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# The Treaty Obligations of the Successor States of the Former Soviet Union, Yugoslavia, and Czechoslovakia: Do They Continue in Force?

PAUL R. WILLIAMS\*

## I. INTRODUCTION

The United States consistently asserts that the successor states emerging from the dissolution of the former Soviet Union, Yugoslavia, and Czechoslovakia are obligated to fulfill the treaty obligations of their predecessor states. The United States bases this duty on the international law of state succession with respect to treaties and on political commitments made during the process of establishing diplomatic relations.

The international law of state succession with respect to treaties, however, indicates that successor states are frequently entitled to a *de novo* review of the treaty commitments of the predecessor state, and they are not immediately obligated to assume all the treaties of the predecessor state. Similarly, the political assurances received from the individual successor states are incomplete, unilateral, and unlikely to be considered binding under international law. Finally, the Department of State's own compilation of *Treaties in Force* indicates that even the State Department might not consider all successor states bound by treaty obligations of the predecessor state. For instance, there are no listings of treaties in force with the states of Bosnia-Herzegovina, Macedonia, and Serbia/Montenegro.

The break-up of a state can generally be characterized as a continuation, separation, or a dissolution.<sup>1</sup> A continuation occurs when one or more sub-state entities breaks away from the predecessor state and forms an independent state.<sup>2</sup> The remainder of the predecessor state is referred to as the continuing state (or continuity of the predecessor state). In general, this state retains the rights and obligations of the

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1. See generally DANIEL P. O'CONNELL, *THE LAW OF STATE SUCCESSION* (1956); ARNOLD D. MCNAIR, *THE LAW OF TREATIES* (1961); UKON UDOKANG, *SUCCESSION OF NEW STATES TO INTERNATIONAL TREATIES* (1972); JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* (1979); P.K. MENON, *THE SUCCESSION OF STATES IN RESPECT TO TREATIES, STATE PROPERTY, ARCHIVES AND DEBTS* (1991).

2. See CRAWFORD, *supra* note 1, at 400.

predecessor state.<sup>3</sup> The break-away states are referred to as successor states.

Separation refers to the break-up of independent states that previously joined together voluntarily to form a Union of states. In a separation, all the states are considered successor states, and all resume their respective pre-Union state personalities, rights, and obligations. In addition, each state may assume some of the rights and obligations accrued during the life of the Union.

In a dissolution, the predecessor state dissolves into a number of independent states, and none of these states is considered a continuing state. All of the emerging states are successor states and are treated as equal heirs to the rights and obligations of the predecessor state.

Whether successor states inherit the rights and obligations of their predecessors is a matter of long-standing debate. Under the continuity theory, "any treaty that was in force for the entire territory of the predecessor state is presumed to continue in force for each separating state."<sup>4</sup> On the other hand, the "clean slate" theory, which is typically applied to newly independent former colonies, holds that new states "wipe their individual slates clean and choose whether or not to join treaties" brought into force by their predecessor states.<sup>5</sup>

This article will examine whether the bilateral treaties of the successor states of the former Soviet Union, Yugoslavia, and Czechoslovakia continue in force with the United States. First, the article will review the break-up of the former Soviet Union, Yugoslavia, and Czechoslovakia. It will then further detail the international law of treaty succession and examine the position of the United States concerning the continuation of treaties with these successor states.

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3. The case of continuation is most frequently associated with the independence of colonies, where the colonial power maintains its status as the continuing state, and the ex-colony is granted status as a newly independent state. Newly independent states are generally granted a clean slate with regard to the rights and obligations of the colonizing state. See, e.g., Vienna Convention on State Succession in Respect to Treaties, contained in the Report of the International Law Commission to the General Assembly on the Work of its 20th Session, U.N. GAOR, 29th Sess., Supp. No. 10, at 4, U.N. Doc. A/9610/Rev.1 (1974), art. 2(d), at 1490 [hereinafter Vienna Convention].

4. George Bunn & John B. Rhineland, *Who Inherited the Former Soviet Union's Obligations under Arms Control Treaties with the United States?*, Memorandum for the United States Senate Committee on Foreign Relations (Mar. 10, 1992), at 4-5. See also UDOKANG, *supra* note 1, at 122-24.

5. Bunn & Rhineland, *supra* note 4, at 5. See also DANIEL P. O'CONNELL, STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW 14-17 (1967).

## II. THE BREAK-UP OF THE FORMER SOVIET UNION, YUGOSLAVIA, AND CZECHOSLOVAKIA

### A. *The Soviet Union*

The definitive stages of the break-up of the former Soviet Union began with the failed coup by hard-line Communists in August 1991. The failed coup sparked declarations of independence from all of the republics of the former Soviet Union except Russia and Kazakhstan.<sup>6</sup> In the midst of these declarations of independence, the Soviet Government formally recognized the independence of the Baltic States of Estonia, Latvia, and Lithuania on September 6, 1991.<sup>7</sup>

The Soviet Government recognized the independence of the Baltic States reluctantly, however, and it attempted to keep the other twelve republics together in a Union of Sovereign States with both the Union and the individual republics maintaining international personalities. A Ukrainian referendum affirming, by 90% of the vote, its declaration of independence doomed this Union Treaty at the outset.

On December 8, 1991, the Republics of Ukraine, Belarus, and Russia formally declared that the Soviet Union had disintegrated and announced the formation of the Commonwealth of Independent States. By December 23rd, all of the republics except Georgia had agreed to membership in the Commonwealth.<sup>8</sup> On December 25, 1991, the United States formally recognized the independent states of Russia, Ukraine, Armenia, Kazakhstan, Belarus, Kyrgyzstan, Moldova, Turkmenistan, Azerbaijan, Tajikistan, Georgia, and Uzbekistan. With the recognition of these states, the United States considered the former Soviet Union to have dissolved.<sup>9</sup>

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6. The Baltic States and Georgia declared independence on April 9, 1991, before the failed coup attempt. Francis X. Clines, *Secession Decried by Soviet Georgia*, N.Y. TIMES, Apr. 10, 1991.

The remaining republics declared their independence on the following dates: Ukraine on August 24, 1991; Belarus on August 25, 1991; Moldova on August 27, 1991; Azerbaijan on August 30, 1991; Uzbekistan on August 31, 1991; Kyrgyzstan on August 31, 1991; Tajikistan on September 9, 1991; Armenia on September 23, 1991; and Turkmenistan on October 27, 1991. See Bill Keller, *Soviet Turmoil: Soviets Prepare to Design a New System*, N.Y. TIMES, Sept. 1, 1991, at 1; Serge Schemann, *Soviet Turmoil: The Questions Gather Like Falling Leaves And Answers Are as Scarce as Essentials*, N.Y. TIMES, Sept. 10, 1991, at A1; Bill Keller, *Armenia Yielding Claim on Enclave*, N.Y. TIMES, Sept. 23, 1991, at A1 (Armenia); and *Independence of Turkmenia Declared After a Referendum*, N.Y. TIMES, Oct. 28, 1991, at A5.

7. Fred Hiatt, *Soviets Recognize Baltic Independence in First Meeting of New State Council*, WASH. POST, Sept. 7, 1991, at A1.

8. Declaration on the Creation of a Commonwealth of Independent States, done in Alma-Ata on December 21, 1991, in COMMONWEALTH OF INDEPENDENT STATES DOCUMENTS 5 (Foreign Broadcast Information Service, May 8, 1992) [hereinafter *Alma Ata Accords*].

9. *We Stand . . . Before a New World of Hope and Possibilities for Our Children*, WASH. POST, Dec. 26, 1991, at A35 (text of President George Bush's Christmas

## B. *Yugoslavia*

The Federal People's Republic of Yugoslavia was created on January 31, 1946, following the conclusion of World War II. The Yugoslav Federation consisted of the republics of Bosnia-Herzegovina, Croatia, Macedonia, Montenegro, Serbia, and Slovenia. In 1974, the Yugoslav Federation adopted a new Constitution and reconstituted itself as the Socialist Federal Republic of Yugoslavia (SFRY or Yugoslavia).

On December 23, 1990, the Republic of Slovenia conducted a referendum seeking to transform Yugoslavia into a confederation of the Republics of Yugoslavia. In that referendum, 88.4% of the population voted in favor of declaring Slovenia a sovereign and independent state.<sup>10</sup> In February 1991, Croatia joined with Slovenia to issue a joint statement invalidating Yugoslavian laws on their territories and demanding the formation of a Confederation of Republics. Yugoslavia resisted these attempts to transform the relationship of the Yugoslav republics. Finding no satisfaction from Yugoslavia, Slovenia and Croatia issued proclamations of independence on June 25, 1991.<sup>11</sup> By December of 1991, Slovenia and Croatia had introduced their own currencies and had adopted new constitutions.<sup>12</sup> The European Community recognized Slovenia and Croatia as independent states on January 15, 1992,<sup>13</sup> and the United States recognized these states on April 7, 1992.<sup>14</sup> The United Nations admitted Slovenia and Croatia as new members on May 22, 1992.<sup>15</sup>

On February 29 and March 1, 1992, the Republic of Bosnia-Herzegovina conducted a referendum in which 63% of the electorate voted to pursue independence from Yugoslavia.<sup>16</sup> The European Com-

Eve Address) [hereinafter Christmas Eve Address].

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

11. Country Reports on Human Rights Practices for 1992, Slovenia, Report submitted to the Committee on Foreign Relations U.S. Senate and the Committee on Foreign Affairs U.S. House of Representatives by the Department of State 907 (Feb. 1993); Country Reports on Human Rights Practices for 1992, Croatia, Report submitted to the Committee on Foreign Relations U.S. Senate and the Committee on Foreign Affairs U.S. House of Representatives by the Department of State 740 (Feb. 1993).

12. Arbitration Commission Opinion No. 7, *supra* note 11, at 1512; Conference on Yugoslavia Arbitration Committee Opinion No 5, On Recognition of Croatia by the EC and its Member States, 31 I.L.M. 1503, 1504 (1992).

13. KEESING'S CONTEMPORARY ARCHIVES, 38 RECORD OF WORLD EVENTS 38703 (Jan. 1992) [hereinafter KEESING'S].

14. Statement on United States Recognition of the Former Yugoslav Republics, PUB. PAPERS 553 (Apr. 7, 1992).

15. KEESING'S, *supra* note 13, at 39033 (July 1992).

16. Country Reports on Human Rights Practices for 1992, Bosnia-Herzegovina, Report submitted to the Committee on Foreign Relations U.S. Senate and the Com-

munity<sup>17</sup> and the United States<sup>18</sup> recognized Bosnia-Herzegovina on April 7, 1992, and the United Nations admitted Bosnia-Herzegovina as a new member on May 22, 1992.<sup>19</sup>

On September 8, 1991, the Republic of Macedonia conducted a referendum on independence<sup>20</sup> and, based on this referendum, adopted a new constitution and declared independence in November 1991.<sup>21</sup> Macedonia attained United Nations membership on April 8, 1993<sup>22</sup> and is recognized by a number of nations, including Russia, Bulgaria, Turkey, Albania,<sup>23</sup> Slovenia, Croatia, Bosnia-Herzegovina,<sup>24</sup> ten members of the European Union, and the United States.<sup>25</sup>

The remaining Yugoslav Republics, Serbia and Montenegro, declared the formation of a joint state named the Federal Republic of Yugoslav (Serbia/Montenegro) on April 27, 1992.<sup>26</sup> This joint state is not recognized by the European Union or the United States.

Serbia/Montenegro claims that the break-up of Yugoslavia follows the model of continuation and that Serbia/Montenegro is the continuity of the former Yugoslavia, entitled to all of the rights and obligations of Yugoslavia.<sup>27</sup> Slovenia, Croatia, and Bosnia-Herzegovina explicitly

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mittee on Foreign Affairs U.S. House of Representatives by the Department of State 719 (Feb. 1993).

17. KEESING'S, *supra* note 13, at 38848 (Jan. 1992).

18. Statement on United States Recognition of the Former Yugoslav Republics, *supra* note 14, at 53.

19. KEESING'S, *supra* note 13, at 39033 (July 1992).

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

21. Country Reports on Human Rights Practices for 1992, Macedonia, Report submitted to the Committee on Foreign Relations U.S. Senate and the Committee on Foreign Affairs U.S. House of Representatives by the Department of State 839 (Feb. 1993) [hereinafter Macedonia Human Rights Report].

22. For United Nations purposes, Macedonia is required to use the name The Former Yugoslav Republic of Macedonia until the controversy between Macedonia and Greece over the name of the territory is resolved. *See infra* note 25.

23. KEESING'S, *supra* note 13, at 390036 (Aug. 1992).

24. KEESING'S, *supra* note 13, at 38850 (Apr. 1992).

25. Originally, the members states of the European Union had decided that they would not recognize Macedonia under any title that included the name "Macedonia." Greece believes that the use of the name Macedonia implies territorial claims by the northern province of Greece, which is also named Macedonia. The European Union and the United States honored Greece's request, denying Macedonia recognition for a substantial period of time despite the fact that Macedonia clearly meet the international criteria for statehood. Lisbon Declaration of June 26-27, KEESING'S, *supra* note 13, at 38943 (June 1992).

26. Country Reports on Human Rights Practices for 1992, Serbia/Montenegro, Report submitted to the Committee on Foreign Relations U.S. Senate and the Committee on Foreign Affairs U.S. House of Representatives by the Department of State 897 (Feb. 1993).

27. Diplomatic Note No. 8/1/92 to the United States Department of State from the Embassy of the S.F.R. of Yugoslavia (Federal Republic of Yugoslavia).

contest the claim of Serbia/Montenegro to be the continuity of Yugoslavia. They assert that Yugoslavia has dissolved, and all of the successor states should be treated equally.<sup>28</sup> The United States also rejects Serbia/Montenegro's claim.<sup>29</sup> Similarly, the states of the European Union take the position that Yugoslavia has dissolved, and Serbia/Montenegro may not claim to be its continuity.<sup>30</sup>

In the United Nations, while Slovenia, Croatia, Bosnia-Herzegovina, and Macedonia have applied for and received new membership, Serbia/Montenegro refuses to apply for new membership and insists that it is entitled to assume the membership of the former Yugoslavia. In response to Serbia/Montenegro's claim to assume the seat of Yugoslavia, the United Nations noted in Security Council Resolution 757 that, "the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations has not been generally accepted."<sup>31</sup> Subsequently, the United Nations Security Council passed Security Council Resolution 777, which effectively excluded Serbia/Montenegro from participating in the United Nations as the continuity of Yugoslavia.<sup>32</sup>

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28. Letter from Foreign Minister Dimitrij Rupel of the Republic of Slovenia to Peter Hohenfeliner, President of the United Nations Security Council and Permanent Representative of Austria to the United Nations, and Note Verbale from Republic of Croatia to United States Mission to the United Nations (June 30, 1992).

29. United States Mission to the United Nations, Press Release 36-92), May 30, 1992, states that "[the U.S. Government] has already informed both the Security Council and the General Assembly that it does not believe that the authorities in Belgrade represent the continuation of the former Socialist Federal Republic of Yugoslavia. I note that many other countries have reserved their position on the continuity issue and quite a few have adopted the same view as we have on this matter."

30. European Community Declaration on Yugoslavia, done at Brussels on June 20, 1992. See also KESING'S, *supra* note 13, at 39013 (July 1992).

31. S.C. Res. 757, U.N. SCOR, 47th Sess., 3082nd mtg. at 2, U.N. Doc. S/RES/757 (1992).

32. Security Council Resolution 777 declares that the state formerly known as the Socialist Federal Republic of Yugoslavia (SFRY) has ceased to exist and that the claim by Serbia/Montenegro to continue automatically the membership of the former SFRY in the United Nations has not been generally accepted. As a result, Resolution 777 concludes Serbia/Montenegro cannot continue automatically the membership of the SFRY in the United Nations, and it recommends that the General Assembly require Serbia/Montenegro to apply for membership. S.C. Res 777, U.N. SCOR, 47th Sess., 3116th mtg. at 1, U.N. Doc. S/RES/777 (1992).

Although Resolution 777 was designed to exclude Serbia and Montenegro from participation in the United Nations, it has been subject to substantial criticism because it also provides that the placard of Yugoslavia shall remain in the United Nations, Serbia and Montenegro may continue to occupy the Yugoslav Mission to the United Nations, and the Security Council will consider the matter of Serbian and Montenegrin participation at the end of the forty-seventh session of the General Assembly. *Id.*; Legal Opinion from Carl-August Fleischhauer, Under-Secretary-General for Legal Affairs, to Kenneth Dadzie, Under-Secretary-General for the United Nations Conference on Trade and Development (Sept. 29, 1992).

### C. Czechoslovakia

The 1920 Peace Treaty of Trianon, conceived by the victorious powers in World War I, created the state of Czechoslovakia out of the Austro-Hungarian Empire.<sup>33</sup> The Czech and Slovak Republics constituted the administrative divisions of this new state.<sup>34</sup>

On November 25, 1992, the Federal Assembly of the Czech and Slovak Federal Republics adopted a law providing that as of midnight, January 1, 1993, the state of Czechoslovakia would cease to exist and would be succeeded by the independent states of the Czech Republic and the Republic of Slovakia.<sup>35</sup> The European Community and the United States immediately recognized the Czech Republic and the Republic of Slovakia (Slovakia).<sup>36</sup>

Prior to the dissolution of Czechoslovakia, the Czech Republic and Slovakia entered into a devolution agreement concerning the allocation of membership in international organizations.<sup>37</sup> This agreement provided that the Czech Republic and Slovakia would alternate the continuity of Czechoslovakia for purposes of membership in international organizations depending upon the nature of the organization.<sup>38</sup>

Despite the existence of this devolution agreement, neither the Czech Republic nor Slovakia has continued the membership of Czechoslovakia in the United Nations. Rather, both states applied and were admitted as new members on January 19, 1993.<sup>39</sup> The United Nations did, however, allocate the membership of Czechoslovakia in the United Nations subsidiary organizations to the Czech Republic and Slovakia in the manner set out in the devolution agreement.<sup>40</sup>

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

34. For an examination of the origins of Czechoslovakia, see W.V. WALLACE, *CZECHO-SLOVAKIA* (1976).

35. Country Reports on Human Rights Practices for 1992, Czech and Slovak Republic, Report submitted to the Committee on Foreign Relations U.S. Senate and the Committee on Foreign Affairs U.S. House of Representatives by the Department of State 753 (Feb. 1993); Constitutional Law on the Termination of the Czech and Slovak Federal Republic, art. 1 (Nov. 25, 1992).

36. Statement by Press Secretary Marlin Fitzwater on Recognition of the Czech and Slovak Republics, PUB. PAPERS 2221 (Jan. 1, 1993).

37. Agreement on Membership in International Governmental Organizations, signed in Prague on December 12, 1992 by the Minister of Foreign Affairs the Czech and Slovak Federal Republics, the Minister of Foreign Relations the Czech Republic, and the Minister of Foreign Affairs the Slovak Republic.

38. *Id.*

39. Statement of the President on the Special Session of the General Assembly on the Admission of membership of the Czech Republic and the Slovak Republic (Jan. 19, 1993).

40. Journal of the United Nations, No. 1993/13 (part 1) (Jan. 20, 1993).



### III. THE INTERNATIONAL LAW OF STATE SUCCESSION CONCERNING THE CONTINUATION OF BILATERAL TREATIES WITH SUCCESSOR STATES

The international law of state succession concerning the continuation of bilateral treaties with successor states can be derived from a number of sources of international law. The most relevant sources are the Vienna Convention on State Succession,<sup>41</sup> the Restatement of Foreign Relations,<sup>42</sup> prior state practice with regard to treaty succession, and the recent meetings of the Committee of Legal Advisers on Public International Law (CAHDI) for the Council of Europe.<sup>43</sup>

#### A. *The Vienna Convention on State Succession*

The Vienna Convention on Succession of States in Respect of Treaties opened for ratification in 1978, but it has not yet received the necessary number of ratifications to enter into force.<sup>44</sup> Although some commentators consider the Vienna Convention to represent a codification of customary international law, it is generally considered that the Convention does not reflect customary international law but rather embodies a number of customary legal rules useful for the determination of treaty continuity.<sup>45</sup> More specifically, the Vienna Convention reflects the customary trend to continue treaty rights and obligations, but it does not accurately reflect the divergent practices regarding the question of whether treaties automatically continue or whether the successor states must consent to their continuation.<sup>46</sup>

The Vienna Convention declares that all successor states of a break-up are generally bound by the treaty rights and obligations of the predecessor state regardless of whether that predecessor state continues to exist.<sup>47</sup> The Convention does not draw a distinction with

41. Vienna Convention, *supra* note 3.

42. RESTATEMENT (THIRD) OF FOREIGN RELATIONS (1987) [hereinafter RESTATEMENT OF FOREIGN RELATIONS].

43. Committee of Legal Advisers on Public International Law for the Council of Europe, Extraordinary Meeting (Jan. 16, 1992) [hereinafter CAHDI I]; and Committee of Legal Advisers on Public International Law for the Council of Europe, 4th Meeting (Sept. 14-15, 1992) [hereinafter CAHDI II].

44. 25 I.L.M. 1640 (1986).

45. CAHDI I, *supra* note 44, at 4-5.

46. *Id.* at 5.

47. Article 33 of the Vienna Convention on State Succession, entitled "Succession of States in cases of separation of parts of a State," states as follows:

1. When a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist:
  - (a) any treaty in force at the date of succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed;
  - (b) any treaty in force at the date of the succession of States in respect only of that part of the territory of the predecessor State which has become a successor State continues in force in respect

regard to treaty continuance between the cases of continuation, separation, or dissolution. Instead, the Convention provides that the predecessor state, if one continues to exist, is generally bound by the treaty rights and obligations in force prior to the break-up of the state.<sup>48</sup>

Under the Convention, treaties in force prior to the break-up of a state may not continue with regard to the successor states, or the predecessor states, if the successor states so agree, the treaty relates to a specific territory not included within the territory of a particular successor state, or the continuation of a particular treaty would be inconsistent with the "object and purpose of the treaty or would radically change the conditions for its operation."<sup>49</sup>

### B. *The Restatement of Foreign Relations Law*

The Restatement of the Law of Foreign Relations, which also does not generally reflect the norms of customary international law, takes a substantially different position from the Vienna Convention. Like the Convention, the Restatement does not draw a distinction between the continuation, separation, or dissolution of a state.

The Restatement, however, adheres to the clean slate rule and asserts that none of the successor states are bound by the treaty rights and obligations of the predecessor state regardless of the particular circumstances of the break-up of that state.<sup>50</sup> The treaties of the pre-

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of that successor State alone.

2. Paragraph 1 does not apply if:

- (a) the States concerned otherwise agree; or
- (b) it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.

Vienna Convention, *supra* note 3, at 299.

48. Article 34 of the Vienna Convention, entitled Position if a State continues after separation of part of its territory, states as follows:

1. When, after separation of any part of the territory of a State, the predecessor State continues to exist, any treaty which at the date of the succession of States was in force in respect of the predecessor State continues in force in respect of its remaining territory unless:

- (a) it is otherwise agreed;
- (b) it is established that the treaty related only to the territory which has separated from the predecessor State; or
- (c) it appears from the treaty or is otherwise established that the application of the treaty in respect of the predecessor State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.

*Id.*

49. *Id.*, arts. 34, 35, at 260.

50. RESTATEMENT OF FOREIGN RELATIONS, *supra* note 43, § 210, at 108, entitled "State Succession: International Agreements" states, in part, that

- (3) When part of a state becomes a new state, the new state does not succeed to the international agreements to which the predecessor state

decessor state may continue in force with the successor states if the successor state and the other party to the agreement expressly or by implication agree to their continuation.<sup>51</sup> The predecessor state, if one continues to exist, continues to be bound by the treaty rights and obligations in force prior to the break-up of the state.<sup>52</sup> The Restatement also provides that treaties concerning boundary or other territorial issues shall continue in force with regard to the appropriate successor states or predecessor state.<sup>53</sup>

The failure to draw a distinction between the dissolution and continuation of a state inhibits the useful application of the Restatement. The Restatement accurately reflects state practice with regard to newly independent states emerging from colonization. It does not, however, reflect an understanding of the different circumstances that characterize the dissolution or the continuation of a state where the successor state is not a colony but rather an integral republic entity of the predecessor state.

The Restatement attempts to justify this lack of precision by arguing that some colonies might have more of a say in treaty obligations than some republic entities. This argument is unpersuasive, however, because it does not take into account state practice. Rather, the Restatement adopts the view that state practice is too complicated to establish a clear rule, so the clean slate approach should be adopted.<sup>54</sup>

### C. *State Practice*

The practice of states regarding the succession of treaties may be divided into the three categories of continuation, separation, and dissolution. An overview of state practice indicates that although there are a number of conflicting precedents, some useful principles may be derived that are applicable to the break-up of the Soviet Union, Yugo-

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was party, unless, expressly or by implication, it accepts such agreements and the other party or parties thereto agree or acquiesce.

(4) Preexisting boundary and other territorial agreements continue to be binding notwithstanding subsections (1)-(3).

In the Comment to section 210, the Restatement specifically rejects the distinction drawn in the Vienna Convention between newly independent states and states arising out of a separation from the predecessor state. The Restatement contends that no distinction is warranted because it rejects the justification provided by the Vienna Convention that ex-colonies are entitled to a clean slate since they likely did not participate in negotiating the treaties of the colonizing state. Republic entities, on the other hand, are more likely to have had the opportunity to comment on the treaties adopted by the predecessor state. *Id.* at 113.

51. *Id.* § 210(3), at 108.

52. *Id.* § 210(1), (2), at 108.

53. *Id.* § 210(4), at 108.

54. The Restatement also suffers from its apparently superficial examination of state practice.

slavia, and Czechoslovakia.

### 1. Continuation

The cases of continuation can be divided into those occurring as the result of decolonization and those occurring as the result of the break-away of a sub-state entity other than a colony. Almost without exception, ex-colonies are not considered to be automatically bound by the treaty rights and obligations of the colonial power. Ex-colonies are, however, frequently granted the opportunity to voluntarily adhere to certain bilateral agreements with the consent of the other party to the agreement. The following analysis will examine cases where a sub-state entity has seceded from the predecessor state.

#### a. Secession of Panama from Colombia

In 1903, Panama seceded from Colombia and declared itself an independent state. Panama asserted that it was not obligated by the treaties of the predecessor state Colombia that continued to exist. The United States and Great Britain accepted this declaration, but France insisted that the bilateral agreements between France and Colombia continued to bind Panama. Colombia, as the continuity, remained bound by the bilateral agreements.<sup>55</sup>

#### b. Secession of Belgium from the Netherlands

In 1830, Belgium seceded from the Netherlands. The United States, Great Britain, and France did not consider the treaty obligations of the Netherlands to continue in force with respect to Belgium. The Netherlands continued to be bound by the bilateral agreements.<sup>56</sup>

#### c. Secession of Finland from Russia

After World War I, Finland seceded from Russia. Great Britain and the United States considered that Finland was not bound by the treaty obligations of Russia but that Russia was still obligated. Consequently, Great Britain and the United States negotiated new treaties with Finland, whereas Sweden entered into an exchange of notes indicating that specific treaties between Sweden and Russia would continue with Finland.<sup>57</sup> Great Britain did note, however, that treaty ob-

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55. Report of the International Law Commission to the General Assembly, U.N. Doc. A/9610/Rev.1, in *Yearbook of the International Law Commission 1974 Vol. II, Part One* at 263 (1975) [hereinafter *ILC Yearbook 1974*].

56. *Id.*

57. Succession of States in respect of Bilateral Treaties, study prepared by the Secretariat, U.N. Doc. A/CN.4/229, in *Yearbook of the International Law Commission 1970 Vol. II*, at 122 (1972) (citing ARNOLD D. MCNAIR, *THE LAW OF TREATIES* (1961)) [hereinafter *ILC Yearbook 1970*].

ligations that were "in the nature of servitudes" would be considered to continue in force.<sup>58</sup>

d. Secession of Poland and Czechoslovakia from the Austro-Hungarian Empire

Upon the break-up of the Austro-Hungarian Empire, the successor states of Poland and Czechoslovakia were obligated to fulfill their duties under certain multilateral treaties as a precondition for recognition as independent states.<sup>59</sup> However, regarding bilateral treaties, Poland and Czechoslovakia were not considered bound by the treaty obligations of the Empire, nor did they voluntarily consent to the continuation of the treaties of the former Empire.<sup>60</sup>

e. Secession of Ireland from the United Kingdom

In 1922, Ireland seceded from the United Kingdom but remained a dominion. Great Britain took the position that bilateral treaties would continue in force with respect to Ireland. Ireland, however, asserted that it was not automatically obligated by those treaty obligations and that the continuance of treaty obligations was a matter for the seceding state to determine. Ireland could therefore deny the continuance of treaty obligations or, with the consent of the other party to the treaty, agree that certain treaties would continue in force.<sup>61</sup>

Regarding multilateral treaties, Ireland chose to accede as a new party rather than succeed. It is important to note that Switzerland considered this act of accession as an indication that Ireland was entitled to a clean slate approach.<sup>62</sup>

f. Secession of Pakistan from India

In 1947, Pakistan seceded from British India, despite the existence of a devolution agreement between Pakistan and British India, which continued as India, providing that Pakistan would continue to be obligated by the treaties of British India.<sup>63</sup> Pakistan later asserted that it was entitled to a clean slate with respect to the multilateral treaties of British India, and it proceeded to accede to a number of these treaties.<sup>64</sup> For bilateral agreements, Pakistan asserted a clean

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58. *Id.*

59. *Id.* at 124.

60. *Id.*

61. *Id.* at 108; ILC Yearbook 1974, *supra* note 56, at 264.

62. Succession of States & Governments, U.N. Doc. A/CN.4/200, in Yearbook of the International Law Commission 1968 Vol. II, at 13 (1970) [hereinafter ILC Yearbook 1968].

63. Succession of States: (a) Succession in respect of Treaties, U.N. Doc. A/CN.4/243, in Yearbook of the International Law Commission 1971, at 121-22 (1972) [hereinafter ILC Yearbook 1971].

64. ILC Yearbook 1968, *supra* note 63, at 16; ILC Yearbook 1970, *supra* note 58,

slate but proceeded to confirm with a number of states that specific treaties of British India continued in force.<sup>65</sup> This approach was not substantially challenged by any of the states party to bilateral agreements with British India.

Pakistan was required, however, to apply for membership in the United Nations, whereas India was entitled to assume the membership of British India. Similarly, India continued to be bound by the treaty rights and obligations of British India.<sup>66</sup>

#### g. Secession of Singapore from the Federation of Malaysia

In 1965, Singapore seceded from the Federation of Malaysia. Despite the existence of a devolution agreement providing for the continuation of bilateral treaties, Singapore later asserted that it was not obligated by the treaties of the Federation of Malaysia.<sup>67</sup> Singapore asserted that continuation of treaty obligations was a matter requiring the mutual consent of Singapore and the other party to a particular bilateral agreement.<sup>68</sup> Some States contested this approach and argued that Singapore remained obligated to the treaties of the Federation. Singapore did not yield to these arguments and refused to be bound by bilateral agreements to which it did not provide independent consent.<sup>69</sup>

Regarding multilateral treaties, Singapore took the position that it was not bound unless it notified the depository of its intention to be bound. Consistent with this assertion, Singapore selectively notified the United Nations of a number of treaties that it wished to continue in force. The United Nations does not consider the treaties about which it has not been notified by Singapore to continue in force.<sup>70</sup>

## 2. Separation

### a. Separation of Greater Colombia

In 1819, the states of New Granada, Venezuela, and Quito (Ecuador) united to form the state of Greater Colombia. Subsequently, between 1829-1831, these states separated from the Union and resumed their previous international personalities. During the existence of the union, Greater Colombia had concluded treaties of amity, navigation, and commerce with the United States and with Great Britain.

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at 71-72.

65. ILC Yearbook 1970, *supra* note 58, at 109-10.

66. ILC Yearbook 1974, *supra* note 56, at 211.

67. *Id.* at 249, 264.

68. ILC Yearbook 1970, *supra* note 58, at 118.

69. ILC Yearbook 1974, *supra* note 56, at 264.

70. *Id.*

After the separation, the United States considered that these treaties should continue in force with respect to New Granada. Similarly, Great Britain considered these treaties to continue in force with respect to Ecuador and Venezuela. The Legal Office of the British Foreign Ministry, however, considered that the continuance of the treaty obligations of Greater Colombia required the consent of both parties and/or that the successor states were entitled to unilaterally claim the continuance of the treaty obligations.<sup>71</sup>

#### b. Separation of the Union of Norway and Sweden

The Union of Norway and Sweden separated in 1905. During the existence of the Union, both Norway and Sweden had maintained separate international personalities. For instance, the United States concluded separate extradition treaties with the Governments of both Norway and Sweden. In some instances, however, the Government of the Union concluded treaties on behalf of the Union; in other instances, the Government of the Union concluded treaties on behalf of one of the particular member states.<sup>72</sup>

Upon the separation of the Union, Norway and Sweden issued identical declarations stating that they considered the treaties of the Union to continue in force with respect to each successor state and that treaties concluded with the individual states during the time of union would continue with that state.<sup>73</sup> In response to these declarations, Great Britain asserted that as a result of the separation of the Union, Great Britain was entitled to review the treaty obligations with the predecessor Union and determine whether it wished those treaties to continue in force between Great Britain and the successor states. The United States and France accepted the declaration of the successor states and agreed to treat Norway and Sweden as bound by the treaties concluded with the Union.<sup>74</sup>

#### c. The Separation of the Austro-Hungarian Empire

Upon the Separation of the Austro-Hungarian Empire, after World War I, Austria asserted that it was not bound by any of the treaties of the former Empire and that the continuance of specific treaties with specific states would require an agreement between Austria and the relevant state.<sup>75</sup> Austria subsequently confirmed the continuation of specific treaties with neighboring states.<sup>76</sup> Hungary, however, made a general declaration affirming its commitment to be bound

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71. *Id.* at 260.

72. *Id.*

73. *Id.* at 260-61.

74. *Id.* at 261.

75. *Id.*

76. ILC Yearbook 1971, *supra* note 64, at 172-73.

by all of the treaties of the former Empire.<sup>77</sup>

Both Austria and Hungary took similar positions with respect to multilateral agreements. Austria asserted that it was not obligated by a particular multilateral agreement unless it had acceded to that agreement; Hungary considering itself to have succeeded to all of the multilateral obligations of the Empire.<sup>78</sup>

#### d. The Separation of the United Arab Republic

In 1958, Egypt and Syria joined to form the United Arab Republic. In 1961, this Union separated. Syria declared that following the separation, it would continue to be bound by the bilateral and multilateral treaties concluded by the United Arab Republic and by the treaties concluded by Syria prior to the formation of the Union.<sup>79</sup> The international community did not object to this declaration.

Egypt made no declaration, but it retained the use of the name United Arab Republic for a period of time and considered itself to be automatically bound by the treaties of the Republic. Egypt also considered itself obligated by the treaties concluded by Egypt prior to the formation of the Union. The same practice was applied to multilateral treaties.<sup>80</sup>

#### e. The Separation of the Union of Iceland and Denmark

The states of Iceland and Denmark joined in the Union of Iceland and Denmark from 1918-1944. During the course of the Union, treaties concluded by the Government of the Union were not considered to be binding upon Iceland absent its explicit consent. In a number of cases, treaties were made independently with Iceland or Denmark without the participation of the Government of the Union.<sup>81</sup> Upon separation, regarding the treaties concluded during the Union, Iceland considered itself bound only by the treaties to which it had explicitly consented, as

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77. ILC Yearbook 1974, *supra* note 56, at 261; ILC Yearbook 1970, *supra* note 58, at 172. Regarding its extradition treaty with Sweden, Hungary stated that it considered itself to be the same entity of the Kingdom of Hungary, which had been joined with Austria in the Austro-Hungarian Empire, so Hungary considered itself obligated by the treaties of the former Empire. ILC Yearbook 1970, *supra* note 58, at 123. Austria, on the other hand, informed Switzerland that a similar extradition treaty would only continue in force after conclusion of an agreement to that effect. ILC Yearbook 1971, *supra* note 64, at 172.

78. ILC Yearbook 1974, *supra* note 56, at 261; ILC Yearbook 1968, *supra* note 63, at 28-29.

79. ILC Yearbook 1974, *supra* note 56, at 262; ILC Yearbook 1968, *supra* note 63, at 142. Despite this declaration, a number of depositories treated Syria as acceding, rather than succeeding, to the treaties of the UAR. ILC Yearbook 1968, *supra* note 63, at 18, 49-50, 67-68.

80. ILC Yearbook 1974, *supra* note 56, at 262.

81. *Id.* at 261.



well as by treaties concluded by Denmark with other states prior to the formation of the Union.<sup>82</sup> Denmark considered itself bound by the treaties of the Union and by its treaties concluded prior to the Union.<sup>83</sup>

Iceland considered itself a party to any multilateral treaty to which it had been a party while a member of the Union.<sup>84</sup> During the Union, however, Iceland made frequent use of its right to decline to be bound by a treaty entered into by the Union.<sup>85</sup>

#### f. The Separation of the Federation of Mali

From 1959 to 1961, Sudan and Senegal joined to form the Federation of Mali. During the brief period of its existence, the Federation entered into a number of cooperation agreements with France. Upon the separation of the Federation, Senegal, which caused the separation by withdrawing from the Federation, declared that in accordance with international law, it considered the treaties with France to continue in force. France accepted this declaration.<sup>86</sup> Sudan, however, retained the name of the Federation of Mali but refused to be obligated by the treaties concluded during the time it was unified with Senegal.<sup>87</sup>

### 3. Dissolution

There are no previous cases where the predecessor state has dissolved into a number of independent states, with none of these states being considered the continuing state and all of the emerging states considered as equal heirs to the rights and obligations of the predecessor state.

Dissolution lies between continuation and separation. As a result, the successor states arising from a dissolution of a predecessor state are more likely to be bound by the treaty rights and obligations of the predecessor state than in the case of continuation, but they are less likely to be bound than in the case of separation, where the successor states maintained some sort of international personality while members of the Union.

#### D. *Committee of Legal Advisers for the Council of Europe*

With the break-up of the Soviet Union and Yugoslavia, the Committee of Ministers for the Council of Europe convened a meeting of

82. *Id.*; ILC Yearbook 1970, *supra* note 58, at 122; ILC Yearbook 1968, *supra* note 63, at 170-71.

83. ILC Yearbook 1974, *supra* note 56, at 261.

84. *Id.*

85. *Id.* at 261-62.

86. *Id.* at 262, and ILC Yearbook 1971, *supra* note 64, at 146, 148.

87. ILC Yearbook 1974, *supra* note 56, at 263.

Legal Advisers to exchange views on the “[c]urrent questions of State succession in Europe relating to treaties, State property, archives and debts.”<sup>88</sup> Although the minutes of the meeting of Legal Advisers does not constitute a viable source of public international law, it does give an indication of the contemporary views of the states of the Council of Europe with regard to the succession of treaty obligation.

Addressing the usefulness of the Vienna Convention, a majority of the Legal Advisers stated that the Vienna Convention could not be assumed to represent existing public international law.<sup>89</sup> Particularly, the Legal Advisers found the distinction between continuation and dissolution unhelpful in determining the obligations of successor states under the treaty rights of the predecessor state.<sup>90</sup> However, the Legal Advisers did indicate that the Vienna Convention contained many “useful elements.”<sup>91</sup>

In particular, the Legal Advisers found the traditional distinction between continuation and dissolution less important in practice than in theory because states entitled to be free of treaty obligations of the predecessor state will wish for a number of those treaty obligations to continue.<sup>92</sup> Similarly, many Legal Advisers identified a number of practical reasons for continuing treaty obligations.<sup>93</sup>

In summing up the discussion, the Chairman of the conference stated that bilateral agreements should “be dealt with in a practical way, irrespective of the theoretical point of departure (clean slate or succession). States should arrive at a common list containing agreements which should apply between them.”<sup>94</sup>

The Legal Advisers found it difficult to establish a general rule concerning multilateral agreements. Some Legal Advisers supported the clean slate approach, while others were willing to accept the principle of succession but felt it necessary to require something more than a general declaration of succession. Similarly, some Legal Advisers considered it inappropriate for the depositories to make declarations of automatic succession on behalf of the states.<sup>95</sup> A number of Legal Advisers noted that the nature of the treaty was important when considering continuity and that, in cases such as human rights and navigation treaties, every successor should be bound by the treaty obligations

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88. CAHDI I, *supra* note 43, at 3.

89. *Id.*

90. *Id.*

91. *Id.* at 4.

92. *Id.*

93. *Id.* These reasons included the difficulty of new states to acquire a whole new set of bilateral treaties and the necessity to regulate international administrative matters such as postal, telecommunications, and transportation services. *Id.*

94. CAHDI II, *supra* note 43, at 5.

95. *Id.* at 3.

of the predecessor.<sup>96</sup>

Switzerland explained that it considered Russia to be the continuity of the former Soviet Union, so it had replaced the designation "USSR" with "Russia" on all multilateral treaties for which it was a depository.<sup>97</sup> Although Serbia/Montenegro had claimed to be the continuation of the former Yugoslavia, this claim has been rejected by the international community. As a result, Switzerland has not determined how to designate the appropriate party to treaties for which it is a depository.<sup>98</sup>

The Legal Adviser from the Hague Conference noted that its position was not to impose but rather to ensure continuity. The Hague had requested confirmation from Russia that it continued to be bound by the treaties deposited by the former Soviet Union. Further, the Hague took the position that Belarus could succeed unless the other parties to the agreement objected.<sup>99</sup> On this point, some Legal Advisers noted that parties to a multilateral treaty could oppose a declaration of succession if such a possibility was provided for in the treaty.<sup>100</sup> It was also noted that the document of succession could be accompanied by new reservations.<sup>101</sup>

In summing up the discussion on succession to multilateral treaties, the Chairman of the Conference stated that a "new State should make a declaration of succession in order to avoid a legal vacuum. States Parties to such a treaty should be able to oppose a declaration of succession."<sup>102</sup>

In addressing the case of the former Soviet Union, the General Consul of Russia, attending as an observer, stated that Russia was the continuity of the former Soviet Union, and the other former Republics "could be considered to be successor States."<sup>103</sup> In support of this view, a number of states expressed the opinion that it was unnecessary to recognize Russia "as the international community considered that

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96. *Id.* This approach has no basis in state practice or in the Vienna Convention. The primary motivation for these statements was the desire to see Serbia/Montenegro abide by the Danube Convention and continue to permit free navigation along the Danube River where it passes through Serbia.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 3-4. This would appear to be inconsistent with the notion of succession as stepping into the shoes of the predecessor state.

102. *Id.* at 5. This conclusion is antithetical to the views of the United States that treaty rights and obligations should continue in force and that the rule of law is important. It basically provides that successor states may pick and choose which treaties they wish to be obligated by, and, therefore, it is equivalent to a clean slate.

103. CAHDI I, *supra* note 43, at 6.

Russia was the continuity of the Soviet Union.<sup>104</sup> In summing up the discussion on the former Soviet Union, the Chairman noted "that the Russian Federation had been considered as the continuing State of the Soviet Union in the United Nations and the CSCE. With respect to the other former Soviet republics the question of succession had to be considered."<sup>105</sup>

In discussing the case of Yugoslavia, the Legal Advisers noted that, unlike Russia, Serbia/Montenegro could not be considered the continuation of the former Yugoslavia because the historical basis was absent, and the other successor states had not accepted Serbia/Montenegro's claim to be the continuation. As a result, the Legal Advisers agreed that all successor states of the former Yugoslavia should be treated as equal.<sup>106</sup>

The Legal Adviser to the Ministry of Foreign Affairs for Slovenia stated that Slovenia would honor the multilateral and bilateral treaties of the former Yugoslavia during the transition period. Consistent with this approach, Slovenia was requesting confirmation of bilateral agreements with Finland, Italy, the Netherlands, and Austria.<sup>107</sup> Slovenia did, however, express uncertainty regarding multilateral treaties as to whether notification of succession to the appropriate depositary was sufficient or whether Slovenia must ratify the treaties anew.<sup>108</sup> The representative from Croatia noted that Croatia would respect all the treaties of the former Yugoslavia unless they conflicted with the Croatian Constitution.<sup>109</sup>

Taking into consideration the Vienna Convention, the Restatement of Foreign Relations, prior state practice with regard to treaty succession, and the recent meetings of the Committee of Legal Advisers on Public International Law for the Council of Europe, the principles of international law governing succession to treaties of a dissolved state can be stated as follows: 1) A successor state is neither clearly entitled to deny continuance of the treaty obligations of the predecessor state nor is it clearly obligated to fulfill all of the treaty obligations of the predecessor state; 2) There exists a presumption of continuity of treaty rights and obligations, but this presumption must be confirmed either by a binding action on behalf of the successor state or by an agreement between the successor state and the other party to the treaties.

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104. *Id.*

105. *Id.* at 7.

106. CAHDI II, *supra* note 43, at 2.

107. *Id.* at 4.

108. CAHDI I, *supra* note 43, at 5.

109. CAHDI II, *supra* note 43, at 3.

IV. THE LEGAL OPINION OF THE DEPARTMENT OF STATE ON THE CONTINUATION OF BILATERAL TREATIES WITH THE SUCCESSOR STATES OF THE FORMER SOVIET UNION, YUGOSLAVIA, AND CZECHOSLOVAKIA

Recognizing the importance of the break-up of the Soviet Union, the Legal Adviser for the United States Department of State remarked that "[i]t may well be that international practice in connection with the dissolution of the Soviet Union will prove to be critical to the future shape of the law."<sup>110</sup> In developing a legal opinion concerning whether the treaties of predecessor states continue in force, the Department of State considered the Vienna Convention and the U.S. Restatement of Foreign Relations Law, but it relied primarily upon state practice.<sup>111</sup>

The United States concluded that treaty succession could be viewed along a continuum.<sup>112</sup> Circumstances at one end of the continuum would warrant a clean slate approach to continuance of treaty rights and obligations, while circumstances at the other end of the continuum would warrant the continuation of treaty obligations.<sup>113</sup> Those circumstances that warrant a clean slate include decolonization and instances of continuation in which a single successor state continues on as the predecessor state.<sup>114</sup> Those circumstances warranting a continuance of treaty obligations include instances of dissolution in which all of the successor states are treated as equal.<sup>115</sup>

In developing this approach, the Department of State relied upon four case studies of dissolution and four case studies of continuation. Cases that followed the model of dissolution include 1) the Greater Colombian Union, formed between 1820 and 1830, which subsequently dissolved into the states of Columbia, Ecuador, and Venezuela; 2) the Union of Norway and Sweden, which dissolved in 1905; 3) the dissolution of the Austro-Hungarian Empire, which created the independent states of Austria and Hungary; and 4) the dissolution of the United Arab Republic.<sup>116</sup> The Department of State determined that in each of these cases, with some exceptions, the successor states were bound by the treaty rights and obligations of the predecessor state.<sup>117</sup>

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110. Treaty Succession and Related Issues in the Wake of the Breakup of the USSR, Presentation by Edwin D. Williamson, Legal Adviser at the U.S. Department of State before the meeting of the American Society of International Law 1 (Apr. 1, 1992) [hereinafter Williamson Speech].

111. *Id.* at 2.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 3. The State Department characterizes these as dissolutions, whereas this article them considers them separations. See *supra* section III(C)(2). Commentary on this discrepancy follows. See *infra* note 127 and accompanying text.

117. *Id.*

Cases that followed the model of continuation include 1) the disassociation of Panama from Colombia in 1903; 2) the disassociation of Finland from the Soviet Union after World War I; 3) the disassociation of Poland and Czechoslovakia from the Austro-Hungarian Empire after World War I; and 4) the disassociation of Pakistan from India in 1947.<sup>118</sup> The Department of State determined that, in these cases, state practice provided that the disassociated state was not bound by the treaty rights and obligations of the predecessor state.<sup>119</sup>

Based on these eight case studies and on the determination that "U.S. interests in maintaining the stability of legal rights and obligations are, on balance, better served by adopting a presumption that treaty relations remain in force," the Department of State concluded that the case of the former Soviet Union fell on the dissolution side of the continuum.<sup>120</sup> The Department of State supported this conclusion with the argument that the successor states of the Soviet Union had agreed in the Alma Ata Declaration to guarantee the "fulfillment of international obligations stemming from the treaties and agreements of the former U.S.S.R."<sup>121</sup>

Subsequently, the Department of State concluded that the break-ups of Yugoslavia and Czechoslovakia also fell on the dissolution side of the continuum, and thus the successor states of Yugoslavia and Czechoslovakia were obligated to fulfill the treaty rights and obligations of the respective predecessor states.<sup>122</sup>

Although the Department of State did not develop a set of criteria for determining where on the continuum a particular break-up would lie, it did develop a set of criteria for determining when a break-up should be considered a continuation or dissolution for purposes of membership in international organizations. The Department of State argued that the break-up of a state followed the continuation model and that the continuing state should be entitled to the membership of the predecessor state in an international organization if a particular successor state had "inherited the essential legal identity of the prede-

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118. *Id.* at 4.

119. *Id.*

120. *Id.* This approach was consistent with the United States emphasis on the rule of law and its desire to promote the development of international legal principles that foster stability of legal rights and obligations. *Id.*

121. *Id.* at 5.

122. The Department of State identified a number of exceptions to the principle that successor states bound by the rights and obligations of the predecessor state after a dissolution. These exceptions are as follows: 1) where the treaty is not relevant to the territory of a particular republic; 2) where it is not feasible to continue a treaty on its terms; 3) where continuation would be inconsistent with the nature of the treaty regime or the object and purpose of the treaty; 4) where treaties allocate quotas or rights on the premise that the predecessor state is a single territory (e.g., bilateral textile agreements); and 5) where treaties are relevant only to those republics with certain nuclear or military capacity. *Id.* at 6-7.

cessor state."<sup>123</sup> Factors to determine whether a successor state inherits the legal identity of its predecessor include the retention of "1) substantial amounts of territory (including the historical territorial hub); 2) the majority of the predecessor state's population, resources, and armed forces; 3) the seat of the government; [and] 4) the name of the former member."<sup>124</sup> On the basis of these factors, the United States supported the assumption by Russia of the seat of the former Soviet Union in the United Nations Security Council.<sup>125</sup>

Although the analysis by the Department of State finds support in state practice for the presumption that treaty relations remain in force following the dissolution of a state, its analysis suffers four primary flaws. First, although the Department of State recognizes that the models of state succession lie upon a continuum, the cases of separation are identified as cases of dissolution, thus narrowing the range of the continuum. This generates a presumption that successor states to a dissolution are more obligated to continue the treaties of the predecessor state than might be the case.<sup>126</sup>

Second, not all of the case studies relied upon by the Department of State actually support its accompanying conclusions.<sup>127</sup> Once again, this generates a presumption that successors to a dissolution are more obligated than should be the case.

Third, the reliance of the United States upon the Alma-Ata Accords is overly confident because it fails to take into consideration that the unconditional commitment to honor treaty obligations was made in the Minsk Accords of December 8, 1991, and it was signed by only Russia, Belarus, and Ukraine.<sup>128</sup> The subsequent Alma-Ata Accords modified the commitment to fulfill treaty obligations to the extent such

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123. *Id.* at 9.

124. *Id.*

125. The United States reasoned as follows: Russia is clearly the dominant part of the former Soviet Union in all respects — land area, population, resources, military strength, etc. — especially when one excludes Ukraine and Belarus, which have always been separate members of the U.N. and not part of the "USSR" for this purpose. As a result, Russia could fairly claim to be the continuation of the USSR for U.N. membership purposes. And regarding its permanent security council seat, certain Russian attributes are precisely those that warranted "Perm Five" designation in the first place — in particular, its continued status as a nuclear power and a preeminent military force in the world. *Id.* at 10-11.

126. *See, e.g., supra* notes 73-74 and 80-81 and accompanying text discussing the separations of the Union of Norway and Sweden and of the United Arab Republic.

127. *See, e.g., supra* notes 73 and 77 and accompanying text discussing the separation of Austria and Hungary from the Austro-Hungarian Empire (with Austria claiming a clean slate) and the separation of Greater Colombia (with Great Britain recognizing that the treaties continued in force only at the option of the successor states).

128. Declaration on the Creation of a Commonwealth of Independent States done in Minsk on December 8, 1991, in Commonwealth of Independent States Documents 31 I.C.M. 138 (May 8, 1992).

continuation was "in accordance with constitutional procedures" of the successor state.<sup>129</sup> Although it is unclear what was intended by this modification, it deliberately changes the unconditional Minsk Accords and creates the opportunity for successor states to refuse to continue some or all treaty obligations based on the rationale that doing so would be incompatible with their constitutional procedures. Additionally, the Minsk and Alma-Ata Accords represent an agreement between the members of the Commonwealth and not between the United States and the individual successor states. As a result, it is unclear whether the Alma-Ata Accords would be useful, aside from political persuasion, in attempting to bind a successor state to the treaty obligations of the former Soviet Union.

Finally, since the United States accepted Russia as the successor of the USSR for membership purposes in the United Nations, it created the contradictory presumption that the case of the former Soviet Union is one of a continuation rather than a dissolution. Although this characterization does not affect the treaty obligations of Russia,<sup>130</sup> it does substantially reduce the obligation of the other eleven successor states to be bound by the treaties concluded by the Soviet Union.

#### V. THE UNITED STATES APPROACH TO SECURING THE CONTINUATION OF BILATERAL TREATIES WITH THE SUCCESSOR STATES OF THE FORMER SOVIET UNION, YUGOSLAVIA, AND CZECHOSLOVAKIA

Taking into consideration the conclusion of the Legal Adviser that a presumption exists for the continuation of treaties by the successor states of a dissolved predecessor state, the Department of State developed a two-prong approach to ensure that treaties of the former Soviet Union, Yugoslavia, and Czechoslovakia would continue in force with respect to their successor states. First, the United States informed the successor states that, as a matter of public international law, they were obligated to continue the treaties of their predecessor state. Second, the United States included a commitment to be bound by the treaties of the predecessor state as one of the conditions for the establishment of diplomatic relations with the United States.<sup>131</sup>

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129. Alma Ata Accords, *supra* note 8, at 5.

130. In fact, this characterization strengthens the obligation to be bound.

131. During the process of the dissolution of the Soviet Union, then-Secretary of State James Baker announced that the relations between the United States and any successor states to the Soviet Union would be guided by a number of principles, including the commitment to follow democratic practices, safeguard human rights, respect borders of neighboring states, implement a market economy, and adhere to the international obligations and practices of the Helsinki Final Act and Charter of Paris. In order to assure a relationship built upon respect for these principles, Secretary Baker announced that the United States would establish diplomatic relations with successor states only after the United States had received sufficient



### A. *Exchange of Letters With the Successor States of the Former Soviet Union*

On December 24, 1992, President Bush announced that the United States recognized the independent states of Russia, Ukraine, Armenia, Kazakhstan, Belarus, Kyrgyzstan, Moldova, Turkmenistan, Azerbaijan, Tajikistan, Georgia, and Uzbekistan. With the recognition of these states, the United States considered the former Soviet Union to have dissolved.<sup>132</sup>

During this announcement, President Bush also disclosed that the United States intended to establish diplomatic relations with Russia, Ukraine, Armenia, Kazakhstan, Belarus, and Kyrgyzstan based on special commitments made to the United States. President Bush further proclaimed the United States was prepared to establish diplomatic relations with Moldova, Turkmenistan, Azerbaijan, Tajikistan, Georgia, and Uzbekistan when the United States received satisfactory assurances regarding "commitments to responsible security policies and democratic principles."<sup>133</sup>

#### 1. Recognition and Diplomatic Relations with Russia, Ukraine, Armenia, Kazakhstan, Belarus, and Kyrgyzstan

##### a. Recognition/Diplomatic Relations Letters and Responses

On December 26, 1991, President Bush sent a Presidential Letter to President Boris Yeltsin of Russia stating in part that he was "pleased to inform [President Yeltsin] that the United States Government recognizes Russia as an independent state."<sup>134</sup> In addition, President Bush stated that, based on a number of commitments, including the commitment "to fulfill the treaty and other obligations of the former USSR," he was "pleased to propose that our two countries conduct full diplomatic relations with permanent missions."<sup>135</sup> President Yeltsin responded to President Bush's recognition of Russia and offer of diplomatic relations with a letter stating that he was pleased with the United States' recognition of Russia and accepted the offer to establish diplomatic relations.<sup>136</sup>

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assurances from the successor states that they were committed to fulfilling these principles. Although the development of what became known as the Baker Five did not originally include the commitment to abide by the treaty obligations of the predecessor state, this commitment was included at the request of the Legal Adviser.

132. Christmas Eve Address, *supra* note 9.

133. *Id.*

134. Letter from President George Bush to President Boris Yeltsin of Russia (Dec. 26, 1991).

135. *Id.*

136. Letter from President Boris Yeltsin of Russia to President Bush (Dec. 28, 1991).

On December 26, 1991, President Bush sent identical letters to Ukraine, Armenia, Kazakhstan, Belarus, and Kyrgyzstan stating that the United States recognized them as independent states and offering to conduct diplomatic relations based upon the assurances regarding a number of commitments, including the commitment to fulfill the treaty and other obligations of the Soviet Union.<sup>137</sup> The Governments of Ukraine, Armenia, Kazakhstan, Belarus, and Kyrgyzstan responded to President Bush's letter with formal letters of reply as follows:

i. President Kravchuk of Ukraine accepted the offer to establish diplomatic relations and provided a general reference to the assurances sought by President Bush. Kravchuk stated that he "would also like to thank you for the expression of respect and trust towards the commitments that Ukraine has taken with full responsibility to implement its independent domestic and foreign policy."<sup>138</sup>

ii. Foreign Minister Hovannisian of Armenia accepted the offer to establish diplomatic relations but made no reference to any assurances.<sup>139</sup>

iii. President Nazarbayev of Kazakhstan accepted the offer to establish diplomatic relations and affirmed Kazakhstan's commitment to a number of the principles enumerated in President Bush's letter. He did not, however, provide any assurances that Kazakhstan would continue to fulfill the treaty obligations of the Soviet Union.<sup>140</sup>

iv. President Shushkevich of Belarus accepted the offer of diplomatic relations and provided assurances concerning all the commitments outlined by President Bush. Regarding the assurance to fulfill the treaty obligations of the USSR, President Shushkevich committed to "fulfill the obligations of the former Union of SSR."<sup>141</sup>

v. President Akayev of Kyrgyzstan accepted the offer to establish diplomatic relations and affirmed Kyrgyzstan's commitment to all of the principles mentioned in President Bush's letter. However, with regard to the commitment to fulfill the treaty obligations of the former Soviet Union, Kyrgyzstan limited its assurance to the "commitments

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137. Letter from President Bush to President Leonid Kravchuk of Ukraine (Dec. 26, 1991); Letter from President Bush to President Levon Ter-Petrosian of Armenia (Dec. 26, 1991); Letter from President Bush to President Nursultan Nazarbaev of Kazakhstan (Dec. 26, 1991); Letter from President Bush to President Stanislav Shushkevich of Belarus (Dec. 26, 1991), and Letter from President Bush to President Askar Akayev of Kyrgyzstan (Dec. 26, 1991).

138. Letter from President Kravchuk of Ukraine to President Bush (Jan. 3, 1992).

139. Letter from Foreign Minister Raffi Hovannisian of Armenia to President Bush (Jan. 6, 1992).

140. Letter from President Nazarbayev of Kazakhstan to President Bush (Jan. 7, 1992).

141. Letter from President Shushkevich of Belarus to President Bush (Dec. 26, 1991).

under the treaties which were signed between the USA and the former Soviet Union." This formulation appears to exclude a commitment to fulfill the multilateral treaties of the former USSR.<sup>142</sup>

## 2. Recognition and Diplomatic Relations with Moldova, Azerbaijan, Tajikistan, Turkmenistan, Uzbekistan, and Georgia

### a. Recognition Letters with Offer to Negotiate Relations

On December 26, 1992, President Bush, with identical letters, notified Moldova, Azerbaijan, Tajikistan, Turkmenistan, Uzbekistan, and Georgia that the United States Government recognized them as independent states. In these letters, President Bush indicated that the United States was not yet in a position to "propose the establishment of full diplomatic relations or a permanent U.S. diplomatic presence in [respective country], but [it was prepared] to continue [the] dialogue on the full range of issues of interest to both sides."<sup>143</sup>

President Bush further articulated the five principles guiding the United States in evaluating its relationship with the successor states of the former Soviet Union. In articulating those principles, President Bush made a vague reference to "respect for international law and obligations," but he did not explicitly outline a commitment to fulfill the treaty obligations of the former Soviet Union.<sup>144</sup>

### b. Response Letters

Only the response letters from Turkmenistan and Uzbekistan are available. The Governments of Moldova, Azerbaijan, Tajikistan, and Georgia either responded orally, or their letters are unavailable.

On December 27, 1991 in Moscow, the Ministry of Foreign Affairs for Turkmenistan presented a diplomatic note to the United States Embassy thankfully acknowledging recognition by the United States but making no reference to its commitment to the five principles.<sup>145</sup> On January 31, 1992, the Foreign Ministry of Turkmenistan provided a second diplomatic note expressing Turkmenistan's commitment to

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142. Letter from President Akayev of Kyrgyzstan to President Bush (Dec. 28, 1991).

143. Letter from President Bush to President Mircea Snegur of Moldova (Dec. 26, 1991); Letter from President Bush to President Rakhman Nabiyev of Tajikistan (Dec. 26, 1991); Letter from President Bush to President Islam Karimov of Uzbekistan (Dec. 26, 1991); Letter from President Bush to President Ayaz Motalibov of Azerbaijan (Dec. 26, 1991); Letter from President Bush to President Saparmurad Niyazov of Turkmenistan (Dec. 26, 1991); and Letter from President Bush to President Zviad Gamsakhurdia of Georgia (Dec. 26, 1991).

144. *Id.*

145. Diplomatic Note from Turkmenistan Ministry of Foreign Affairs to U.S. Embassy in Moscow (Dec. 27, 1991).

international principles.<sup>146</sup> This diplomatic note made scant reference to the specific assurances sought by the United States and made no commitment to be bound by the treaty obligations of the former Soviet Union.<sup>147</sup>

On January 2, 1992, President Karimov of Uzbekistan furnished a letter to President Bush providing assurances that the Republic of Uzbekistan would abide by commitments sought by the United States. President Karimov went on to articulate the principles, wherein they were modified. With regard to treaty obligations, President Karimov provided that Uzbekistan would "observe international treaties and commitments," making no distinction between treaties of the former Soviet Union and treaties to which Uzbekistan might selectively succeed or accede.<sup>148</sup>

### c. Establishment of Diplomatic Relations

On February 18-19, 1992, the United States offered to establish diplomatic relations with Moldova, Azerbaijan, Tajikistan, Turkmenistan, and Uzbekistan.<sup>149</sup> On February 28, 1992, President Bush sent a formal letter to the Presidents of these states indicating that, based upon the assurances received regarding commitments sought by the United States, he was pleased to propose that the United States and the respective countries conduct full diplomatic relations.<sup>150</sup> Referring to the commitment to fulfill treaty obligations, President Bush specifically enumerated that the successor state had indicated a "commitment to fulfill the treaty and other obligations of the former USSR."<sup>151</sup>

## B. *Exchange of Letters With the Successor States of the Former Yugoslavia*

On April 14, 1992, President Bush announced that the United States recognized the independent states of Slovenia, Croatia, and Bosnia-Herzegovina.

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146. Diplomatic Note No. 19 from Turkmenistan Ministry of Foreign Affairs to U.S. Embassy in Moscow. (Jan. 31, 1992).

147. *Id.*

148. Letter from President Islam Karimov of Uzbekistan to President Bush (Jan. 2, 1992).

149. White House Press Release (Feb. 19, 1992).

150. Letter from President Bush to President Mircea Snegur of Moldova (Feb. 28, 1992); Letter from President Bush to President Ayaz Mutalibov of Azerbaijan (Feb. 28, 1992); Letter from President Bush to President Rakhman Nabiyev of Tajikistan (Feb. 28, 1992); Letter from President Bush to President Saparmurad Niyazov of Turkmenistan (Feb. 28, 1992); Letter from President Bush to President Islam Karimov of Uzbekistan (Feb. 28, 1992).

151. *Id.*

## 1. Recognition and Diplomatic Relations with Bosnia-Herzegovina, Croatia, and Slovenia

### a. Recognition with Offer to Consider Diplomatic Relations

On April 14, 1992, Secretary of State Baker notified President Alija Izetbegovic of Bosnia-Herzegovina, President Tudjman of Croatia, and President Milan Kucan of Slovenia, via identical diplomatic letters, that the United States was prepared to begin a dialogue with the respective states with a view toward the establishment of full diplomatic relations. Secretary Baker noted that the United States would seek written assurances from the successor states on a number of matters. Included in this list of assurances was "the readiness of [the respective state] to fulfill the treaty and other obligations of the former SFRY."<sup>152</sup>

### b. Response Letters

The Governments of Bosnia-Herzegovina, Croatia, and Slovenia responded to President Bush's letters as follows:

i. President Izetbegovic of Bosnia-Herzegovina responded to Secretary Baker's request for assurances via letter, stating in part that "Bosnia-Herzegovina is ready to fulfill the treaty and other obligations of the former SFRY."<sup>153</sup>

ii. President Tudjman of Croatia provided the assurances sought from Secretary Baker with a letter stating that "[a]s one of the successors to former Yugoslavia, the Republic of Croatia is prepared to fulfill treaty and other obligations of the former Yugoslav state . . . ."<sup>154</sup>

iii. President Kucan of Slovenia responded to Secretary Baker's request for assurances with a letter stating that "[w]hen declaring independence on June 25, 1991, the Parliament of the Republic of Slovenia decided that international treaties which had been concluded by the SFRY and which relate to the Republic of Slovenia remain valid on its territory."<sup>155</sup>

On August 10, 1992, the United States announced the establish-

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152. Letter from Secretary of State James Baker to President Alija Izetbegovic of Bosnia Herzegovina (Apr. 14, 1992); Letter from Secretary of State James Baker to President Franco Tudjman of Croatia (Apr. 14, 1992); Letter from Secretary of State James Baker to President Milan Kucan of Slovenia (Apr. 14, 1992).

153. Letter from President Alija Izetbegovic of Bosnia-Herzegovina to Secretary of State James Baker of the United States of America (Apr. 19, 1992).

154. Letter from President Franco Tudjman of the Republic of Croatia to Secretary of State James Baker of the United States of America (Apr. 16, 1992).

155. Letter from President Milan Kucan of the Republic of Slovenia to Secretary of State James Baker of the United States of America (Apr. 20, 1992).

ment of diplomatic relations with the states of Bosnia-Herzegovina, Croatia, and Slovenia.

## 2. Denial of Recognition and Diplomatic Relations with Serbia/Montenegro and Macedonia

### a. Serbia/Montenegro

On April 27, 1992, the Embassy of the former Yugoslavia provided the United States Department of State with a diplomatic note indicating that

the Socialist Federal Republic of Yugoslavia is transformed into the Federal Republic of Yugoslavia consisting of the Republic of Serbia and the Republic of Montenegro. Strictly respecting the continuity of the international personality of Yugoslavia, the Federal Republic of Yugoslavia shall continue to fulfill all the rights conferred to and obligations assumed by the Socialist Federal Republic of Yugoslavia in international relations, including its membership in all international organizations and participation in international treaties ratified or acceded to by Yugoslavia.<sup>156</sup>

The United States responded to this diplomatic note by refusing to recognize Serbia/Montenegro as an independent state<sup>157</sup> and by denying that Serbia/Montenegro constituted the continuation of Yugoslavia. The refusal of the United States to recognize Serbia/Montenegro as a state precluded the opportunity to seek assurances arising out of recognition. Similarly, the non-recognition prevented the United States from seeking commitments as a basis for diplomatic relations because the United States already maintained diplomatic relations with Serbia/Montenegro through the United States Embassy to the former Yugoslavia located in Belgrade.

The United States has thus rejected the Serbian/Montenegrin claim to be the continuation of the former Yugoslavia. Since that claim is the basis for the assertion by Serbia/Montenegro to continue the treaty obligations of the former Yugoslavia, the United States was unable to seek separate assurances prior to establishing diplomatic relations since diplomatic relations already exist with Serbia/Montenegro.

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156. Diplomatic Note No. 8/I.92 from the Embassy of the S.F.R. of Yugoslavia (Federal Republic of Yugoslavia) to the United States Department of State (Apr. 27, 1992).

157. Chuck Sudetic, *In Disputed Region, Belgrade Foes Reject New Yugoslav State*, N.Y. TIMES, Apr. 29, 1992, at A10.

## b. Macedonia

The United States recently recognized Macedonia as an independent state. However, the United States has yet to establish diplomatic relations with Macedonia due to Greece's concerns over the name Macedonia.

The situation with Macedonia is particularly peculiar because the United States has proposed the establishment of diplomatic relations, via a letter from President Clinton,<sup>158</sup> upon the receipt of specific assurances through a reply letter from President Gligorov.<sup>159</sup> These assurances included Macedonia's commitment to fulfill treaty and other obligations of the former SFRY.<sup>160</sup>

In all other circumstances such an exchange of letters would constitute the establishment of diplomatic relations. However, the United States denies that it has established diplomatic relations with Macedonia and has stated that it refuses to do so until Greece approves of an appropriate name for Macedonia.<sup>161</sup> Although the United States is in possession of a letter from President Gligorov providing assurances to continue treaty obligations, the letter cannot be considered binding; if it were, it would constitute the establishment of diplomatic relations. As a result, the United States may not claim that Macedonia has consented to fulfill its treaty obligations.

## C. Exchange of Letters With the Successor States of the Former Czechoslovakia

### 1. Recognition and Offer of Diplomatic Relations

On January 1, 1993, President Bush sent identical letters to Prime Minister Vladimir Meciar of the Slovak Republic and Prime Minister Vaclav Klaus of the Czech Republic informing them that the United States Government recognizes the Slovak Republic and the Czech Republic as independent states. The letters also proposed that the United States and the respective states "conduct full diplomatic relations" based on the affirmation of the Republics to fulfill a number of commitments, including the "commitment to fulfill the treaty and other obligations of the former Czechoslovakia."<sup>162</sup>

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158. Letter from President William Clinton to President Kiro Gligorov of Macedonia (Feb. 9, 1994).

159. Letter from President Gligorov of Macedonia to President Clinton (Feb. 8, 1994).

160. *Id.*

161. Department of State Briefings on Mar. 31, 1994 and Apr. 4, 1994.

162. Letter from President Bush to Prime Minister Vladimir Meciar of the Slovak Republic (Jan. 1, 1993); Letter from President Bush to Prime Minister Vaclav Klaus of the Czech Republic (Jan. 1, 1993).

## 2. Acceptance of Offer of Diplomatic Relations

On January 1, 1993, Vladimir Meciar responded to President Bush's offer of diplomatic relations with a letter stating in part that "[t]he Slovak Republic greatly appreciates the United States' formal recognition of the Slovak Republic as an independent state and welcomes the United States offer to establish full diplomatic relations."<sup>163</sup> Meciar further stated that "[t]he Slovak Republic is a successor state to the dissolved Czechoslovak federation, and is committed to fulfilling the treaty and other obligations of the Czech and Slovak Federal Republic."<sup>164</sup>

On January 1, 1993, Vaclav Klaus responded to President Bush's offer of diplomatic relations with a letter stating in part that "[t]he Czech Republic greatly appreciates the United States' formal recognition of the Czech Republic as an independent state, and welcomes the United States offer to establish full diplomatic relations."<sup>165</sup> Klaus further stated that "[t]he Czech Republic is a successor state to the dissolved Czechoslovak federation, and is committed to fulfilling the treaty and other obligations of the Czech and Slovak Federal Republic."<sup>166</sup>

## VI. THE DEFICIENCY OF THE UNITED STATES APPROACH TO SECURING CONTINUATION OF BILATERAL TREATIES WITH SUCCESSOR STATES

The performance of the United States in securing the continuation of the treaty obligations from the former Soviet Union, Yugoslavia, and Czechoslovakia should be measured against the standards set forth by the Legal Adviser in his presentation to the American Society of International Law. The Legal Adviser cited the interest in maintaining the stability of legal rights and obligations as the primary objective behind United States policy regarding treaty obligations and ensuring that the treaties of the former states remain in force.<sup>167</sup> An examination of the practice of the United States indicates that this goal has at best been marginally attained.

### A. *Shift from Legal Assertion to Reliance on Political Commitments*

Although the Department of State perceived that it was necessary to support assertions of a legal obligation by the successor states to

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163. Letter from Prime Minister Vladimir Meciar of the Slovak Republic to President Bush (Jan. 1, 1993).

164. *Id.*

165. Letter from Prime Minister Vaclav Klaus of the Czech Republic to President Bush (Jan. 1, 1993).

166. *Id.*

167. See *supra* note 121 and accompanying text.



continue treaties by seeking assurances from the successor states, it erred in carrying out its objective. First, the Department of State abandoned any assertions of automatic continuation of treaty obligations and relied entirely on any assurances provided by the successor states. Second, the Department of State sought to receive unilateral assurances from the member states as part of a package of recognition, but it did not follow up these assurances with bilateral agreements confirming that the treaties would continue in force. By relying solely on assurances provided during the process of developing diplomatic relations, the U.S. is left with a fragile tool for maintaining the stability of the legal rights and obligations of treaty obligations.

### 1. Feigned Commitments

Although the United States asserts that all of the successor states have committed to fulfill the treaty rights and obligations of their respective predecessor states, an examination of the commitments provided indicates that a number of countries failed to provide these assurances or modified the extent of their commitments.

Where the United States did not receive the specific assurances, it attempted to create those assurances by responding with a letter proposing to establish diplomatic relations based on assurances received and restating the commitments it sought.<sup>168</sup> The mere fact of feigning the receipt of commitments is not sufficient under international law or international diplomacy to require a state to be bound by those commitments.

### 2. Unilateral Commitments

Where the United States has received unequivocal commitments from the successor states, those commitments are purely unilateral, raising two problems. First, unilateral commitments may be rescinded by the successor state without requiring the consent of the United States.<sup>169</sup> Second, by not providing any commitment itself to be obligated by its treaties with the relevant predecessor state, the United States has effectively reserved the right to discontinue a treaty at its option. Although the latter difficulty may appear to be a benefit to the

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168. See *supra* notes 149-51 and accompanying text.

169. The United States would likely argue that the establishment of diplomatic relations was based upon the assurance of continuance of treaty obligations. This argument may be defeated upon proving that the assurances of a commitment to be bound by treaty obligations was not central to the establishment of diplomatic relations. This lack of centrality can be proven by pointing to the fact that the United States established diplomatic relations with those states that did not provide assurances or modified the assurances. Further, the United States is unlikely to withdraw diplomatic relations if a state breaches a commitment to continue treaty obligations.

United States under the international law perspective, it will make for a difficult diplomatic effort if the United States chooses to exercise this option.

### 3. Aspirational Assurances

The other assurances sought by the United States in the exchange of diplomatic letters are of a specifically political nature, including assurances to develop a market economy, protect the rights of minorities, abide by the principles of the Committee on Security and Cooperation in Europe, and adopt responsible security policies. Although the commitment to continue treaty obligations appears to be a legal commitment, it can be read in the context of the other commitments as a purely political commitment. Like the other political commitments, it can be carried out with varying degrees of attainment and still be considered to be a satisfaction of the successor states' commitment.<sup>170</sup> Similarly, if a successor state revokes its commitment to continue the treaties, the United States is restricted to political means of reversing that revocation and may not seek legal recourse.<sup>171</sup>

### 4. Lack of Commitments from Serbia/Montenegro or Macedonia

Since the United States has neither sought nor received commitments from Serbia/Montenegro or from Macedonia, those states may freely assert that they are not obligated by the treaties of the former Yugoslavia. In fact, it appears that the United States does not consider either Serbia/Montenegro or Macedonia to be obligated to continue those treaties.<sup>172</sup> This is particularly important in the case of Serbia/Montenegro, given the imposition of United Nations sanctions and the hostile attitude between it and the United States.

### B. *Subsequent Practice of the Department of State Detrimental to Policy of Securing Continuation of Bilateral Treaties with Successor States*

The primary indicator of the treaties that the United States considers to be in force is the Department of State annual publication, *Treaties in Force*. This compilation contains all treaties and other

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170. For instance, there are many progressive levels of a market economy, and although some of the successor states are far from developing the level of market economy sought in the commitments provided to the United States, the United States does not consider this to be a violation of those commitments. Similarly, a successor state may continue all of the treaties, only those that are consistent with its constitution, or only those approved by its Parliament, and it will still be considered to be in compliance with the political commitment.

171. The U.S. may not even be able to support its political approaches with a supporting reference to the moral authority deriving from international law.

172. See *infra* note 68 and accompanying text.

agreements "to which the United States has become a party and which are carried on the records of the Department of State as being in force as of January 1 of each year."<sup>173</sup> A close examination of the most recent issue of *Treaties in Force* indicates that the United States may in fact consider that only some of the successor states of the former Soviet Union, Yugoslavia, and Czechoslovakia remain obligated to the treaties of the predecessor state.

Under the headings of the successor states of the former Soviet Union, *Treaties in Force* only lists those treaties that have been concluded with the successor states since the dissolution of the Soviet Union. Each heading also includes a reference to see the heading USSR for treaties concluded prior to December 31, 1991. Under the heading of the Soviet Union, *Treaties in Force* states that the United States is reviewing the continued applicability of the agreements under this heading. *Treaties in Force* further indicates that the former Soviet Union has dissolved and cites the Alma Ata declaration stating that the successor states agreed, in accordance with their constitutional procedures, to discharge the international obligations of the former Soviet Union. Additionally, *Treaties in Force* quotes the Russian diplomatic note of January 13, 1992 indicating that Russia intended to fulfill the treaty obligations of the former Soviet Union.<sup>174</sup>

This collection of information is at best inconclusive concerning the view of the United States on treaty continuation. The position that the Soviet Union has dissolved and a citation to the Alma Ata accords, even considering their limitation, as discussed above, indicates that the United States considers all of the successor states bound by the treaty obligations of the former Soviet Union. However, the lack of a clear statement indicating continuation of treaty obligations, coupled with the statement that the continued applicability is under review and the fact that only the Russian commitment to continue the treaties is cited, despite the existence of commitments by several other successor states, indicates that the United States may in fact only consider Russia to be obligated to continue the treaties of the former Soviet Union.

Regarding the successor states of the former Yugoslavia, only Slovenia and Croatia are listed;<sup>175</sup> Bosnia-Herzegovina, Macedonia, and Serbia/Montenegro are not. Under the headings for Slovenia and Croatia, *Treaties in Force* lists those treaties concluded after the dissolution of Yugoslavia and refers the reader to the heading for Yugoslavia for treaties concluded prior to independence. Under the heading Yugoslavia, *Treaties in Force* notes that Yugoslavia has dissolved and

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173. Department of State, Office of the Legal Adviser, *Treaties in Force*, at i (1993) [hereinafter *Treaties in Force*].

174. *Id.* at 252.

175. *Id.* at 55, 224.

that the status of agreements concluded prior to the dissolution is under review.<sup>176</sup> *Treaties in Force* makes no reference to any of the commitments received from the successor states.

*Treaties in Force* gives no reason why the other three successor states are not listed. The absence of Macedonia and Serbia/Montenegro is consistent with the view that since no assurances have been received, and since the argument for legal obligation has been abandoned, they are not bound to continue the treaties obligations of the former Yugoslavia. Bosnia-Herzegovina has, however, provided the necessary assurances — in a more exact form than the other successor state — has diplomatic relations with the United States, and is even a member of the United Nations. As a result, in the case of Bosnia-Herzegovina, it appears that the United States has exercised its option not to be bound by the treaty obligations of the former Yugoslavia with regard to Bosnia-Herzegovina despite the assurances provided.

Regarding the successor states of the former Czechoslovakia, *Treaties in Force* omits any heading for the Czech Republic or the Slovak Republic, listing Czechoslovakia instead. Under Czechoslovakia, *Treaties in Force* notes that as of December 31, 1992, Czechoslovakia ceased to exist and was succeeded by two separate and independent states. *Treaties in Force* then indicates that the status of the treaties concluded with Czechoslovakia were under review, making no reference to the commitments made by the Czech or Slovak Republics.<sup>177</sup> *Treaties in Force* offers no explanation for the absence of the Czech and Slovak Republics. This absence is notably conspicuous since the Czech and Slovak Republics provided some of the strongest assurances regarding their intention to be bound by the treaties of the former Czechoslovakia.

#### VII. CURRENT STATE PRACTICE EVIDENCING UNCERTAINTY ON THE PART OF THE SUCCESSOR STATES AS TO WHETHER THE BILATERAL TREATIES WITH THE UNITED STATES CONTINUE IN FORCE

The practice of successor states subsequent to the provision of assurances to the United States indicates that a number of successor states are, at a minimum, unsure of whether the treaty rights and obligations of their predecessors continue in force. In some cases, the successor states have indicated that they believe they are obligated only by those treaties that they choose.

##### A. *Successor States of the Former Soviet Union*

Russia has taken the definite position that it is the continuation of the former Soviet Union and will fulfill the treaty obligations of the

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176. *Id.* at 275.

177. *Id.* at 58.

former Soviet Union. Nevertheless, in a meeting between representatives of the United States Department of State and the Russian Ministry of Foreign Affairs shortly after the dissolution of the former Soviet Union, the Russian representatives stated that Russia will honor the commitments of the former Soviet Union as long as they do not conflict with Russian law.

While meeting with the Office of the Legal Adviser for the Department of State in October 1992, and again in December 1992, the Counsel of the Ukrainian Embassy, after being informed of the United States position regarding treaty succession, noted that the Ukrainian Ministry of Foreign Affairs and the Ukrainian Parliament intended to review all of the international agreements of the former Soviet Union and determine which treaties it considered to continue in force. The Ukrainian Counsel also expressed a desire to re-sign those agreements that the Ukrainian Government considered to remain in force.<sup>178</sup>

In addition, on January 30, 1992, the Ukrainian Ministry of Foreign Affairs notified the United States Embassy in Moscow that it wished to conclude a Protocol on Consular Relations Between Ukraine and the United States of America. This Protocol would provide that Consular Relations between the United States and Ukraine would be governed by the Vienna Convention on Consular Relations.<sup>179</sup> This approach is inconsistent with the United States view of the continuity of treaty obligations since the United States and the former Soviet Union concluded a number of bilateral agreements concerning consular relations that would now govern consular relations with Ukraine.

Consistent with its view on continuity, the United States responded that it would be inappropriate to conclude a new bilateral agreement. The United States, however, was willing to issue a joint communique confirming that the United States-Ukrainian consular relations were based on the Vienna Convention on Consular Relations as well as on the bilateral agreements between the United States and former Soviet Union. The communique also took the opportunity to note that the United States and Ukraine further agree that all notes and agreements between the Government of the United States and the Government of the former Soviet Union shall remain in force. This joint communique was never issued.

The Government of Turkmenistan similarly requested that Turkmenistan and the United States enter into a Protocol stating that

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178. Such intentions on the part of the Ukrainian Government are clearly at odds with the United States position that all of the agreements continue in force and raises considerable doubt whether Ukraine considers itself bound by those obligations, regardless of any assurances that might have been provided while accepting the United States offer to establish full diplomatic relations.

179. Diplomatic Note No. 45/37-1379 from the Ukrainian Ministry of Foreign Affairs to the United States Embassy in Moscow (Jan. 30, 1992).

consular relations between the United States and Turkmenistan would be governed by the Vienna Convention on Consular Relations. The United States similarly rejected this approach and informed the Government of Turkmenistan that it was prepared to issue a joint communique acknowledging that consular relations between the two states would be conducted in accordance with the agreements on this subject in force between the United States and the former Soviet Union, which included the Vienna Convention on Consular Relations and a 1964 bilateral Consular Convention and Protocol. The suggested communique conflicted with previous United States practices in two important respects. First, the communique, unlike the Ukrainian communique, referred only to the continuation of consular agreements and did not confirm *all* agreements between the U.S. and Soviet Union. Second, the communique provided that Turkmenistan would deposit an instrument of accession to the Vienna Convention on Consular Relations. If the pre-dissolution multilateral, and bilateral, agreements continue in force, then Turkmenistan should only be required to deposit a notice of succession or a notice confirming its intent to be bound.

On July 15, 1992, the Ministry of Foreign Affairs for Belarus requested "review of the question of the legalization of successorship in relation to the agreement between the Government of the United States of America and the Government of the Former Soviet Union Concerning Cooperation in the Fields of Basic Scientific Research, which had been signed in Paris [on January 8, 1989]."<sup>180</sup> The United States responded via diplomatic note confirming that the particular agreement remains in force.<sup>181</sup> Notably, this diplomatic note did not take the opportunity to confirm that all of the agreements continue in force but rather confirmed only the Scientific Cooperation Agreement.<sup>182</sup>

The draft resolution submitted by Russia at the Forty-ninth session of the Commission on Human Rights is a strong indication that the successor states of the former Soviet Union do not consider all its treaties, and especially its multilateral treaty obligations, to continue in force. This draft resolution called for those successor states that "have not yet done so to consider without delay the issue of their succession in respect of international human rights treaties."<sup>183</sup> If Russia

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180. Diplomatic Note from Foreign Ministry of Belarus to the United States Embassy in Minsk (July 15, 1993).

181. Diplomatic Note from The Embassy of the United States of America to the Ministry of Foreign Affairs of the Republic of Belarus (Aug. 7, 1993).

182. *Id.*

183. The draft resolution stated, in more detail, as follows:

Bearing in mind the considerable changes within the international community connected with the emergence of new States which are the successors of those States that have been responsible for the obligations under international human rights treaties of the relevant territories be-

considered the successor states to be bound as a matter of law, then the resolution would have called upon those states to confirm their succession to the human rights treaties rather than to consider their succession to those treaties.<sup>184</sup>

### B. *Successor States of the Former Yugoslavia*

In February 1993, the Ministry of Foreign Affairs for the Republic of Croatia requested that the Government of Croatia and the Government of the United States exchange diplomatic notes formalizing the status of the treaty obligations between the United States and Croatia. Croatia proposed that the parties would agree that the treaties of the former Yugoslavia would remain applicable until such time as new agreements were concluded. The United States declined the invitation to exchange diplomatic notes on the grounds that the exchange of letters between Secretary Baker and President Tudjman constituted the basis for obligating Croatia to the treaties of the former Yugoslavia.

Slovenia removed any doubt concerning its intent to fulfill the obligations of the former Yugoslavia by explicitly stating in Article 3 of the Constitutional Law of Slovenia that the "[i]nternational agreements concluded by Yugoslavia and relating to the Republic of Slovenia will be effective in the territory of the Republic of Slovenia." The Constitution provided further that the Executive Council of Slovenia would submit to the Assembly of Slovenia a list of international agreements relating to Slovenia and that the Assembly shall adopt an act on notification of other parties to these international agreements.<sup>185</sup>

Although the constitutional provision clearly provides for the

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fore the date of succession . . . Noting that non-participation of these States in international human rights treaties impedes their full-scale cooperation with the United Nations human rights bodies . . . Expresses its satisfaction that some of the aforementioned States have already become parties to international human rights treaties or have notified their succession to those treaties . . . Urges those States that have not yet done so to consider without delay the issue of their succession in respect of international human rights treaties, as well as to accede to or ratify those international human rights treaties to which the predecessor states have not been parties.

Draft Resolution: Succession of States in Respect of International Human Rights Treaties, U.N. Doc. E/CN.4/1993/L.25 (Feb. 22, 1993).

184. The language of the Russian resolution does not challenge the concept that the break-away states are properly successor states. Rather, it challenges the notion that all successor states are bound by the treaty obligations of the predecessor states.

185. Republic of Slovenia Assembly, Constitutional Law on the Enforcement of the Basic Constitutional Charter on the Autonomy and Independence of the Republic of Slovenia (June 25, 1991).

continuance of treaties, it also evidences a view that Slovenia has a unilateral right to determine whether it will continue to be bound by the treaty obligations of the former Yugoslavia. Similarly, the requirement that the list of treaties be approved by the Assembly and then notified to the parties to the treaties indicates that Slovenia believed it could selectively determine which treaties it considered in force.

In accordance with Article 3, the Slovenian Foreign Ministry notified the U.S. Embassy in Vienna, on May 14, 1992 via diplomatic note, that "international agreements concluded by Yugoslavia and relating to the Republic of Slovenia will be effective in the territory of the Republic of Slovenia." Slovenia further considered the agreement between Yugoslavia and the United States on a Reciprocal Issue of Multiple Entry Visas to continue in force and wished to confirm that Slovenian Consular officers could issue multiple visas for entry into Slovenia in American Passports.<sup>186</sup> It is important to note here, however, that this notification occurred before the establishment of diplomatic relations with the United States and thus supports the position that Slovenia presumed a unilateral right to confirm the treaty obligations of the former Yugoslavia — and presumably could have exercised the unilateral right not to confirm those treaties.

Regarding multilateral treaties with the former Yugoslavia, a number of conflicting precedents have been set. First, on June 8, 1992, Slovenia notified the Netherlands, as depository for the Statute of the Hague Conference on Public International Law, that it considered itself a party to the Statute and therefore an automatic member of the Hague Conference.<sup>187</sup> Both the Netherlands and the Secretariat of the Hague Conference supported this position.<sup>188</sup>

On January 30, 1992, the Government of the Republic of Croatia notified the Department of State, as depository for the ICAO Convention, that Croatia accedes to the ICAO convention by deposit of the relevant instrument of accession.<sup>189</sup> This is inconsistent with the action taken by the Netherlands and evidences a presumption that Croatia is not bound by the multilateral treaties of the former Yugoslavia and must accede anew.

On November 9, 1992, the Ministry of Foreign Affairs for the Republic of Croatia notified the Department of State, as depository of

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186. Diplomatic Note from the Ministry of Foreign Affairs of the Republic of Slovenia to the United States Embassy in Vienna (May 14, 1992).

187. Letter from Foreign Minister Dimitrij Rupel of Slovenia to Foreign Minister Hans van den Broek of the Kingdom of the Netherlands (June 8, 1992).

188. The Secretariat did, however, provide an opportunity for member states to express divergent opinions. Circular Note From Secretariat of the Hague Conference on Public International Law to Member States (Sept. 23, 1992).

189. Letter from President Franco Tudjman of the Republic of Croatia to The Government of the United States of America (Jan. 30, 1992).



the Charter of United Nations, that as one of the successors to the former Yugoslavia, Croatia considers itself committed to the international agreements signed and ratified by the former Yugoslavia and therefore is a party to the Charter of the United Nations.<sup>190</sup> The letter left unclear whether Croatia wished to succeed, accede, or notify of its adherence. This particular note is especially confusing as Croatia had attained membership in the United Nations, and, therefore, it is automatically considered a party to the Charter of the United Nations.

Finally, as a result of the dissolution of the former Yugoslavia, the Council of Europe concluded that "for the purposes of the Conventions and Agreements of the Council of Europe to which it was a Party, the Socialist Federal Republic of Yugoslavia had ceased to exist." The former Yugoslavia had been a party to sixteen agreements with the Council of Europe.<sup>191</sup> This determination of the Council of Europe effectively prohibited the successor states of Yugoslavia from succeeding to any of these treaties.

### *C. Successor States of the Former Czechoslovakia*

On April 24, 1993, Slovakia and Poland concluded the Protocol on Succession to the Bilateral Treaties Concluded between Czechoslovakia and Poland between 1918 and 1992.<sup>192</sup> The Czech and Slovak Republics, after negotiations, informed Hungary that they accepted that the approximately 100 international agreements concluded between Hungary and the former Czechoslovakia would be binding on them as successor states.<sup>193</sup> The conclusion of specific Protocols or declarations evidences substantial doubt regarding the legal automaticity of the continuation of treaty obligations.

In June 1993, the Ministry of Foreign Affairs for the Czech Republic notified the United States Department of State of the U.S.-Czechoslovakia treaties that it considered to continue in force between the United States and the Czech Republic. This list exempted a number of significant treaties that the United States considered to remain in force.<sup>194</sup> The exemptions could be either a lapse on the part of the

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190. Diplomatic Note No. 0506127/92 from the Ministry of Foreign Affairs for the Republic of Croatia to the Department of State of the United States of America (Nov. 9, 1992).

191. Letter from Deputy Director of Legal Affairs Marie-Odile Wiederkehr of the Council of Europe to Secretary of State James Baker of the United States of America (Oct. 6, 1992).

192. Protocol on Succession to the Bilateral Treaties Concluded between Czechoslovakia and Poland Between 1918 and 1992 (Apr. 24, 1993).

193. *Czechs, Slovaks Accept Existing Agreements*, FIBIS-EEU-93, at 24 (Jan. 14, 1993).

194. The following treaties were omitted from the Czech Republic's list: Arrangement Concerning the Exchange of Technical Information and Cooperation in Nuclear Safety Matters (Apr. 14, 1989); Agreement Regarding Settlement for Certain War Ac-

Czech Ministry of Foreign Affairs regarding the compilation of bilateral treaties, or it could reflect an exercise of Czechoslovakia's perceived right to select those treaties which it considers to continue in force.

Concerning multilateral treaties, on March 4, 1993, the Czech Republic deposited an instrument of accession to the Convention on International Civil Aviation (Chicago 1944) to the United States Government, depository for that Convention.<sup>195</sup> At the same time, the Czech Republic also presented the United States with a Declaration on the Accession of the Czech Republic to the Convention of International Civil Aviation, stating that the Czech Republic considered itself a legal successor to the former Czechoslovakia, "notwithstanding the act of deposit of the instrument of its accession to the Convention on International Civil Aviation . . . and thus to be an original member of ICAO since 1944."<sup>196</sup>

The deposit of an instrument of accession is clearly inconsistent with a declaration stating that the Czech Republic is a successor state of Czechoslovakia and thereby a member of ICAO since 1944. The confusion is a result of the requirement by ICAO, supported by the United States a Depository, that the Czech and Slovak Republics accede to the International Aviation Convention rather than succeed to the Convention. This approach is inconsistent with the United States position that the Czech and Slovak Republics are bound by the obligations of the former Czechoslovakia.

### VIII. CONCLUSION

The United States correctly perceived the need to ensure that the treaties of the former Soviet Union, Yugoslavia, and Czechoslovakia continued in force with respect to their successor states. At an early stage, the United States developed a two-pronged approach designed to ensure the continuation of those treaties in light of the uncertain legal precedent requiring continuation.

Unfortunately, the United States has abandoned its legal justifications for continuation and has relied solely upon political assurances.

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counts and Claims incident to the operations of the United States Army in Europe (July 25, 1947); Agreement Relating to Commercial Policy (Nov. 14, 1946); Agreement Relating to the Funding of the Indebtedness of Czechoslovakia to the United States (Oct. 13, 1925); Agreement Modifying the Debt Funding Agreement of October 13, 1925 (June 10, 1932); Preliminary Agreement Regarding Principles Applying to Mutual Aid in the Prosecution of the War Against Aggression (July 11, 1942); Agreement on Settlement for Lend-Lease and Certain claims (Sept. 16, 1948); International Express Mail Agreement, with Detailed Regulations (Aug. 17, 1988).

195. Diplomatic Note No. 2616/93 from the Embassy of the Czech Republic to the Department of State of the United States of America (Mar. 4, 1993).

196. Declaration of the Czech Republic on the Accession of the Czech Republic to the Convention of International Civil Aviation (Mar. 4, 1993).

The sole reliance upon these assurances might have proved satisfactory except that the United States was not particularly successful at receiving all the necessary assurances.

The failure of the Department of State to carefully preserve its position with a consistent assertion of the obligation of the successor states to continue the treaty obligations of the predecessor state has aggravated the already diminished justification for the United State's position. Most noteworthy is the inconsistent practice by the Department of State in the Treaties in Force compilation, the only representation of the United States position widely available.

This erosion of the United States position creates the distinct possibility that a number of successor states could choose to assert that they will continue to be obligated only by those treaties which they so choose. As a result, the successor states may choose not to abide by important treaties regarding commercial relations, privileges and immunities for diplomatic personnel, trade agreements, arms control, aviation, fisheries management, extradition, and narcotics cooperation.

In order to properly secure the continuation of treaties, the United States should enter into bilateral agreements with the successor states providing that all of the treaties of the predecessor state shall continue in force. Until the continuation of treaties is confirmed in suitable agreements, the continuing validity of treaties between the United States and the successor states remains in doubt.