

Chicago-Kent College of Law

## Scholarly Commons @ IIT Chicago-Kent College of Law

---

All Faculty Scholarship

Faculty Scholarship

---

March 2005

# Resolving Claims When Countries Disintegrate: The Challenge of Kosovo

Henry H. Perritt Jr.

IIT Chicago-Kent College of Law, [hperritt@kentlaw.iit.edu](mailto:hperritt@kentlaw.iit.edu)

Follow this and additional works at: [https://scholarship.kentlaw.iit.edu/fac\\_schol](https://scholarship.kentlaw.iit.edu/fac_schol)



Part of the [International Law Commons](#), and the [Rule of Law Commons](#)

---

### Recommended Citation

Henry H. Perritt Jr., *Resolving Claims When Countries Disintegrate: The Challenge of Kosovo*, 80 Chi.-Kent L. Rev. 119 (2005).

Available at: [https://scholarship.kentlaw.iit.edu/fac\\_schol/489](https://scholarship.kentlaw.iit.edu/fac_schol/489)

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in All Faculty Scholarship by an authorized administrator of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact [jwenger@kentlaw.iit.edu](mailto:jwenger@kentlaw.iit.edu), [ebarney@kentlaw.iit.edu](mailto:ebarney@kentlaw.iit.edu).

## RESOLVING CLAIMS WHEN COUNTRIES DISINTEGRATE: THE CHALLENGE OF KOSOVO

HENRY H. PERRITT, JR.\*

### INTRODUCTION

Final status for Kosovo<sup>1</sup> must be accompanied by mechanisms for resolving claims by and against Kosovo and persons operating within its territory. When states break up, as in the cases of the Soviet Union, Yugoslavia, and East Timor, the international legal, political, and economic systems must deal with conflicting claims by and against the elements of the preexisting state.<sup>2</sup> Who is entitled to a bank account maintained by the former state of Yugoslavia in New York: Serbia-Montenegro? Croatia? Slovenia? Who is responsible for a debt of a socially-owned enterprise (“SOE”) located in Kosovo? Serbia-Montenegro? The purchaser of the assets of the SOE in a privatization sale? The privatization agency? Are the debts of the former Yugoslavia to be allocated in the same way as claims on its assets?

Some but not all of the same issues arise when the former government of a state is displaced by revolution or by the international community, as in Afghanistan or Iraq.<sup>3</sup> Is the new government responsible for all the debts of the old regime? Are elements of the old regime or nominally private persons or entities enjoying franchises under the old regime entitled to

\* Professor of Law and former Dean, Chicago-Kent College of Law, Illinois Institute of Technology. The author appreciates good research, analysis, and drafting assistance from Brian Orr, Class of 2004, Chicago-Kent College of Law. The author also appreciates attorney William Klawonn’s legal insights, including identifying for the author the importance of a claims resolution mechanism to successful final status negotiations for Kosovo. The author welcomes comments and suggestions on this Article. He may be contacted at (312) 906-5098 or hperritt@kentlaw.edu.

1. Under U.N. Security Council Resolution 1244, Kosovo, formerly an autonomous province of the Republic of Serbia within Yugoslavia, is being administered by the U.N. as a political trusteeship. See S.C. Res. 1244, U.N. SCOR, 54th Sess., 4011th mtg., U.N. Doc. S/RES/1244 (1999). See generally Henry H. Perritt, Jr., *Structures and Standards for Political Trusteeship*, 8 UCLA J. INT’L L. & FOREIGN AFF. 385 (2003) (explaining the concept of political trusteeship). Security Council Resolution 1244 requires the U.N. to facilitate “a political process designed to determine Kosovo’s future status.” S.C. Res. 1244, *supra*, ¶ 11(e).

2. See Paul Williams & Jennifer Harris, *State Succession to Debts and Assets: The Modern Law and Policy*, 42 HARV. INT’L L.J. 355 (2001) (reviewing public international law on state succession; analyzing how public international law has been affected by the dissolutions of the Soviet Union, Yugoslavia, and Czechoslovakia; and recommending approaches for the future).

3. See *Yucyco, Ltd. v. Republic of Slovenia*, 984 F. Supp. 209, 217–18 (S.D.N.Y. 1997) (distinguishing state succession from mere change in government).

some of the assets, on the grounds that they were personal and not governmental in character?<sup>4</sup> Public international law provides only scant guidance for resolving these questions.

Part I of this Article discusses the categories of claims, the dispute resolution mechanisms, and the private international law concepts developed in other contexts that may be useful in deciding the final status of Kosovo. Part II addresses the legal concepts, tools, and frameworks available that may provide insight for resolving claims in Kosovo. In Part III, this Article surveys frameworks used in other situations with features similar to those present in Kosovo. Part IV discusses the need for any claims resolution system to have the power to extinguish preexisting rights. Part V describes the unique situation in Kosovo, including problems with claims dispute mechanisms already in place and common criticisms of the procedures currently being followed. Part VI then offers several scenarios that might reduce the potential of claims disputes to block successful negotiations over final status for Kosovo. In order to frame the claims resolution issues, the Article assumes an independent Kosovo. Final status other than independence, such as defining an autonomous Kosovo within the Union of Serbia and Montenegro or within a separate state of Serbia, presents fewer claims resolution challenges because an overarching legal system would already exist within which claims could be resolved.

## I. UNIVERSE OF CLAIMS, DISPUTE RESOLUTION MACHINERY, AND PRIVATE INTERNATIONAL LAW RULES

Any policy analysis of claims affecting the future status of Kosovo involves three overlapping tasks: categorizing claims, identifying institutional mechanisms for resolving disputes over claims, and crystallizing questions of private international law (conflict of laws) to know what sources of substantive law, what tribunals, and what enforcement mechanisms are available to decide claims disputes.

### A. *Categories of Claims*

Claims relating to Kosovo fall into two broad categories: intergovernmental claims and private claims. Intergovernmental claims include

4. See *Republic of the Philippines v. Marcos*, 806 F.2d 344, 352, 354 (2d Cir. 1986) (affirming injunction against disposing of assets in the U.S. until the Philippines Commission can determine whether they were bought with money misappropriated from the Philippines Government and finding federal question jurisdiction because the court must decide as a matter of federal law the effect to be given a foreign act of state); *Republic of the Philippines v. Marcos*, 653 F. Supp. 494, 496 (S.D.N.Y. 1987) (appointing receiver over assets in U.S. allegedly bought with money misappropriated from the Philippines Government until legal proceedings in the Philippines can determine the merits).

claims by the state of Serbia, a possible new state of Kosovo, and third states to physical assets and to intangibles (such as currency and gold reserves), regardless of where they are located. Intergovernmental claims also include claims by international organizations such as the World Bank for repayment of loans.

A useful analytical framework for evaluating mechanisms for claims resolution must accommodate differences along two dimensions: a sovereignty dimension and a public-private dimension. The first dimension involves disputes over where sovereignty resides. In some cases, such as Cuba in 1958, or Afghanistan or Iraq in 2002–2004, state boundaries remain intact, but one government is supplanted by another, which seeks to exercise sovereign power in a way that affects ownership or other claims to property. In other cases, such as the breakup of the Soviet Union, a preexisting state dissolves, but a part of the territory enjoys the status of “surviving state.” In the most difficult case, a preexisting state, such as Yugoslavia, dissolves, and there is no entity entitled to the status of surviving state.

The second dimension concerns the characterization of an entity obligated on a claim or asserting rights to assets. In some cases, a creditor or debtor may unambiguously be a state. At the opposite pole, a creditor or debtor may unambiguously be a private person—natural or legal, such as a corporation. A number of intermediate possibilities exist, such as nationalized enterprises, SOEs in the former Yugoslavia, and enterprises formerly owned by the state but that had been privatized in whole or in part.

Private claims fall into three overlapping categories: claims by natural persons to real property; employment-related claims, as for unpaid wages, termination pay, or pension benefits; and commercial claims, as by owners of equity interests in enterprises or claims by creditors of enterprises. In some cases, the alleged obligor on private claims is a state or quasi-public entity. In other cases, the alleged obligor is another private person, natural or juridical.

Mechanisms for claims dispute resolution must encompass all of the relevant permutations:

1. a state asset holder’s relations with a state claimant,
2. a state asset holder’s relations with a private claimant,
3. a private asset holder’s relations with a state claimant, and
4. a private asset holder’s relations with a private claimant in conditions in which the power to change legal relations is clouded by changes in sovereignty.

Most of the literature on state succession focuses on the first permutation, and, indeed public international law concerns itself with only that permutation. The fourth permutation has often been ignored, presumably on the basis that it involves private law only, and is a matter for national courts. But in the case of Kosovo, all four permutations must be addressed.

### *B. Dispute Resolution Mechanisms*

Most scholarly attention to successorship has focused on the resolution of intergovernmental claims because there is no permanent, comprehensive mechanism for resolving such claims in the international public law system. Conversely, a variety of legal systems already exist for resolving private claims, including the national legal systems of the surviving states, the national legal systems of third states in which assets may be located or where creditors may be citizens, and international private arbitration under the New York Convention.<sup>5</sup>

In the case of Kosovo, policymakers and lawyers should focus attention on mechanisms for resolving disputes over private claims as well as intergovernmental claims. Presumably, whatever final status is determined for Kosovo, both Kosovar and Serbian claimants could file claims in the domestic courts of Kosovo, the domestic courts of Serbia, or the domestic courts of third states. This approach is unlikely to be acceptable, however, because of likely mistrust by Kosovars of the domestic courts in Serbia<sup>6</sup> and mistrust by Serbs of the domestic courts in Kosovo. Whether the domestic courts of third countries are perceived as fair depends substantially on what substantive law they apply, an issue that implicates questions of private international law considered in the next section.

Likely mistrust of the neutrality of conventional judicial institutions for claim resolution suggests consideration of specialized claims resolution tribunals accompanied by procedures and personnel appointment processes that assure neutrality. Following sections of this Article consider various models that should be considered.

5. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38. Most relevant states are parties to the New York Convention.

6. The acceptability of claims dispute resolution in the courts of Serbia could be increased by the possibility of appealing decisions in which the procedure failed to meet the standards of the European Convention on Human Rights ("ECHR"). "Any person" has standing to challenge in the European Court of Human Rights a decision by a court in a state signatory to the ECHR. See Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, Nov. 5, 1994, art. 34 Europ. T.S. No. 155. The ECHR was signed by the Member States of the Council of Europe, including Serbia and Montenegro. *Id.* at 2; see also [http://www.coe.int/T/E/Com/About\\_Coe/Member\\_states/default.asp](http://www.coe.int/T/E/Com/About_Coe/Member_states/default.asp) (last visited Jan. 21, 2005) (listing Serbia-Montenegro as a Member State of the Council of Europe).

### C. Private International Law

Any mechanisms for resolving private claims disputes must address the three traditional subjects encompassed by private international law: choice of substantive law to be applied to a case; adjudicative jurisdiction (the power of a particular tribunal over the parties to a particular dispute);<sup>7</sup> and enforcement of tribunal decisions, especially enforcement by the courts of states in which assets belonging to a judgment debtor may be located.

Choice of law is a complex and—in the United States, at least—substantially indeterminate legal regime. Nevertheless, some basic rules of thumb, common to most choice of law regimes, are helpful in designing claims dispute resolution systems. First, in a dispute over real property, the law of the place where the property is located usually is applied.<sup>8</sup> Second, in employment disputes, the law of the place where the workplace is located usually is applied.<sup>9</sup> Third, in contract disputes, explicit choice of law provisions in the contract usually are enforced.<sup>10</sup> In the absence of such choice of law provisions, adjudicative forums usually apply either the law of the place of performance of the contract or the law of the place where the contract was made.<sup>11</sup>

Uncertainties with respect to adjudicative jurisdiction can be reduced by ensuring that any tribunals intended to be available for resolution of claims related to Kosovo are fair and fully accessible to claimants, and that their organic statutes or regulations give them exclusive jurisdiction over such claims. Such features increase the likelihood that the doctrine of *forum non conveniens*, discussed in Part VI(A)(11), will steer claims to the preferred tribunals, and that the doctrine of *lis pendens* will give priority to the preferred tribunals if claims are filed there first.

The same features that reduce uncertainty with respect to adjudicative jurisdiction will increase the likelihood that decisions by the preferred tri-

7. See generally Council Regulation 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1 (replacing Brussels and Lugano Conventions).

8. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 222–43 (1971).

9. *Id.* § 196 (contracts for the performance of services, giving employment as example).

10. *Id.* § 187.

11. See Rome Convention of 1980 on the Law Applicable to Contractual Obligations art. 4, 1998 O.J. (C 27) 34, 37 (applicable law in the absence of choice). On January 14, 2003, the European Commission (“EC”) adopted a Green Paper to launch a discussion about conversion of the Rome Convention of 1980 into European legislation harmonizing choice of law in contract disputes. Although the rules of the Rome Convention are in force in all the member states, it still takes the form of an international agreement rather than a community instrument proper, and as such the Court of Justice of the European Communities has no jurisdiction to interpret it. See Proposal Put Forward by European Commission, at [http://europa.eu.int/comm/justice\\_home/fsj/civil/applicable\\_law/fsj\\_civil\\_applicable\\_law\\_en.htm](http://europa.eu.int/comm/justice_home/fsj/civil/applicable_law/fsj_civil_applicable_law_en.htm) (last visited Jan. 21, 2005).

bunals will be effectively enforced by courts in places where judgment-debtor assets are located.

Nevertheless, residual uncertainty is inescapable because the source of private international law for any specific case is the law of the forum.<sup>12</sup> An external sovereign, in the absence of a treaty mechanism, cannot determine absolutely what choice of law, adjudicative jurisdiction, or judgment enforcement rules will be applied by a court in another legal system.<sup>13</sup>

## II. LEGAL CONCEPTS, TOOLS AND FRAMEWORKS

### A. *Elemental Concepts*

Claims incident to the dissolution of a state are similar to those arising in the context of other legal relationships, but the conflict of laws problems are more serious when states are involved. When the dissolving state is solvent at the time of dissolution, the situation resembles probate of a will, severance and partition of a joint tenancy, or a corporate division such as a spin-off.<sup>14</sup> When a will is probated, claimants may be sad that the decedent no longer exists, but their wealth may increase. The challenge for the legal system involves marshalling of assets, valuation, notifying debtors, and distribution according to rules set by the will. Distribution is shaped by the requirements of one legal system for the interpretation of the will and for forced shares of certain privileged descendants. In the severance of a joint tenancy and partition of the resulting tenancy in common,<sup>15</sup> claimant assets are not increased, but they are not diminished either. Equitable distribution

12. See RESTATEMENT (SECOND) OF CONFLICTS OF LAWS, *supra* note 8, § 6.

13. See generally RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 482 (1987) (noting some variation in whether choice of law by a foreign court is the basis for nonrecognition of judgment of that court).

14. See Lawrence B. Low et al, *Divisive Corporate Reorganizations: Spin-offs and Subsidiary Public Offerings*, in LAWRENCE LEDERMAN & MARTIN NUSSBAUM, *ACQUISITIONS IN A DELEVERAGING ENVIRONMENT* 125, 128-31 (PLI Handbook Series. No. B-787, 1992) (defining a "spin-off" as occurring:

when a parent corporation forms a subsidiary corporation, transfers certain of its assets to the subsidiary in exchange for all of the subsidiary's stock and distributes the subsidiary's stock to its own shareholders pro rata as a dividend and/or sells stock in a public offering. Following a spin-off reorganization, shareholders of the former parent corporation own stock in two corporations which are brother-sister, rather than parent-subsidiary corporations and distinguishing "split-off" and "split-up").

15. Professor Helmholz describes:

Joint tenancies and tenancies in common exist where estates in land or rights to chattels are held as a unit by two or more persons. The former are distinguished from the latter by the characteristic, traditionally called the *ius accrescendi*, which makes the joint tenant who survives the death of the other(s) the outright owner of all the property.

R.H. Helmholz, *Realism and Formalism in the Severance of Joint Tenancies*, 77 NEB. L. REV. 1, 4 (1998).

is the standard, but most cases involve the comparatively simple reality that land is located in only one state, whose local law is applied to the partition.<sup>16</sup>

When the dissolving state is insolvent, not all the claimants can be satisfied, and the problem resembles bankruptcy or equity receivership,<sup>17</sup> with the added complexity that multiple legal systems are involved. In a bankruptcy, assets are insufficient to satisfy all claims, and there often are multiple, conflicting claims to the same assets. Once the bankruptcy is complete, claimants have fewer assets than they did before the bankruptcy.<sup>18</sup>

Any model for apportionment of claims and assets must include a mechanism for resolving disputes over valuation<sup>19</sup> and distribution.

### B. Legal Frameworks for State Succession

Public international law provides only scant guidance for resolving claims when states break up. Until 1989, when the Soviet Union broke up, the customary international law doctrine of state succession focused mainly on treaty continuity and membership in international organizations, and not much on succession to debts and assets.<sup>20</sup> Among other things, this was due to the fact that most instances of state succession until 1989 involved decolonization where most of the assets and debts were clearly under the control of the colonial power.<sup>21</sup> Natural resources located in the former colonies did present issues, however.

16. See *Flood v. Kalinyaprak*, 84 P.3d 27, 32 (Mont. 2004). When partitioning a tenancy in common, assets are presumed to be divided equally, but evidence of unequal contribution requires property to be divided in proportion to contribution. *Id.*

17. See *Mellen v. Moline Malleable Iron Works*, 131 U.S. 352 (1889) (discussing basic characteristics of equity receivership); David L. Abney, *The Practitioner's Corner: Selling Equity Receivership Property Free and Clear of Liens and Encumbrances*, 16 REAL EST. L.J. 364 (1988) (providing an overview of equity receiverships, citing authority, and noting the flexibility and power to sell property free of liens and encumbrances, which must be asserted against proceeds of the sale).

18. For example, a creditor of the enterprise would value a debt from the enterprise at full value on the creditor's balance sheet. After bankruptcy, the balance sheet of the creditor would show only the value of whatever the creditor received in distribution of assets of the bankrupt.

19. See *In re Zell*, 284 B.R. 569 (Bankr. D. Md. 2002) (determining valuation method in Chapter 7 bankruptcy proceeding); *Flanigan v. Gen. Elec. Co.*, 93 F. Supp. 2d 236, 256 (D. Conn. 2000) (addressing valuation dispute in spin-off); *Lance v. Lance*, 979 S.W.2d 245, 253 (Mo. Ct. App. 1998) (reversing and remanding for valuation of assets involved in joint tenancy); *In re Estate of Daniels*, 279 Cal. Rptr. 40, 42 (Cal. Ct. App. 1991) (reversing probate court decision because of error in valuation).

20. See *Williams & Harris*, *supra* note 2, at 360. Public international law, despite a long history of dealing with treaty continuity and membership in international organizations, gives scant precedent regarding state succession to debts and assets, due in part to the relatively recent development of the international financial system and arrangements for multilateral lending. *Id.*

21. See Marco A. Martins, *An Alternative Approach to the International Law of State Succession: Lex Naturae and the Dissolution of Yugoslavia*, 44 SYRACUSE L. REV. 1019 (1993) (characterizing the history of the law of state succession as rooted in decolonization).

In discussions in the U.N. General Assembly beginning in 1981, former colonies asserted indefeasible claims to their natural resources. The International Law Commission drafted some preparatory documents, and a diplomatic conference authorized by the General Assembly produced the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts in 1983 ("1983 Vienna Convention").<sup>22</sup> The 1983 Vienna Convention, which has not entered into effect because it has not obtained the requisite fifteen ratifications, failed to resolve many important questions arising in the dissolution of states, as in the cases of the Soviet Union, Yugoslavia,<sup>23</sup> and East Timor. For example, the treaty failed to distinguish between territorial and national assets.<sup>24</sup> It did not require any proportionality between assumption of claims and assets.<sup>25</sup> It did not provide for any ongoing dispute resolution machinery. In the main, it provided for claims to be resolved by international agreement and provided only a general framework of default rules.

Customary international law with respect to state succession distinguishes between continuation and dissolution:

In the case of continuation, one or more sub-state entities breaks away from the predecessor state and forms an independent state. What remains of the predecessor state is referred to as the continuing state . . . and is deemed to continue the international legal personality of the predecessor states. The break-away states are referred to as successor states or newly independent states.

In the case of dissolution, the predecessor state dissolves into a number of independent states, with none of these states considered the continuing state. All of the emerging states are considered successor states and are treated as equal heirs to the rights and obligations of the predecessor state.<sup>26</sup>

The 1983 Vienna Convention did not distinguish between continuation and dissolution, although it did distinguish between newly independent

22. See Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, Apr. 8, 1983, 22 I.L.M. 306, available at <http://www.un.org/law/ilc/texts/tresufra.htm> [hereinafter 1983 Vienna Convention].

23. See *Yucyco, Ltd. v. Republic of Slovenia*, 984 F. Supp. 209, 217–18 (S.D.N.Y. 1997) (observing that, absent acceptance, a successor state is not bound by contracts executed by a former sovereign, and rejecting a claim to equitable apportionment as a nonjusticiable political question).

24. See Williams & Harris, *supra* note 2, at 361. The 1983 Vienna Convention did not distinguish between national and territorial debt, but it did distinguish between national and territorial assets. Territorial assets are those things, such as power plants, manufacturing enterprises, and mineral deposits that are linked to the physical territory of a particular successor state. National assets are "held by the former central government, and include things such as currency accounts, federal movable property, gold reserves, and diplomatic and state property located abroad." *Id.*

25. *Id.* at 357. Equitable allocation can be defined in terms of gross national product, natural resources, territory, population, or some combination, but the main issue is whether a successor state's share of assets is the same as its share of debts. *Id.*

26. *Id.* at 362.

states, separation of part or parts of the territory of a state, and dissolution of a state.<sup>27</sup> Under customary international law, the continuation case left the assets with the continuing state, a practice derived from decolonization, where the national property did not come within the sovereignty of the successor state.<sup>28</sup>

But in the case of dissolution, the predecessor state, having lost its international legal personality, is no longer competent to own property<sup>29</sup> and, thus, state property must devolve to successor states.<sup>30</sup> But the legal position of successor states depended on whether they were recognized as states.<sup>31</sup>

Because the 1983 Vienna Convention has not entered into effect, customary international law, informed by commentary arising from negotiation of the 1983 Vienna Convention, provides the principal legal framework for resolving state succession issues involving debts and assets. But this legal environment also is indeterminate and incomplete, primarily because public international law focuses only on the relationships among states.<sup>32</sup> The 1983 Vienna Convention defined state property as “property, rights and interests . . . owned by that state.”<sup>33</sup> State debts are defined as “any financial obligation . . . towards another State, an international organization or any other subject of international law.”<sup>34</sup>

The treaty framework contemplated by the 1983 Vienna Convention also is incomplete in that it fails to implement a freeze or standstill to preserve assets.<sup>35</sup>

Williams and Harris draw the following principles from state practice after the end of the Cold War: first, a distinction should be drawn between

27. *Id.*

28. *Id.* at 364.

29. *See id.* at 388. On July 4, 1992, the EC Arbitration Commission found that the Socialist Federal Republic of Yugoslavia (“SFRY”) should be considered to have dissolved and that the Federal Republic of Yugoslavia (“FRY”) could not be considered the continuity of the SFRY. *Id.*

30. *Id.* at 364.

31. *Id.* Whether third-party states were obligated to recognize successor state claims to assets depended on whether third-party states had recognized successor states as sovereign. *Id.*

32. *See id.* at 357. The three most important categories of norms relate to the identification of national, territorial, and identifiable debt, the principle of *pacta sunt servanda*, and the principle of equitable allocation. *Id.*

33. 1983 Vienna Convention, *supra* note 22, at art. 8.

34. *Id.* at art. 33.

35. *See Williams & Harris, supra* note 2, at 366. The 1983 Vienna Convention creates no obligation of third-party states to protect assets of predecessor states during the breakup or to assist successor states in obtaining equitable shares of either territorial or national property. *Id.* Serbia-Montenegro was able to seize most of the national assets of the former Yugoslavia. *Id.* at 399. The eventual freeze of assets of the former Yugoslavia occurred after most were dissipated in order to finance Serbia’s armed conflict in Croatia and Bosnia. *Id.*

national and territorial debts;<sup>36</sup> second, the principle of *pacta sunt servanda* should govern debt obligations;<sup>37</sup> third, the proportion of territorial debt can be used as a basis for allocating national debt;<sup>38</sup> and finally, population and economic indicators can determine the share of national debt.<sup>39</sup>

Whatever guidance the 1983 Vienna Convention or customary international law may give for adjusting debts owed by dissolving states to other states and for allocating assets held by other states among the components of dissolving states, neither offers theoretical guidance for claims by private persons against dissolving states and assets owned by dissolving states but held by private entities. Those private sector issues are rather the province of informal arrangements in the financial community, such as the Paris Club<sup>40</sup> and the London Club,<sup>41</sup> or by specialized mechanisms established by bilateral agreement, such as the Iran-U.S. Claims Tribunal.<sup>42</sup>

### C. Legal Frameworks for Private Claims

Legal regimes for resolving private claims associated with dissolution of states are fragmentary and incomplete. This is due, in part, to the traditional limitation of customary international law to relations among states, and to the conventional belief that private claims can be resolved by national legal systems of the debtor or creditor states according to private international law principles for adjudicative jurisdiction, judgment recognition and enforcement, and choice of law.<sup>43</sup>

Private claim resolution has been addressed in international law in the context of transnational investment disputes, including expropriation and privatization, and in bilateral U.S. treaties providing for comprehensive claims dispute resolution in the cases of Russia, Korea, Vietnam, and Iran. Privatization can have a significant impact on the resolution of claims in the state succession context. The Yugoslav experience, where Serbia re-

36. *Id.* at 407.

37. *Id.* at 408.

38. *Id.* at 412.

39. *Id.* (noting, however, that this approach may be less adapted to dissolution of states with centrally controlled economies because of the lack of third-party access to data).

40. The Paris Club is a voluntary collection of official creditors (such as states and state central banks) who work to reschedule debt of distressed states. See Paris Club, *Description of the Paris Club*, at <http://www.clubdeparis.org/en/presentation/presentation.php?BATCH=B01WP01> (last visited Jan. 21, 2005).

41. The London Club is an informal group of commercial banks who work to reschedule or forgive debt of distressed states. See Steven L. Schwarcz, *Sovereign Debt Restructuring: A Bankruptcy Reorganization Approach*, 85 CORNELL L. REV. 956, 960 n.15 (2000) (summarily explaining the nature of the London Club).

42. See *infra* Part III(B)(1).

43. See *infra* Part I(C).

fused to participate in various EU mechanisms for resolving claims involving the former Yugoslavia,<sup>44</sup> in part because it wanted to include assets held by SOEs in Yugoslavia,<sup>45</sup> is an example.<sup>46</sup> The breakup of Czechoslovakia provides another example, where disagreements between the Czech Republic and Slovakia were driven in large part by the differential impact of privatization.<sup>47</sup>

One of the few comprehensive mechanisms for private claims is the International Center for the Settlement of Investment Disputes ("ICSID"), established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("Settlement Convention"), which came into force on October 14, 1966.<sup>48</sup> Among other things, it provides standing machinery for conciliation and arbitration of investment disputes between nationals of signatory states and other signatory states.<sup>49</sup>

One hypothesis of this Article is that private debts and claims should follow the same norms as those for public debts and claims, unless there is a clear private agreement to the contrary, such as one containing explicit guarantees by states.

The absence of comprehensive international law models for the resolution of private claims associated with dissolution of states requires reference to features of several overlapping international and national law regimes: nationalization, privatization, and bankruptcy.

### 1. Breach of Contract

The most general legal regime for resolving private claims that cross state boundaries is the regime for breach of contract. Even when unresolved controversies exist over apportioning state assets and responsibility for state debts in cases of state succession, private creditors and debtors

44. The European Community ("EC") created the EC Arbitration Commission in 1991 to assist in negotiating a settlement to the Yugoslav conflict. See Williams & Harris, *supra* note 2, at 385–86.

45. *Id.* at 390 (indicating that Serbia refused to participate meaningfully in the Working Group on Economic Issues established by the International Peace Conference because it insisted that assets include all property possessed by former republics, all public property, all property belonging to associated labor organizations, and all property financed by more than one republic).

46. *Id.* at 388 (noting "there was little pressure by creditor states to reach an agreement on the allocation of the debts or assets" because Yugoslavia did not have a substantial amount of external debt other than debt to international financial institutions).

47. See *id.* at 406.

48. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159, 17 U.S.T. 1270, available at <http://www.worldbank.org/icsid/basicdoc/partA.htm>.

49. See, e.g., Tradex Hellas S.A. (Greece) v. Republic of Albania, Award, ICSID Case No. ARB/94/2, 14 ICSID Rev.-For. Inv. L.J. 197 (1999), available at [http://www.worldbank.org/icsid/cases/tradex\\_award.pdf](http://www.worldbank.org/icsid/cases/tradex_award.pdf) (last visited Jan. 22, 2005) (arbitration award by the ICSID on an unsuccessful claim by a Greek company against the state of Albania for expropriation of a farming venture).

remain subject to preexisting private contractual obligations. Claims for breach of those obligations lie in national courts.

Breach of contract actions traditionally were not available against states and their instrumentalities,<sup>50</sup> so the private contract regime may be unavailing when a predecessor or successor state is the obligor on a contract obligation.<sup>51</sup> Moreover, breach of contract liability may not provide a private creditor with meaningful relief when the debtor—public or private—is insolvent.<sup>52</sup>

## 2. Sovereign Immunity

Sovereign immunity is implied by an international legal system of co-equal sovereigns.<sup>53</sup> As U.S. law evolved, however, it extended sovereign immunity more broadly than the law of many foreign jurisdictions.<sup>54</sup> Moreover, the extension of state activities into the commercial sphere spawned calls for revision of sovereign immunity doctrine under U.S. law.<sup>55</sup> In 1952, the U.S. State Department adopted a “restrictive” interpretation of sovereign immunity, which extended immunity to governmental acts, but not to commercial ones, albeit undertaken by entities nominally governmental.<sup>56</sup> The restrictive theory is regularly applied by foreign courts in suits against instrumentalities of the U.S.<sup>57</sup>

In 1976, Congress enacted the Foreign Sovereign Immunities Act (“FSIA”), codifying the restrictive interpretation of sovereign immunity.<sup>58</sup> The FSIA contains a “commercial activities” exception to sovereign immunity, which subjects foreign entities to suit in U.S. courts over their com-

50. See *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 486–89 (1983) (reviewing the history of sovereign immunity); see *id.* at 490–91, 497 (holding that federal courts could exercise jurisdiction over breach of contract claims against state banks under the Foreign Sovereign Immunities Act (“FSIA”), and that the FSIA did not violate Article III of the U.S. Constitution).

51. See discussion *infra* Part II(C)(2).

52. See discussion *infra* Part II(C)(3).

53. *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 146 (1812) (the immunity of one sovereign to the exercise of judicial power over it by another is inherent in the concept of sovereignty).

54. Paul L. Lee, *Central Banks and Sovereign Immunity*, 41 COLUM. J. TRANSNAT’L L. 327, 333 (2003).

55. *Id.*

56. *Id.*

57. See *Abrams v. Société Nationale des Chemins de Fer Français*, 175 F. Supp. 2d 423, 427 (E.D.N.Y. 2001) (“Moreover, the principle is regularly applied in suits against the United States in foreign courts.”), *vacated*, 332 F.3d 173 (2d Cir. 2003) (questioning constitutionality of giving retroactive effect to FSIA), *vacated*, 124 S. Ct. 2834 (2004) (retroactive effect not unconstitutional).

58. Lee, *supra* note 54, at 334. The FSIA “was designed to codify the restrictive theory of sovereign immunity and to remove the subject from diplomatic pressures by transferring . . . decisions [about sovereign immunity] to the judiciary.” *Abrams*, 332 F.3d at 178.

mercial activities.<sup>59</sup> Uncertainty with respect to the commercial activities exception to sovereign immunity is particularly troublesome in connection with suits by private parties against central banks, which often guarantee private commercial transactions.<sup>60</sup>

### 3. Bankruptcy

Bankruptcy is the traditional method for resolving private claims when the debtor lacks sufficient assets fully to satisfy all creditors, but significant limitations vitiate its utility in the context of final status determination for Kosovo.

Bankruptcy is a statutory procedure, usually triggered by insolvency,<sup>61</sup> in which a (usually private) debtor is reorganized or liquidated by a judicial body for the benefit of the debtor's creditors.<sup>62</sup> Under U.S. law, there are two basic forms of bankruptcy: reorganization and liquidation. In a reorganization, the debtor continues as a going concern, and its future earnings are structured to satisfy part or all of its debts.<sup>63</sup> In a liquidation, the debtor's assets are sold off, with the proceeds used to satisfy its debts.<sup>64</sup>

The bankruptcy laws of other countries vary widely. French bankruptcy law was extensively reformed in 1984, 1985, and 1994, with goals of saving enterprises, preserving jobs, and paying creditors.<sup>65</sup> Bankruptcy proceedings occur before panels of the Commerce Tribunal, comprising lay businesspeople elected by local chambers of commerce.<sup>66</sup> Creditor control of the debtor estate is minimized<sup>67</sup> and the court itself decides whether

59. 28 U.S.C. § 1605(a)(2) (2000).

60. See Lee, *supra* note 54 (reviewing application of the FSIA to foreign central banks as defendants).

61. Insolvency is a "financial condition such that the sum of such entity's debts is greater than all of such entity's property, at a fair valuation." 11 U.S.C. § 101(32)(A) (2000) (defining "insolvent"); see also Draft Legislative Guide on Insolvency Law, United Nations Commission on International Trade Law (UNCITRAL) Working Group V (Insolvency), 30th Sess., at 6, U.N. Doc. A/CN.9/WG.V/WP.70 (Part I) (2003) (defining "insolvency" as "[w]hen the debtor is generally unable to pay its debts as they mature or when its liabilities exceed the value of its assets"), available at <http://www.uncitral.org/en/index.htm> [hereinafter UNCITRAL Draft Legislative Guide Part I].

62. BLACK'S LAW DICTIONARY 141 (7th ed. 1999).

63. See 11 U.S.C. §§ 1101–74 (2000) (reorganization); UNCITRAL Draft Legislative Guide Part I, *supra* note 61, at 8 (defining reorganization as the "[p]rocess by which the financial well-being and viability of a debtor's business can be restored and the business continue to operate, using various means possibly including debt forgiveness, debt rescheduling, debt-equity conversions and sale of the business (or parts of it) as a going concern").

64. See 11 U.S.C. §§ 701–84 (liquidation); UNCITRAL Draft Legislative Guide Part I, *supra* note 61, at 7 (defining liquidation as "[p]roceedings to assemble and reduce the debtor's assets to money for distribution in accordance with the insolvency law").

65. Richard L. Koral & Marie-Christine Sordino, *The New Bankruptcy Reorganization Law in France: Ten Years Later*, 70 AM. BANKR. L.J. 437, 442 (1996).

66. *Id.* at 443.

67. See *id.* at 442.

reorganization is possible or whether liquidation is necessary.<sup>68</sup> In contrast, virtually all reorganizations in Germany occur out of court, a result of inadequate reorganization procedures under German bankruptcy law.<sup>69</sup>

In 1995, the member states of the European Union adopted the Convention on Insolvency Proceedings (“Insolvency Convention”), which integrates European bankruptcy law.<sup>70</sup> The Insolvency Convention applies to insolvencies of individual and corporate debtors, but excludes banks and insurance companies.<sup>71</sup> It provides for an automatic stay and for the appointment of a trustee.<sup>72</sup> The decisions resulting from an insolvency proceeding in one member state must be recognized and enforced by courts in all member states, subject to choice of law rules contained in the Insolvency Convention and to the possibility of ancillary proceedings.<sup>73</sup> It does not, however, address the effect to be given bankruptcy court decisions from states outside the EU.<sup>74</sup>

The United Nations Commission on International Trade Law (“UNCITRAL”) has formulated a legislative guide on insolvency law,<sup>75</sup> seeking to strengthen and harmonize national bankruptcy law.<sup>76</sup> The guide distinguishes between liquidation and reorganization, making recommendations for effective national law regimes, while noting the socio-political interests that may thwart complete harmonization.<sup>77</sup> Among other things, it recommends subjecting SOEs to bankruptcy provisions applicable to purely private enterprises.<sup>78</sup>

A bankruptcy system, whether international or purely local, is infeasible unless the legal system within the territory where assets are located has an effective creditors’ rights regime. A declaration by a bankruptcy tribunal

68. *See id.* at 448.

69. Karen M. Gebbia-Pinetti, *First Report of the Select Advisory Committee on Business Reorganization*, 57 Bus. Law. 163, 174–75 n.7 (2001).

70. Eberhard Schollmeyer, *The New European Convention on International Insolvency*, 13 BANKR. DEV. J. 421, 421, 422 (1997).

71. *Id.* at 425.

72. *Id.*

73. *Id.* at 435.

74. *Id.* at 437–38.

75. *See* UNCITRAL Draft Legislative Guide Part I, *supra* note 61; Draft Legislative Guide on Insolvency Law, United Nations Commission on International Trade Law (UNCITRAL) Working Group V (Insolvency), 30th Sess., U.N. Doc. A/CN.9/WG.V/WP.70 (Part II) (2003), available at <http://www.uncitral.org/en-index.htm> [hereinafter UNCITRAL Draft Legislative Guide Part II].

76. *See* Report of Working Group V (Insolvency Law) on the Work of its Twenty-ninth Session, 37th Sess., ¶ 11, U.N. Doc. A/CN.9/542 (2003), available at <http://www.uncitral.org/en-index.htm> (summarizing the work culminating in UNCITRAL adopting the Draft Legislative Guide on Insolvency Law) [hereinafter 2003 UNCITRAL Report].

77. *Id.* ¶ 2 (noting the difficulty in harmonizing bankruptcy law).

78. Draft Legislative Guide on Insolvency Law Part II, *supra* note 75, ¶¶ 88–90 (suggesting that SOEs be subjected to general bankruptcy law, with certain exceptions, such as state guarantees).

that a creditor is entitled to particular assets is worthless unless the creditor has a way to compel the legal authorities to force those in possession of the assets to give them up. Thus, if the assets involved in a bankruptcy are located in a territory where the authorities do not recognize the legal authority of the bankruptcy apparatus, or in which there is no effective commercial rule of law, those assets are not a meaningful part of the bankrupt estate.<sup>79</sup>

A number of commentators have proposed a “universalist” approach, in which states would recognize the decisions of the bankruptcy courts of the state of incorporation of multinational corporations.<sup>80</sup> Other commentators insist that the most that can be hoped for is a greater measure of cooperation among national courts, considering parallel bankruptcy proceedings for the same corporate entity.<sup>81</sup> Chapter III of the UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment provides for national court recognition of decisions by bankruptcy courts of other jurisdictions, subject to important exceptions.<sup>82</sup>

#### 4. Nationalization, Expropriation, and Eminent Domain

International law does not distinguish meaningfully among nationalization, expropriation, and eminent domain.<sup>83</sup> All three terms refer to the exercise of legal power by a state to transfer the ownership of private property into state hands. Whenever such power is exercised, the former owners of the property are likely to have difficulty realizing their claims through litigation in national courts of other states. The biggest barriers are sovereign immunity and the act of state doctrine.

79. See generally Michael T. Hilgers, *Debtor-States and an International Bankruptcy Court: The IMF Creditor Problem*, 4 CHI. J. INT'L L. 257 (2003) (evaluating and criticizing the International Monetary Fund's ("IMF") proposal for an international bankruptcy court to deal with private and intergovernmental claims against insolvent states).

80. Several commentators, however, have suggested that universalism will not work. See Frederick Tung, *Is International Bankruptcy Possible?*, 23 MICH. J. INT'L L. 31 (2001) (questioning the feasibility of the “universalist” approach to international bankruptcy); Frederick Tung, *Fear of Commitment in International Bankruptcy*, 33 GEO. WASH. INT'L L. REV. 555 (2001) (same). But see Andrew T. Guzman, *International Bankruptcy: In Defense of Universalism*, 98 MICH. L. REV. 2177 (2000) (defending universalism in the case of nonadjusting creditors).

81. See Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 CORNELL L. REV. 696 (1999) (arguing for a system of cooperative territoriality as the most feasible approach to international bankruptcies).

82. Model Law on Cross-Border Insolvency with Guide to Enactment, U.N. Commission on International Trade Law (UNCITRAL), arts. 15–24, U.N. Sales Doc. E.99.V.3 (1997), available at <http://www.uncitral.org/english/texts/insolven/insolvency.htm>.

83. See Craig R. Giesze, *Helms-Burton in Light of the Common Law and Civil Law Legal Traditions: Is Legal Analysis Alone Sufficient to Settle Controversies Arising Under International Law on the Eve of the Second Summit of the Americas?*, 32 INT'L LAW. 51, 74 n.127 (1998) (citing *Black's Law Dictionary*, French judicial precedent, and foreign-state constitutional provisions for definitions of nationalization and expropriation).

In *Banco Nacional de Cuba v. Sabbatino*, the U.S. Supreme Court held that the validity of an expropriation decree by the Cuban government could not be questioned in a U.S. court because of the act of state doctrine.<sup>84</sup> The controversy arose from facts typical of nationalization or expropriation. A commodity broker purchased sugar from a private enterprise operating in Cuba. After the sugar was loaded, but before it was shipped, the government of Cuba nationalized the enterprise. Both the former owners of the nationalized enterprise and the Cuban government claimed the proceeds, and the Cuban government sued in U.S. federal court.<sup>85</sup> The district court found the expropriation decree invalid because it violated international law, and the court of appeals affirmed.<sup>86</sup>

The Supreme Court reversed.<sup>87</sup> First, even though the U.S. had not recognized the Cuban Government, the Court held that the government of Cuba could sue in U.S. federal court.<sup>88</sup> Second, the Court held that the act of state doctrine foreclosed judicial invalidation of the Cuban law on which the Cuban Government's claim was based.<sup>89</sup> The Court characterized the act of state doctrine as having arisen in England in 1674 and having been transplanted to the U.S. in the late eighteenth and early-nineteenth centuries.<sup>90</sup> The Court expressed the doctrine as follows:

Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.<sup>91</sup>

If the posture of the case had been somewhat different, the Court said, the act of state doctrine could have been interposed successfully as a defense to a claim by the former owner of the enterprise for the proceeds.<sup>92</sup>

The act of state doctrine thus is a powerful barrier to litigation of private claims in national courts when the outcome of the litigation is determined by an expropriation or nationalization law.

The international community has sought to develop international legal frameworks, accompanied by dispute resolution machinery, to fill the gap,

84. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 437 (1964).

85. *Id.* at 406-07 (describing the procedural history of the dispute).

86. *Id.*

87. *Id.* at 439.

88. *Id.* at 412.

89. *Id.* at 439.

90. *Id.* at 416.

91. *Id.*

92. *Id.* at 438.

but working out a multilateral framework for encouraging and protecting private investment in developing countries has proven difficult.<sup>93</sup>

In the late 1990s, members of the Organization for Economic Cooperation and Development ("OECD") sought unsuccessfully to negotiate a Multilateral Agreement on Investment ("MAI"), working with the World Bank through its International Center for the Settlement of Investment Disputes ("ICSID"). The MAI negotiations were scheduled to be completed by April 1998, but that deadline has long passed, and most observers consider the initiative to be dead.<sup>94</sup>

The MAI was to have defined rights for private sector investors and to have included a procedure for seeking recourse against host governments in investment disputes. The MAI's scope would have included more than outright nationalization or expropriation; it would have extended to excessive or discriminatory taxation or regulation. The proposed MAI included the following key components:

1. Nondiscrimination: guaranteeing that "host states" (i.e., states where the investment is taking place) grant foreign investors equal or comparable rights to host state (national) investors;
2. Restrictions on certain performance requirements: this would prohibit states from imposing special targets or other conditionalities on the activities of investors;
3. Transparency: ensuring that investment-related laws, guidelines, and procedures are publicly available to ensure predictability;
4. Funds transfer guidelines: ensuring that host states will not restrict certain investment-related financial transactions, such as the transfer of profits back to an investor's home country;
5. Tight controls on expropriation: setting international limits and laws governing expropriation and subsequent compensation; and
6. Dispute resolution: establishing binding arbitration procedures to settle investment-related disputes between states and investors and between host and home states.<sup>95</sup>

93. See Peter T. Muchlinski, *The Rise and Fall of the Multilateral Agreement on Investment: Where Now?*, 34 INT'L LAW. 1033, 1050-53 (2000) (reviewing the history and political context for negotiating investment-protection agreements).

94. See Jessica S. Wiltse, Comment, *An Investor-State Dispute Mechanism in the Free Trade Area of the Americas: Lessons from NAFTA Chapter Eleven*, 51 BUFF. L. REV. 1145, 1151 (2003) (referring to MAI negotiations as "failed"); see also Kevin C. Kennedy, *A WTO Agreement on Investment: A Solution in Search of a Problem?*, 24 U. PA. J. INT'L ECON. L. 77, 83-84 (2003) (questioning the need for a multilateral agreement on investment because market forces are sufficient to encourage foreign direct investment).

95. See CHRISTOPHER CHAMBERLAIN, BANK INFO. CTR., THE ROLE OF WORLD BANK GROUP IN THE MULTILATERAL AGREEMENT ON INVESTMENT NEGOTIATIONS AND ADMINISTRATION (Jan. 12, 1998), at [http://www.bicusa.org/bicusa/issues/misc\\_resources/461.php](http://www.bicusa.org/bicusa/issues/misc_resources/461.php).

Absent such a treaty framework, disputes over alleged discriminatory treatment of investors or expropriation of investments must be resolved in national judicial systems of the host country, or of the investor's country, or through various third-party arbitration and conciliation mechanisms.

Despite the failure of the MAI, bilateral investment-protection treaties fill the gap.<sup>96</sup> Federal statutes in the U.S. contemplate suspension of foreign assistance to states that expropriate the property of U.S. investors.<sup>97</sup> Chapter 11 of the North America Free Trade Agreement ("NAFTA") is the only instance so far in which private investors have been given direct access to dispute resolution mechanisms that are binding against states.<sup>98</sup>

### 5. Privatization

Privatization superficially appears to be the converse of nationalization. In privatization, property formerly owned by the state is transferred to private owners. But this formulation is misleading. State-owned property subject to privatization usually is held subject to private claims arising from loans or other commercial claims by suppliers of equipment or raw material. Privatization of such property often involves application of governmental power to extinguish or otherwise to limit such claims. Moreover, the property subject to privatization often was the subject of an earlier nationalization. Some commentators frame the legal issues involved in privatization as relating to a "nationalization-privatization cycle."<sup>99</sup>

Privatization thus presents special problems in the state succession context. By definition, it results in the transfer of property interests from

96. See Andreas F. Lowenfeld, *Investment Agreements and International Law*, 42 COLUM. J. TRANSNAT'L L. 123, 125 (2003) (evaluating the failure of efforts to negotiate multilateral investment treaties and observing that thousands of bilateral investment treaties are in force).

97. But see *Talenti v. Clinton*, 102 F.3d 573, 578 (D.C. Cir. 1996) (private citizen lacked standing to compel enforcement of the Hickenlooper Amendment to the Foreign Assistance Act, 22 U.S.C. § 2370(e)(1), superseded by the Helms Amendment, 22 U.S.C. § 2370(a)(1), against Italy for the alleged expropriation of plaintiff's property); *Betterroads Asphalt Corp. v. United States*, 106 F. Supp. 2d 262, 267-69 (D.P.R. 2000) (private creditor lacks standing to compel enforcement of rarely enforced statutes authorizing the President to suspend foreign assistance to any foreign state that blocks payment of claims by a U.S. private entity).

98. See Guillermo Aguilar Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 YALE J. INT'L L. 365 (2003) (evaluating NAFTA Chapter 11 and analyzing the legal bases for enforcing arbitration decisions on Chapter 11); Wiltse, *supra* note 94, at 1147-51 (evaluating the desirability and feasibility of extending the concepts of private-investor access to arbitration against states in investment disputes); Lydia Lazar, *NAFTA: Structural Damage to the Ship of State?*, in 2001 EMPLOYMENT LAW UPDATE 169 (Henry H. Perritt, Jr. ed., 2001) (arguing that NAFTA's dispute resolution process diminishes notions of state sovereignty).

99. See George Chifor, *Caveat Emptor: Developing International Disciplines for Deterring Third Party Investment in Unlawfully Expropriated Property*, 33 LAW & POL'Y INT'L BUS. 179, 185 (2002) (widespread seizure of foreign-owned property may return as a phenomenon associated with privatization); Amy L. Chua, *The Privatization-Nationalization Cycle: The Link Between Markets and Ethnicity in Developing Countries*, 95 COLUM. L. REV. 223 (1995) (describing historical and likely future cycles).

the state to private owners. But to encourage private investment, the privatization process often strips liabilities from the privatized assets and requires that these claims be satisfied by recourse to a special privatization fund, accumulated from a combination of public funding and payments by investors in the assets.<sup>100</sup> When the legal personality of the state changes, the new state may seek to repudiate those transfers. Or, in many cases, preprivatization creditors of the privatized enterprises may assert liability against the new owners.

In more complicated cases, such as Kosovo, enterprises were already privatized or transformed into private ownership, then renationalized by the political trustee, and finally privatized through a process deriving its legal power from an ambiguous legal mandate to the trustee. Some claimants argue that the first privatization process was invalid. Other claimants argue that the first privatization process was valid and the second invalid.

Such privatization disputes frequently result in litigation in the courts of third states. When that occurs, courts presented with the disputes must decide whether to exercise judicial power over them. U.S. courts generally have uniformly viewed the activities of privatization agencies as falling within the judicial immunity conferred by the U.S. Foreign Sovereign Immunities Act, although case authority is mixed on whether such activities nevertheless present justiciable controversies under the commercial activities exception of the Act. In *Sablic v. Croatia Line*, the New Jersey intermediate court held that the Croatian Privatization Fund was a foreign entity entitled to FSIA immunity.<sup>101</sup> In *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, the court of appeals held that the district court lacked jurisdiction to adjudicate a variety of contract claims asserted by an entity granted

100. The approach of the Kosovo Trust Agency ("KTA") is a good example. See Kosovo Trust Agency, *Objectives of the Kosovo Trust Agency*, at <http://www.kta-kosovo.org/html/index.php?module=htmlpages&func=display&pid=1> (last visited Jan. 22, 2005) (explaining the spin-off approach to privatization). The reorganization of the northeast and midwest railroads in the U.S. is another example, albeit not involving foreign investors. See *Regional Rail Reorganization Cases*, 419 U.S. 102, 111 (1974) (describing the framework for reorganization, requiring owners of rail assets to accept securities in new government-created corporations in exchange for rail properties). The process represented nationalization of rail assets contemporaneous with privatization. Conrail subsequently was financially successful, able to sell securities in private capital markets and to pay off its obligations to the federal government. See Christian C. Day, *Corporate Governance, Conrail, and the Market: Getting on the Right Track!*, 26 J. CORP. L. 1, 3-4 (2000) (describing the financial success of Conrail, leading to public offering and subsequent purchase by other railroads). The previous owners of the rail properties were required to present any claims for deficiency in payments to them before the U.S. Claims Court. Absent such a remedy, the Supreme Court held the takings of private property might raise serious constitutional questions. *Regional Rail Reorganization Cases*, 419 U.S. at 148-49.

101. 719 A.2d 172, 177 (N.J. Sup. Ct. 1998).

management rights over a state-owned uranium mining enterprise in Kazakhstan.<sup>102</sup>

Two district courts found privatization in other countries to be within the commercial activities exception of the FSIA.<sup>103</sup> To be sure, “[e]ngaging in a program of privatization does not *automatically* insulate [another state] from suit in the United States.”<sup>104</sup> But it is well accepted that the applicability of the commercial activities exception is determined, not with reference to the purpose of the entity claiming immunity under the FSIA, but with reference to the specific activities drawn into question in the litigation. In *Ampac Group, Inc. v. Republic of Honduras*, the activity in litigation was “[t]he sale of a company from its owners to the highest bidder [which] is a routine commercial transaction.”<sup>105</sup> In the case of Kosovo, many activi-

102. 296 F.3d 1154, 1164 (D.C. Cir. 2002). The court held that the state of Kazakhstan and its instrumentalities enjoyed immunity under the FSIA and had not waived it. *Id.* The lawsuit alleged that the contracts were not performed because of certain decisions reached in the Kazakhstan privatization process. *Id.* at 1157–59. The plaintiff did not assert the commercial activities exception. *Id.* at 1161. The court held that certain of the defendants were entitled to FSIA immunity and that immunity had been waived only for certain claims that nevertheless fell within the act of state doctrine. *Id.* at 1156–57. As to claims against a private corporation that allegedly interfered with the plaintiff’s contracts, the court remanded for a determination whether jurisdiction existed based on an alleged meeting in the U.S. involving that private defendant. *Id.* at 1169.

103. In *WMW Machinery, Inc. v. Werkzeugmaschinenhandel GMBH*, the district court held that the German privatization agency (the Treuhand) was not entitled to sovereign immunity because the privatization agency, though an entity of the state of Germany, fell within the commercial activities exception. 960 F. Supp. 734, 741 (S.D.N.Y. 1997). WMW Machinery sued the Treuhand as an owner of the German enterprise with which it contracted. *Id.* at 736. The contract at issue in *WMW Machinery* (an exclusive distribution agreement) was to be performed wholly in the United States and Canada. *Id.* at 737. The Treuhand allegedly ratified the contract at issue and assured WMW that the contract was still valid. *Id.* WMW Machinery could be decided by reference only to primarily commercial decisions by the Treuhand. “The actions that form the basis of plaintiffs’ claims reflect an exercise of powers . . . akin to those that a controlling stockholder of a corporation might take as a player in the private market.” *Id.* at 740 (internal quotation marks and citations omitted).

Compare *Dar-El-Bina Eng’g & Contracting Co., Ltd. v. Republic of Iraq*, 79 F. Supp. 2d 374, 382 (S.D.N.Y. 2000) (dismissing claim for nonpayment of commercial obligation as falling outside the commercial activities exception of the FSIA because there is no obligation to make payment in the U.S.) with *Weltover, Inc. v. Republic of Argentina*, 753 F. Supp. 1201, 1207 (S.D.N.Y. 1991) (holding that the nonpayment of debt in the U.S. was sufficient to satisfy the direct effect requirement of the FSIA commercial activities exception), *aff’d*, 941 F.2d 145, 153 (2d Cir. 1991) (emphasizing payment in New York as factual consideration in finding direct effect), *aff’d on other grounds*, 504 U.S. 607, 619 (1992) (holding that Argentina’s act of diminishing New York’s status as a “financial leader” was insufficient to satisfy the direct effects test, but that contract performance in New York was sufficient).

In *Ampac Group, Inc. v. Republic of Honduras*, the district court found subject matter jurisdiction under the commercial activities exception to the FSIA, rejecting the defendants’ arguments that “privatizing a national cement industry is an action that could only be taken by a foreign sovereign and is thus not ‘commercial activity’” and that privatization is “merely the ‘flip side’ of nationalization, a quintessentially sovereign prerogative.” 797 F. Supp. 973, 976, 977 (S.D. Fla. 1992). The district court also rejected the argument that the act of state doctrine applied to the “unquestionably commercial” privatization decisions by the government of Honduras. *Id.* at 978. The court also found personal jurisdiction based on meetings held by Honduran officials in the U.S. *Id.* at 979.

104. *Id.* at 976 (emphasis added).

105. *Id.*

ties in potential litigation would be policy decisions by the Kosovo Trust Agency ("KTA") board relating to how privatization should be conducted after an earlier phase of commercialization under the direction of another agency.<sup>106</sup>

Privatization disputes also may be insulated from litigation in third countries by the act of state doctrine, which requires the dismissal of certain national court lawsuits when deciding the merits would require the court to rule on the validity of acts performed by a foreign government.<sup>107</sup> In *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, the court of appeals held the act of state doctrine foreclosed litigation of certain claims involving privatization as to which the state of Kazakhstan and its instrumentalities had waived immunity.<sup>108</sup>

106. See generally Abigail Hing Wen, *Suing the Sovereign's Servant: The Implications of Privatization for the Scope of Foreign Sovereign Immunities*, 103 COLUM. L. REV. 1538 (2003) (proposing an amendment to the FSIA to extend the immunity to private entities performing public functions).

107. See *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) (courts of one country must not sit in judgment on acts of another government). When a U.S. federal court has jurisdiction over a claim, the act of state doctrine obliges the court to accept the acts of the foreign sovereign as valid. The policies supporting the doctrine center around notions of international comity, separation of powers, and a desire to avoid embarrassing the Executive Branch in its conduct of foreign relations. See *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1165 (D.C. Cir. 2002). Because of these policy considerations and because ruling on the validity of acts by foreign sovereigns uncomfortably approaches the political question doctrine, courts routinely avoid ruling on the validity of acts by foreign sovereigns. See *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 727 (1976) (Marshall, J., dissenting) (ruling on foreign acts of state approaches nonjusticiable political questions in federal courts); *Baker v. Carr*, 369 U.S. 186, 211–12 (1962) (questions involving foreign relations would require the judiciary to exercise discretion committed to the Executive); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 13, § 1, rptrs. n.4 (discussing the issues courts have held to be nonjusticiable political questions).

The act of state doctrine is a widely applied common law doctrine of judicial decision making, rather than a statutory command. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 (1964); *Ricaud v. Am. Metal Co.*, 246 U.S. 304, 310 (1918). In *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l*, the Supreme Court stated that "[a]ct of state issues only arise when a court *must decide*—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign." 493 U.S. 400, 406 (1990) (emphasis in original).

108. *World Wide Minerals*, 296 F.3d at 1157.

### III. PAST PRACTICE AND MODELS

#### A. Secession and National Disintegration

##### 1. Yugoslavia

Yugoslavia presents an especially complicated case.<sup>109</sup> Two revolutions were overlaid by the dissolution of a state. Persons owning property before the Communist revolution presided over by Josip Tito stand in line alongside persons with property interests derived from the Tito regime—perhaps as part of a worker community. They compete with persons who obtained property during Slobodan Milosevic's discriminatory privatization regime.<sup>110</sup> By the time of its dissolution, Yugoslavia was one of the most heavily indebted states involved in the transition from socialism, owing some \$15 billion in 1991,<sup>111</sup> and having participated in two rounds of major debt restructuring in 1983 and 1988.<sup>112</sup> “Allocated debt”—debt incurred for the benefit of specific republics—amounted to about \$12 billion, and “unallocated debt”—debt incurred by the federal government for purposes not easily identified with a specific republic—accounted for the \$3 billion remainder.<sup>113</sup> The Socialist Federal Republic of Yugoslavia (“SFRY”) owed \$683 million to the International Monetary Fund (“IMF”) and \$2 billion to the World Bank.<sup>114</sup> A 1993 estimate concluded that as of 1990 the net assets of the SFRY were about \$60 billion, with military assets comprising 75%, immovable assets 3.4%, and financial assets 21.6%.<sup>115</sup>

Negotiations over the apportionment of and succession to Yugoslav assets and debt began soon after international recognition of the former Yugoslav republics of Slovenia and Croatia in 1991–1992. Three international peace conferences on the former Yugoslavia addressed succession, without significant results.<sup>116</sup> A negotiated solution was frustrated until

109. See, e.g., Ana Stanič, *Financial Aspects of State Succession: The Case of Yugoslavia*, 12 EUR. J. INT'L L. 751 (2001) (reviewing negotiations over Yugoslav succession and analyzing agreements reached with the IMF, the World Bank, and the London and Paris Clubs); MOJMIR MRAK, APPORTIONMENT AND SUCCESSION OF EXTERNAL DEBTS: THE CASE OF THE SOCIALIST FEDERAL REPUBLIC OF YUGOSLAVIA (Vienna Inst. Int'l Econ. Studs. No. 259, 1999).

110. See Williams & Harris, *supra* note 2, at 392–94 (the European Community Arbitration Commission essentially punted on questions presented to it about state succession to debts and assets).

111. See Stanič, *supra* note 109, at 758 (quantifying total debt at \$15.99 billion, with \$3.79 billion unallocated and \$12.2 billion allocated).

112. See MRAK, *supra* note 109, at 3.

113. *Id.* at 4.

114. *Id.* at 13. More than \$1.3 billion of this was for project loans, with clearly identifiable beneficiaries in individual republics of former Yugoslavia. *Id.*

115. See Stanič, *supra* note 109, at 755.

116. MRAK, *supra* note 109, at 8–9 (describing institutional mechanisms for negotiations over succession).

2001 by rump Yugoslavia's insistence that no dissolution of Yugoslavia had occurred and, instead, that rump Yugoslavia was the "continuator" state.<sup>117</sup> All of the breakaway republics and the international community disagreed.<sup>118</sup> In *Republic of Croatia v. Girocredit Bank A.G. der Sparkassen*, the Austrian Supreme Court enjoined rump Yugoslavia from disposing of assets represented by an account in an Austrian bank, holding that, after the dissolution of Yugoslavia, the assets represented joint property of the successor states.<sup>119</sup>

A further barrier to negotiations was the fact that most of the assets were held by one successor state—the Federal Republic of Yugoslavia ("FRY"). Moreover, the FRY had spent most of the foreign currency reserves.<sup>120</sup> Disagreements existed over the proper date to use for dissolution, a date that significantly impacted valuation.<sup>121</sup> In addition, Slovenia argued that Yugoslav "connected persons" should be excluded as beneficiaries of any negotiated agreement.<sup>122</sup> And, what constituted "state property" was blurred by the Yugoslav concept of "social ownership." If socially-owned property were excluded, the level of assets would be diminished significantly.<sup>123</sup>

The lack of success with the international conference approach to resolving succession issues, combined with the desire of the breakaway republics to normalize their relations with the international financial community, led all to embrace direct negotiations as the institutional mechanism for determining succession.<sup>124</sup> These direct negotiations resulted in agreement on several important issues, including assignment of allocated debt to the republic for whose benefit the debt had been occurred, conforming to customary international law,<sup>125</sup> and determination of a

117. See Stanič, *supra* note 109, at 754.

118. See MRAK, *supra* note 109, at 11 (discussing the Badinter Commission's Opinions 1 & 8, U.N. Security Council Resolutions 757 and 777, and noting the 1992 decision by the IMF and the 1993 decision by the World Bank).

119. Austria: Supreme Court Decision in Republic of Croatia et al. v. Girocredit Bank A.G. der Sparkassen, Dec. 17, 1996, 36 I.L.M. 1520, 1529.

120. Stanič, *supra* note 109, at 755. Stanič concluded that, "[c]learly, the FRY should account to the four successor states for these assets. Their actual division, however, is no longer possible as they have either been spent, or in case of military assets are destroyed or obsolete." *Id.* at 771.

121. *Id.* at 757–58.

122. *Id.* at 762. "Connected persons" were persons who had purchased Yugoslav debt on secondary markets at a discount, allegedly with assets belonging to Yugoslavia. *Id.*

123. See *id.* at 764 (describing the dispute over whether socially-owned property constituted "state property").

124. See MRAK, *supra* note 109, at 11; Stanič, *supra* note 109, at 752.

125. See MRAK, *supra* note 109, at 6 (noting the practice of assigning allocated debt to the beneficiary successor state); *id.* at 10 (reporting the adoption of principles for Yugoslav succession by the World Bank).

“key”—percentages for apportioning nonallocated debt to each breakaway republic.<sup>126</sup> Separate bilateral agreements were then reached between the successor states and the London and Paris Clubs, which dealt with the bulk of the former Yugoslavia’s financial liabilities,<sup>127</sup> mostly following the pattern set by the IMF and World Bank negotiations as to assignment of allocated debt and the key for apportionment of unallocated debt.<sup>128</sup>

After Milosevic stepped down as leader of rump Yugoslavia, that state abandoned its position that it was the continuator state and agreed that Yugoslavia had dissolved.<sup>129</sup> Shortly thereafter, the five former states of the SFRY reached an agreement regarding various succession issues in June 2001, using the IMF key.<sup>130</sup> All five successor states signed the Agreement on Succession Issues Between the Five Successor States of the Former State of Yugoslavia (“Agreement”) on June 29, 2001.<sup>131</sup>

A percentage of the former Yugoslavia’s assets, not distributed according to previous bilateral agreements, were divided up among the successor states.<sup>132</sup> All immovable state property of the former Yugoslavia was passed to the successor state on whose territory the property was currently situated.<sup>133</sup> Movable state property of the former Yugoslavia was passed to the successor state in whose territory the property was located on the date that state declared independence.<sup>134</sup>

126. *See id.* The apportionment of nonallocated debt was calculated as follows: Serbia-Montenegro: 36.52%; Croatia: 28.49%; Slovenia: 16.39%; Bosnia and Herzegovina: 13.2%; and Macedonia: 5.4%. *Id.* The IMF “key” was determined based on economic criteria such as the republics’ contributions to the federal budget, their share in social product and export earnings, and their percentage of Yugoslavia’s population and territory. Stanič, *supra* note 109, at 759.

127. *See* Agreement on Succession Issues Between the Five Successor States of the Former State of Yugoslavia, June 29, 2001, 41 I.L.M. 1, 1 (Introductory Note by Sir Author Watts) [hereinafter Agreement on Succession Issues]. One successor state, the FRY, had not yet concluded any agreements regarding its share of debt liability and was required to assume responsibility for its allocated debt to Paris Club and London Club creditors and for its unallocated debt to such creditors. *See id.* at annex C, art. 3(2); *see also* Williams & Harris, *supra* note 2, at 397 (noting that the Paris Club, prodded by Germany, took main responsibility for allocating debt of the former Yugoslavia).

128. *See* MRAK, *supra* note 109, at 17 (noting the London Club’s deviations from the IMF’s calculated percentages).

129. Stanič, *supra* note 109, at 753 (reporting the FRY’s concession that the SFRY has dissolved).

130. *See id.* at 779 (noting agreement using IMF key); Agreement on Succession Issues, *supra* note 127, at 2. The five successor states included: Slovenia, Croatia, Macedonia, Bosnia and Herzegovina, and the FRY (comprised of the provinces of Serbia, Montenegro, Kosovo, and Vojvodina). *See id.* at 1.

131. *See id.* at 2.

132. *See id.* at Annex C, arts. 4, 5. The distributed assets included the former Yugoslavia’s funds at the Yugoslav Bank for International Economic Co-operation and foreign financial assets. *See id.*

133. *Id.* at Annex A, art. 2(1).

134. *Id.* at Annex A, art. 3(1). Movable property is not transferred to the successor state if the property is of great cultural importance to another successor state and the property originated from that state. *Id.* at Annex A, art. 3(2).

A joint committee of senior representatives of each successor state was created to serve as a forum to address issues arising from the implementation of the Agreement on Succession Issues.<sup>135</sup> Any disagreements over the interpretation or application of the Agreement on Succession Issues were first to be resolved by discussion among the concerned states.<sup>136</sup> If the disagreement could not be resolved through discussions within one month, the concerned states could refer the matter to either an independent person or the joint committee.<sup>137</sup>

The Agreement on Succession Issues was to come into force thirty days after ratification by all five states.<sup>138</sup> By July 2002, all but Croatia had ratified the Agreement on Succession Issues,<sup>139</sup> with Croatia finally ratifying in March 2004.<sup>140</sup>

## 2. Soviet Union

In the case of the dissolution of the Soviet Union, insistence on international legal norms played a relatively small role. Creditor states used leverage in negotiations, withholding recognition and access to the international financial system until successor states agreed to be obligated by the debt of the former Soviet Union.<sup>141</sup>

The negotiations were driven by Russia's desire to assume both assets and debts, and by mistrust of the international financial community that successor states except for Russia would ever be in a position to satisfy their obligations.<sup>142</sup>

In order to privatize the Russian state-run oil industry, the Russian industry was carved up into regional monopolies and joint (public and private) stock companies were created.<sup>143</sup> At first, the Russian government sold shares of the state-run companies through vouchers only to workers

135. *Id.* at art. 4(1)–(2). The rules of procedure were left to the joint committee to establish itself. *Id.* at art. 4(4).

136. *Id.* at art. 5(1).

137. *Id.* at art. 5(2)(a)–(b).

138. *Id.* at art. 12(1).

139. Slovenia and NATO, *Political Issues*, at <http://nato.gov.si/eng/topic/ratification/timetable/political-economic/> (last visited Jan. 22, 2005).

140. *Croatia Notifies U.N. on Ratification of Succession Agreement*, BBC MONITORING INT'L REPS., May 4, 2004, available in LexisNexis AllNews database and on file with the Chicago-Kent Law Review.

141. Williams & Harris, *supra* note 2, at 369.

142. *Id.* at 376–83.

143. ARIEL COHEN & GERALD P. O'DRISCOLL, JR., THE ROAD TO ECONOMIC PROSPERITY FOR A POST-SADDAM IRAQ 9 (Heritage Found. Backgrounder No. 1633, 2003), available at <http://www.heritage.org/Research/MiddleEast/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=37452>; Energy Information Administration, *Russia*, at [www.eia.doe.gov/emeu/pgem/ch4a.html](http://www.eia.doe.gov/emeu/pgem/ch4a.html).

and Russian citizens.<sup>144</sup> Later, foreigners were allowed to purchase any remaining shares.<sup>145</sup> Russia did not completely privatize its oil industry; nor did it privatize all state companies, and it retained state ownership of some of the stock in other companies.<sup>146</sup>

Various problems have plagued the Russian oil privatization plan. In 1995, large blocks of shares in many state-run oil companies were auctioned off to a group of Russian banks in exchange for cash.<sup>147</sup> The insider dealings of the politically connected banks discredited Russian privatization.<sup>148</sup> Additionally, the use of vouchers and the initial denial of foreign investment resulted in lower revenues for the Russian government.<sup>149</sup>

### 3. Czechoslovakia

The former Czechoslovakia is another complicated example, where: distribution of assets was substantially more complicated than the allocation of debts. The reasons for the difficulties encountered in distributing assets were (1) the majority of the institutions were still in the state hands[;] (2) since the Velvet Revolution of 1989, the republics had practically no legal or institutional base for a market economy; (3) privatization, in the form of vouchers, had already begun by the former Czechoslovakian government to citizens of both republics, prior to dissolution; and (4) tension existed between the republics due to the disproportionately severe effects of privatization on the Slovak Republic.<sup>150</sup>

Originally, every adult citizen of the Czech Republic was given privatization vouchers.<sup>151</sup> These vouchers could be used to purchase shares of SOEs.<sup>152</sup>

Corruption and an inadequate legal system allowed this privatization program to be exploited.<sup>153</sup> For example, one entrepreneur, Viktor Kozeny, created an "investment fund" that collected vouchers from more than

144. Energy Information Administration, *supra* note 143.

145. *Id.*

146. COHEN & O'DRISCOLL, *supra* note 143, at 9. Privatized oil companies expanded production and exports, while government-run companies have not expanded as rapidly. *See id.* Privatized companies also have been more successful than government-run companies at attracting foreign investment. *Id.*

147. Energy Information Administration, *supra* note 143.

148. COHEN & O'DRISCOLL, *supra* note 143, at 9. Large banks and industrial groups have become the major players in the sale of shares in Russian state-run companies. Henry Gibbon, *Mass Privatization Nearly Completed*, FINANCIAL NEWS, May 25, 1998.

149. COHEN & DRISCOLL, *supra* note 143, at 9.

150. Williams & Harris, *supra* note 2, at 401 (citations omitted).

151. Thomas Fuller, *A 'Bad Situation' is Looking a Lot Better; The New Europe: Czech Republic*, INT'L HERALD TRIB. (Paris), Oct. 20, 2003, at 10.

152. Keith Dovkants, *A Most Impeccable Crook*, EVENING STANDARD (London), Oct. 23, 2002, at 16.

153. *See* William Megginson, *Privatization*, 118 FOREIGN POL'Y 14, 24 (2000).

820,000 Czech citizens.<sup>154</sup> Kozeny began siphoning off money from the fund, and individual shareholders lost most of their money.<sup>155</sup> In 2003, Kozeny was indicted for fraud in the Czech Republic and the U.S.<sup>156</sup>

### B. Regime Change Through Revolution or Conquest

International law treats regime change differently from state succession. Regime change involves substitution of one government for another, with the sovereignty of the state remaining intact. State succession involves changes in state sovereignty over a territory. U.S. courts consistently have applied this distinction in cases involving the Communist revolution in China,<sup>157</sup> the 1917 Russian Revolution,<sup>158</sup> post-World War II Germany,<sup>159</sup> and more recent coups in Sudan.<sup>160</sup>

Nevertheless, regime change often creates situations in which the ordinary national legal machinery is unacceptable as a way of resolving disputes over changes in property rights incident to the change. Machinery established to deal with claims arising from the Holocaust, from the Islamic revolution in Iran, and from the U.S.-led invasion of Iraq provide recent examples.

154. See Dovkants, *supra* note 152, at 16.

155. See *id.*

156. Nick Carey, *Pirate of Prague Indicted for Fraud in U.S.*, PRAGUE BUS. J., Oct. 6, 2003. Kozeny later tried a similar scheme in Azerbaijan. See Dovkant, *supra* note 152, at 16. Kozeny collected money to purchase privatization vouchers from the Azerbaijan government. *Id.* The vouchers were to be used to purchase shares in the state oil industry, but the Azerbaijan government would not sell shares of the state oil industry to foreigners. *Id.* Kozeny was later accused of using the money for his personal expenses. See Carey, *supra*.

157. Jackson v. People's Republic of China, 550 F. Supp. 869, 871–72 (N.D. Ala. 1982) (holding the People's Republic of China liable as successor government for bonds issued by the Imperial Chinese government in 1911), *aff'd on other grounds*, 794 F.2d 1490 (11th Cir. 1986).

158. United States v. Nat'l City Bank of N.Y., 90 F. Supp. 448, 452 (S.D.N.Y. 1950) (finding that the Bolshevik Revolution of 1917 did not amount to state succession).

159. Kunstsammlungen Zu Weimar v. Elicofon, 536 F. Supp. 829, 853, 857 (E.D.N.Y. 1981) (holding that the German Democratic Republic was entitled to possession of stolen paintings as successor government to the Third Reich), *aff'd*, 678 F.2d 1150 (2d Cir. 1982).

160. See, e.g., Trans-Orient Marine Corp. v. Star Trading & Marine, Inc., 731 F. Supp. 619, 623 (S.D.N.Y. 1990) The court wrote:

The military coups of 1985 and 1989 did not effect a succession of state of the Sudan but merely changed the state's governing body, leaving the state's obligations undisturbed. . . . [T]he rights and liabilities of a state are unaffected by a change either in the form or personnel of its government, however accomplished, whether by revolution or otherwise. No other doctrine is thinkable, at least among nations which have any conception of international honor.

*Id.* (internal quotations and citations omitted).

### 1. Iran

The Iran-U.S. Claims Tribunal ("Tribunal"),<sup>161</sup> characterized as an "international arbitral tribunal,"<sup>162</sup> was established after the revolutionary government of Iran released American hostages in order to permit Iran to regain its international financial position. Establishment of the Tribunal led to lifting various attachments and liens on its assets resulting from piecemeal litigation in the regular courts.<sup>163</sup> The Tribunal:

has jurisdiction to decide claims of United States nationals against Iran and of Iranian nationals against the United States, which arise out of debts, contracts, expropriations or other measures affecting property rights; certain "official claims" between the two Governments relating to the purchase and sale of goods and services; disputes between the two Governments concerning the interpretation or performance of the Algiers Declarations; and certain claims between United States and Iranian banking institutions.<sup>164</sup>

Purely private claims—those by private persons against private persons—were excluded. One case, *Riahi v. Government of the Islamic Republic of Iran*, illustrates the scope of the Tribunal's jurisdiction over private claims.<sup>165</sup> The plaintiff alleged that Iran expropriated shareholder and

161. See generally Iran-United States Claims Tribunal, at <http://www.iusct.org/index-english.html> (last visited Jan. 24, 2005).

162. Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration), art. II, ¶ 1 (Jan. 19, 1981), at <http://www.iusct.org/claims-settlement.pdf> [hereinafter Claims Agreement].

163. See Iran-United States Claims Tribunal, *Background Information*, at <http://www.iusct.org/background-english.html> (last visited Jan. 24, 2005).

164. *Id.* The Tribunal Agreement gives it jurisdiction over:

1. [C]laims of nationals of the United States against Iran and claims of nationals of Iran against the United States, and any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim, if such claims and counterclaims are outstanding on the date of this Agreement, whether or not filed with any court, and arise out of debts, contracts (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights, excluding claims described in Paragraph 11 of the Declaration of the Government of Algeria of January 19, 1981, and claims arising out of the actions of the United States in response to the conduct described in such paragraph, and excluding claims arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts, in response to the Majlis position.
2. The Tribunal shall also have jurisdiction over official claims of the United States and Iran against each other arising out of contractual arrangements between them for the purchase and sale of goods and services.
3. The Tribunal shall have jurisdiction, as specified in Paragraphs 16–17 of the Declaration of the Government of Algeria of January 19, 1981, over any dispute as to the interpretation or performance of any provision of that Declaration.

Claims Agreement, *supra* note 162, at art. II.

165. See *Riahi v. Gov't of the Islamic Republic of Iran*, Award No. ITL 80-485-1, 28 Iran-U.S. Cl. Trib. Rep. 176 (1992).

creditor interests in several enterprises, including ownership interests in an apartment building and personal property located therein, two automobiles, four horses, and certain other property.<sup>166</sup>

An estimated 1,000 claims for \$250,000 or more and 2,800 claims for less than \$250,000 were filed before January 19, 1982.<sup>167</sup> Claims were decided by one of three three-member Chambers of the Tribunal or by the Full Tribunal.<sup>168</sup> Rules of decision were the UNCITRAL arbitration rules, as modified by the governments and the Tribunal.<sup>169</sup> Awards in favor of U.S. claimants were payable from an account established by Iran at the Settlement Bank of the Netherlands.<sup>170</sup>

By October 2003, the Tribunal had terminated 880 claims by decision or order, and had caused nearly \$2.2 billion to be awarded to U.S. parties.<sup>171</sup>

## 2. Iraq

The United Nations Compensation Commission (“UNCC”)<sup>172</sup> was created by the U.N. Security Council in 1991 to resolve claims growing out of Iraq’s invasion of Kuwait.<sup>173</sup> Iraq, however, failed to cooperate, and the UNCC and the U.N. Compensation Fund (“Fund”) operated under a variety of ad hoc arrangements until adoption of Security Council Resolution 1330 in 2000, which established a 25% level of funding.<sup>174</sup>

The UNCC accepted claims by individuals, corporations, and governments, submitted by governments, and claims submitted by international

166. Nancy Combs et al, *International Courts and Tribunals*, 37 INT’L LAW. 523, 537 (describing case).

167. Iran-United States Claims Tribunal, *supra* note 163.

168. *Id.*

169. *Id.*

170. *Id.*

171. Communiqué from the Office of the Secretary-General of the Iran-United States Claims Tribunal (Jan. 20, 2004), at <http://www.iusct.org/communique-english.pdf>.

172. *See generally* United Nations Compensation Commission, at <http://www.unog.ch/uncc> (last visited Jan. 24, 2005).

173. *See* Report of Secretary-General Pursuant to Paragraph 19 of Security Council Resolution 687, ¶¶ 1–2, U.N. Doc. S/22559 (1991), available at <http://www.unog.ch/uncc/resolutio/res22559.pdf> (finding Iraq responsible for damages occasioned by the invasion of Iraq, and directing the Secretary-General to develop recommendations for a compensation fund and a commission to administer it); *id.* ¶ 4 (noting that the UNCC must determine the level of contribution to the U.N. Compensation Fund, allocate funds and payments of claims, evaluate losses, list claims and verify their validity, and resolve disputed claims); S.C. Res. 692, U.N. SCOR, 2987th mtg. ¶ 3, U.N. Doc. S/RES/692 (1991) (establishing the UNCC and U.N. Compensation Fund); S.C. Res. 705, U.N. SCOR, 3004th mtg. ¶ 2, U.N. Doc. S/RES/705 (1991) (adopting the recommendation by the Secretary-General to satisfy claims through a Compensation Fund, financed by up to 30% of the value of Iraq’s exports of petroleum and petroleum products).

174. S.C. Res. 1330, U.N. SCOR, 4241st mtg. ¶ 12, U.N. Doc. S/RES/1330 (2000).

organizations for individuals who were not in a position to have their claims filed by a government.<sup>175</sup> Under the rules adopted by the UNCC, claims, including claims of individuals and private corporations, could be submitted only by governments or other persons or entities specifically authorized.<sup>176</sup> Eligible claims included those for losses occasioned by forced departure from Iraq; losses of personal property, bank accounts, stocks and other securities, income, real property, construction, or other contract losses; losses from the nonpayment for goods or services; losses related to the destruction or seizure of business assets; loss of profits; oil sector losses; and individual business losses.<sup>177</sup> Deadlines were established for presentation of claims, the latest of which expired in 1997.<sup>178</sup> As of October 27, 2004, the UNCC reported that approximately 99% of claims totalling some \$277 billion had been resolved, with nearly \$49 billion awarded, and over \$18 billion actually paid.<sup>179</sup>

After the U.S.-led invasion of Iraq in 2003, the U.N. Security Council linked the UNCC and the Fund to the new governing institutions of Iraq under the Occupying Authority and Governing Council and provided for continuing funding of the Fund.<sup>180</sup> It also stayed national legal proceedings against proceeds from petroleum and other energy products, pending establishment of a representative government and a restructuring of Iraq's debt.<sup>181</sup>

175. U.N. Compensation Commission Governing Council, Provisional Rules for Claims Procedure, art. 5, 6th Sess., U.N. Doc. S/AC.26/1992/10 (1992), available at [http://www.unog.ch/uncc/decision/dec\\_10.pdf](http://www.unog.ch/uncc/decision/dec_10.pdf).

176. *Id.*

177. See U.N. Compensation Commission, *The Claims*, at <http://www.unog.ch/uncc/theclaims.htm> (last visited Jan. 24, 2005) (describing Category "C," "D," and "E" claims).

178. *Id.*

179. U.N. Compensation Commission, *Status of Claims Processing* (Oct. 27, 2004), at <http://www.unog.ch/uncc/status.htm>.

180. See S.C. Res. 1483, U.N. SCOR, 4761st mtg. ¶ 21, U.N. Doc. S/RES/1483 (2003) (making funding requirements binding on ultimate government of Iraq and any successor).

181. Resolution 1483 reads:

[The Security Council *decides* that] petroleum, petroleum products, and natural gas originating in Iraq shall be immune, until title passes to the initial purchaser from legal proceedings against them and not be subject to any form of attachment, garnishment, or execution, and that all States shall take any steps that may be necessary under their respective domestic legal systems to assure this protection, and that proceeds and obligations arising from sales thereof, as well as the Development Fund for Iraq, shall enjoy privileges and immunities equivalent to those enjoyed by the United Nations except that the abovementioned privileges and immunities will not apply with respect to any legal proceeding in which recourse to such proceeds or obligations is necessary to satisfy liability for damages assessed in connection with an ecological accident, including an oil spill, that occurs after the date of adoption of this resolution; *Decides* that all Member States in which there are:

a) funds or other financial assets or economic resources of the previous Government of Iraq or its state bodies, corporations, or agencies, located outside Iraq as of the date of this resolution, or

### 3. The Holocaust

A Claims Resolution Tribunal (“Holocaust Tribunal”)<sup>182</sup> was established in 1997 to resolve claims by Holocaust victims and their successors to dormant Swiss bank accounts, assets deposited in Swiss banks before and during World War II, and to claims arising under insurance policies issued to victims of Nazi persecution by Swiss insurance companies. The Holocaust Tribunal was funded by a settlement from the Holocaust Victim Assets class action litigation against Swiss banks in U.S. district court.<sup>183</sup> Under the settlement, Swiss banks paid \$1.25 billion in exchange for the release of all claims relating to the Holocaust and World War II.<sup>184</sup> The Holocaust Tribunal illustrates the use of class action litigation under U.S. law as a mechanism to force negotiation of claims dispute resolution machinery in the international context.<sup>185</sup>

A separate International Commission on Holocaust Era Insurance Claims (“ICHEIC”) was established in 1998 to resolve claims arising from insurance policies issued prior to and during the Holocaust.<sup>186</sup> The ICHEIC was established through negotiations involving European insurance companies, U.S. insurance regulators, representatives of international Jewish and Holocaust survivor organizations, and the State of Israel.<sup>187</sup> The signa-

- b) funds or other financial assets or economic resources that have been removed from Iraq, or acquired, by Saddam Hussein or other senior officials of the former Iraqi regime and their immediate family members, including entities owned or controlled, directly or indirectly, by them or by persons acting on their behalf or at their direction,

shall freeze without delay those funds or other financial assets or economic resources and, unless these funds or other financial assets or economic resources are themselves the subject of a prior judicial, administrative, or arbitral lien or judgement, immediately shall cause their transfer to the Development Fund for Iraq, it being understood that, unless otherwise addressed, claims made by private individuals or non-government entities on those transferred funds or other financial assets may be presented to the internationally recognized, representative government of Iraq; and *decides further* that all such funds or other financial assets or economic resources shall enjoy the same privileges, immunities, and protections as provided under paragraph 22.

*Id.* ¶¶ 22–23 (emphasis in original).

182. See generally Claims Resolution Tribunal, at [http://www.crt-ii.org/index\\_en.phtml](http://www.crt-ii.org/index_en.phtml) (last visited Jan. 24, 2005).

183. Combs, *supra* note 166, at 538–39 (describing the dispute resolution system). The Holocaust Tribunal acquired jurisdiction under settlement of a U.S. class action. See *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139, 165 (E.D.N.Y. 2000) (approving the Holocaust Tribunal and Fund in settlement of consolidated class actions); *In re Holocaust Victim Assets Litig.*, 225 F.3d 191, 193 (2d Cir. 2000) (affirming denial of motion to intervene by a Polish class in a worldwide class action).

184. Combs, *supra* note 166, at 538.

185. But see *Alperin v. Vatican Bank*, 242 F. Supp. 2d 686, 695 (N.D. Cal. 2003) (dismissing claims arising during World War II as presenting nonjusticiable political questions).

186. The International Commission on Holocaust Era Insurance Claims, at <http://www.icheic.org> (last visited Jan. 24, 2005).

187. International Commission on Holocaust Era Insurance Claims, *About ICHEIC*, at <http://www.icheic.org/about.html> (last visited Jan. 24, 2005).

tory insurers promised to fund claims awards.<sup>188</sup> As of early 2004, the ICHEIC had received nearly \$500 million to pay claims and had paid \$16 million to claimants.<sup>189</sup> As of November 2004, ICHEIC had offered \$108 million for Holocaust-era insurance policies.<sup>190</sup>

In *In re Assicurazioni Generali S.P.A. Holocaust Insurance Litigation*, however, a district court denied a motion to dismiss on the ground of *forum non conveniens*, finding that the ICHEIC was an inadequate alternative forum.<sup>191</sup> The court distinguished such a private dispute resolution body from a public court, characterizing it as a “company store,” dependent on interested parties.<sup>192</sup>

#### 4. Bulgarian Reprivatization Law

Separate Bulgarian laws compensated for farmland expropriated or voluntarily granted to the state<sup>193</sup> and for other real estate expropriated by the state.<sup>194</sup> If the claimant was a foreign corporation, foreign national, or a Bulgarian citizen permanently residing abroad, any restored farmland must have been transferred within three years to a Bulgarian citizen, the state, or a Bulgarian corporation or cooperative.<sup>195</sup>

Individuals or their heirs could have their real estate restored.<sup>196</sup> A corporation’s expropriated real estate could be restored to the corporation if it was still existing at the time the reprivatization law was enacted.<sup>197</sup> If the corporation no longer existed at that time, the real estate was restored to the associates or members of the corporation or their heirs.<sup>198</sup>

188. International Commission on Holocaust Era Insurance Claims, *Memorandum of Understanding*, ¶ 8, at [http://www.icheic.org/pdf/ICHEIC\\_MOU.PDF](http://www.icheic.org/pdf/ICHEIC_MOU.PDF) (last visited Jan. 24, 2005).

189. Press Release, International Commission on Holocaust Era Insurance Claims, \$16 Million Paid to Holocaust-Era Insurance Claimants From ICHEIC Humanitarian Fund (Mar. 30, 2004), at <http://www.icheic.org/newsroom.html>.

190. Press Release, International Commission on Holocaust Era Insurance Claims, ICHEIC has Made \$108 Million in Offers for Shoah-era Insurance Policies (Nov. 18, 2004), at <http://www.icheic.org/pdf/Press%20Release%2011-18-04.pdf>.

191. *In re Assicurazioni Generali S.P.A. Holocaust Ins. Litig.*, 228 F. Supp. 2d 348, 353–58 (S.D.N.Y. 2002).

192. *Id.* at 356–57.

193. See Ownership and Use of Farm Land Act, State Gazette No. 17, arts. 10(2)–(6) (1991) (Bulg.), available at [www.bild.net/legislation](http://www.bild.net/legislation).

194. See Restitution of Nationalised Real Property Act, State Gazette No. 15, arts. 1–2 (1992) (Bulg.), available at [www.bild.net/legislation](http://www.bild.net/legislation); Transformation and Privatisation of State-Owned and Municipal Enterprises Act, State Gazette No. 38, art. 18(1) (1992) (Bulg.), available at [www.bild.net/legislation](http://www.bild.net/legislation).

195. Ownership and Use of Farm Land Act, *supra* note 193, at art. 10a(3).

196. Restitution of Nationalised Real Property Act, *supra* note 194, at art. 3(1).

197. *Id.* at art. 3(2).

198. *Id.*

Expropriated farmland was compensated by restoring ownership of the land to the claimant if the original boundaries of the property could be determined and remained in existence.<sup>199</sup> If the original boundaries did not exist, expropriated farmland was compensated by providing the original owner with farmland equivalent in quantity and quality within the same local area.<sup>200</sup> If compensation was previously granted for expropriated farmland, the original or equivalent farmland would be granted to the original owner only if he or she returned the compensation.<sup>201</sup>

Nationalized real estate was restored to its original owner.<sup>202</sup> When the reprivatization law went into effect on February 17, 1992, the real estate must have been owned by the state, a township, or a public organization.<sup>203</sup> The real estate also had to exist in the same dimensions as it did when the property was expropriated.<sup>204</sup> If these two conditions were not met, the original owner was still entitled to compensation under “a procedure laid down in a separate enactment.”<sup>205</sup> Real estate was not restored if the original owner previously had been compensated with an equivalent cash payment or with real estate of equal value.<sup>206</sup> If a person already occupied the property, the tenant could not be removed for three years following the enactment of the law.<sup>207</sup> The current tenant, however, had to pay rent to the restored owner.<sup>208</sup>

Original owners of expropriated real property that had been part of the long-term assets of a state- or municipal-owned enterprise were compensated with shares of stock in the company formed by the privatization of

199. Ownership and Use of Farmland Act, *supra* note 193, at art. 10a(1).

200. *Id.* at arts. 10a(2), 17(1).

201. *Id.* at art. 10(2).

202. See Restitution of Nationalised Real Property Act, *supra* note 194, at arts. 1–2.

203. *Id.* at arts. 1(1), 2(2).

204. *Id.*

205. *Id.* at art. 3(3). The property also could be restored if the original building had been destroyed and the lot was still vacant. See Restitution of Some Expropriated Property Act, State Gazette No. 15, art. 1(2) (1992) (Bulg.), available at [www.bild.net/legislation](http://www.bild.net/legislation).

206. Restitution of Nationalised Real Property Act, *supra* note 194, at art. 4(1). Original owners who received bonds or had debts withheld in exchange for their real property were not considered to have been compensated. *Id.* at art. 4(1)–(2). Additionally, the former owners and their heirs of shops, workshops, warehouses, and studios that were sold under Decree No. 60 of 1975 could have their property restored if they reimbursed the buyers the sum the former owner received from the sale. See Restitution of the Ownership of Some Shops, Workshops, Warehouses, and Studios Act, State Gazette No. 105, art. 1 (1991) (Bulg.), available at [www.bild.net/legislation](http://www.bild.net/legislation). If improvements were made to the property, the purchaser was entitled to compensation by the original owner for the value of those improvements, but the purchaser was not entitled to retain the property. See *id.* at art. 2(1).

207. Restitution of Nationalised Real Property Act, *supra* note 194, at art. 6(2). The three-year term also applied if the property was being used as a child-care institution, school, or health institution. *Id.* at art. 6(3).

208. *Id.* at art. 6(2). A rental contract could be cancelled until the three-year term had expired. *Id.*

such enterprises equal to the value of the expropriated property.<sup>209</sup> If the original owner previously had been given any kind of compensation for the expropriated real property, compensation was not granted.<sup>210</sup>

A claim for farmland was required to be submitted to the Municipal Land Board within seventeen months after the reprivatization law came into force.<sup>211</sup> Any application for compensation for farmland was available to the public for examination.<sup>212</sup> The Municipal Land Board determined whether the original property would be restored or whether equivalent property would be granted.<sup>213</sup> The Municipal Land Board's decision could be appealed to a district court within fourteen days of notification.<sup>214</sup> The district court reviewed the claim *de novo*.<sup>215</sup>

Claims for real property that had been part of the long-term assets of a state- or municipal-owned enterprise had to be filed by September 30, 1994.<sup>216</sup> Claims for SOEs were submitted to the Council of Ministers, and claims for municipal enterprises were submitted to the local municipal council.<sup>217</sup> Decisions could be appealed to a district court within fourteen days after notice had been received.<sup>218</sup>

## 5. Hungarian Reprivatization Law

All private property that was nationalized or taken from its original owner under coercion between 1939 and 1987 was eligible for compensation,<sup>219</sup> including both real and personal property.<sup>220</sup> A claimant had to be a

209. Transformation and Privatisation of State-Owned and Municipal Enterprises Act, *supra* note 194, at art. 18(1).

210. *Id.* at art. 18(4).

211. Ownership and Use of Farm Land Act, *supra* note 193, at art. 11(1).

212. *See id.* at art. 13(1).

213. *See id.* at art. 14(1).

214. *Id.* at art. 14(3).

215. *Id.* "The Court shall rule at the substance of the matter." *Id.*

216. Transformation and Privatisation of State-Owned and Municipal Enterprises Act, *supra* note 194, at art. 18(1).

217. *Id.*

218. *Id.* at art. 18(3).

219. Law XXV of 1991 On Partial Compensation for Damages Unlawfully Caused by the State to Properties Owned by Citizens in the Interest of Settling Owner Relations, ¶ 1(1)–(3), Supp. Nos. 1–2 (Hung.) [hereinafter First Compensation Law]. The original version of the First Compensation Law only compensated for losses that occurred after June 8, 1949 (the first session of the Communist Parliament). *See Compensation Law Passed*, MTI ECONews, June 26, 1991. Before the Hungarian President signed the original First Compensation Law, the Hungarian Constitutional Court declared that section of the law unconstitutional. *Id.* The Hungarian Parliament then extended the First Compensation Law to property lost as far back as 1939. *Id.*

220. *See* First Compensation Law, *supra* note 219, ¶ 4; Act XXIV of 1992 On Providing in the Interest of Settling Ownership Relations, Partial Compensation for Damages Unlawfully Caused by the State to Properties of Citizens Through Applying Legal Regulations Enacted From May 1, 1939, to June 8, 1994 § 3 (Hung.) [hereinafter Second Compensation Law].

natural person.<sup>221</sup> Both current Hungarian citizens and non-Hungarian citizens could claim lost property.<sup>222</sup> Non-Hungarian citizens, however, could claim property only if they were a Hungarian citizen on the date the property was taken, if they were a non-Hungarian citizen whose property was lost in connection with the deprivation of his or her Hungarian citizenship, or if they were a resident of Hungary on December 31, 1990.<sup>223</sup>

If the former owner of the property was deceased, his descendant was entitled to compensation up to the share due to the former owner.<sup>224</sup> A surviving spouse could collect the compensation if the former owner had no surviving descendants and the spouse and the former owner were married and living together both at the time of the former owner's death and at the time the property was taken away.<sup>225</sup>

The only form of compensation available was transferable, bearer securities called compensation coupons.<sup>226</sup> A lump sum payment for the value of the lost property was granted in compensation coupons.<sup>227</sup> Compensated real property was valued between 200 to 2,000 Forints per square meter, depending on the property's location.<sup>228</sup> The value of farmland was calculated differently.<sup>229</sup> Farmland was compensated based on the registered net income of the land.<sup>230</sup> The compensated value for a lost company was based on the number of employees.<sup>231</sup> The compensation for various movable assets (i.e., wedding rings, necklaces, and watches) was established by the object's weight and composition.<sup>232</sup>

The value of property was compensated 100% up to 200,000 Forints.<sup>233</sup> If the value of the property exceeded 200,000 Forints, only a percentage of the value above 200,000 Forints was compensated.<sup>234</sup> The

221. First Compensation Law, *supra* note 219, ¶ 1(2).

222. *Id.* ¶ 2(1).

223. *Id.*

224. *Id.* ¶ 2(2)–(3).

225. *Id.* ¶ 2(4).

226. *Id.* ¶ 5(1)–(2). Compensation coupons paid interest for three years at 75% the basic interest rate of Hungary's central bank. *Id.* ¶ 5(3).

227. *Id.* ¶¶ 3(1), 5(1).

228. *Id.* at Supp. 3.

229. *See id.* ¶ 13.

230. *Id.* ¶ 13(1).

231. *Id.* at Supp. 3.

232. Second Compensation Law, *supra* note 220, Supp. 3. Weight and karat guidelines were set forth for various objects when the weight and composition could not be established. *Id.*

233. First Compensation Law, *supra* note 219, ¶ 4(2).

234. *Id.* For property valued 200,001 to 300,000 Forints, only 50% of the value was compensated for the portion above 200,000 Forints. *Id.* If the property was valued from 300,001–500,000 Forints, the claimant only received 30% of the value for the value above 300,000 Forints. *Id.* For property that was valued above 500,001 Forints, only 10% of the value of the property was compensated for the value above 500,000 Forints. *Id.*

maximum amount of compensation granted per owner for each piece of property could not exceed 5,000,000 Forints.<sup>235</sup>

Compensation coupons could be used to purchase shares of businesses privatized by the state.<sup>236</sup> Compensation coupons also could be used to purchase farmland and state-owned apartments.<sup>237</sup> Some of the farmland owned by the state was sold at auction, with only those who own compensation coupons being allowed to bid.<sup>238</sup> Any farmland purchased at such an auction had to be used for agricultural purposes for five years.<sup>239</sup> If the farmland was not used for agricultural purposes for five years, the property was transferred back to the state, and compensation was not given.<sup>240</sup> Additionally, if the government auctioned property once owned by a claimant, the claimant was entitled to bid on the lost property.<sup>241</sup>

A claimant was required to file an application for compensation with a local Hungarian Compensation Office by March 15, 1994.<sup>242</sup> The local Compensation Office at which the claimant filed an application decided the amount of compensation.<sup>243</sup> The local Compensation Office's decision could be appealed to the National Compensation Office,<sup>244</sup> and a Hungarian court could hear appeals from the National Compensation Office.<sup>245</sup>

#### IV. POWER TO EXTINGUISH PREEXISTING RIGHTS

The success of any system for claims resolution depends either on voluntary waiver of preexisting rights, as in the ICHEIC system,<sup>246</sup> or the

235. *Id.* ¶ 4(3).

236. *Id.* ¶ 7(1)(a). Compensation coupons were accepted for up to at least 10% of the value of state companies being transformed into business organizations. *Id.* ¶ 8(3).

237. *Id.* ¶¶ 7(1)(b), (2).

238. *Id.* ¶ 27. In certain locations, compensation coupon holders got to bid first at 80% of the farmable land. Act LXIII of 1995, On the Amendment of Act XXV of 1991 On the Partial Compensation for Damages Caused Unlawfully in the Property of Citizens by the State, in the Interest of the Settlement of Property Relationships § 1 (Hung.).

239. First Compensation Law, *supra* note 219, ¶ 23(1).

240. *Id.* ¶ 23(2).

241. *Id.* ¶ 9.

242. See Act II of 1994 On the Amendment of Act XXV of 1991 on the Deadline of the Submission of Applications for Compensation, and on the Partial Compensation of the Damage Caused Unjustly in the Property of Citizens § 1(1) (Hung.) [hereinafter Act of 1994]. At first, a claim had to be submitted within 90 days of the enactment of the First Compensation Law on September 14, 1991. See First Compensation Law, *supra* note 219, ¶ 11(1). The final date for submission of a claim was then extended to December 16, 1991. See Act L of 1991 Concerning the Amendment of Act XXV of 1991 On Partial Compensation for Damages Unjustly Caused by the State to Properties of Citizens, in the Interests of the Settlement of Ownership Relations, art. 1 (Hung.). Finally, the deadline was pushed back to Mar. 15, 1994. See Act II of 1994, *supra*, § 1(1).

243. First Compensation Law, *supra* note 219, ¶ 10(1).

244. *Id.*

245. *Id.* ¶ 10(3).

246. See discussion *supra* Part III(B)(3).

effective exercise of governmental power to extinguish those rights. The inherent cross-border nature of claims incident to state succession and of certain controversies involving regime change necessitates attention to the power of international institutions or of individual sovereigns to extinguish rights in order to reinforce comprehensive claims resolution.

#### *A. Executive Power Under U.S. Law*

The U.S. Government has followed a long practice of diverting private international claims from its regular courts to specialized claims settlement machinery. The most recent instance, involving claims against Iran, resulted in Supreme Court litigation which reviewed the history and validated the practice.

After the Iranian government seized hostages at the U.S. Embassy in Tehran on November 4, 1979, President Carter exercised emergency powers under the International Emergency Economic Powers Act ("IEEPA").<sup>247</sup> President Carter declared a national emergency on November 14, 1979, blocking the removal or transfer of "all property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are or become subject to the jurisdiction of the United States," delegating to the Secretary of the Treasury authority to implement the freeze.<sup>248</sup> On November 15, 1979, the Treasury Department's Office of Foreign Assets Control issued a regulation providing that "[u]nless licensed or authorized . . . any attachment, judgment, decree, lien, execution, garnishment, or other judicial process is null and void with respect to any property in which on or since [November 14, 1979] there existed an interest of Iran."<sup>249</sup>

When the hostages were released on January 20, 1981, the U.S. entered into an agreement brokered by the Algerian government to establish an Iran-U.S. Claims Tribunal. The stated purpose of the agreement and the Tribunal was "to terminate all litigation as between the Government of each party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration."<sup>250</sup> Awards

247. International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-06 (Supp. III 1976) [hereinafter IEEPA]. The IEEPA states that the President's authority under the Act "may be exercised to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat." *Id.* § 1701(a).

248. Exec. Order No. 12,170, 3 C.F.R. 457 (1980).

249. 31 C.F.R. § 535.203(e) (2003).

250. *Dames & Moore v. Regan*, 453 U.S. 654, 665 (1981) (describing stated purpose of the agreement).

of the Tribunal were “final and binding” and to be enforceable “in the courts of any nation in accordance with its laws.”<sup>251</sup> The agreement obligated the U.S. to:

terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration.<sup>252</sup>

The agreement also obligated the U.S. to “bring about the transfer” by July 19, 1981, of all Iranian assets held in this country by American banks.<sup>253</sup> “One billion dollars of these assets [was to] be deposited in a security account in the Bank of England, to the account of the Algerian Central Bank, and used to satisfy awards rendered against Iran by the [Tribunal].”<sup>254</sup>

President Carter issued a series of executive orders implementing the terms of the agreement.<sup>255</sup> These orders revoked all licenses permitting the exercise of “any right, power, or privilege” with regard to Iranian funds, securities, or deposits; “nullified” all non-Iranian interests in such assets acquired subsequent to the blocking order of November 14, 1979; and required those banks holding Iranian assets to transfer them “to the Federal Reserve Bank of New York, to be held or transferred as directed by the Secretary of the Treasury.”<sup>256</sup>

Then in 1981, newly inaugurated President Reagan issued an executive order in which he ratified the Carter executive orders, suspended “all claims which may be presented to the [Tribunal],” and provided that “such claims shall have no legal effect in any action now pending in any court of the United States.”<sup>257</sup> The suspension of any particular claim terminates if the Tribunal determines that it has no jurisdiction over that claim; claims are discharged for all purposes when the Tribunal either awards some recovery and that amount is paid, or determines that no recovery is due.<sup>258</sup>

In *Dames & Moore v. Regan*, the U.S. Supreme Court rejected challenges brought by a creditor of the Government of Iran, Iran’s atomic energy agency, and several Iranian banks to the executive orders freezing the

251. *Id.*

252. *Id.* (internal quotations omitted) (describing the agreement and the powers of the Tribunal).

253. *Id.*

254. *Id.*

255. Exec. Order Nos. 12,276–12,285, 46 Fed. Reg. 7913–32 (Jan. 19, 1981) [hereinafter Carter executive orders].

256. Exec. Order No. 12,279, 46 Fed. Reg. 7919 (Jan. 19, 1981).

257. Exec. Order No. 12,294, 46 Fed. Reg. 14,111 (Feb. 24, 1981).

258. *Id.* See generally *Dames & Moore*, 453 U.S. at 665–66 (discussing the executive orders and the Tribunal’s obligations and powers).

removal or transfer of property of the Government of Iran.<sup>259</sup> The Court held that the IEEPA gave the President authority to freeze assets<sup>260</sup> and that the President had inherent Constitutional power, acquiesced to by the Congress, to suspend judicial enforcement actions in U.S. courts.<sup>261</sup> The Court stated:

Not infrequently in affairs between nations, outstanding claims by nationals of one country against the government of another country are "sources of friction" between the two sovereigns. To resolve these difficulties, nations have often entered into agreements settling the claims of their respective nationals. As one treatise writer puts it, international agreements settling claims by nationals of one state against the government of another are established international practice reflecting traditional international theory. Consistent with that principle, the United States has repeatedly exercised its sovereign authority to settle the claims of its nationals against foreign countries. Though those settlements have sometimes been made by treaty, there has also been a longstanding practice of settling such claims by executive agreement without the advice and consent of the Senate. . . . It is clear that the practice of settling claims continues today. Since 1952, the President has entered into at least 10 binding settlements with foreign nations, including an \$80 million settlement with the People's Republic of China.<sup>262</sup>

The Court noted the enactment of the International Claims Settlement Act ("ICSA") in 1949,<sup>263</sup> which provided for the allocation to U.S. nationals of funds received in the course of an executive claims settlement with Yugoslavia, and established a procedure to distribute funds resulting from future settlements through the Foreign Claims Settlement Commission.<sup>264</sup> "To achieve these ends Congress created the International Claims Commission, now the Foreign Claims Settlement Commission, and gave it jurisdiction to make final and binding decisions with respect to claims by United States nationals against settlement funds."<sup>265</sup>

The Court further observed that, "[i]n 1976, Congress authorized the Foreign Claims Settlement Commission to adjudicate the merits of claims by United States nationals against East Germany," and subsequently, claims against Vietnam.<sup>266</sup> The Court noted:

The constitutional power of the President extends to the settlement of mutual claims between a foreign government and the United States, at least when it is an incident to the recognition of that government; and it

259. *Dames & Moore*, 453 U.S. at 688–89.

260. *Id.* at 675.

261. *Id.* at 688.

262. *Id.* at 679–80 (internal citations and quotations omitted).

263. 22 U.S.C. § 1621 *et seq.* (1976 & Supp. IV).

264. *Id.*

265. *Dames & Moore*, 453 U.S. at 680 (citing 22 U.S.C. § 1623(a)).

266. *Id.* at 681 (citing 22 U.S.C. §§ 1644b, 1645, 1645a(5)).

would be unreasonable to circumscribe it to such controversies. The continued mutual amity between the nation and other powers again and again depends upon a satisfactory compromise of mutual claims; the necessary power to make such compromises has existed from the earliest times and been exercised by the foreign offices of all civilized nations.<sup>267</sup>

Although the terms of the executive orders and Treasury regulations did not require deciding whether the power to freeze assets and suspend claims pending in jurisdictional tribunals extends to purely private claims—those by natural or juridical persons against other private persons—the Court's reasoning suggests that the powers would include such claims, as long as such a broad exercise was justified as necessary in the interest of U.S. foreign policy.

The Court declined to address the argument that suspension of its claims constituted a taking of property in violation of the Fifth Amendment because of the possibility that the Tribunal would provide adequate compensation, supplemented as necessary by a claim for any deficiency under the Tucker Act.<sup>268</sup>

Apart from the specifics of the Tribunal, a statutorily established claims commission, the Foreign Claims Settlement Commission,<sup>269</sup> has authority to resolve claims by U.S. nationals against specified governments, including those of Yugoslavia, Bulgaria, Hungary, Romania, Italy, the Soviet Union, Czechoslovakia, Cuba, China, East Germany, and Vietnam.<sup>270</sup> Decisions by the Foreign Claims Settlement Commission are exempt from judicial review.<sup>271</sup>

267. *Id.* at 683 (citing *Ozanic v. United States*, 188 F.2d 228, 231 (2d Cir. 1951)).

268. *Id.* at 688–89. At least since the case of the “Wilmington Packet” in 1799, Presidents have exercised the power to settle claims of U.S. nationals by executive agreement. *See* R.B. Lillich, *The Gravel Amendment to the Trade Reform Act of 1974: Congress Checkmates a Presidential Lump Sum Agreement*, 69 AM. J. INT’L L. 837, 844 (1975). In fact, during the period of 1817–1917, “no fewer than eighty executive agreements were entered into by the United States looking toward the liquidation of claims of its citizens.” WALLACE MCCLURE, *INTERNATIONAL EXECUTIVE AGREEMENTS: DEMOCRATIC PROCEDURE UNDER THE CONSTITUTION OF THE UNITED STATES* 53 (1941); *see also* 14 DIGEST OF INTERNATIONAL LAW 247 (Marjorie M. Whiteman ed., 1970).

269. Foreign Claims Settlement Commission, *Press Releases and New Developments*, at <http://www.usdoj.gov/fcsc/index.html> (last visited Jan. 26, 2005).

270. 22 U.S.C. §§ 1621–45 (2000).

271. *See Am. & Eur. Agencies, Inc. v. Gilliland*, 247 F.2d 95, 98 (D.C. Cir. 1957).

### B. German, French, British, and EU Counterparts to *Dames & Moore*

Commentators have suggested that all Western legal systems are likely to embrace reasoning similar to that used by the U.S. Supreme Court in *Dames & Moore*.<sup>272</sup>

### C. U.N. Security Council Resolution 1483

In its resolution pertaining to post-invasion of Iraq, the U.N. Security Council purports to obligate states to freeze assets belonging to Iraq and to suspend claims and enforcement proceedings relating to Iraq oil revenues.<sup>273</sup> There is no international mechanism for testing the power of the Security Council to exercise such a power, other than state recognition. So far, it appears that states are honoring the freeze and suspension.

## V. KOSOVO'S UNIQUE SITUATION

Claims disputes in Kosovo are characterized by a number of unique—or at least unusual—features of Kosovo as a constituent unit of the former Yugoslavia, with ambiguous legal personality within Yugoslavia, subjected to ten years of exploitation by the Milosevic regime in Yugoslavia, and then a period of international political trusteeship.<sup>274</sup>

The Yugoslav experience means, first, that some private property was expropriated by the socialist government after the Second World War; second, that much property was held in “social ownership” in SOEs; and third, that assets owned by the Yugoslav state and Yugoslav state enterprises were potentially subject to various freezes and trading embargos imposed by the U.S. and other states incident to the wars in Croatia, Bosnia, and Kosovo.<sup>275</sup> Expropriation raises all the issues of claims resolution usually incident to expropriation in other states.<sup>276</sup> Social ownership presents some

272. See Jessica Heslop & Joel Roberto, *Property Rights in the Unified Germany: A Constitutional, Comparative, and International Legal Analysis*, 11 B.U. INT'L L.J. 243, 271–73 (1993) (suggesting that German constitutional law allows constitutionally protected property claims to be determined through special mechanisms established through foreign affairs powers of executive and legislative branches).

273. See discussion *supra* Part III(B)(2) (describing the post-invasion approach to claims administration and quoting language of Resolution 1483).

274. See generally Organization for Security and Co-operation in Europe Mission in Kosovo (“OSCE”), *Property Rights in Kosovo (2002–2003)*, at [http://www.osce.org/documents/mik/2003/06/974\\_en.pdf](http://www.osce.org/documents/mik/2003/06/974_en.pdf) (assessing confusion about property rights in Kosovo) [hereinafter 2002–2003 OSCE Property Report].

275. See *Proctor & Gamble Cellulose Co. v. Viskoza-Loznica*, 33 F. Supp. 2d 644, 650 (W.D. Tenn. 1998) (summarizing U.S. presidential executive orders imposing trade prohibitions and asset freezes); *Belgrade v. Sidex Int'l Furniture Corp.*, 2 F. Supp. 2d 407, 410 (S.D.N.Y. 1998) (summarizing U.S. Government actions freezing Yugoslav assets and prohibiting trade with Yugoslav entities).

276. See discussion *supra* Part III.

special problems because ownership of SOEs was highly ambiguous.<sup>277</sup> The state retained some attributes of ownership of some assets.<sup>278</sup> Possession, however, was the right of SOE employees, represented through workers' councils, with municipalities in which SOE assets were located also having rights and powers resembling those of trustees holding property rights on behalf of the workers.<sup>279</sup> This murky set of legal relationships was further complicated by privatization or "transformation" of many SOEs during the Milosevic period.<sup>280</sup>

Succession issues are even more complicated in Kosovo and are not addressed by the Agreement on Succession Issues.<sup>281</sup> Kosovo, formerly an autonomous province of the Republic of Serbia within Yugoslavia, has been, since June 10, 1999, under the civil administration of the U.N., operating through the United Nations Interim Mission in Kosovo ("UNMIK"), backed by a NATO security force called the Kosovo Force ("KFOR").

In Kosovo, conflicting claims to property, such as apartments, exist between Serbs who left Kosovo after NATO and the U.N. arrived, the international institutions conducting the civil administration, the provisional institutions of self-government in Kosovo, Kosovar Albanians, or other Serbs. Kosovar Albanians have claims to pension assets held in Serbia. A variety of commercial entities around the world have claims to assets that were privatized by the Milosevic regime and then renationalized and reprivatized through the privatization process under U.N. administration.<sup>282</sup>

Sorting all this out is made more difficult by the parallel state run by the Albanians during the Milosevic regime, when many transfers from

277. See *Proctor & Gamble*, 33 F. Supp. 2d at 644, 653–54 (involving a suit by a U.S. firm against Yugoslav SOE, its purchasing agents, and banks issuing letters of credit on its behalf for payment for raw materials). The court noted and deferred to the Treasury Department presumption that SOEs were controlled by the Yugoslav government, but found that the bank had been privatized in 1990 and thus was no longer an SOE. *Id.*; see also *Sablic v. Croatia Line*, 719 A.2d 172 (N.J. Super. Ct. App. Div. 1998) (suit alleging, among other things, wrongful termination of employment by Croatian SOE).

278. See *Milena Ship Mgmt. Co. v. Newcomb*, 995 F.2d 620, 625 (5th Cir. 1993) (noting that the Yugoslav government retained interest in SOE because proceeds from any sale would be paid into a government-controlled fund); *Proctor & Gamble*, 33 F. Supp. 2d at 658 (characterizing SOE as managed by workers councils but owned by state).

279. See generally *Belgrade*, 2 F. Supp. 2d at 414 (stating that a "socio-political community"—a subdivision of the state—retained equitable ownership and reversionary property rights in SOE assets).

280. *Proctor & Gamble*, 33 F. Supp. 2d at 657–58 (explaining the Yugoslav system of privatization, in which shares in SOEs were sold, with proceeds paid into "development funds" established by the state). Privatization also occurred under the auspices of states seceding from Yugoslavia. See *Sablic*, 719 A.2d at 176–77 (finding former SOE to be controlled by Croatia privatization agency under 1992 law on privatization); 2002–2003 OSCE Property Report, *supra* note 274, at 3–4 (summarizing the peculiarities of the property rights regime in Kosovo).

281. See discussion *supra* Part III(A)(1).

282. See generally *MRAK*, *supra* note 109, at 17 (noting Slovenia's position in London-Club negotiations that "controlled Yugoslav persons" should be excluded as debtor beneficiaries).

Albanians to Serbs were coerced and many voluntary transfers to Albanians were not recorded, and by the chaotic situation after the NATO bombing campaign in 1999, when property transfers from Serbs were allegedly coerced, and in many cases not recorded. In addition, the Serbs, as part of their ethnic cleansing campaign, deliberately destroyed many formal documents held by Kosovar Albanians.

Resolution 1244 authorizes both civil and security presences, which were agreed to by the FRY.<sup>283</sup> The resolution requests the Secretary-General of the U.N. to appoint a "Special Representative" ("Special Representative of the Secretary-General" or "SRSG") to control the implementation of the international civil presence.<sup>284</sup> The resolution authorizes the SRSG to establish the civil presence in order to:

provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo.<sup>285</sup>

Among other things, the SRSG is to perform "basic civilian administrative functions where and as long as required,"<sup>286</sup> to transfer its administrative responsibilities to "local provisional institutions,"<sup>287</sup> to facilitate a political process to determine Kosovo's future status taking into the account the Rambouillet Accords,<sup>288</sup> and, ultimately, to oversee the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement.<sup>289</sup> Most significantly in conjunction with the subject of this Article—the SRSG is authorized to support "the reconstruction of key infrastructure and other economic reconstruction."<sup>290</sup>

On July 25, 1999, the SRSG promulgated UNMIK Regulation 1999/1, exercising authority under Resolution 1244. Regulation 1999/1 provided, among other things, that the civil administration—UNMIK—would perform its duties under Resolution 1244 by "issue[ing] legislative acts in the

283. S.C. Res. 1244, *supra* note 1, ¶ 5.

284. *Id.* ¶ 6.

285. *Id.* ¶ 10.

286. *Id.* ¶ 11(b).

287. *Id.* ¶ 11(d).

288. *Id.* ¶ 11(e). The Rambouillet Accords, brokered by the U.S. and signed by representatives of political- and guerilla-resistance entities in Kosovo, but not by the FRY, envisioned, among other things, a plebiscite after three years to determine future status. *Interim Agreement for Peace and Self-Government in Kosovo*, Feb. 23, 1999, U.N. Doc. S/1999/648 (June 7, 1999), at [http://www.state.gov/www/regions/eur/ksvo\\_ambouillet\\_text.html](http://www.state.gov/www/regions/eur/ksvo_ambouillet_text.html).

289. S.C. Res. 1244, *supra* note 1, ¶ 11(c).

290. *Id.* ¶ 11(g).

form of [UNMIK] regulations.”<sup>291</sup> UNMIK Regulation 2000/54, which amended Regulation 1999/1, further provided that UNMIK would “administer movable or immovable property which is in the territory of Kosovo, including monies, bank accounts and other assets” as to which UNMIK has “reasonable and objective grounds to conclude” is “property of, or registered in the name of, the Federal Republic of Yugoslavia or the Republic of Serbia or any of their organs,”<sup>292</sup> or “socially owned property.”<sup>293</sup> UNMIK administration of property pursuant to this authority “shall be without prejudice to the right of any person or entity to assert ownership or other rights in the property in a competent court in Kosovo, or in a judicial mechanism to be established by [UNMIK] Regulation.”<sup>294</sup>

In UNMIK Regulation 2000/47, the SRSG declared that “UNMIK, its property, funds and assets shall be immune from any legal process.”<sup>295</sup>

On June 13, 2002, the SRSG established the Kosovo Trust Agency (“KTA” or “the Agency”) in UNMIK Regulation 2002/12, explicitly citing authority under Resolution 1244 and Regulation 1999/1. The KTA was established as an independent body, possessing “full juridical personality,” with the capacity to contract, acquire, hold, and dispose of property, and to sue and be sued in its own name.<sup>296</sup> The KTA reports through the reconstruction component of the civil administration.<sup>297</sup> The KTA was authorized to “administer publicly owned and socially owned enterprises and related assets within the context of Section 8.1(q) of the Constitutional Framework.”<sup>298</sup> The authority of the KTA expressly extended to “all [e]n-

291. On the Authority of the Interim Administration in Kosovo, U.N. Interim Administration Mission in Kosovo, U.N. Doc. UNMIK/REG/1999/1 § 4 (July 25, 1999), *amended by* Amending UNMIK Regulation No. 1999/1, as Amended, On the Authority of the Interim Administration in Kosovo, U.N. Interim Administration Mission in Kosovo, U.N. Doc. UNMIK/REG/2000/54 (Sept. 27, 2000).

292. UNMIK/REG/2000/54 § 6.1(a).

293. *Id.* § 6.1(b).

294. *Id.* § 6.2.

295. On the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo, U.N. Interim Administration Mission in Kosovo, U.N. Doc. UNMIK/REG/2000/47 § 3 (Aug. 18, 2000). Section 1 defines “UNMIK” to mean the “international civil presence established pursuant to Security Council resolution 1244 . . . integrating the Interim Civil Administration (United Nations); Humanitarian Affairs (UNHCR); Institution-building (OSCE) and Reconstruction (EU) components.” *Id.* § 1.

296. On the Establishment of the Kosovo Trust Agency, U.N. Interim Administration Mission in Kosovo, U.N. Doc. UNMIK/REG/2002/12 § 1 (June 13, 2002).

297. *Id.* § 12.3(a).

298. *Id.* § 2.1. The Constitutional Framework was set forth in UNMIK Regulation 2001/9, which reserved to UNMIK (as distinct from the provisional institutions of self-government set up by that UNMIK Regulation) “[a]uthority to administer public, state and socially-owned property in accordance with the relevant UNMIK legislation in force” and to regulate “public and socially-owned enterprises after having consulted the Economic and Fiscal Council and the Provisional Institutions of Self-Government” established by that UNMIK Regulation. On a Constitutional Framework for Provisional

terprises and assets within the scope of UNMIK Regulation 2000/63 . . . [e]stablish[ing] an Administrative Department of Trade and Industry,” and UNMIK Regulation 2000/45, providing for self government of municipalities in Kosovo.<sup>299</sup>

The KTA also has authority to take “any action, [with certain exceptions] . . . that the Agency considers appropriate to preserve or enhance the value, viability, or governance” of the enterprises.<sup>300</sup> The authority expressly includes “[e]ntering into arrangements for the management, reconstruction or reorganization of [e]nterprises.”<sup>301</sup> The KTA may establish subsidiaries and transfer assets to the subsidiaries,<sup>302</sup> restructure an enterprise into several enterprises or corporations,<sup>303</sup> contract out part of the activities of enterprises,<sup>304</sup> and initiate bankruptcy proceedings.<sup>305</sup>

With respect to SOEs, the KTA, in addition to its basic authority, is empowered to establish corporate subsidiaries of an SOE and transfer SOE assets to the subsidiary, to sell shares of the subsidiaries, to liquidate SOEs, and to dispose of monies and other assets of SOEs.<sup>306</sup> When reorganizing SOEs, the KTA is authorized to strip the liabilities from assets and to transfer the assets to investors free and clear of claims, and then must place the money received for the assets from investors selected through an open tender process into a trust, which then is available to satisfy claims adjudicated by the Special Chamber of the Kosovo Supreme Court (“Special Chamber”).<sup>307</sup> Twenty percent of the proceeds of a spin-off must be reserved for employee claims.<sup>308</sup> Eligible employee claimants are those included on lists for each SOE developed by the “representative body of employees in the [SOE] concerned, in cooperation with the Federation of Independent Trade Unions of Kosovo,” and submitted to the KTA.<sup>309</sup> The KTA must “review

Self-Government in Kosovo, U.N. Interim Administration Mission in Kosovo, U.N. Doc. UNMIK/REG/2001/9 § 8.1(q)–(r) (May 15, 2001).

299. UNMIK/REG/2002/12 § 5.5(a)–(b).

300. *Id.* § 6.1.

301. *Id.* § 6.1(m).

302. *Id.* § 6.1(o).

303. *Id.* § 6.1(q).

304. *Id.* § 6.1(r).

305. *Id.* § 6.1(s).

306. *Id.* § 6.2.

307. *See id.* §§ 8.1–8.7; *see also* Operational Policies of the Kosovo Trust Agency, § 5.1.1(a) (2003) [hereinafter KTA Operating Policies] (describing spin-off as the preferred method, involving transferring assets and certain liabilities of SOE to the newly incorporated subsidiary of the SOE, which shall be sold to investors with proceeds deposited into trust accounts to satisfy liabilities remaining with the SOE, including ownership claims).

308. On the Transformation of the Right of Use to Socially-Owned Immovable Property, U.N. Interim Administration Mission in Kosovo, U.N. Doc. UNMIK/REG/2003/13 § 10 (May 9, 2003).

309. *Id.* § 10.2.

the list and make such adjustments as it deems necessary to ensure equitable access by all eligible employees to the funds to be distributed.”<sup>310</sup>

Section 18 of UNMIK Regulation 2002/12 limits the liability of the KTA to its assets “plus the unpaid portion of its subscribed capital,” and imposes other limitations on liability.<sup>311</sup> This section also waives UNMIK’s immunity for the KTA, but within sharply circumscribed channels. Unless extended by UNMIK regulation, the KTA’s authority expires three years after its establishment, or June 13, 2005.<sup>312</sup>

### A. *Existing Claims Dispute Machinery in Kosovo*

The international civil administration in Kosovo has set up two specialized legal regimes to handle claims with respect to socially-owned property and residential property. These regimes are incomplete, in that their scope excludes a significant universe of claims likely to impede agreement on and implementation of any final status. They also are imperfect in their operation. Moreover, other uncertainties in Kosovo are likely to spawn new claims, including an incomplete property registration system,<sup>313</sup> imperfect functioning of the regular courts,<sup>314</sup> and failure of several levels of executive authority to comply with procedures for expropriating property.<sup>315</sup> In the aggregate, these difficulties create a situation significantly out of compliance with property-rights guarantees under the ECHR.<sup>316</sup>

#### 1. Special Chamber of the Kosovo Supreme Court

The UNMIK Regulation establishing the KTA provides that “the Special Chamber shall have exclusive jurisdiction for all suits against the [KTA].”<sup>317</sup> The Special Chamber also has primary jurisdiction over claims, including creditor or ownership claims, brought against an enterprise under

310. *Id.*

311. UNMIK/REG/2002/12 § 18.1.

312. *Id.* § 31.

313. See 2002–2003 OSCE Property Report, *supra* note 274, at 10 (concluding that Kosovo’s property registration system does not function effectively to secure property rights or to enable a smooth transition to a market economy).

314. See *id.* at 36 (concluding that the regular courts were not functioning effectively to protect property rights in Kosovo, despite a generally solid legal framework).

315. See *id.* at 43 (expressing concern that municipal and other authorities in Kosovo were expropriating private property without following expropriation procedures).

316. See *id.* at 2–3 (summarizing property rights under the ECHR).

317. UNMIK/REG/2002/12 § 30.1 (referring to the Special Chamber of the Supreme Court of Kosovo, established by UNMIK Regulation 2002/13).

the authority of the KTA, and claims involving rights in property in the possession or control of an enterprise under the KTA's authority.<sup>318</sup>

Procedures before the Special Chamber reflect common concepts of due process. Special Chamber procedures provide parties with "a meaningful opportunity to have [their claims] adjudicated in an impartial and transparent manner within a reasonable period of time and in accordance with norms established under the ECHR and having regard to generally accepted international standards."<sup>319</sup> Decisions of the Special Chamber must be in writing, specifying reasons for the decision.<sup>320</sup> Parties may be represented by counsel, including foreign counsel.<sup>321</sup> The Special Chamber allows written and oral submissions.<sup>322</sup> It provides for compulsory process for obtaining testimony<sup>323</sup> and has procedures for obtaining evidence located outside of Kosovo.<sup>324</sup> It allows expert reports,<sup>325</sup> compulsory production of documents and physical items,<sup>326</sup> and site visits.<sup>327</sup> All pleadings and supporting documents must be submitted in English, but additional Serbian or Albanian copies also may be submitted.<sup>328</sup> Discovery is enforceable through monetary sanctions.<sup>329</sup> Oral as well as written arguments can be made before the court,<sup>330</sup> and the parties have the option of invoking the appeals process of the Special Chamber.<sup>331</sup> The Special Chamber also has the power to afford a number of desirable remedies, including injunctions,<sup>332</sup> costs,<sup>333</sup> and monetary compensation equivalent to the lost asset.<sup>334</sup>

The Special Chamber was designed to be as impartial as possible. A majority of the judges on the Special Chamber's five judge panel are inter-

318. On the Establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters, U.N. Interim Administration Mission in Kosovo, U.N. Doc. UNMIK/REG/2002/13 § 4.1(c)-(d) (June 13, 2002).

319. *Id.* § 7.

320. *Id.* § 9.3(b).

321. Implementing UNMIK Regulation No. 2002/13 on the Establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters, U.N. Interim Administration Mission in Kosovo, U.N. Doc. UNMIK/DIR/2003/13 § 21 (June 11, 2003).

322. *Id.* § 19.

323. UNMIK/REG/2002/13 § 8.

324. UNMIK/DIR/2003/13 § 9.

325. *Id.* § 40.

326. *Id.* § 43.

327. *Id.* § 44.

328. *Id.* § 22.7.

329. *Id.* § 43.4.

330. *Id.* § 32.

331. *See id.* §§ 55-63.

332. *Id.* § 52.

333. *Id.* § 53.

334. UNMIK/REG/2002/13 §10.3.

national judges,<sup>335</sup> with an international judge serving as the presiding judge.<sup>336</sup> The Special Chamber has rules ensuring the impartiality of its judges, which minimizes any concern of local partiality.<sup>337</sup>

Claims must be submitted to the Special Chamber within nine months after the claimant knew or should have known of the decision or other action giving rise to the claim by the KTA.<sup>338</sup> Claims only are cognizable by the Special Chamber when the claimant has given prior notice of the claim to the KTA.<sup>339</sup> Upon request of the KTA, the Special Chamber may suspend any case filed with the Special Chamber for an additional sixty days.<sup>340</sup> In the case of liquidation, creditor claims must be filed with the Liquidating Committee established by the KTA within sixty days of the second notification of the liquidation proceedings.<sup>341</sup> Within thirty days, the Liquidation Committee must determine whether to include a claim on the schedule of claims for the liquidation, and must notify the claimant within five days after its determination.<sup>342</sup> After a Liquidation Committee is terminated, the KTA must refer future claims to the Special Chamber.<sup>343</sup> The Special Chamber must decide cases within two months after the completion of proceedings in any case.<sup>344</sup> Protests over lists of employees eligible for 20% of privatization proceeds must be submitted to the Special Chamber within twenty days of the formal publication of the list, and the Special Chamber must decide any such protest within forty days of its submission.<sup>345</sup>

While the Special Chamber was functioning as of March 2004, it got off to a slow start.<sup>346</sup> Because contracts for the first round of privatization by the KTA were not signed until March 2004, and no liquidations under KTA auspices had occurred as of the end of March 2004, the earliest that

335. *Id.* § 3.1.

336. *Id.* § 3.2.

337. UNMIK/DIR/2003/13 § 4.

338. UNMIK/REG/2002/13 § 6.1.

339. *Id.* § 6.2 (referring to UNMIK/REG/2002/12 § 30.2, which reads: "The Special Chamber shall not admit any suit against the Agency unless the claimant submits evidence of having notified the Chairman of the Board of his intention of filing such suit at least sixty (60) days prior to the actual filing").

340. UNMIK/REG/2002/12 § 30.2 (the function of the suspension of proceedings is to facilitate amicable settlements).

341. KTA Operating Policies, *supra* note 307, § 7.9.1.

342. *Id.* § 7.9.2.

343. *Id.* § 7.9.3.

344. UNMIK/REG/2002/13 § 9.1.

345. UNMIK/REG/2003/13 § 10.6.

346. Property Rights in Kosovo 2002–2003, *supra* note 274, at 28 (noting that the Special Chamber was not fully functioning in 2003).

privatization claims are likely to be decided by the Special Chamber is early to mid-2005.

Whether the privatization regime in Kosovo represents a partial solution to the problem of claims resolution in the context of final status determination or whether it will become yet another source of disputes depends on the legal status of the privatization institutions under the sovereign immunity and act of state doctrines.

The KTA's decisions fall within the scope of the act of state doctrine, although this proposition is not immune from challenge. The KTA's decisions are those of a state for purposes of the doctrine. The KTA, within its sphere of delegated authority under UNMIK Regulation 2002/12, exercises legislative and executive functions. The SRSG retains veto power over KTA decisions.<sup>347</sup> Judicial deference for acts of state extends to duly authorized agents of the sovereign state acting for governmental purposes.

The Court in *Underhill v. Hernandez* held that the acts of a military commander in Venezuela were subject to immunity.<sup>348</sup> "The immunity of individuals from suits brought in foreign tribunals for acts done within their own states . . . must necessarily extend to the agents of governments ruling by paramount force as matter of fact."<sup>349</sup> "[T]hat the acts of the defendant were the acts of the government of Venezuela . . . are not properly the subject of adjudication in the courts of another government."<sup>350</sup> The Court broadly extended the protection of the sovereign to all agents acting under its authority.

The KTA acts as the U.N.'s agent, authorized by UNMIK Regulation 2002/12. The U.N. expressly empowered the KTA to engage in privatization activities on its behalf.<sup>351</sup> Because the KTA is a U.N.-created body that is granted authority to act on behalf of the Kosovo population, its public acts share the same sovereign character as if those acts were performed by the U.N. itself. The KTA's actions likely to be challenged in national court litigation were authorized by the U.N. and thus fall within the act of state doctrine.

The Government of Kosovo is not fully recognized on the international stage, but this does not affect legal treatment of the acts performed by the KTA for two reasons: (1) the Government of Kosovo, recognized or

347. UNMIK/REG/2002/12 § 24.3 (authorizing the SRSG to repeal or modify KTA decisions and to mandate KTA actions).

348. See *Underhill v. Hernandez*, 168 U.S. 250, 254 (1897).

349. *Id.* at 252.

350. *Id.* at 254.

351. UNMIK/REG/2002/12 § 6.2 (authorizing the creation of SOE subsidiaries and the sale of SOE assets).

not, is not party to privatization decisions; and (2) as an authorized agent of the U.N., the KTA is accorded the same sovereign character as its parent. Because the U.S. has recognized the sovereignty of the U.N. as an international body,<sup>352</sup> agencies and instrumentalities of the U.N. in Kosovo enjoy the privilege of comity in U.S. courts.

The act of state doctrine also extends to contract cases. The Second Circuit held in *Hewitt* that the act of state doctrine applied to contract actions involving sovereign entities as parties.<sup>353</sup> And while the Supreme Court has never squarely addressed whether a contractual breach implicates the act of state doctrine, lower courts have applied the doctrine to such cases.<sup>354</sup>

Even if the activities of the KTA subject to challenge fall within the commercial activities exception of the FSIA, that does not foreclose judicial deference under the act of state doctrine because the commercial activities exception is not part of the act of state doctrine. In *Dunhill*, a majority of the Court did not accept the idea advanced by four Justices that the act of state doctrine extends only to governmental acts and not to commercial ones. The Court stated that “we are in no sense compelled to recognize as an act of state the purely commercial conduct of foreign governments.”<sup>355</sup> Justice Stevens did not join in this part of the opinion.<sup>356</sup> Four dissenting justices reasoned that even if the restrictive theory of sovereign immunity were adopted (as it subsequently was in the FSIA) “it does not follow that there should be a commercial act exception to the act of state doctrine.”<sup>357</sup>

Subsequently, in *Machinists v. Organization of the Petroleum Exporting Countries (OPEC)*, the U.S. Court of Appeals for the Ninth Circuit observed that “[t]he act of state doctrine is not diluted by the commercial activity exception which limits the doctrine of sovereign immunity. While purely commercial activity may not rise to the level of an act of state, certain seemingly commercial activity will trigger act of state considera-

352. Exec. Order No. 9698, 11 Fed. Reg. 1809 (Feb. 19, 1946).

353. *Hewitt v. Speyer*, 250 F. 367, 370 (2d Cir. 1918) (suit challenging a contract that diverted monies allegedly due bondholders).

354. Michael D. Ramsey, *Acts of State and Foreign Sovereign Obligations*, 39 HARV. INT'L L.J. 1, 16–22 (1998). Compare *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1165–66 (D.C. Cir. 2002) (act of state doctrine prevents deciding whether the denial of an export license was a breach of contract); *Libyan Am. Oil Co. v. Socialist People's Libyan Arab Jamahiriya*, 482 F. Supp. 1175, 1179 (D.D.C. 1980) (adjudication of contract rights reflected in arbitration award is nonjusticiable because of act of state doctrine), *vacated*, 684 F.2d 1032 (D.C. Cir. 1981); with *Walter Fuller Aircraft Sales, Inc. v. Republic of the Philippines*, 965 F.2d 1375, 1388 (5th Cir. 1992) (act of state doctrine did not foreclose deciding a breach of contract case because the court need not question foreign governmental policy decisions).

355. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 697–98 (1976).

356. *Id.* at 715 (Stevens, J., concurring).

357. *Id.* at 725 (Marshall, J., dissenting).

tions.”<sup>358</sup> The court held that price fixing activity by OPEC fell within the act of state doctrine.<sup>359</sup>

The KTA acted to privatize SOEs within Kosovo. While this sort of activity is undoubtedly intended to promote commerce and the development of the institutions of a market economy, the KTA’s role in the endeavor was not commercial in nature. The KTA assumed a governmental role in privatizing the enterprises, and it did so with proper authorization by the U.N. The KTA’s discretion in choosing the means of introducing private investment, whether commercialization or privatization, and its choice of investors is a necessary and legitimate exercise of its discretion and authority.

Even if the KTA’s activities are “seemingly commercial,” a court is not foreclosed from applying the act of state doctrine. Given the ultimate goals the KTA hopes to achieve through privatization and the means it must use to reach those goals, a U.S. court’s second-guessing of those acts implicates the same policy concerns leading to the act of state doctrine. Application of the act of state doctrine has always been within the courts’ discretion. When the activities that a court must judge possess certain commercial characteristics, but still point to greater public objectives as the KTA’s privatization efforts most certainly do, the court should recognize that applying the act of state doctrine is not only permitted, but also necessary.

As in the Ninth Circuit OPEC case, granting the relief a litigant is likely to request from a national court would “in effect amount to an order from a domestic court instructing a foreign sovereign [the international civil administration of Kosovo] to alter its chosen means” of privatizing industry.<sup>360</sup> This is precisely the kind of interference in affairs within the responsibility of the political branches that the act of state doctrine is meant to avoid.

Beyond inserting the judiciary into difficult, interrelated, and ultimately political controversies over the scope of U.N. administration of Kosovo and approaches to privatization, a decision on the merits by a national court would cripple the U.N.’s, UNMIK’s, and the KTA’s ability to build an efficient market economy in postconflict Kosovo. Applying the act of state doctrine will avoid that result.

358. See *Int’l Ass’n of Machinists & Aerospace Workers, (IAM) v. Org. of the Petroleum Exp. Countries (OPEC)*, 649 F.2d 1354, 1360 (9th Cir. 1981).

359. *Id.* at 1361.

360. *Id.*

In *Bigio v. Coca-Cola Co.*, the Second Circuit held that the “function of the court in applying the act of state doctrine is to weigh in balance the foreign policy interests that favor or disfavor [its] application.”<sup>361</sup> “[T]he doctrine demands a case-by-case analysis of the extent to which in the context of a particular dispute separation of powers concerns are implicated.”<sup>362</sup>

In Kosovo, the foreign policy concerns are paramount, unlike in *Bigio*, where the only identifiable act of state was decades old and had apparently been repudiated by the current foreign government. In *WMW Machinery*, the court found governmental policy decisions irrelevant to the issue in suit,<sup>363</sup> and in *Ampac Group*, the court, without much analysis, found the transactions in dispute to be unquestionably commercial in nature, and not linked to any Executive Branch objective.<sup>364</sup>

National courts should follow the example of *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, in which the court of appeals affirmed application of the act of state doctrine to foreclose consideration of a claim that refusal of an export license breached a contract with the plaintiff.<sup>365</sup> Evaluating the KTA’s decision to privatize rather than to execute contracts contemplated by the U.N. before its creation would draw national courts into ruling on the validity of the KTA’s governmental decisions.

## 2. Challenges to the Special Chamber and Privatization Machinery

A number of criticisms have been aimed at the privatization and claims resolution regimes in Kosovo, especially by Serb interests. While designers of claims resolution machinery in conjunction with final status determination need not necessarily accede to these criticisms, it is appropriate to take them into account because they will shape the political constraints within which any claims machinery must be negotiated.

### a. *Unauthorized Expropriation*

The broadest of the criticisms asserts that the transfer of property interests through the KTA represents an unauthorized deprivation of property interests. This allegedly occurs at two levels. Most broadly, critics claim that UNMIK’s mandate does not extend to the compulsory transfer of

361. See *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 452 (2d Cir. 2001) (internal quotations omitted).

362. *Id.* (internal quotations omitted).

363. *WMW Machinery, Inc. v. Werkzeugmaschinenhandel GMBH*, 960 F. Supp. 734, 745 (S.D.N.Y. 1997).

364. See *Ampac Group, Inc. v. Republic of Honduras*, 797 F. Supp. 973, 978 (S.D. Fla. 1992).

365. See *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1165 (D.C. Cir. 2002).

property interests such as necessarily occurs when assets are leased to investors for ninety-nine years through the privatization process. Resolution 1244 authorizes the civil administration established by the Secretary-General to “[support] the reconstruction of key infrastructure and other economic reconstruction.”<sup>366</sup>

This authority, it is argued, cannot be construed to extend to the compulsory transfer of property interests incident to developing a market economy. Rather, it is limited to short-term reconstruction of physical assets and economic stabilization. While the authority granted UNMIK to “[perform] basic civilian administrative functions where and as long as required”<sup>367</sup> may include the power to adjudicate competing property claims, it does not include the power to conduct a forced sale to a third-party investor. Critics dispute arguments that broader responsibility to “[promote] the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo,”<sup>368</sup> to “[organize] and [oversee] the development of provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections,”<sup>369</sup> to “[perform] basic civilian administrative functions where and as long as required,”<sup>370</sup> to “[transfer], as these institutions are established, its administrative responsibilities while overseeing and supporting the consolidation of Kosovo’s local provisional institutions and other peace-building activities,”<sup>371</sup> and to “[promote] the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo,”<sup>372</sup> in the aggregate, necessarily implies the power to restructure economic institutions through rearrangement of property interests, in order to create sustainable economic prosperity through a market economy.

Critics also argue that the powers of UNMIK should not exceed those of a “belligerent occupant” under international law, whose power to change law and institutional arrangements is strictly limited to measures necessary to protect security of occupying forces and to assure the short-term welfare of local populations, pending resumption of the government displaced by the occupation.<sup>373</sup>

366. S.C. Res. 1244, *supra* note 1, ¶ 11(g).

367. *Id.* ¶ 11(b).

368. *Id.* ¶ 11(a).

369. *Id.* ¶ 11(c).

370. *Id.* ¶ 11(b).

371. *Id.* ¶ 11(d).

372. *Id.* ¶ 11(a).

373. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Arm'd Forces in the Field, art. 47, Aug. 12, 1949, 6 U.S.T. 3114, 3548, 75 U.N.T.S. 31, 62; Maxine

But this argument fails to take account of the reality that Kosovo is not appropriately classified as a belligerent occupant, where the preexisting sovereign is expected to return intact. Resolution 1244 expressly contemplates a political settlement, in terms of final status, that, whatever its form, will alter preexisting political institutions and the structure of sovereignty.<sup>374</sup> The role of UNMIK is better characterized as a political trusteeship, under which UNMIK, as trustee, has the power to restructure property interests and legal and political institutions whenever justifiable as useful in protecting and enhancing the interests of the beneficiaries of the trusteeship—the people of Kosovo.<sup>375</sup>

Under a narrow view of the powers granted by Resolution 1244, the assumption by UNMIK of “[a]ll legislative and executive authority with respect to Kosovo,”<sup>376</sup> and the assumption of plenary power over all “movable or immovable property, including monies, bank accounts, and other property of, or registered in the name of the Federal Republic of Yugoslavia or the Republic of Serbia or any of its organs, which is in the territory of Kosovo”<sup>377</sup> is *ultra vires*, because it exceeds the powers conferred by the Security Council. Moreover, critics claim that the powers assumed by UNMIK extend only to state property and not to property in social ownership.

But the Security Council has, since the issuance of Resolution 1244, exercised continuous oversight over the U.N.’s administration of Kosovo, receiving notice of UNMIK regulations and also receiving regular reports by the Secretary-General and the SRSG, some of which have expressly referred to privatization of socially-owned assets as a priority, and the machinery for privatization and claims resolution. Failure by the U.N. Security Council to take action to limit the exercise of this authority by UNMIK evidences concurrence by the U.N. Security Council in the view that UNMIK’s power includes the power to privatize through the mechanism established by UNMIK.

Finally, critics of the privatization regime argue that KTA has acted *ultra vires* in interfering with property interests in enterprises outside its mandate. The KTA has authority only over socially-owned and publicly-owned enterprises (“POEs”) registered or operating in the territory of Kosovo, expressly excluding those lawfully transformed into a different form

Marcus, *Humanitarian Intervention Without Borders: Belligerent Occupation or Colonization?*, 25 HOUS. J. INT’L L. 99, 113 (2002) (summarizing limitations on changes in local law).

374. S.C. Res. 1244, *supra* note 1, ¶ 11(e).

375. See Perritt, *supra* note 1, at 391 (explaining concept of political trusteeship).

376. UNMIK/REG/1991/1 § 1(1).

377. *Id.* § 6.

of business enterprise.<sup>378</sup> The KTA has, they argue, asserted authority over enterprises, and sold assets or intends to sell assets belonging to enterprises that do not qualify as socially- or publicly-owned. Such claims should be within the jurisdiction of the Special Chamber to resolve, but critics argue that the power of the Special Chamber should be congruent with that of the KTA. The Special Chamber has jurisdiction over “[c]hallenges to decisions or other actions of [the KTA] undertaken pursuant to Regulation No. 2002/12,”<sup>379</sup> over “creditor or ownership claims, brought against an Enterprise . . . currently or formerly under the administrative authority of the [KTA],”<sup>380</sup> and over claims “involving recognition of a right, title or interest in property in the possession or control of [a business enterprise] currently or formerly under the . . . authority of the [KTA].”<sup>381</sup> Critics argue that this grant of jurisdiction to the Special Chamber excludes claims and challenges outside KTA authority.

*b. Denial of Due Process*

Even if KTA and Special Chamber authority extends to enterprises and claims contended to be outside their authority, critics argue that the procedures used by the KTA and the Special Chamber violate European and international norms of due process. In particular, they criticize the management of the KTA as biased because of inadequate Serb representation on the board and staff. They claim that KTA’s operating procedures fail to assure adequate “due diligence” in classifying enterprises as socially- or publicly-owned and thus within KTA’s jurisdiction. They argue that appointment of judges to the Special Chamber for relatively short terms of six months and employment of judges as consultants to UNMIK deprives them of the requisite independence.

*c. Violation of the European Convention on Human Rights*

Critics of the KTA/Special Chamber machinery argue that these substantive and procedural shortcomings of the privatization process violate UNMIK’s duty under the ECHR, expressly made applicable in Kosovo by UNMIK.<sup>382</sup> Article 1 of the First Protocol to the Convention guarantees

378. UNMIK/REG/2002/12 §§ 5.1, 5.3.

379. UNMIK/REG/2002/13 § 4.1(a).

380. *Id.* § 4.1(c).

381. *Id.* § 4.1(d).

382. On the Law Applicable in Kosovo, U.N. Interim Administration Mission in Kosovo, U.N. Doc. UNMIK/REG/1999/24 § 1.3 (Dec. 12, 1999) (expressly adopting the European Convention for the Protection of Human Rights and Fundamental Freedoms as part of applicable law in Kosovo).

“peaceful enjoyment of possessions,”<sup>383</sup> and this provision has been interpreted by the European Court of Human Rights to cover cases of privatization and nationalization. States have wide latitude to determine state interests that justify alteration of property relationships, but the European Court of Human Rights has held that states must provide access to fair judicial procedures to determine the compensation due for interference with property rights.

### 3. Possible Solutions to Challenges to Privatization Machinery

Overreaction to criticisms of the KTA and the Special Chamber resulted in a number of roadblocks to privatization. After a very promising start, privatization efforts were complicated by new EU personnel, beginning with a freeze in October 2003, and followed by an effort to substitute illogical operational policies that would not allow investors to obtain clear title to assets. The result was significant political controversy, pitting the Provisional Institutions of Self-Government (“PISG”) and the Kosovar trade union organization against the new management of the KTA. This resulted in paralysis of the privatization machinery well into 2004.

Hopefully, these short-term controversies can be resolved in a way that will allow privatization to continue, with disputes over the extent of KTA and Special Chamber authority presented for adjudication in the Special Chamber.

In the longer run, however, a strategy must be adopted that provides for a more robust and comprehensive mechanism for resolution of claims associated with SOEs, POEs and their management, liquidation, and privatization. Any viable strategy must include features that respond to the criticisms of the KTA/Special Chamber machinery.

Such a strategy also must encompass the universe of housing claims within the jurisdiction of the Housing and Property Directorate<sup>384</sup> and the other types of claims entirely outside the scope of the KTA/Special Chamber and Housing Property Directorate institutions.

383. Protocol 1 of the ECHR says:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Protocol 1, art. 1, European Convention on Human Rights and Fundamental Freedoms, May 18, 1954, 213 U.N.T.S. 262, available at <http://www.hri.org/docs/ECHR50.html#P1>.

384. See discussion *infra* Part V(A)(4).

#### 4. Housing and Property Directorate

UNMIK established a Housing and Property Directorate (“Directorate”) and a Housing and Property Claims Commission (“Commission”) in 1999.<sup>385</sup> The Directorate was empowered to register claims by natural persons to residential property involving discriminatory revocation of rights subsequent to March 1989,<sup>386</sup> or deprivation of possession occurring before 1999.<sup>387</sup> The Commission was empowered to “settle private non-commercial disputes concerning residential property referred to it by the Directorate until the Special Representative of the Secretary-General determines that local courts are able to carry out the functions entrusted to the Commission.”<sup>388</sup> The Commission is composed of one panel of two international and one local members, who are all “experts in the field of housing and property law and competent to hold judicial office.”<sup>389</sup>

Claims were required to be submitted to the Commission by December 1, 2001.<sup>390</sup> Decisions are enforceable by eviction by an officer of the Directorate and law enforcement authorities.<sup>391</sup>

By the end of 2003, more than 25,000 claims had been presented to the Commission and about half had been resolved.<sup>392</sup> Even so, the Commission was not fully performing its mission because of confusion about overlapping jurisdiction and impediments to enforcement of its decisions.<sup>393</sup>

The most serious limitation on the effectiveness of the Commission is uncertainty as to the legal regime for residential property claims not presented to the Commission by the December 2001 deadline.

#### *B. Solving Problems Relating to Existing Machinery*

Elements of a comprehensive claims resolution strategy for Kosovo can take one of three basic approaches to claims and challenges associated

385. On the Establishment of the Housing and Property Directorate and the Housing and Property Claims Commission, U.N. Interim Administration Mission in Kosovo, U.N. Doc. UNMIK/REG/1999/23 §§ 1–2 (Nov. 15, 1999).

386. *Id.* § 1.2(a).

387. *Id.* § 1.2(c).

388. *Id.* § 2.1.

389. *Id.* § 2.2.

390. On Residential Property Claims and the Rules of Procedure and Evidence of the Housing and Property Directorate and the Housing and Property Claims Commission, U.N. Interim Administration Mission in Kosovo, U.N. Doc. UNMIK/REG/2000/60 § 3.2 (Oct. 31, 2000).

391. *Id.* § 13.4.

392. See 2002–2003 OSCE Property Report, *supra* note 274, at 15.

393. *Id.* at 12–24 (concluding that the Directorate and the Commission were not yet functioning effectively to protect residential property rights in Kosovo).

with privatization and residential housing: ratify KTA, Special Chamber, and Directorate decisions, while reinforcing and extending the existing machinery; replace the existing machinery with a new set of claims resolution institutions with broader jurisdiction; or provide new mechanisms for review of KTA, Special Chamber, and Directorate decisions.

Choosing among these approaches will necessarily involve a political resolution of the controversies incident to each existing system. At the same time, however, the process of designing and erecting new claims resolution machinery should not interrupt progress in economic transformation, or introduce new uncertainties for investors or claimants. The best approach would be one that allows decisions made through the existing institutions to stand, ratifying them in general, while affording narrow grounds for those aggrieved by those decisions to seek compensation through new mechanisms.

In any event, a comprehensive claims resolution system must address the significant subset of claims outside the jurisdiction of the KTA, the Special Chamber, and the Directorate. These include claims for interference with property interests not associated with SOEs or POEs, pension claims by pension beneficiaries in Kosovo,<sup>394</sup> claims by any new government of Kosovo for misappropriation of public funds by Serbia, claims for personal injury and property damage associated with the Milosevic regime and its ethnic cleansing activities (mostly Kosovar Albanian claims) and with the NATO intervention (mostly Serb claims), and claims by Serbia for recovery or offset of funds invested in enterprises and infrastructure in Kosovo.

## VI. PROPOSED STRUCTURE FOR CLAIMS RELATING TO KOSOVO

If Kosovo (or UNMIK as political trustee) and Serbia-Montenegro reach an agreement on claims resolution, the two entities could agree on a mechanism resembling the Iran-U.S. Claims Tribunal. Issues may arise about the power of the two signatories to alter legal relations involving other states or citizens of other states.

If Kosovo and Serbia-Montenegro are unable to reach agreement, two basic possibilities exist for orderly claims resolution. The U.N. Security Council could mandate a process for resolving claims. Alternatively, creditors could cooperate in "the shadow of the law" (a very dim shadow, given the paucity of clear law on the subject) in a manner resembling that which

394. Arguably some such claims may represent creditor claims against SOEs and POEs, which can be partially satisfied by the funds generated by privatization and liquidation of SOE and POE assets.

occurred in connection with the breakup of the Soviet Union, or in the nineteenth century<sup>395</sup> before the first federal bankruptcy statute was enacted in 1898.<sup>396</sup> The literature on game theory and the prisoner's dilemma in the context of international bankruptcy<sup>397</sup> suggests that such cooperation would be unlikely and fragile, if it occurred at all.

Claims relating to Kosovo present a less daunting challenge to the international legal system than efforts to develop a comprehensive global system for handling international bankruptcies or a global system for adjusting investment disputes; fewer players are involved, and an ad hoc mechanism rather than a permanent one will suffice. Accordingly, any useful evaluation of the possibilities for Kosovo claims should begin with an identification of the key players, both state players and private stakeholders. State players are those in which Kosovar or Serbian assets are located, or in which claimants to property in Kosovo are located. Switzerland, Germany, France, Great Britain, the U.S., Albania, states formerly a part of Yugoslavia, Bulgaria, Turkey, Italy, and Greece probably account for the lion's share.

A second, potentially simplifying, inquiry relates to the magnitude of available assets, compared to the magnitude of total claims. The Milosevic regime in Yugoslavia is widely viewed as having dissipated most of the assets owned by the Yugoslav state. If the assets are de minimis, then sophisticated claimants are unlikely to invest substantial amounts of energy in aggressive battles over claims resolution.

395. See Lee C. Buchheit & G. Mitu Gulati, *Sovereign Bonds and the Collective Will*, 51 EMORY L.J. 1317, 1337–38 (2002) (proposing equity receivership as model for creditor cooperation when states default on bonds); Joseph F. Rice & Nancy Worth Davis, *The Future of Mass Tort Claims: Comparison of Settlement Class Action to Bankruptcy Treatment of Mass Tort Claims*, 50 S.C. L. REV. 405, 427 (1999) (noting that creditors often cooperated with debtors to avoid liquidation through equity receivership).

396. Bankruptcy Act of 1898, ch. 541, 30 Stat. 544, amended by Chandler Act, ch. 575, 52 Stat. 840 (1938). The Bankruptcy Act was repealed by the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended in scattered sections of U.S.C.). See Adam J. Wiensch, Note, *The Supreme Court, Textualism, and the Treatment of Pre-Bankruptcy Code Law*, 79 GEO. L.J. 1831 (1991) (describing the history of U.S. bankruptcy law); John Fabian Witt, Review Essay, *Narrating Bankruptcy/Narrating Risk*, 98 NW. U. L. REV. 303 (2003) (describing the short-lived efforts to enact federal bankruptcy law in the first half of nineteenth century); Mark Bradshaw, Note, *The Role of Politics and Economics in Early American Bankruptcy Law*, 18 WHITTIER L. REV. 739 (1997) (same).

397. See, e.g., Frederick Tung, *Is International Bankruptcy Possible?*, 23 MICH. J. INT'L L. 31 (2001) (arguing that game theory demonstrates infeasibility of broad cooperation in international bankruptcies and challenging the proponents of the "universalist" approach to international bankruptcy, in which the law of the home state of the bankrupt governs, even when assets are located in other states).

*A. Specific Principles to Guide the Design of a Claims Resolution System*

1. Even though recognition of Kosovo as a new state, separate from Serbia may not meet the usual prerequisites for dissolution of the state of Serbia, the dissolution model in the Yugoslav Agreement on Succession Issues should be followed.

Were Kosovo to become independent of Serbia, succession issues would be addressed in a slightly different context from that applicable to the independent republics of Slovenia, Croatia, Bosnia, and Macedonia, although the pattern set by the Yugoslav Agreement on Succession Issues<sup>398</sup> would be difficult to avoid as the model for Kosovo. The principal difference is that Yugoslavia was treated as a case of dissolution rather than continuation,<sup>399</sup> while the secession of Kosovo more likely would be treated as a case of continuation. Kosovo was an autonomous province of the Republic of Serbia, not a republic within Yugoslavia. Accordingly, the relevant state from which Kosovo would secede is Serbia, not Yugoslavia itself. Therefore, the conclusion that Yugoslavia dissolved does not guarantee that Kosovo would be treated as a successor state to Yugoslavia under the dissolution principle, rather than a newly independent state, while the continuation state of Serbia retains the preexisting legal personality. The main implication of treating the withdrawal of Kosovo as a case of continuation rather than dissolution is that Serbia would retain all of the assets of the predecessor state under customary international law.

There is a counterargument, based on Kosovo's 1991 declaration of independence, which predated the declarations of independence by Slovenia, Croatia, Macedonia, and Bosnia. If that declaration of independence is accorded international recognition retrospectively, it would be more plausible to treat Kosovo as a successor state to the former Yugoslavia, with entitlements to assets and responsibilities for debts determined under the Yugoslav Agreement on Succession Issues should it become a signatory. Whether the other signatories would accept such an arrangement is, of course, yet to be determined.

398. See discussion *supra* Part III(A)(1).

399. See discussion *supra* Part II(B) (explaining difference between succession and continuation in international law).

2. Kosovo should accept responsibility for the allocated portion of Yugoslav and Serbian debt—debt directly associated with projects and other benefits in the territory of Kosovo.

This principle is appropriate so that the claims resolution strategy for Kosovo can follow the basic pattern set by other independent constituent units of the former Yugoslavia. Any economic disadvantage to Kosovo from application of this principle can be mitigated by appropriate apportionment of Serbian assets, increased by allowances for corruption and waste.<sup>400</sup>

3. March 22, 1989, should be used for determining debt and asset values to be apportioned to the states of Serbia and Kosovo.

Adopting the same date as that used to determine applicable law under UNMIK administration simplifies claims administration and avoids problems associated with trying to frame some aggregate method for dealing with the discriminatory Milosevic regime and the parallel system.

4. Kosovo should be entitled to the same percentage of Yugoslav assets as the percentage of Yugoslav debt apportioned to it.

No apparent reason exists for adopting different formulas for equitable allocation of assets and debt not readily linked to particular territory, persons, or enterprises.

5. An adjustment should be made for “waste” by the former Yugoslav regime.

The adjustment for waste should include losses due to corruption and expenditures for ethnic cleansing in Kosovo. Serbia-Montenegro should be required to account for assets that have been spent and for military assets that have been destroyed or rendered obsolete since the appropriate date for dissolution.<sup>401</sup>

6. Serbia-Montenegro should be entitled to an adjustment for damage resulting from the NATO bombing campaign or the Kosovo Liberation Army insurgency.

It will be politically difficult to arrive at an agreement that charges Serbia with dissipation of assets associated with systemic human rights

400. See discussion *infra* Part VI(A)(5).

401. See Stanič, *supra* note 109, at 771.

abuses and armed conflict without symmetrical treatment of dissipation resulting from opposing armed conflict.

7. A “peace conference” approach is more likely to be efficacious than a “direct negotiations” approach.

While direct negotiations were effective in resolving most private claims associated with the dissolution of the Soviet Union and of the secession of the republics from Yugoslavia, such an approach is far less likely to work in the case of Kosovo because of legal uncertainty associated with the periods of parallel government, Serb exploitation, and international administration. Moreover, a peace conference approach is inevitable to resolve final status.

8. The PISG should negotiate on behalf of Kosovo, with UNMIK participation and oversight.

No system for claims resolution will be viable unless it is accepted by locally accountable political institutions in Kosovo. The most efficient way to achieve such acceptance is to empower the PISG to participate directly in negotiations over claims resolution. Formal concerns about UNMIK’s “reserved powers” can be accommodated adequately by allowing UNMIK participation and oversight, with periodic reporting to the U.N. Security Council by both the PISG and the SRSG.

9. The claims resolution system should include an adequate system for identifying assets available to satisfy claims and subjecting them to the automatic stay.

The best way to assure appropriate disclosure of the assets and liabilities subject to any claims resolution system is to empower a claims resolution institution to undertake investigations and audits, reinforced by an obligation for states in which assets may be located to command cooperation by legal and natural persons subject to their sovereignty.<sup>402</sup> The obligations for state cooperation expressed in Resolution 1483 pertaining to Iraq are good models.<sup>403</sup>

402. See *In re Coastal Plains, Inc.*, 179 F.3d 197, 208 n.6 (5th Cir. 1999) (without disclosure, the “basic system of marshalling of assets” in the resulting distribution of proceeds to creditors in bankruptcy proceedings would be an impossible task); *In re Estate of Barsanti*, 773 So. 2d 1206, 1209 (Fla. Dist. Ct. App. 2000) (affirming injunction was necessary for marshalling of assets in probate proceeding); *Kreta Shipping, S.A. v. Preussag Int’l Steel Corp.*, 192 F.3d 41, 48 (2d Cir. 1999) (a judicial order to marshal assets is appropriate in admiralty proceeding only when fund is inadequate to pay all claimants in full (citing *Petition of Texas Co.*, 213 F.2d 479, 482 (2d Cir. 1954))).

403. See discussion *supra* Part III(B)(2).

10. A fund must be established to pay claims, financed by Serbian state revenues, Kosovar state revenues, and the international community.

It is likely that claims will far exceed available assets in value. In order for a claims resolution system to be meaningful in such a situation some sort of fund must be established to satisfy claims, as in the case of privatization in Kosovo,<sup>404</sup> and the claims resolution systems for Iran,<sup>405</sup> Iraq,<sup>406</sup> and the Holocaust.<sup>407</sup> A fund can be financed by identified assets—which represents a way of sequestering those assets—from streams of public revenues proportional to negotiated responsibility for dissipation of assets,<sup>408</sup> and from national and international governmental subsidies as necessary.

11. An automatic stay should be imposed as soon as the claims resolution system is adopted.

Any dispute resolution mechanism intended to include competing claims for the same asset and any mechanism intended to assure the primacy of its decisions with respect to claims must include some kind of automatic stay rule.<sup>409</sup> The automatic stay in the U.S. Bankruptcy Code operates to suspend any “judicial, administrative, or other action or proceeding against the debtor” once a petition is filed.<sup>410</sup> Although the extra-territorial effect of the automatic stay in U.S. bankruptcy law is controversial,<sup>411</sup> this issue is only one of many relating to coordination of transborder bankruptcies.

The doctrine of *forum non conveniens* in U.S. courts and in the courts of other common law countries,<sup>412</sup> such as England,<sup>413</sup> Scotland, Can-

404. See discussion *supra* Part V.

405. See discussion *supra* Part III(B)(1).

406. See discussion *supra* Part III(B)(2).

407. See discussion *supra* Part III(B)(3).

408. See discussion *supra* Part VI(A)(5)–(6).

409. The UNCITRAL Draft Legislative Guide refers to this as the “[p]rotection of the assets of the debtor against the actions of creditors, the debtor itself and the insolvency representative, and where the protective measures apply to secured creditors, the manner in which the economic value of the security interest will be protected during the insolvency proceedings.” UNCITRAL Draft Legislative Guide Part I, *supra* note 61, ¶ 28(d). The UNCITRAL Draft Legislative Guide considers the desirable attributes of an automatic stay. UNCITRAL Draft Legislative Guide Part II, *supra* note 75, ¶¶ 176–219.

410. 11 U.S.C. § 362(a)(1) (2000).

411. See *In re Rimsat, Ltd.*, 98 F.3d 956, 965–66 (7th Cir. 1996) (affirming injunctions against filings in foreign receivership proceeding).

412. The doctrine permits discretionary refusal of jurisdiction in all common law countries, but the standards for its application differ from country to country.

413. See Alexander Reus, *Judicial Discretion: A Comparative View of the Doctrine of Forum Non Conveniens in the United States, the United Kingdom, and Germany*, 16 LOY. L.A. INT’L & COMP. L.J.

ada,<sup>414</sup> and Australia, obligates a court hearing a controversy to dismiss a case that more properly should be heard in another tribunal. The doctrine is unavailable in civil law countries because it violates strict jurisdictional rules under procedure codes.<sup>415</sup> Even in those countries, however, a related doctrine, *lis pendens*, allows staying an action in favor of a similar action already pending in the court of another state,<sup>416</sup> presumably including courts established by a political trustee.

Absent a treaty binding all states in which parallel proceedings might be attempted or a U.N. Security Council resolution similar to Resolution 1483,<sup>417</sup> an automatic stay provision in a claims resolution regime for Kosovo, while desirable, cannot do more than automatic stay provisions in the U.S. Bankruptcy Code and counterparts in other national bankruptcy regimes.

12. Private claims as well as intergovernmental claims should be included.

A significant part of the universe of claims associated with Kosovo are private, rather than governmental claims. Excluding such claims would undermine the political utility of any claims resolution system.

13. Private claimants should have standing to present claims directly to claims resolution tribunals.

Forcing private claims to be presented only through governments or international organizations, as in the case of the Iran-U.S. Claims Tribunal,<sup>418</sup> affords the possible benefit of an initial, national law screening mechanism. But the uncertainties of the past and present legal regimes in Kosovo vitiate any such benefit in Kosovo, where many of the likely claimants are located. Allowing private presentation of claims, however,

455, 481–82 (1994) (characterizing the English version of the *forum non conveniens* doctrine as being more focused on identifying the best forum).

414. See Donald J. Carney, *Forum Non Conveniens in the United States and Canada*, 3 BUFF. J. INT'L L. 117, 126 (1996) (describing the Canadian doctrine as first determining whether a better forum exists for trying the case, and second, determining whether the plaintiff would be disadvantaged by dismissal); *id.* at 133 (procedural law changes that would disadvantage a plaintiff would bar a dismissal on *forum non conveniens* grounds in Canada).

415. Reus, *supra* note 413, at 489 (giving reasons for hostility to the doctrine of *forum non conveniens* by civil law jurists); *id.* at 495–502 (discussing the controversy over the doctrine in Germany and other civil law systems).

416. See Martine Stükelberg, *Lis Pendens and Forum Non Conveniens at the Hague Conference: The Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, 26 BROOK. J. INT'L L. 949 (2001) (suggesting that eventual Hague convention on international jurisdiction and judgment enforcement will contain some type of *forum non conveniens* provision).

417. See discussion *supra* Part III(B)(2).

418. See discussion *supra* Part III(B)(1).

necessitates some sort of legal aid or simplified resolution process, as the Special Chamber has learned.<sup>419</sup>

14. A deadline of two years after establishment of the claims resolution system should be imposed.

Any claims resolution system is unacceptably open-ended unless it extinguishes claims not presented by a certain date. A two-year deadline should be adequate and is commensurate with deadlines imposed in all of the systems considered in this Article.

15. Valuation techniques should be those used in other recent claims resolution systems.

Valuation of assets and claims is a major challenge for any dispute resolution system. Controversies and the burden on decisionmakers can be reduced by following standard practices in other models.

16. Decisions on private claims should be insulated from collateral attack under appropriate recognition and enforcement rules.

Any system for reallocating legal rights in assets is ineffective unless the legal authorities of the place where the assets are located are willing and able to compel one in physical control of the assets to respect the decisions made in the reallocation process. In part this depends on formal rules for recognition and enforcement of judgments under private international law. It also depends on the effectiveness of the legal system where the assets are located. Formal recognition and the issuance of formal enforcement or execution orders are of little value if there is no one who can apply coercive power to overcome resistance to the orders.<sup>420</sup>

There is no multilateral convention on jurisdiction of national courts or enforcement of foreign judgments, despite a continuing effort by the Hague Conference on Private International Law to negotiate a "convention on international jurisdiction and foreign judgments in civil and commercial matters."<sup>421</sup> Private international law,<sup>422</sup> supplemented by European treaty law,<sup>423</sup> provides a starting point for obligating all states to respect judg-

419. See discussion *supra* Part V(A)(1).

420. See generally Alvarez & Park, *supra* note 98 (evaluating NAFTA Chapter 11 and analyzing legal bases for enforcing arbitration decisions on Chapter 11).

421. See Hague Conference on Private International Law, *Works in Progress: Judgements*, at [http://www.hcch.net/index\\_en.php?act=progress.listing&cat=4](http://www.hcch.net/index_en.php?act=progress.listing&cat=4) (last visited Jan. 26, 2005).

422. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 13, §§ 481–82 (reviewing common law criteria for enforcement of foreign judgments).

423. See discussion *supra* Part I(C).

ments emerging from the Kosovo claims dispute resolution system under criteria that discourage relitigation of the merits.

Acceptable levels of finality, however, necessitate a U.N. Security Council resolution, or a broad multilateral treaty, obligating member states or signatory states to take steps under national law to ensure recognition and enforcement of Kosovo claims resolution decisions, and to insulate them from collateral attack.

17. Claims should be tradable in the private marketplace before and after they are presented to any claims resolution tribunal.

Any mechanism for claims resolution should make it easy for claimants to trade their claims to persons who may be willing to buy them, enhancing the ability of the market to provide part of the solution. Some of the problems arising with voucher systems for privatization<sup>424</sup> should be avoidable in the case of Kosovo because of better general awareness of what private claims are worth.

### B. *Composition of the Tribunal*

Several models for constituting a Kosovo claims tribunal are available. One model is that used for the Special Chamber of the Kosovo Supreme Court. The SRSG designates five members of the Kosovo Supreme Court, three international judges, one of whom serves as presiding judge of the Special Chamber, and two judges who are residents of Kosovo.<sup>425</sup> This approach suffers from the defect that Serb interests are unlikely to accept it as legitimate.

The structure and membership of a Kosovo claims tribunal also can draw upon the models of the Iran-U.S. Claims Tribunal and the UNCC. The Tribunal has nine members, although the U.S. and Iran can agree on a greater number of members, in multiples of three.<sup>426</sup> Each government appoints one-third of the members. The partisan members thus appointed name the remainder of the members and designate a President of the Tribunal from among them. The tribunal sits *en banc* or in panels of three as determined by the President.

The UNCC has a Governing Council and Commissioners, who assess losses and recommend compensation to the Governing Council.<sup>427</sup> The

424. See discussion *supra* Part III(A)(3).

425. UNMIK/REG/2002/13 § 3.1.

426. See *supra* Part III(B)(1).

427. United Nations Compensation Commission, *The Commissioners*, at <http://www.unog.ch/uncc/commiss.htm> (last visited Jan. 28, 2005).

Governing Council comprises the members of the U.N. Security Council.<sup>428</sup> Commissioners are international jurists selected for their integrity, experience, and expertise in such areas as law, accounting, loss adjustment, assessment of environmental damage, and engineering.<sup>429</sup> Fifty-nine commissioners had been appointed as of April 2002 representing forty different nationalities.<sup>430</sup> Commissioners are selected by the Executive Secretary from a register maintained by the Secretary-General, subject to approval by the Governing Council.<sup>431</sup> Commissioners sit in panels of three, each specializing in a particular type of claim.<sup>432</sup>

The composition of the Tribunal is less apparently political than that of the UNCC, inasmuch as the work of the Tribunal is not overseen by state representatives who have other diplomatic functions.

The most satisfactory approach is to combine features of the Tribunal and the International Chamber of Commerce ("ICC"). The Kosovo Claims "Tribunal" itself should comprise seven members, two selected by the government of Serbia, two selected by the government of Kosovo, two selected by the SRSG to represent the interests of claimants and asset holders in other states, and one selected by the Presiding Judge of the International Court of Justice. The Kosovo Claims Tribunal would consider and accept, reject, or modify recommendations submitted by commissioners, who would actually hear claims. Commissioners would be assigned from a roster developed by the ICC. The Kosovo Claims Tribunal would have the power to adopt rules of procedure.

Involvement by the International Court of Justice and by the ICC is intended to link the Kosovo Claims Tribunal more closely to the commercial community than might be the case if it were entirely defined by political bodies of the U.N. The role of the governments of Kosovo and Serbia would be less than in the case of the Iran-U.S. Claims Tribunal because the Kosovo Claims Tribunal, unlike the Iran-U.S. Tribunal, will hear claims involving nationals of third states.

428. United Nations Compensation Commission, *The Governing Council*, at <http://www.unog.ch/uncc/governin.htm> (last visited Jan. 28, 2005).

429. *Id.*

430. United Nations Compensation Commission, *supra* note 427.

431. *Id.*

432. *Id.*

