia pending discontinuation of the work of the so-called Badinter Commission for the reasons which we have indicated on several occasions.

The substantiated reasons underlying the decision of the Federal Republic of Yugoslavia not to accept the competence of the so-called Badinter Commission as a body for settlement of disputes through arbitration have been presented in the statement by the Government of the Federal Republic of Yugoslavia, in my letter addressed to you as well as in our direct talks. First of all, it is a fact that the Commission has not been established in compliance with international law. Furthermore, in its opinions Nos. 1 to 10, the Commission has essentially violated the legal norms of international law, in respect of both procedure as well as the implementation of material law. In practice the opinions of the Commission, as an advisory body of the International Conference on the Former Yugoslavia, on the basis of which the Yugoslav participants at the Conference were to adopt relevant decisions by consensus taking also into account the Commission's opinion, were taken as judgements and served as a basis for making concrete decisions on relevant issues concerning the Yugoslav crisis.

Our side has particularly underlined the fact that the Government of the Federal Republic of Yugoslavia considers unjustifiable and unacceptable resort

to any court mechanism, prior to substantiated and comprehensive discussion on the principles on the basis of which the property of the Federal Republic of Yugoslavia should be ceded to successor States.

I would like also to recall that the Government of the Federal Republic of Yugoslavia and its representatives have underlined on several occasions that outstanding and pending questions that may arise in the work of the International Conference on the Former Yugoslavia could be solved, following a substantiated and comprehensive discussion, within a court procedure in accordance with international law.

For all the above reasons, the Government of the Federal Republic of Yugoslavia considers the opinions of the so-called Badinter Commission and the decisions and acts of other subjects based thereupon, null and non-binding for the Federal Republic of Yugoslavia.

Confident that, this time again, you will show understanding, please accept, Excellencies, the assurances of my highest consideration.

Vladislav JOVANOVIC
Deputy Prime Minister and
Minister for Foreign Affairs of the
Federal Republic of Yugoslavia

INTERNATIONAL CONFERENCE ON THE FORMER YUGOSLAVIA DOCUMENTATION ON THE ARBITRATION COMMISSION UNDER THE UN/EC (GENEVA) CONFERENCE: ADVISORY OPINIONS NOS. 11-15 OF THE ARBITRATION COMMISSION*

[July 16-August 13, 1993]

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I.L.M. Content Summary

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[The note on the composition and terms of reference of the Arbitration Commission (January 27, 1993), the note on the reconstitution of the Arbitration Commission (February 19, 1993) and its Rules of Procedure (April 26, 1993) appear at 32 I.L.M. 1572 (1993).

[The ten opinions of the earlier Arbitration Commission, constituted in 1991 by the European Community, appear at 31 I.L.M. 1488 (1992).]

A. OPINION NO. 11

On 20 April 1993, the Co-Chairmen of the Steering Committee of the International Conference on the Former Yugoslavia referred six questions to the Chairman of the Arbitration Commission, seeking the Commission's opinion.

Question No. 2 was:

> "On what date(s) did State succession occur for the various States that have emerged from the Socialist Federal Republic of Yugoslavia?"

On 12 May 1993, the co-Chairmen of the Steering Committee of the International Conference transmitted to the Chairman of the Commission a declaration by the Government of the Federal Republic of Yugoslavia raising a number of objections to the reference to the Commission. The members of the Commission unanimously adopted a document reacting to the assertions made by the Federal Republic of Yugoslavia; this was addressed to the Co-Chairmen of the Steering Committee of the International Conference on 26 May 1993. None of the States parties to the proceedings has contested the Commission's right to answer questions referred to it.

The Commission has taken cognizance of the memorandum, observations and other materials communicated by the Republic of Bosnia and Herzegovina, the Republic of Croatia, the former Yugoslav Republic of Macedonia and the Republic of Slovenia, which have been passed on to all the successor States of the Socialist Federal Republic of Yugoslavia. The Federal Republic of Yugoslavia has submitted no memorandum or observations on the questions referred.

1. In accordance with the generally accepted definition contained in article 2 of the 1978 and 1983 Vienna Conventions on the Succession of States, "'date of the succession of States' means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates".

2. In the case in point there is a particular problem arising from the circumstances in which State succession occurred:

First, the predecessor State, the Socialist Federal Republic of Yugoslavia, has ceased to exist and, as the Commission found in its opinion No. 9, none of the successor States can claim to be the sole continuing State.

Second, the demise of the Socialist Federal Republic of Yugoslavia, unlike that of other recently dissolved States (USSR, Czechoslovakia), resulted not from an agreement between the parties but from a process of disintegration that lasted some time, starting, in the Commission's view, on 29 November 1991, when the Commission issued opinion No. 1, and ending on 4 July 1992, when it issued opinion No. 8.

3. However, while these circumstances need to be taken into account in determining the legal arrangements applying to State succession (see arts. 18, 31 and 41 of the Vienna Convention of 8 April 1983 on Succession of States in respect of State Property, Archives and Debts), they are immaterial in determining the date of State succession, which, as the Commission indicated in paragraph 1 above, is the date upon which each successor State replaced the predecessor State. Since, in the case in point, the successor States of the Socialist Federal Republic of Yugoslavia are new States, and since they became independent on different dates, the relevant date is, for each of them, that on which they became States.

As the Commission indicated in opinion No. 1, this is a question of fact that is to be assessed in each case in the light of the circumstances in which each of the States concerned was created.

4. The issue is the same as regards the Republics of Croatia and Slovenia, both of which declared their independence on 25 June 1991 and suspended their declarations of independence for three months on 7 July 1991, as provided by the Brioni declaration. In accordance with the declaration, the suspension ceased to have effect on 8 October 1991. Only then did these two Republics definitively break all links with the organs of the Socialist Federal Republic of Yugoslavia and become sovereign States in international law. For them, then, 8 October 1991 is the date of State succession.

5. Macedonia asserted its right to independence on 25 January 1991, but it did not declare its independence until after the referendum held on 8 September 1991, the consequences of which were drawn in the Constitution adopted on 17 November 1991, effective on the same day. That is the date on which the Republic of Macedonia became a sovereign State, having no institutional link with the Socialist Federal Republic of Yugoslavia. So 17 November 1991 is the date of State succession as regards Macedonia.

6. In opinion No. 4, issued on 11 January 1991, the Arbitration Commission came to the view that "the will of the peoples of Bosnia-Herzegovina to constitute the Socialist Republic of Bosnia-Herzegovina as a sovereign and independent State [could] not be held to have been fully established". Since then, in a referendum held on 29 February and 1 March 1992, the majority of the people of the Republic have expressed themselves in favour of a sovereign and independent Bosnia. The result of the referendum was officially promulgated on 6 March, and since that date, notwithstanding the dramatic events that have occurred in Bosnia and Herzegovina, the constitutional authorities of the Republic have acted like those of a sovereign State in order to maintain its territorial integrity and their full and exclusive powers. So 6 March 1992 must be considered the date on which Bosnia and Herzegovina succeeded the Socialist Federal Republic of Yugoslavia.

7. There are particular problems in determining the date of State succession in respect of the Federal Republic of Yugoslavia because that State considers itself to be the continuation of the Socialist Federal Republic of Yugoslavia rather than a successor State.

As has been affirmed by all international agencies which have had to state their views on this issue, and as the Commission itself has indicated more than once, this is not a position that can be upheld.

The Commission opines that 27 April 1992 must be considered the date of State succession in respect of the Federal Republic of Yugoslavia because that was the date on which Montenegro and Serbia adopted the Constitution of the new entry and because the relevant international agencies then began to refer to "the former Socialist Federal Republic of Yugoslavia", affirming that the process of dissolution of the Socialist Federal Republic of Yugoslavia had been completed.

8. The Arbitration Commission is aware of the practical problems that might ensue from determining more than one date of State succession because of the long-drawn-out process whereby the Socialist Federal Republic of Yugoslavia was dissolved. One implication is that different dates would apply for the transfer of State property, archives and debts, and of other rights and interests, to the several successor States of the Socialist Federal Republic of Yugoslavia.

9. The Commission would point out, however, that the principles and rules of international law in general relating to State succession are supplemental, and that States are at liberty to resolve the difficulties that might ensue from applying them by entering into agreements that would permit an equitable outcome.

10. The Arbitration Commission consequently takes the view:

- That the dates upon which the States stemming from the Socialist Federal Republic of Yugoslavia succeeded the Socialist Federal Republic of Yugoslavia are:

  . 8 October 1991 in the case of the Republic of Croatia and the Republic of Slovenia,

  . 17 November 1991 in the case of the former Yugoslav Republic of Macedonia,

  . 6 March 1992 in the case of the Republic of Bosnia and Herzegovina, and

  . 27 April 1992 in the case of the Federal Republic of Yugoslavia (Serbia-Montenegro).

- That, unless the States concerned agree otherwise, these are the dates upon which State property, assets and miscellaneous rights, archives, debts and various obligations of the former Socialist Federal Republic of Yugoslavia pass to the successor States.

Paris, 16 July 1993

B. OPINION NO. 12

On 20 April 1993, the Co-Chairmen of the Steering Committee of the International Conference on the Former Yugoslavia referred six questions to the Chairman of the Arbitration Commission, seeking the Commission's opinion.

Question No. 3 was:

"(a) What legal principles apply to the division of State property, archives and debts of the Socialist Federal Republic of Yugoslavia in connection with the succession of States when one or more of the parties concerned refuse(s) to cooperate?

"(b) In particular, what should happen to property

- not located on the territory of any of the States concerned; or

- situated on the territory of the States taking part in the negotiations?"

Question No. 6 was:

"(a) On what conditions can States, within whose jurisdiction property formerly belonging to the Socialist Federal Republic of Yugoslavia is situated, block the free disposal of that property or take other protective measures?

"(b) On what conditions and under what circumstances would such States be required to take such steps?"

The Commission considers that these two questions form an entity and should be answered in one and the same opinion.

On 12 May 1993, the Co-Chairmen of the Steering Committee of the International Conference transmitted to the Chairman of the Commission a declaration by the Government of the Federal Republic of Yugoslavia raising a number of objections to the reference to the Commission. The members of the Commission unanimously adopted a document reacting to the assertions made by the Federal Republic of Yugoslavia; this was addressed to the Co-Chairmen of the Steering Committee of the International Conference on 26 May 1993. None of the States parties to the proceedings has contested the Commission's right to answer questions referred to it.

The Commission has taken cognizance of the memorandum, observations and other materials communicated by the Republic of Bosnia and Herzegovina, the Republic of Croatia, the former Yugoslav Republic of Macedonia and the Republic of Slovenia, which have been passed on to all the successor States of the Socialist Federal Republic of Yugoslavia. The Federal Republic of Yugoslavia has submitted no memorandum or observations on the questions referred.

1. In its opinion No. 9, the Arbitration Commission recalled the few well-established principles of international law applicable to State succession. The fundamental rule is that States must achieve an equitable result by negotiation and agreement. The principle is applicable to the distribution of the State property, archives and debts of the Socialist Federal Republic of Yugoslavia.

2. If one or more of the parties concerned refused to cooperate, it would be in breach of that fundamental obligation and would be liable internationally, with all the legal consequences this entails, notably the possibility for States sustaining loss to take non-forcible countermeasures, in accordance with international law.

3. It follows from the principle formulated above that the other States concerned must consult with each other and achieve, by agreement between them, a comprehensive equitable result reserving the rights of the State or States refusing to cooperate.

Such an agreement is <u>res inter alios acta</u> in relation to third States, be they States refusing to cooperate or other States. In accordance with the established principle of international law enshrined in article 34 of the Vienna Convention on the Law of Treaties, whereby "a treaty does not create either obligations or rights for a third State without its consent", third States in whose territory property covered by State succession is situated are not required to take action in pursuance of such agreements.

However, such third States may, in the exercise of their sovereignty, give effect to them if they satisfy the conditions set out in paragraph 1 above.

4. Even in the absence of such agreements, third States may take such interim measures of protection as are needed to safeguard the interests of the successor States by virtue of the principles applicable to State succession.

5. Third States would be required so to do if an international agency with powers in the matter took decisions that were binding on States within whose jurisdiction property having belonged to the former Socialist Federal Republic of Yugoslavia was situated.

6. The Arbitration Commission consequently takes the view that:

- Refusal by one or more successor States to cooperate in no way alters the principles applicable to State succession as set out in opinion No. 9;

- Other States concerned may conclude one or more agreements conforming to those principles in order to secure the equitable distribution of the State property, archives and debts of the Socialist Federal Republic of Yugoslavia;

- Such agreements would not be binding on States which were not party to them, nor on other States in whose territory property having belonged to the Socialist Federal Republic of Yugoslavia was situated;

- However, this answer is without prejudice to the right of successor States sustaining loss by virtue of the refusal of one or more of the parties concerned to cooperate, to take countermeasures in accordance with international law, to the right of third States to take the necessary safeguard measures to protect the successor States and to such obligations as might be incumbent on third States to give effect to decisions taken by an international agency having powers in the matter.

Paris, 16 July 1993

C. OPINION NO. 13

On 20 April 1993, the Co-Chairmen of the Steering Committee of the International Conference on the Former Yugoslavia referred six questions to the Chairman of the Arbitration Commission, seeking the Commission's opinion.

Question No. 4 was:

"Under the legal principles that apply, might any amounts owed by one or more parties in the form of war damages affect the distribution of State property, archives and debts in connection with the succession process?"

On 12 May 1993, the Co-Chairmen of the Steering Committee of the International Conference transmitted to the Chairman of the Commission a declaration by the Government of the Federal Republic of Yugoslavia raising a number of objections to the reference to the Commission. The members of the Commission unanimously adopted a document reacting to the assertions made by the Federal Republic of Yugoslavia; this was addressed to the Co-Chairmen of the International Conference on 26 May 1993. None of the States parties to the proceedings has contested the Commission's right to answer questions referred to it.

The Commission has taken cognizance of the memorandum, observations and other materials communicated by the Republic of Bosnia and Herzegovina, the Republic of Croatia, the former Yugoslav Republic of Macedonia and the Republic of Slovenia, which have been passed on to all the successor States of the Socialist Federal Republic of Yugoslavia. The Federal Republic of Yugoslavia has submitted no memorandum or observations on the questions referred.

1. In opinion No. 9 the Arbitration Commission appreciates that there are few well-established principles of international law that apply to State succession. Application of these principles is largely to be determined case by case, depending on the circumstances proper to each form of succession, although the 1978 and 1983 Vienna Conventions do offer some guidance.

2. The Commission would point out in particular that articles 18, 31 and 41 of the Convention of 8 April 1983 are relevant where State succession occurs as a result of the dissolution of a pre-existing State. While equity has some part to play in the division of State property, archives and debts between successor States, these articles do not require that each category of assets or liabilities be divided in equitable proportions but only that the overall outcome be an equitable division.

3. However, this equitable outcome is to be obtained by reference to the law of State succession. The rules applicable to State succession, on the one hand, and the rules of State responsibility, on which the question of war damages depends, on the other, fall within two distinct areas of international law.

4. The equitable division of the assets and liabilities of the former Socialist Federal Republic of Yugoslavia between the successor States must therefore be effected without the question of war damages being allowed to interfere in the matter of State succession, in the absence of an agreement to the contrary between some or all of the States concerned or of a decision imposed upon them by an international body.

5. The Arbitration Commission would, however, underline the fact that its reply to the question referred to it is in no way prejudicial to the respective responsibilities of the parties concerned in international law. The possibility cannot be excluded in particular of setting off assets and liabilities to be transferred under the rules of State succession on the one hand against war damages on the other.

6. Subject to the observations made above, the Arbitration Commission consequently takes the view that amounts that might be owing by one or more parties in respect of war damages can have no direct impact on the division of State property, archives or debts for purposes of State succession.

Paris, 16 July 1993

INTERNATIONAL CONFERENCE ON THE FORMER YUGOSLAVIA

ARBITRATION COMMISSION

OPINION N° 14

On 20 April 1993 the Co-Chairmen of the Steering Committee of the Conference on Yugoslavia referred six questions to the Chairman of the Arbitration Commission, seeking the Commission's opinion.

Question 1 was:

"In the light of the inventory in the report by the Chairman of the Working Group on Economic Issues, what assets and liabilities should be divided between the successor States to the former Socialist Federal Republic of Yugoslavia in connection with the succession process?"

On 12 May 1993 the Co-Chairmen of the Steering Committee of the Conference transmitted to the Chairman of the Commission a declaration by the Government of the Federal Republic of Yugoslavia raising a number of objections to the reference to the Commission. The members of the Commission unanimously adopted a document reacting to the assertions made by the FRY; this was addressed to the Co-Chairmen of the Steering Committee of the Conference on 26 May 1993. None of the States party to the proceedings has contested the Commission's right to answer questions referred to it.

The Commission has taken cognizance of the memorandum, observations and other materials communicated by the Republic of Bosnia-Hercegovina, the Republic of Croatia, the Former Yugoslav Republic of Macedonia and the Republic of Slovenia, which have been passed on to all the successor States of the SFRY. The Federal Republic of Yugoslavia has submitted no memorandum or observations on the questions referred.

1. The Arbitration Commission notes that the Draft Single Inventory of the Assets and Liabilities of the SFRY as at 31 December 1990 drawn up by the Working Group of the International Conference on the Former Yugoslavia on 26 February 1993 divides the assets and liabilities into two categories -- agreed items and non-agreed items.

As the Commission recalled in Opinion N° 9, the first principle applicable to state succession is that the successor States should consult with each other and agree a settlement of all questions relating to the succession.

Assets and liabilities listed in the Inventory of 26 February 1993 upon which the successor States have reached agreement should accordingly be divided between them.

2. As regards non-agreed items, the Arbitration Commission considers that it does not have sufficient information on which to base a decision as to each asset and liability listed in the Inventory. Moreover, it considers that these are not legal issues which it could profitably seek to resolve as part of its consultative remit and that it should confine itself to determining the general principles to be applied.

3. The Commission would nevertheless draw attention to the well-established rule of state succession law that immovable property situated on the territory of a successor State passes exclusively to that State. Subject to possible compensation if such property is divided very unequally between the successor States to the SFRY, the principle of the locus in quo implies that there is no need to determine the previous owner of the property: public property passes to the successor State on whose territory it is situated. The origin or initial financing of the property and any loans or contributions made in respect of it have no bearing on the matter.

4. As regards other state property, debts and archives, a commonly agreed principle to be found in several provisions of the Vienna Convention of 8 April 1983 on the Succession of States in Respect of State Property, Archives and Debts requires that they be divided between the successor States to the SFRY if, at the date of succession, they belonged to the SFRY, and the question of the origin and initial financing of the property, debts and archives, or of any loans or contributions made in respect of them, is irrelevant.

5. To determine whether the property, debts and archives belonged to the SFRY, reference should be had to the domestic law of the SFRY in operation at the date of succession -- notably to the 1974 Constitution.

There are, however, two particular problems arising from the federal structure of the Yugoslav State and from the concept of "social ownership" -- a concept which, while it does exist in other countries, was particularly highly developed in the SFRY.

6. On the first point, there is no doubt that the 1974 Constitution transferred to the constituent republics ownership of many items of property which in consequence cannot be held to have belonged to the SFRY, whatever their origin or initial financing.

7. As for "social ownership", it was held for the most part by "associated labour organizations" -- bodies with their own legal personality, operating in a single republic and coming within its exclusive jurisdiction. Their property, debts and archives are not to be divided for purposes of state succession: each successor State exercises its sovereign powers in respect of them.

If and to the extent that other organizations operated "social ownership" either at federal level or in two or more republics, their property, debts and archives should be divided between the successor States in question if they exercised public prerogatives on behalf of the SFRY or of individual

republics. On the other hand, organizations operating at federal level or in two or more republics but not exercising such prerogatives should be considered private-sector enterprises to which state succession does not apply.

8. The answer to the question referred is without prejudice to whatever compensation might be necessary to achieve an equitable overall outcome.

9. Should the application of these principles or the determination of the ownership of an item of property at the date of state succession give rise to problems, it would be for the States concerned to resort to arbitration or some other mode of peaceful settlement of their disputes, but it does not behove the Arbitration Commission in the exercise of its consultative function to detail what rules would apply to a particular contentious issue between States emerging from the dissolution of the SFRY.

10. The Arbitration Commission consequently takes the view that the assets and liabilities to be divided between the successor States to the SFRY for purposes of state succession are (i) those which the successor States are agreed in regarding as being such and (ii) the state property, debts and archives which at the date of state succession belonged to the SFRY in accordance with the law in operation there, excluding property belonging to individual republics or to "associated labour organizations" depending on them.

Paris, 13 August 1993

ARBITRATION COMMISSION

OPINION N° 15

On 20 April 1993 the Co-Chairmen of the Steering Committee of the Conference on Yugoslavia referred six questions to the Chairman of the Arbitration Commission, seeking the Commission's opinion.

Question 5 was:

"(a) In view of the dissolution of the Socialist Federal Republic of Yugoslavia, is the National Bank of Yugoslavia entitled to take decisions affecting property, rights and interests that should be divided between the successor States to the Socialist Federal Republic of Yugoslavia in connection with state succession?

(b) Have the central banks of the States emerging from the dissolution of the Socialist Federal Republic of Yugoslavia succeeded to the rights and obligations of the National Bank of Yugoslavia deriving from international agreements concluded by the latter, in particular the 1988 financial agreement with foreign commercial banks?"

On 12 May 1993 the Co-Chairmen of the Steering Committee of the Conference transmitted to the Chairman of the Commission a declaration by the Government of the Federal Republic of Yugoslavia raising a number of objections to the reference to the Commission. The members of the Commission unanimously adopted a document reacting to the assertions made by the FRY; this was addressed to the Co-Chairmen of the Steering Committee of the Conference on 26 May 1993. None of the States party to the proceedings has contested the Commission's right to answer questions referred to it.

The Commission has taken cognizance of the memorandum, observations and other materials communicated by the Republic of Bosnia-Hercegovina, the Republic of Croatia, the Former Yugoslav Republic of Macedonia and the Republic of Slovenia, which have been passed on to all the successor States of the SFRY. The Federal Republic of Yugoslavia has submitted no memorandum or observations on the questions referred.

While they are linked, questions 5(a) and 5(b) are distinct enough to be answered separately.

I. Question 5(a)

1. Although municipal laws are merely facts in international law (Certain German Interests in Polish Upper Silesia, 1926 PCIJ, Ser. A, N° 7, 12), account must nevertheless be taken of the structure and responsibilities of the NBY as set out in the SFRY Constitution of 21 February 1974 and in the NBY Statute of November 1989.

As the bank of issue of the SFRY, the NBY participated in the exercise of the prerogatives of sovereignty. Moreover, as a composite of banking institutions - central, republican and provincial - it was responsible for carrying out common currency issue, credit and foreign exchange policy, and it had close institutional relations with Parliament.

The NBY, then, partook of the state power of the SFRY, whose dissolution led simultaneously to the disintegration of the collective structure of the NBY.

2. None of the organs of the NBY, therefore, can take legitimate decisions in respect of property, rights and interests that should be divided between the successor States of the SFRY.

No decision in such matters taken by the Governor of the NBY on his own authority would have any legal validity once the former collective organization has ceased to exist.

3. Only if, outside the preexisting institutional framework, collaboration between the central banks of the States emerging from the dissolution of the SFRY had continued could the NBY be considered to be a coordinating agency acting on their behalf for purposes of jurisdictio inter volentes to effect - rather than obstruct - the division of the property, rights and interests of the former SFRY.

4. As this is not the case, the Arbitration Commission takes the view that the NBY is not entitled to take decisions affecting property, rights and interests to be divided between the successor States in accordance with the principles of state succession.

II. Question 5(b)

5. Given the answer to question 5(a), decisions taken by the NBY as an organ of the SFRY committed that State. The rights and obligations deriving from those decisions consequently pass to the successor States and must be divided between them in accordance with the principles of international law rehearsed by the Commission in Opinion N° 9. This does not apply to ordinary commitments entered into by the NBY acting as a bank with its own legal personality.

6. This distinction is applicable to rights and obligations of the NBY deriving from international agreements it has entered into. The answer to the first part of question 5(b) therefore depends in each case upon the nature of the agreement and upon the NBY's commitments.

7. However, the Arbitration Commission would underline the fact that the rights and obligations of the NBY, as an organ of the SFRY, which are therefore subject to state succession (supra para. 5), do not pass automatically to the central banks of the States emerging from the dissolution of the SFRY: it is for each of the successor States to determine, by virtue of its sovereign constitutional powers, how these rights are to be exercised and these obligations discharged - rights and obligations which they may assume either direct or through their central banks.

8. As regards the financial agreement of 20 September 1988 between the NBY and Manufacturers Hanover Limited, acting for the international creditors, the Commission would point out that the NBY acted together with other Yugoslav banking institutions presenting themselves expressly as legal persons accepting on their own behalf the obligations deriving from the agreement (notably sections 1.01 and 10.01) and that the parties to the agreement made the discharge of their obligations subject to the law of a third State (section 14.12) and, in the event of a dispute, to the jurisdiction of various ordinary Yugoslav or foreign courts (section 14.08).

In the event of any dispute over the interpretation or application of the agreement, it is therefore for the parties to refer it to one of the courts that have jurisdiction under the agreement itself.

9. The Commission notes, however, that the successor States to the SFRY have succeeded it in so far as it had assumed the obligations of guarantor under the agreement of 20 September 1988.

Should the application of this principle give rise to problems, it would be for the States concerned to resort to arbitration or some other mode of peaceful settlement of their disputes.

10. The Arbitration Commission consequently takes the view:

(i) that problems arising from the rights and obligations of the NBY deriving from international agreements concluded by it are to be resolved by reference to the terms of the agreements and, in case of dispute, are to be referred to the appropriate courts; and

(ii) that this holds good in particular for rights and obligations deriving from the financial agreement of 1988 entered into by the NBY and other Yugoslav banking institutions with foreign commercial banks.

Paris, 13 August 1993