FOURTH SECTION

CASE OF ALIŠIĆ AND OTHERS v. BOSNIA AND HERZEGOVINA, CROATIA, SERBIA, SLOVENIA AND THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA

(Application no. 60642/08)

JUDGMENT

STRASBOURG

6 November 2012

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Nicolas Bratza, *President,*
Lech Garlicki,
Nina Vajić,
Boštjan M. Zupančič,
Ljiljana Mijović,
Dragoljub Popović,
Mirjana Lazarova Trajkovska, *judges,*
and Lawrence Early, *Section Registrar*,

Having deliberated in private on 11 October 2012,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 60642/08) against Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by three citizens of Bosnia and Herzegovina, Ms Emina Ališić, Mr Aziz Sadžak and Mr Sakib Šahdanović ("the applicants"), on 30 July 2005. The first applicant is also a German citizen.

2. The applicants were represented by Mr B. Mujčin, a lawyer practising in Germany. The Bosnian-Herzegovinian, Croatian, Serbian, Slovenian and Macedonian Governments ("the Governments") were represented by their Agents, Ms M. Mijić, Ms Š. Stažnik, Mr S. Carić, Ms N. Pintar Gosenca and Mr K. Bogdanov, respectively.

3. The applicants alleged that they were still not able to withdraw their "old" foreign-currency savings from their accounts at the Sarajevo branch of Ljubljanska Banka Ljubljana and the Tuzla branch of Investbanka.

4. By a decision of 17 October 2011, the Court joined to the merits the issue of the exhaustion of domestic remedies and declared the application admissible.

5. The parties filed further written observations on the merits (Rule 59 § 1 of the Rules of Court). The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3), the parties replied in writing to each other's observations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicants were born in 1976, 1949 and 1952, respectively, and live in Germany.

7. Before the dissolution of the Socialist Federal Republic of Yugoslavia ("the SFRY"), Ms Ališić and Mr Sadžak deposited foreign currency in the then Ljubljanska Banka Sarajevo and Mr Šahdanović in the Tuzla branch of Investbanka. It would appear that the balance in their accounts is 4,715.56 German marks (DEM), DEM 129,874.30 and DEM 63,880.44, respectively. Mr Šahdanović also has 73 US dollars (USD) and 4 Austrian schillings in his accounts.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The SFRY

8. Until the 1989/90 economic reforms, the commercial banking system consisted of basic and associated banks. Basic banks were as a rule founded and controlled by socially owned companies[1] based in the same territorial unit (that is, in one of the Republics – Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia – or Autonomous Provinces – Kosovo and Vojvodina). The founders of Ljubljanska Banka Sarajevo were thus 16 socially owned companies from Bosnia and Herzegovina (such as Energoinvest Sarajevo, Gorenje Bira Bihać, Šipad Sarajevo, Velepromet Visoko, Đuro Salaj Mostar) and Pamučni kombinat Vranje from Serbia. At least two basic banks could form an associated bank, while preserving their separate legal personality. In 1978 Ljubljanska Banka Sarajevo, Ljubljanska Banka Zagreb, Ljubljanska Banka Skopje and some other basic banks thus founded an associated bank – Ljubljanska Banka Ljubljana. Similarly, in 1978 Investbanka and a number of other basic banks founded Beogradska udružena Banka Beograd. In the SFRY there were approximately 150 basic and 9 associated banks (Jugobanka Beograd, Beogradska Udružena Banka, Privredna Banka Sarajevo, Vojvođanska Banka Novi Sad, Kosovska Banka Priština, Udružena Banka Hrvatske Zagreb, Ljubljanska Banka Ljubljana, Stopanska Banka Skopje and Investiciona Banka Titograd).

9. Being hard-pressed for hard currency, the SFRY made it attractive for its expatriates and other citizens to deposit foreign currency with its banks.

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1. The concept of "social ownership", while it does exist in other countries, was particularly highly developed in the SFRY (see Medjad, *The fate of the Yugoslav model: A case against legal conformity*, American Journal of Comparative Law 52/1 (2004), pp. 287-319).

Such deposits earned high interest (the annual interest rate often exceeded 10%). Moreover, they were guaranteed by the State (see section 14(3) of the Foreign-Currency Transactions Act 1985[1] and section 76(1) of the Banks and Other Financial Institutions Act 1989[2]). The State guarantee was to be activated in case of the bankruptcy or "manifest insolvency" of a bank at the request of the bank (section 18 of the Banks and Other Financial Institutions Insolvency Act 1989[3] and the relevant secondary legislation[4]). None of the banks under consideration in the present case made such a request. It should be emphasised that savers could not request the activation of the guarantee on their own. They were nevertheless entitled, in accordance with the Civil Obligations Act 1978[5], to collect their deposits at any time, together with accrued interest, from basic banks (see sections 1035 and 1045 of that Act).

10. Beginning in the mid 1970s, the commercial banks incurred foreign-exchange losses because the dinar exchange rate depreciated. In response, the SFRY set up a system for "redepositing" of foreign currency, allowing commercial banks to transfer citizens' foreign-currency deposits to the National Bank of Yugoslavia ("the NBY"), which assumed the currency risk (see section 51(2) of the Foreign-Currency Transactions Act 1977[6]). Although the system was optional, commercial banks did not have another option as they were not allowed to maintain foreign-currency accounts with foreign banks, as was necessary to make payments abroad, nor were they allowed to grant foreign-currency loans. Virtually all foreign currency was therefore redeposited with the NBY. It should be emphasised, however, that only a fraction of that money was physically transferred to the NBY (see *Kovačić and Others v. Slovenia* [GC], nos. 44574/98, 45133/98 and 48316/99, §§ 36 and 39, 3 October 2008; see also decision AP 164/04 of the Constitutional Court of Bosnia and Herzegovina of 1 April 2006, § 53).

11. With regard to Ljubljanska Banka Sarajevo, the redepositing scheme functioned as follows. Pursuant to a series of agreements between that bank, Ljubljanska Banka Ljubljana, the National Bank of Bosnia and Herzegovina and the National Bank of Slovenia, Ljubljanska Banka Sarajevo had to ship on a monthly basis any difference between foreign currency deposited and

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1. *Zakon o deviznom poslovanju*, Official Gazette of the SFRY nos. 66/85, 13/86, 71/86, 2/87, 3/88, 59/88, 85/89, 27/90, 82/90 and 22/91.
2. *Zakon o bankama i drugim finansijskim organizacijama*, Official Gazette of the SFRY nos. 10/89, 40/89, 87/89, 18/90, 72/90 and 79/90.
3 *Zakon o sanaciji, stečaju i likvidaciji banaka i drugih finansijskih organizacija*, Official Gazette of the SFRY nos. 84/89 and 63/90.
4. *Odluka o načinu izvršavanja obaveza Federacije po osnovu jemstva za devize na deviznim računima i deviznim štednim ulozima građana, građanskih pravnih lica i stranih fizičkih lica*, Official Gazette of the SFRY no. 27/90.
5. *Zakon o obligacionim odnosima*, Official Gazette of the SFRY nos. 29/78, 39/85, 45/89 and 57/89.
6. *Zakon o deviznom poslovanju i kreditnim odnosima*, Official Gazette of the SFRY nos. 15/77, 61/82, 77/82, 34/83, 70/83 and 71/84.

foreign currency withdrawn to the National Bank of Slovenia. The foreign currency so shipped was recorded as a claim of Ljubljanska Banka Sarajevo against the NBY. The Slovenian Government maintained in the present case that the National Bank of Slovenia then shipped all those funds to the NBY, but they failed to provide any proof in that regard. They proved only that a part of those funds had been shipped back to Ljubljanska Banka Sarajevo at the request of that bank to meet its liquidity needs (in the period when more foreign currency was withdrawn than deposited). The exact figures are: in 1984 DEM 57,389, 894 was shipped to Ljubljana and DEM 150,187 back to Sarajevo; in 1985 DEM 59,465,398 was shipped to Ljubljana and DEM 71,270 back to Sarajevo, in 1986 DEM 19,794,416 was shipped to Ljubljana and DEM 1,564,823 back to Sarajevo, and so on. In total, between 1984 and 1991 DEM 244,665,082 was shipped to Ljubljana and DEM 41,469,528 (that is, less than 17%) back to Sarajevo.

12. Another relevant factor is that basic banks were granted dinar loans (initially, interest-free) by the NBY in return for the value of the redeposited foreign currency. The dinars so received were used by basic banks to give credits, at interest rates below the rate of inflation, to companies based, as a rule, in the same territorial unit (for instance, in the case of Ljubljanska Banka Sarajevo, such credits were given to Polietilenka Bihać, Gorenje Bira Bihać, Šipad Šator Glamoč, Bilećanka Bileća, UPI Sarajevo, Soko Komerc Mostar, Rudi Čajavec Banja Luka, Velepromet Visoko, and so on).

13. In 1988 the redepositing system was brought to an end (by virtue of section 103 of the Foreign-Currency Transactions Act 1985, as amended on 15 October 1988). Banks were given permission to open foreign-currency accounts with foreign banks. Ljubljanska Banka Sarajevo, like other banks, seized that opportunity and deposited in total USD 13.5 million with foreign banks in the period from October 1988 until December 1989.

14. Within the framework of the 1989/90 reforms, the SFRY abolished the system of basic and associated banks described above. This shift in the banking regulations allowed some basic banks to opt for an independent status, while other basic banks became branches (without legal personality) of the former associated banks to which they had formerly belonged. On 1 January 1990 Ljubljanska Banka Sarajevo thus became a branch (without legal personality) of Ljubljanska Banka Ljubljana and the latter took over the former's rights, assets and liabilities. By contrast, Investbanka became an independent bank with its headquarters in Serbia and a number of branches in Bosnia and Herzegovina (including the Tuzla branch at which Mr Šahdanović had accounts). Moreover, the convertibility of the dinar was declared and very favourable exchange rates were fixed by the NBY. It led to a massive withdrawal of foreign currency from commercial banks. The SFRY therefore resorted to emergency measures restricting to a large extent the withdrawals of foreign-currency deposits. For example, as of December 1990, when section 71 of the Foreign-Currency Transactions Act 1985 was

amended, savers could use their savings only to pay for imported goods or services for their own or close relatives' needs, to purchase foreign-currency bonds, to make testamentary gifts for scientific or humanitarian purposes, or to pay for life insurance with a local insurance company (before, they could use their deposits also to pay for goods and services abroad). In addition, section 3 of a decision of the SFRY Government of April 1991[1], which was in force until 8 February 1992, and section 17c of a decision of the NBY of January 1991[2], which the Constitutional Court of the SFRY declared unconstitutional on 22 April 1992, limited the amount which savers could withdraw or use for the above purposes to DEM 500 at a time, but not more than DEM 1,000 per month.

15. The SFRY disintegrated in 1991/92. In the successor States, foreign currency deposited beforehand is customarily referred to as "old" or "frozen" foreign-currency savings.

B. Bosnia and Herzegovina

1. Law and practice concerning "old" foreign-currency savings

16. In 1992 Bosnia and Herzegovina took over the statutory guarantee for "old" foreign-currency savings from the SFRY (see section 6 of the SFRY Legislation Application Act 1992[3]). Although the relevant statutory provisions were not clear in that regard, the National Bank of Bosnia and Herzegovina held that the guarantee covered "old" foreign-currency savings in domestic banks only (see its report 63/94 of 8 August 1994[4]).

17. While during the war all "old" foreign-currency savings remained frozen, withdrawals were exceptionally allowed on humanitarian grounds and in some other special cases (see the relevant secondary legislation[5]).

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1. *Odluka o načinu na koji ovlašćene banke izvršavaju naloge za plaćanje domaćih fizičkih lica devizama sa njihovih deviznih računa i deviznih štednih uloga*, Official Gazette of the SFRY nos. 28/91, 34/91, 64/91 and 9/92.
2. *Odluka o načinu vođenja deviznog računa i deviznog štednog uloga domaćeg i stranog fizičkog lica*, Official Gazette of the SFRY nos. 6/91, 30/91, 36/91 and 25/92.
3. *Uredba sa zakonskom snagom o preuzimanju i primjenjivanju saveznih zakona koji se u Bosni i Hercegovini primjenjuju kao republički zakoni*, Official Gazette of the Republic of Bosnia and Herzegovina no. 2/92.
4. A copy thereof was provided by the Bosnian-Herzegovinian authorities.
5. *Odluka o uslovima i načinu isplata dinara po osnovu definitivne prodaje devizne štednje domaćih fizičkih lica i korišćenju deviza sa deviznih računa i deviznih štednih uloga domaćih fizičkih lica za potrebe liječenja i plaćanja školarine u inostranstvu*, Official Gazette of the Republic of Bosnia and Herzegovina no. 4/93; *Odluka o uslovima i načinu davanja kratkoročnih kredita bankama na osnovu definitivne prodaje deponovane devizne štednje građana i efektivno prodatih deviza od strane građana*, Official Gazette of the Republika Srpska nos. 10/93 and 2/94; and *Odluka o ciljevima i zadacima monetarno-kreditne politike u 1995,* Official Gazette of the Republic of Bosnia and Herzegovina nos. 11/95 and 19/95.

18. After the 1992-95 war, each of the Entities (the Federation of Bosnia and Herzegovina – “the FBH” – and the Republika Srpska) enacted its own legislation on “old” foreign-currency savings. Only the FBH legislation is relevant in the present case, given that the branches in issue are situated in that Entity. In 1997 the FBH assumed liability for “old” foreign-currency savings in banks and branches placed in its territory (see section 3(1) of the Claims Settlement Act 1997[1] and the Non-Residents’ Claims Settlement Decree 1999[2]). Such savings remained frozen, but they could be used to purchase State-owned flats and companies under certain conditions (section 18 of the Claims Settlement Act 1997, as amended in August 2004).

19. In 2004 the FBH enacted new legislation. It undertook to repay “old” foreign-currency savings in domestic banks in that Entity, regardless of the citizenship of the depositor concerned. Its liability for such savings in the branches of Ljubljanska Banka Ljubljana and Investbanka were expressly excluded (see section 9(2) of the Settlement of Domestic Debt Act 2004[3]).

20. In 2006 the liability for “old” foreign-currency savings in domestic banks passed from the Entities to the State. Liability for such savings at the local branches of Ljubljanska Banka Ljubljana and Investbanka are again expressly excluded, but the State must help the clients of those branches to obtain the payment of their savings from Slovenia and Serbia, respectively (see section 2 of the Old Foreign-Currency Savings Act 2006[4]). In addition, all proceedings concerning “old” foreign-currency savings ceased by virtue of law (see section 28 of that Act; that provision was declared constitutional by decision U 13/06 of the Constitutional Court of Bosnia and Herzegovina of 28 March 2008, § 35). The Constitutional Court has examined numerous individual complaints about the failure of Bosnia and Herzegovina and its Entities to pay back “old” foreign-currency savings at the domestic branches of Ljubljanska Banka Ljubljana and Investbanka: it held that neither Bosnia and Herzegovina nor its Entities were liable and ordered instead the State to help the clients of those branches to recover their savings from Slovenia and Serbia, respectively (see, for example, decisions AP 164/04 of 1 April 2006, AP 423/07 of 14 October 2008 and AP 14/08 of 21 December 2010).

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1. *Zakon o utvrđivanju i realizaciji potraživanja građana u postupku privatizacije*, Official Gazette of the FBH nos. 27/97, 8/99, 45/00, 54/00, 32/01, 27/02, 57/03, 44/04, 79/07 and 65/09.
2. *Uredba o ostvarivanju potraživanja lica koja su imala deviznu štednju u bankama na teritoriju Federacije, a nisu imala prebivalište na teritoriju Federacije,* Official Gazette of the FBH no. 44/99.
3. *Zakon o utvrđivanju i načinu izmirenja unutrašnjih obaveza Federacije*, Official Gazette of the FBH nos. 66/04, 49/05, 35/06, 31/08, 32/09 and 65/09.
4. *Zakon o izmirenju obaveza po osnovu računa stare devizne štednje*, Official Gazette of Bosnia and Herzegovina nos. 28/06, 76/06 and 72/07.

2. *Status of the Sarajevo branch of Ljubljanska Banka Ljubljana*

21. In 1990 Ljubljanska Banka Sarajevo became a branch, without legal personality, of Ljubljanska Banka Ljubljana and the latter took over the former's rights, assets and liabilities. Pursuant to the companies register, the Sarajevo branch acted on behalf and for the account of the parent bank. On 31 December 1991 the amount of foreign-currency savings at the Sarajevo branch was approximately DEM 250,000,000, but it would appear that less than DEM 350,000 was in the vault of the Sarajevo branch on that date. While it is unclear what happened with the remaining sum, it is likely that most of it ended up in Slovenia (see paragraph 11 above).

22. A domestic bank, Ljubljanska Banka Sarajevo, was set up in 1993. It assumed Ljubljanska Banka Ljubljana's liability for "old" foreign-currency savings at the Sarajevo branch. In 1994 the National Bank of Bosnia and Herzegovina carried out an inspection and noted many shortcomings. First of all, its management had not been properly appointed and it was not clear who its shareholders were. The National Bank therefore appointed a director of Ljubljanska Banka Sarajevo. Secondly, as a domestic bank, Ljubljanska Banka Sarajevo could not have assumed a foreign bank's liability for "old" foreign-currency savings, as this would impose new financial obligations on the State (as the State was the statutory guarantor for "old" foreign-currency savings in all domestic banks). The National Bank ordered that a closing balance sheet for the Sarajevo branch of Ljubljanska Banka Ljubljana as at 31 March 1992 be drawn up urgently and that its relations with the parent bank be defined. However, according to the companies register, Ljubljanska Banka Sarajevo had remained liable for "old" foreign-currency savings at Ljubljanska Banka Ljubljana's Sarajevo branch until November 2004 (see paragraph 24 below). Accordingly, it continued to administer the savings of clients of the Sarajevo branch; those savings were used in the privatisation process in the FBH (see paragraph 18 above); and a domestic court ordered Ljubljanska Banka Sarajevo to pay those savings in one case (see *Višnjevac v. Bosnia and Herzegovina* (dec.), no. 2333/04, 24 October 2006).

23. In 2003 the FBH Banking Agency placed that domestic bank under its provisional administration for the reason that it had undefined relations with the foreign Ljubljanska Banka Ljubljana.

24. By virtue of an amendment to the Companies Register Act 2000[1], in 2003 the FBH Parliament extended the statutory time-limit for the deletion of war-time entries in the companies register until 10 April 2004. Shortly thereafter, in November 2004 the Sarajevo Municipal Court decided that the domestic Ljubljanska Banka Sarajevo was not the successor of the Sarajevo branch of the foreign Ljubljanska Banka Ljubljana; that it was not liable for

1. *Zakon o postupku upisa pravnih lica u sudski registar*, Official Gazette of the FBH nos. 4/00, 49/00, 32/01, 19/03 and 50/03.

"old" foreign-currency savings in that branch; and that, as a result, the 1993 entry in the companies register stating otherwise must be deleted.

25. In 2006 the domestic Ljubljanska Banka Sarajevo sold its assets and let out premises and equipment belonging to Ljubljanska Banka Ljubljana's Sarajevo branch to a Croatian company which, in return, undertook to pay debts of Ljubljanska Banka Sarajevo. While endorsing that agreement, the FBH Government emphasised that all premises and archives of Ljubljanska Banka Ljubljana's Sarajevo branch remained under the care of the FBH Government pending the final determination of the status of that branch.

26. In 2010 the competent court started bankruptcy proceedings against the domestic Ljubljanska Banka Sarajevo. They are still pending.

3. Status of the Tuzla branch of Investbanka

27. The Tuzla branch of Investbanka has at all times had the status of a branch without legal personality. The size of "old" foreign-currency savings at that branch was approximately USD 67 million (approximately DEM 100 million) on 31 December 1991. The branch closed on 1 June 1992 and it has never resumed its activities. It is unclear what happened with its funds, but given the manner in which the redepositing scheme was administered (see paragraph 11 above), it is likely that most of them ended up in Serbia.

28. In 2002 the competent court in Serbia made a bankruptcy order against Investbanka. The Serbian authorities then sold the premises of the FBH branches of Investbanka (those in the Republika Srpska had been sold in 1999). The bankruptcy proceedings are still pending.

29. In 2010 the FBH Government placed the premises and archives of the FBH branches of Investbanka under its care, but it would appear that Investbanka no longer has any premises or archives in the FBH.

30. In 2011, at the request of the FBH authorities, the Serbian authorities started a criminal investigation into the manner in which the archives of the Tuzla branch had been transferred to the Serbian territory in 2008.

C. Croatia

31. The Croatian Government argued that they had repaid "old" foreign-currency savings in domestic banks and their foreign branches, regardless of the citizenship of the depositor concerned. Indeed, it is clear that they repaid such savings of Bosnian-Herzegovinian citizens in Bosnian-Herzegovinian branches of Croatian banks. However, the Slovenian Government provided decisions of the Supreme Court of Croatia (Rev 3015/1993-2 of 1994, Rev 3172/1995-2 of 1996 and Rev 1747 /1995-2 of 1996) holding that the term used in that legislation (*građanin*) meant a Croatian citizen and argued that it was not excluded that the Bosnian-Herzegovinian citizens in issue were also Croatian citizens or that an *ad hoc* agreement had been concluded.

32. Croatia also repaid its citizens' "old" foreign-currency savings which had been transferred from Ljubljanska Banka Ljubljana's Zagreb branch to domestic banks at the request of the depositors concerned (see section 14 of the Old Foreign-Currency Savings Act 1993[1] and the relevant secondary legislation[2]). Apparently, about two thirds of all clients of that branch used that possibility. As to its remaining clients, whose "old" foreign-currency savings allegedly amount to approximately DEM 300 million, some of them have pursued civil proceedings in the Croatian courts and 63 of them have obtained their "old" foreign-currency savings from a forced sale of assets of that branch located in Croatia (decisions of the Osijek Municipal Court of 8 April 2005 and 15 June 2010)[3]. Some others are pursuing civil proceedings in the Slovenian courts (see paragraph 38 below).

D. Serbia

33. In the direct aftermath of the dissolution of the SFRY, "old" foreign-currency savings in domestic banks remained frozen, but withdrawals were exceptionally allowed on humanitarian grounds regardless of the citizenship of the depositor concerned (see the relevant secondary legislation[4]).

34. In 1998 and then again in 2002 Serbia agreed to repay "old" foreign-currency savings in domestic branches of domestic banks of its citizens and of citizens of all States other than the successor States of the SFRY. All savings of citizens of the SFRY successor States and all savings in domestic banks' branches located in those States remained frozen pending succession negotiations. Moreover, all proceedings concerning "old" foreign-currency savings ceased by virtue of law in accordance with sections 21 and 22 of the

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1. *Zakon o pretvaranju deviznih depozita građana u javni dug Republike Hrvatske*, Official Gazette of the Republic of Croatia no. 106/93.
2. *Pravilnik o utvrđivanju uvjeta i načina pod kojima građani mogu prenijeti svoju deviznu štednju s organizacijske jedinice banke čije je sjedište izvan Republike Hrvatske na banke u Republici Hrvatskoj*, Official Gazette of the Republic of Croatia no. 19/94.
3. A copy thereof was provided by the Slovenian Government (annexes nos. 273-74).
4. *Odluka o uslovima i načinu davanja kratkoročnih kredita bankama na osnovu definitivne prodaje deponovane devizne štednje građana*, Official Gazette of the Federal Republic of Yugoslavia nos. 42/93, 49/93, 71/93 and 77/93; *Odluka o uslovima i načinu isplate dela devizne štednje građana koja je deponovana kod NBJ*, Official Gazette nos. 42/94, 44/94 and 50/94; *Odluka o uslovima i načinu isplate dela devizne štednje građana koja je deponovana kod NBJ*, Official Gazette nos. 10/95, 52/95, 58/95, 20/96, 24/96 and 30/96; and *Odluka o privremenom obezbeđivanju i načinu i uslovima isplate sredstava ovlašćenim bankama na ime dinarske protivvrednosti dela devizne štednje deponovane kod NBJ isplaćene građanima za određene namene*, Official Gazette nos. 41/96, 21/98 and 4/99.

Old Foreign-Currency Savings Act 1998[1] and sections 21 and 36 of the Old Foreign-Currency Savings Act 2002[2].

35. In January 2002 the competent court in Serbia made a bankruptcy order against Investbanka. As a result, the State guarantee on "old" foreign-currency savings was activated (section 18 of the Banks and Other Financial Institutions Insolvency Act 1989 and section 135 of the Foreign-Currency Transactions Act 1995[3]). 322 clients of Bosnian-Herzegovinian branches of Investbanka unsuccessfully applied to be paid back within the context of the bankruptcy proceedings; 20 of them then pursued civil proceedings against Investbanka, but to no avail. The bankruptcy proceedings are still pending.

E. Slovenia

36. In 1991 Slovenia assumed the statutory guarantee from the SFRY for "old" foreign-currency savings in domestic branches of all banks, regardless of the citizenship of the depositor concerned (see Article 19 § 3 of the Basic Constitutional Charter Constitutional Act 1991[4] and section 1 of the Old Foreign-Currency Savings Act 1993[5]). While, as a rule, anyone who shows legal interest may petition that abstract constitutionality review proceedings be initiated (section 24 of the Constitutional Court Act 2007[6]), the Slovenian Constitutional Court held that the Basic Constitutional Charter Constitutional Act 1991 was not subject to such a review (see its decisions nos. U-I-332/94 of 11 April 1996 and U-I-184/96 of 20 June 1996).

37. After futile attempts to register the Sarajevo branch of Ljubljanska Banka Ljubljana as a separate bank (see the correspondence between the NBY and the National Bank of Bosnia and Herzegovina of October 1991 stressing the unlawfulness of such proposals as Slovenia had meanwhile become an independent State and Ljubljanska Banka Ljubljana a foreign bank[7]), Slovenia nationalised and then, in 1994, restructured Ljubljanska

1. *Zakon o izmirenju obaveza po osnovu devizne štednje građana*, Official Gazette of the Federal Republic of Yugoslavia nos. 59/98, 44/99 and 53/01.
2. *Zakon o regulisanju javnog duga Savezne Republike Jugoslavije po osnovu devizne štednje građana*, Official Gazette of the Federal Republic of Yugoslavia no. 36/02.
3. *Zakon o deviznom poslovanju*, Official Gazette of the Federal Republic of Yugoslavia nos. 12/95, 29/97, 44/99, 74/99 and 73/00.
4. *Ustavni zakon za izvedbo Temeljne ustavne listine o samostojnosti in neodvisnosti RS*, Official Gazette of the Republic of Slovenia no. 1/91.
5. *Zakon o poravnavanju obveznosti iz neizplačanih deviznih vlog*, Official Gazette of the Republic of Slovenia no. 7/93.
6. *Zakon o ustavnem sodišču (uradno prečiščeno besedilo)*, Official Gazette of the Republic of Slovenia no. 64/07.
7. A copy thereof was provided by the Bosnian-Herzegovinian authorities.

Banka Ljubljana itself[1]. A new bank, Nova Ljubljanska Banka, took over Ljubljanska Banka Ljubljana's domestic assets and liabilities. The old bank retained the liability for "old" foreign-currency savings in its branches in the other successor States and the related claims against the NBY.

38. In 1997 all proceedings concerning "old" foreign-currency savings in the old Ljubljanska Banka's branches in the other successor States were stayed pending the outcome of the succession negotiations[2]. In December 2009 the Constitutional Court of Slovenia, upon a constitutional petition of two Croatian savers, declared that measure unconstitutional[3]. The Ljubljana District Court has thereafter rendered numerous judgments ordering the old Ljubljanska Banka to pay "old" foreign-currency savings in its Sarajevo and Zagreb branches together with interest. It held that the relationship between the old Ljubljanska Banka and its clients at those branches was of a private-law nature. The fact that some foreign currency had allegedly been shipped to the NBY and that succession negotiations were pending was considered irrelevant. Similarly, it considered irrelevant the decisions regarding the status of the Sarajevo branch set out in paragraphs 22-24 above. At least one such judgment, concerning the Sarajevo branch, has become final (judgment P 119/1995-I of 16 November 2010). A number of clients of the Sarajevo and Zagreb branches have pursued civil proceedings also against the Republic of Slovenia, but in vain. The Ljubljana District Court has rejected such claims in three cases (as no appeals have been lodged, those decisions have become final). Around 10 similar cases are apparently still pending.

F. The former Yugoslav Republic of Macedonia

39. It paid back "old" foreign-currency savings in domestic banks and local branches of foreign banks, such as the Skopje branch of Ljubljanska Banka Ljubljana, regardless of the citizenship of the depositor concerned[4].

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1. *Ustavni zakon o dopolnitvah ustavnega zakona za izvedbo Temeljne ustavne listine o samostojnosti in neodvisnosti Republike Slovenije*, Official Gazette of the Republic of Slovenia no. 45/94.
2. *Zakon o dopolnitvah zakona o Skladu Republike Slovenije za sukcesijo*, Official Gazette of the Republic of Slovenia no. 40/97.
3. The decision published in the Official Gazette of the Republic of Slovenia no. 105/09.
4. *Закон за преземање на депонираните девизни влогови на граѓаните од страна на Република Македонија*, "Official Gazette of the Republic of Macedonia" no. 26/92; *Закон за гаранција на Република Македонија за депонираните девизни влогови на граѓаните и за обезбедување на средства и начин за исплата на депонираните девизни влогови на граѓаните во 1993 и 1994*, Official Gazette nos. 31/93, 70/94, 65/95 and 71/96; and *Закон за начинот и постапката на исплатување на депонираните девизни влогови на граѓаните по кои гарант е Република Македонија*, Official Gazette nos. 32/00, 108/00, 4/02 and 42/03.

III. RELEVANT INTERNATIONAL LAW AND PRACTICE

A. Relevant international law concerning State succession

40. The matter of State succession is regulated by customary rules, partly codified in the 1978 Vienna Convention on Succession of States in respect of Treaties and the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts[1]. Although the latter treaty is not yet in force and only three respondent States are parties to it as of today (Croatia, Slovenia and the former Yugoslav Republic of Macedonia), it is a well-established principle of international law that, even if a State has not ratified a treaty, it may be bound by one of its provisions in so far as that provision reflects customary international law, either codifying it or forming a new customary rule (see *Cudak v. Lithuania* [GC], no. 15869/02, § 66, ECHR 2010, and judgment of the International Court of Justice in the *North Sea Continental Shelf Cases* of 20 February 1969, § 71).

41. The fundamental rule is that States must together settle all aspects of succession by agreement (see Opinion No. 9 of the Arbitration Commission of the International Conference on the Former Yugoslavia[2], and Article 6 of the 2001 Guiding Principles on State Succession in Matters of Property and Debts of the Institute of International Law). If one of the States refused to cooperate, it would be in breach of that obligation and would be liable internationally (Opinion No. 12 of the Arbitration Commission). While it is not required that each category of property and debts of a predecessor State be divided in equitable proportions, an overall outcome must be an equitable division (Article 41 of the 1983 Vienna Convention; Opinion No. 13 of the Arbitration Commission; Articles 8, 9 and 23 of the Guiding Principles).

B. Agreement on Succession Issues

42. This Agreement was the result of nearly ten years of negotiations under the auspices of the International Conference on the former Yugoslavia and the High Representative (an international administrator appointed under Annex 10 to the General Framework Agreement for Peace in Bosnia and Herzegovina). It was signed on 29 June 2001 and entered into force between Bosnia and Herzegovina, Croatia, Serbia and Montenegro (later succeeded by Serbia), Slovenia and the former Yugoslav Republic of Macedonia on 2 June 2004.

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1. In 1983 the SFRY signed that treaty. In 2001 the Federal Republic of Yugoslavia lodged an instrument advising its intent to maintain the signature made by the SFRY.
2. The Commission was set up by the European Community and its Member States in 1991. It handed down fifteen opinions pertaining to legal issues arising from the dissolution of the SFRY (see International Law Reports 92 (1993), pp. 162-208, and 96 (1994), pp. 719-37).

43. The issue of "old" foreign-currency savings was a contentious one. The successor States had different views as to whether that issue should be dealt with as a liability of the SFRY under Annex C (Financial Assets and Liabilities) or as a private-law issue under Annex G (Private Property and Acquired Rights)[1]. Neither could those States agree whether the guarantees of the SFRY of "old" foreign-currency savings should be taken over by the State in which the parent bank in issue had its head office or by the State in which the deposit had actually been made. The following provisions were eventually included in Annex C to the Agreement:

Article 2 § 3 (a)

"Other financial liabilities [of the SFRY] include:

(a) guarantees by the SFRY or its National Bank of Yugoslavia of hard currency savings deposited in a commercial bank and any of its branches in any successor State before the date on which it proclaimed independence; ..."

Article 7

"Guarantees by the SFRY or its NBY of hard currency savings deposited in a commercial bank and any of its branches in any successor State before the date on which it proclaimed its independence shall be negotiated without delay taking into account in particular the necessity of protecting the hard currency savings of individuals. This negotiation shall take place under the auspices of the Bank for International Settlements."

44. In 2001/2 four rounds of negotiations regarding the distribution of the SFRY's guarantees of "old" foreign-currency savings were held. As the successor States could not reach an agreement, in September 2002 the Bank for International Settlements ("the BIS") informed them that the expert, Mr Meyer, had decided to terminate his involvement in the matter and that the BIS had no further role to play in this regard. It concluded as follows:

"If, however, all five successor States were to decide at a later stage to enter into new negotiations about guarantees of hard currency savings deposits and were to seek the BIS' assistance in this regard, the BIS would be prepared to give consideration to providing such assistance, under conditions to be agreed."[2]

It appears that four successor States (all but Croatia) notified the BIS of their willingness to continue the negotiations shortly thereafter. Croatia did so in October 2010 and received a response in November 2010 which, in so far as relevant, reads as follows:

"...the BIS did recently reconsider this issue and believes that its contribution to any new round of negotiations, as part of a good offices role, could not bring added value, also bearing in mind the amount of time which lapsed since the last round of negotiations, as well as its current priorities in the field of monetary and financial

1. See the *travaux préparatoires* of the Agreement provided by the Slovenian Government (annexes nos. 265-70).
2. A copy of that letter was provided by the Croatian Government.

> stability. However, we would like to emphasise that the organisation of the bi-monthly meetings in Basel offers the practical opportunity for the governors of the successor States to discuss this matter between them on an informal basis at the BIS.” [1]

45. It should be noted that a comparable issue of the SFRY’s guarantees of savings deposited with the Post Office Savings Bank and its branches had been settled outside the negotiations of the Agreement on Succession Issues, in that each of the States had taken over the guarantees as to the branches in its territory.

46. In accordance with Article 4 of the Agreement on Succession Issues, a Standing Joint Committee of senior representatives of the successor States was established to monitor the effective implementation of the Agreement and to serve as a forum in which issues arising in the course of its implementation could be discussed. It has so far met three times: in 2005, in 2007 and in 2009.

47. The following provisions of this Agreement are also relevant in this case:

Article 5

“(1) Differences which may arise over the interpretation and application of this Agreement shall, in the first place, be resolved in discussion among the States concerned.

(2) If the differences cannot be resolved in such discussions within one month of the first communication in the discussion the States concerned shall either

(a) refer the matter to an independent person of their choice, with a view to obtaining a speedy and authoritative determination of the matter which shall be respected and which may, as appropriate, indicate specific time-limits for actions to be taken; or

(b) refer the matter to the Standing Joint Committee established by Article 4 of this Agreement for resolution.

(3) Differences which may arise in practice over the interpretation of the terms used in this Agreement or in any subsequent agreement called for in implementation of the Annexes to this Agreement may, additionally, be referred at the initiative of any State concerned to binding expert solution, conducted by a single expert (who shall not be a national of any party to this Agreement) to be appointed by agreement between the parties in dispute or, in the absence of agreement, by the President of the Court of Conciliation and Arbitration within the OSCE. The expert shall determine all questions of procedure, after consulting the parties seeking such expert solution if the expert considers it appropriate to do so, with the firm intention of securing a speedy and effective resolution of the difference.

(4) The procedure provided for in paragraph (3) of this Article shall be strictly limited to the interpretation of terms used in the agreements in question and shall in no circumstances permit the expert to determine the practical application of any of those agreements. In particular the procedure referred to shall not apply to

(a) The Appendix to this Agreement;

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1. A copy of that letter was provided by the Croatian Government.

(b) Articles 1, 3 and 4 of Annex B;

(c) Articles 4 and 5(1) of Annex C;

(d) Article 6 of Annex D.

(5) Nothing in the preceding paragraphs of this Article shall affect the rights or obligations of the Parties to the present Agreement under any provision in force binding them with regard to the settlement of disputes.”

Article 9

“This Agreement shall be implemented by the successor States in good faith in conformity with the Charter of the United Nations and in accordance with international law.”

C. International practice concerning a *pactum de negotiando* in inter-State cases

48. The obligation flowing from a *pactum de negotiando*, to negotiate with a view to concluding an agreement, must be fulfilled in good faith according to the fundamental principle *pacta sunt servanda*.

49. The International Court of Justice stated in its judgment of 20 February 1969 in the *North Sea Continental Shelf Cases* (§ 85):

> “...the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modifications of it...”

50. The decision of the Arbitral Tribunal for the Agreement on German External Debts in the case of Greece v. the Federal Republic of Germany of 26 January 1972 reads, in so far as relevant, as follows (§§ 62-65):

> “However, a *pactum de negotiando* is also not without legal consequences. It means that both sides would make an effort, in good faith, to bring about a mutually satisfactory solution by way of a compromise, even if that meant the relinquishment of strongly held positions earlier taken. It implies a willingness for the purpose of negotiation to abandon earlier positions and to meet the other side part way. The language of the Agreement cannot be construed to mean that either side intends to adhere to its previous stand and to insist upon the complete capitulation of the other side. Such a concept would be inconsistent with the term ‘negotiation’. It would be the very opposite of what was intended. An undertaking to negotiate involves an understanding to deal with the other side with a view to coming to terms. Though the Tribunal does not conclude that Article 19 in connection with paragraph II of Annex I absolutely obligates either side to reach an agreement, it is of the opinion that the terms of these provisions require the parties to negotiate, bargain, and in good faith attempt to reach a result acceptable to both parties and thus bring an end to this long drawn out controversy...

The agreement to negotiate the disputed monetary claims, in this case, necessarily involves a willingness to consider a settlement. This is true, even though the dispute extends not only to the amount of the claims but to their existence as well. The principle of settlement is not thereby affected. Article 19 does not necessarily require that the parties resolve the various legal questions on which they have disagreed. For example, it does not contemplate that both sides are expected to see eye to eye on certain points separating them, such as whether the disputed claims legally exist or not, or whether they are government or private claims. As to these points, the parties, in effect, have agreed to disagree but, notwithstanding their contentions with regard to them, they did commit themselves to pursue negotiations as far as possible with a view to concluding an agreement on a settlement...

The Tribunal considers that the underlying principle of the *North Sea Continental Shelf Cases* is pertinent to the present dispute. As enunciated by the International Court of Justice, it confirms and gives substance to the ordinary meaning of 'negotiation'. To be meaningful, negotiations have to be entered into with a view to arriving at an agreement. Though, as we have pointed out, an agreement to negotiate does not necessarily imply an obligation to reach an agreement, it does imply that serious efforts towards that end will be made."

THE LAW

I. THE GOVERNMENTS' PRELIMINARY OBJECTIONS

51. The Serbian, Slovenian and Macedonian Governments maintained at the admissibility stage that the applicants had failed to exhaust all domestic remedies. The Court noted that this question went to the heart of the Article 13 complaint and that it would be more appropriately examined at the merits stage (see paragraph 4 above). Accordingly, the parties' submissions and the Court's assessment in that regard are set out in paragraphs 76-90 below.

52. The Court notes that the Governments of Bosnia and Herzegovina and Croatia have advanced further submissions in support of their objection raised at the admissibility stage to the compatibility *ratione personae* of the application. However, the Court, having studied these submissions, finds that they do not give rise to any grounds for re-opening the conclusion it reached in the admissibility decision in this case, namely that the respondent States have accepted that "old" foreign-currency savings were part of the SFRY's financial liabilities which they should share (see paragraphs 38 and 58 of that decision). The Court will only have regard to these submissions insofar as they have any bearing on the merits of the issues raised under Article 1 of Protocol No. 1.

53. The Court would confine itself to stressing that the qualification of this issue as a succession issue requires only, having regard to the applicable international law, that an overall outcome of a division of property and debts of a predecessor State be fair. Provided that is the case, States can decide freely the actual terms of a settlement agreement, using the

mechanisms they themselves consider appropriate, concerning among other issues, the repayment of "old" foreign-currency savings. This task cannot be done by the Strasbourg Court.

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1

54. Article 1 of Protocol No. 1 to the Convention reads as follows:

> "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."

A. The parties' submissions

1. The applicants

55. The applicants submitted that the respondent States, as the successor States of the SFRY, should pay back their "old" foreign-currency savings in view of the fact that they had failed to settle this remaining succession issue.

2. The Bosnian-Herzegovinian Government

56. The Government disagreed with the Court's finding that the issue of "old" foreign-currency savings in the Sarajevo branch of Ljubljanska Banka Ljubljana and the Tuzla branch of Investbanka was a succession issue (see the admissibility decision in this case, § 58). In this connection, they argued that the question of the SFRY guarantees of "old" foreign-currency savings, dealt with under Annex C to the Agreement on Succession Issues, should be distinguished from the question of "old" foreign-currency savings as such. Furthermore, while acknowledging that "old" foreign-currency savings had not been expressly mentioned in Annex G to the Agreement on Succession Issues dealing with private property and acquired rights, the Government argued that it was more important that they had not been expressly excluded either. They asserted that the relationship between savers and banks was of a private-law nature, despite the SFRY guarantees of "old" foreign-currency savings, and that the savers of the above-mentioned branches were in such a private-law relationship not with the branches themselves but rather with the parent banks (that is, Ljubljanska Banka Ljubljana and Investbanka). Given that Ljubljanska Banka Ljubljana was based in Slovenia and Investbanka in Serbia and, more importantly, that most of the funds of their branches in all probability ended up in Slovenia and Serbia respectively (see paragraphs 21

and 27 above), this Government maintained that Slovenia and Serbia should hence be held liable in the present case. In this regard, they referred to the decisions of the Slovenian courts mentioned in paragraph 38 above and the decision of the Serbian courts mentioned in *Šekerović v. Serbia* (dec.), no. 32472/03, 4 January 2007. They further referred to decision AP 164/04 of the Constitutional Court of Bosnia and Herzegovina of 1 April 2006, § 68, holding that Bosnia and Herzegovina was not responsible for "old" foreign-currency savings in the branches under consideration in the present case.

57. As to the obligation set out in Article 7 of Annex C to the Agreement on Succession Issues to negotiate the issue of the SFRY guarantees of "old" foreign-currency savings, the Bosnian-Herzegovinian Government claimed that they had made serious efforts towards reaching an agreement, whereas Serbia and Slovenia had all the time insisted upon their respective positions without contemplating any modifications thereof. It is true that Bosnia and Herzegovina had been expected to convene the next meeting of the Standing Joint Committee in Sarajevo since 2010. However, the Government argued that this was due to the fact that the successor States had not yet agreed on an agenda of the meeting (pursuant to Rule 5 of the Rules of Procedure of that Committee a meeting cannot be held unless an agenda has been agreed upon). The Bosnian-Herzegovinian Government added that their delegations had raised the issue of "old" foreign-currency savings in Ljubljanska Banka Ljubljana's Sarajevo branch on various occasions at bilateral meetings with their Slovenian counterparts. The Slovenian side had allegedly refused any talks simply because succession negotiations in that regard had not yet been concluded.

3. *The Croatian Government*

58. The Croatian Government submitted that Serbia and Slovenia should be held liable in the present case. Their reasons were along the lines of those of the Bosnian-Herzegovinian Government (see paragraph 56 above). As to the obligation to negotiate set out in Article 7 of Annex C to the Agreement on Succession Issues, this Government maintained that they had negotiated in good faith, whereas the Serbian and Slovenian Governments had shown no willingness to abandon earlier positions.

4. *The Serbian Government*

59. After a long analysis of international practice concerning a *pactum de negotiando*, the Serbian Government submitted that they had negotiated in good faith. As to the conduct of the other successor States, they criticised in particular Croatia for notifying the BIS of their willingness to continue negotiations concerning this issue only in 2010 (see paragraph 44 above). If the Court was to consider that Serbia interfered with the "possessions" of

Mr Šahdanović for the purposes of Article 1 of Protocol No. 1, the Serbian Government argued that the interference was justified as it simply froze his savings in the Tuzla branch of Investbanka pending succession negotiations (see paragraph 34 above). Lastly, they asserted that Bosnia and Herzegovina had benefitted the most from "old" foreign-currency savings in the Tuzla branch of Investbanka; it should therefore be held liable in the present case. In support of their position, they submitted a contract pursuant to which a certain E.M. from Tuzla had obtained a dinar loan from the Tuzla branch of Investbanka in exchange for his foreign-currency deposit.

5. *The Slovenian Government*

60. The Slovenian Government submitted that the issue of "old" foreign-currency savings in the Sarajevo branch of Ljubljanska Banka Ljubljana and the Tuzla branch of Investbanka was a succession issue. They further argued that Slovenia had at all times worked to find a solution to the distribution of the SFRY guarantees of "old" foreign-currency savings and that their efforts had failed because of Bosnia and Herzegovina's and Croatia's frustration of the negotiations. Notably, the Slovenian Government criticised Croatia for having refused to resolve the issue by IMF arbitration in 1999; for having refused to discuss it in the meetings of the Standing Joint Committee; for having agreed to continue BIS negotiations, allegedly under the pressure of the EU, only in 2010 (see paragraph 44 above); for having reneged on that offer after the closure of the EU accession negotiations in 2011; and, lastly, for making it impossible for Ljubljanska Banka Ljubljana's Zagreb branch to engage in regular banking activities and thus generate additional assets. The Slovenian Government criticised Bosnia and Herzegovina for having taken a series of unilateral measures, shortly after the conclusion of the BIS negotiations, designed to improve its negotiating position towards Slovenia: on 15 July 2002 the FBH Government adopted a decision requiring the Ministry of Justice to propose an amendment to the Companies Register Act 2000 to retroactively extend the statute of limitations for the deletion of the 1993 entry in the companies register regarding the domestic Ljubljanska Banka Sarajevo and requiring the management board of that bank, which had been appointed by the Ministry of Finance, to apply for the deletion of that entry (see paragraph 24 above). In conclusion, they argued that Bosnia and Herzegovina and Croatia should be held liable in the present case.

61. As regards the transfers of foreign currency from Ljubljanska Banka Ljubljana's Sarajevo branch to the National Bank of Slovenia, the Slovenian Government showed that a part of those funds had afterwards been shipped back to Sarajevo. They argued that the remaining funds had been forwarded to the NBY. However, while they showed that those funds had indeed been recorded as a claim of the Sarajevo branch against the NBY, they failed to show that they had been physically transferred to the NBY (see paragraph

11 above). In this regard, the Slovenian Government invited the Court not to accept any theory according to which physical cash would be more valuable than book entry cash (that is, paper transactions).

6. The Macedonian Government

62. The Macedonian Government submitted that they did not violate the applicants' property rights as they had negotiated this issue in good faith.

B. The Court's assessment

1. Applicable rule of Article 1 of Protocol No. 1

63. As the Court has stated on numerous occasions, Article 1 of Protocol No. 1 comprises three rules: the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of property and subjects it to conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should be construed in the light of the general principle enunciated in the first rule (see, among other authorities, *Iatridis v. Greece* [GC], no. 31107/96, § 55, ECHR 1999-II).

64. It has not been contested before the Court that the present applicants' claims have never been extinguished, but that they have nevertheless been unable to freely dispose of their "old" foreign-currency savings for many years. Therefore, the Court will examine the present case, like other similar cases (see *Trajkovski v. the former Yugoslav Republic of Macedonia* (dec.), no. 53320/99, ECHR 2002-IV, and *Suljagić v. Bosnia and Herzegovina*, no. 27912/02, 3 November 2009), under the third rule of this Article.

2. General principles

65. The general principles of the interpretation of Article 1 of Protocol No. 1 (the principle of lawfulness, the principle of a legitimate aim and the principle of a fair balance) were restated in *Suljagić*, cited above, §§ 40-44.

3. Application of the general principles to the present case

66. The Court is ready to accept that the principle of lawfulness and that of a legitimate aim were respected in this case (see *Trajkovski*, cited above, and *Suljagić*, cited above). It will therefore proceed to examine the core issue, namely whether a fair balance has been struck between the general interest and the applicants' rights guaranteed by this Article.

67. By depositing foreign currency with banks, foreign-currency savers acquired an entitlement to collect at any time their deposits, together with accumulated interest, from the banks. Their claims against the banks have survived the dissolution of the SFRY (see the admissibility decision in this case, §§ 53-54). While it is true that all "old" foreign-currency savings were guaranteed by the State, that guarantee could have been activated only at the request of a bank and none of the banks in issue made such a request (see paragraph 9 above). Liability, therefore, did not shift from those banks to the SFRY. It should also be noted that the branches of Ljubljanska Banka Ljubljana and Investbanka did not have separate legal personality at the time of the dissolution of the SFRY; pursuant to the companies register, they acted on behalf and for the account of the parent banks.

Having regard to the foregoing, the Court finds that Ljubljanska Banka Ljubljana, based in Slovenia, and Investbanka, based in Serbia, remained liable for "old" foreign-currency savings in their branches, irrespective of their location, until the dissolution of the SFRY. The Court will examine the period after the dissolution of the SFRY below.

68. As to Ljubljanska Banka Ljubljana, the Slovenian Government first nationalised it and then transferred most of its assets to a new bank; at the same time, it confirmed that the old Ljubljanska Banka retained liability for "old" foreign-currency savings in its branches in the other successor States and the related claims against the NBY. The Court has already held that a Contracting State may be liable for debts of a State-owned company, even if the company is a separate legal entity, providing that the company does not enjoy "sufficient institutional and operational independence from the State" (see *Mykhaylenky and Others v. Ukraine*, nos. 35091/02 *et al.*, § 43-45, ECHR 2004-XII). It is clear that Slovenia is the sole shareholder of the old Ljubljanska Banka and that a Government agency administers this bank. In addition, the State is responsible, to a large extent, for the bank's inability to service its debts (as it transferred, by virtue of law, most of its assets to another bank). The Court finally notes that most of the funds of the Sarajevo branch of Ljubljanska Banka Ljubljana in all probability ended up in Slovenia (see paragraph 21 above). Considering all those factors, the Court concludes that there are sufficient grounds to deem Slovenia liable for the bank's debt to Ms Ališić and Mr Sadžak in the special circumstances of the present case.

69. The Court has noted the Slovenian Government's argument that the status of the clients of Ljubljanska Banka Ljubljana's Sarajevo branch was far from being clear in the period 1992-2004 because of inconsistencies in law and practice in Bosnia and Herzegovina (see paragraphs 16 and 22-24 above). However, the situation has meanwhile changed: it has been shown that since 2004 Bosnia and Herzegovina has no intention to reimburse those savers. In those circumstances, the Court agrees with the Slovenian courts that those past inconsistencies are now irrelevant (see paragraph 38 above).

70. As to Investbanka, it had remained liable for "old" foreign-currency savings at its branches in the other successor States until 3 January 2002. On that date, the competent Serbian court made a bankruptcy order against that bank and the State guarantee of "old" foreign-currency savings in the bank and its branches was activated (see paragraph 35 above). The Court further notes that Investbanka is either entirely or to a large extent socially-owned. It has held in comparable cases against Serbia that the State is liable for debts of socially-owned companies as they are closely controlled by a Government agency (see, notably, *R. Kačapor and Others v. Serbia*, nos. 2269/06 *et al.*, §§ 97-98, 15 January 2008, concerning a company mainly comprised of socially-owned capital, and *Rašković and Milunović v. Serbia*, nos. 1789/07 and 28058/07, § 71, 31 May 2011, as to a company comprised of both socially- and State-owned capital). The Court sees no reason to depart from that jurisprudence. Having regard also to the fact that most of the funds of Investbanka's Tuzla branch most likely ended up in Serbia (see paragraph 27 above) and that Serbia sold all premises of that branch located in Bosnia and Herzegovina (see paragraph 28 above), the Court concludes that there are sufficient grounds to deem Serbia liable for the bank's debt to Mr Šahdanović in the special circumstances of the present case.

71. The Court has noted the Serbian Government's view, shared by the Slovenian Government, that Bosnia and Herzegovina benefited the most from "old" foreign-currency savings in Ljubljanska Banka Ljubljana's and Investbanka's branches in its territory in view of the fact that companies based in that country were granted dinar loans on very favourable terms in return for foreign currency shipped to Slovenia and Serbia (see paragraph 12 above). However, given the hyperinflation in the former SFRY and then, during the war, in Bosnia and Herzegovina, those dinar loans rapidly lost all their value, in contrast to "old" foreign-currency savings.

72. Having established that Slovenia is liable for "old" foreign-currency savings in Ljubljanska Banka Ljubljana's Sarajevo branch and that Serbia is liable for "old" foreign-currency savings in Investbanka's Tuzla branch, the Court must lastly examine whether the applicants' inability to freely dispose of their "old" foreign-currency savings in those branches since 1991/92 has amounted to a violation of Article 1 of Protocol No. 1 by those States.

The explanation of the Serbian and Slovenian Governments for the delay essentially comes down to their duty to negotiate this question in good faith together with other successor States, as required by international law. Any unilateral solution would, in their view, be contrary to that duty.

73. However, the Court disagrees. The duty to negotiate does not prevent the successor States from adopting interim measures aimed at protecting the interests of savers. The Croatian Government have repaid a large part of its citizens' "old" foreign-currency savings in Ljubljanska Banka Ljubljana's Zagreb branch (see paragraph 32 above) and the

Macedonian Government have repaid the total amount of "old" foreign-currency savings in the Skopje branch of that bank (see paragraph 39 above). At the same time, those two Governments have never abandoned their position that the Slovenian Government should eventually be held liable and have continued to claim compensation for the amounts paid at the inter-State level (notably, within the context of the succession negotiations). Although certain delays may be justified in exceptional circumstances (see, by analogy, *Immobiliare Saffi v. Italy* [GC], no. 22774/93, § 69, ECHR 1999-V), the Court considers that the applicants' continued inability to freely dispose of their savings despite the 2002 collapse of the BIS negotiations conducted under the Agreement on Succession Issues and a lack of any meaningful negotiations concerning this issue thereafter is nevertheless contrary to Article 1 of Protocol No. 1.

74. Therefore, a breach of Article 1 of Protocol No. 1 by Slovenia with regard to Ms Ališić and Mr Sadžak and by Serbia with regard to Mr Šahdanović should be found, unless the applicants have failed to exhaust all domestic remedies (for the Court's final conclusion as to this Article, see paragraph 91 below). As regards the other respondent States, no breach of that Article should be found (ibid.).

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

75. Article 13 of the Convention provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. The parties' submissions

1. The applicants

76. The applicants maintained that they did not have at their disposal in any of the respondent States an effective remedy for their complaints under Article 1 of Protocol No. 1.

2. The respondent Governments

77. The Slovenian Government submitted that the applicants had at their disposal the following remedies. First, they could have brought an action against the old Ljubljanska Banka in the Slovenian courts. That Government referred to a number of domestic judgments which had either become final before the 1997 stay of proceedings relating to the old Ljubljanska Banka's branches in the other successor States or had been rendered after the 2009 decision declaring the stay of proceedings unconstitutional (see paragraph 38 above). Furthermore, the applicants could have brought an action against

the Republic of Slovenia. In case of a negative decision on the merits or a procedural decision to stay proceedings, they would have been able to lodge a constitutional appeal. In addition, the applicants could have petitioned the Slovenian Constitutional Court to initiate abstract constitutionality review proceedings as regards the 1997-2009 stay of proceedings and/or the failure of the State to assume liability for "old" foreign-currency savings in the old Ljubljanska Banka's Sarajevo branch. Otherwise, the applicants could have brought an action against the old Ljubljanska Banka in the Croatian courts: more than 500 clients of the old Ljubljanska Banka's Zagreb branch had obtained judgments and 63 of them had so far been paid their "old" foreign-currency savings from a forced sale of assets of that bank located in Croatia (see paragraph 32 above).

78. The Serbian Government were also of the opinion that the applicants had at their disposal various remedies. They maintained that Mr Šahdanović should have registered his claim against Investbanka's Tuzla branch in the bankruptcy proceedings. At the same time, that Government acknowledged that none of the clients of Investbanka's branches situated in Bosnia and Herzegovina had been paid back their "old" foreign-currency savings within the context of those bankruptcy proceedings. They further submitted that Mr Šahdanović should have pursued civil proceedings against Investbanka in the Serbian courts. Lastly, they argued that he should have made an attempt to withdraw his savings on humanitarian grounds (see paragraph 33 above).

79. The Macedonian Government submitted that the applicants should have exhausted all domestic remedies in Serbia and Slovenia, without going into any details.

80. In contrast, the Governments of Bosnia and Herzegovina and Croatia maintained that there were no effective remedies at the applicants' disposal, given the stay on all proceedings concerning "old" foreign-currency savings in Ljubljanska Banka Ljubljana's and Investbanka's branches located in the other successor States (see paragraphs 34 and 38 above). Moreover, even if the applicants obtained decisions ordering the old Ljubljanska Banka to pay them their savings, they would most likely not be enforced because the 1994 legislation had left that bank with limited assets (see paragraph 37 above).

B. The Court's assessment

81. The Court has held on many occasions that Article 13 guarantees the availability at national level of a remedy to enforce the substance of the Convention rights in whatever form they may happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief. Although the scope of the Contracting States' obligations under Article 13 varies depending on the

nature of the applicant's complaint, the remedy required by Article 13 must be effective in practice as well as in law. The "effectiveness" of a "remedy" within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. Nor does the "authority" referred to in that provision necessarily have to be a judicial authority; but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective. Also, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so (see *Kudła v. Poland* [GC], no. 30210/96, § 157, ECHR 2000-XI). It should be reiterated that, although there may be exceptions justified by particular circumstances of a case, the assessment of whether domestic remedies have been exhausted is normally carried out with reference to the date on which the application was lodged with the Court (see *Baumann v. France*, no. 33592/96, § 47, ECHR 2001-V, and *Babylonová v. Slovakia*, no. 69146/01, § 44, ECHR 2006-VIII). Lastly, as a general rule, applicants living outside the jurisdiction of a Contracting State are not exempted from exhausting remedies within that State (see, by analogy, *Demopoulos and Others v. Turkey* (dec.) [GC], nos. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04 and 21819/04, § 98, ECHR 2010).

82. Turning to the present case, the Court will first examine whether an action against the old Ljubljanska Banka or the Republic of Slovenia in the Slovenian courts, a petition to the Slovenian Constitutional Court to initiate abstract constitutionality review proceedings and an action against the old Ljubljanska Banka in the Croatian courts, taken separately or together, can be considered effective domestic remedies for the inability of Ms Ališić and Mr Sadžak to freely dispose of their "old" foreign-currency savings at the old Ljubljanska Banka's Sarajevo branch. It will then proceed to determine whether a claim to the competent bankruptcy court in Serbia, a civil action against Investbanka in the Serbian courts and an application for withdrawal on humanitarian grounds, taken separately or together, can be considered effective domestic remedies for the inability of Mr Šahdanović to freely dispose of his "old" foreign-currency savings at Investbanka's Tuzla branch.

1. *As regards the Sarajevo branch of the old Ljubljanska Banka*

(a) Civil action against the old Ljubljanska Banka in the Slovenian courts

83. The Court notes that the Ljubljana District Court has rendered many judgments ordering the old Ljubljanska Banka to pay back "old" foreign-currency savings in its Sarajevo and Zagreb branches, together with interest, and that at least one such judgment, concerning exactly the Sarajevo branch, has already become final (see paragraph 38 above). However, given the fact that the 1994 legislation had left that bank with limited assets, it is uncertain whether those judgments will be enforced (see

paragraph 37 above). Indeed, the Slovenian Government have failed to demonstrate that at least one such judgment has been enforced. There is therefore no evidence as of now that this remedy was capable of providing appropriate and sufficient redress to the applicants.

(b) Civil action against the Republic of Slovenia in the Slovenian courts

84. A number of clients of the Sarajevo and Zagreb branches of the old Ljubljanska Banka have pursued civil proceedings against the Republic of Slovenia. Since none of them have so far been successful (see paragraph 38 above), the Court finds that this remedy did not offer reasonable prospects of success to the applicants (see, by analogy, *E.O. and V.P. v. Slovakia*, nos. 56193/00 and 57581/00, § 97, 27 April 2004).

(c) Petition to the Slovenian Constitutional Court

85. The Court notes that under section 24 of the Constitutional Court Act 2007 any individual who demonstrates legal interest may petition that abstract constitutionality review proceedings be initiated (see paragraph 36 above). In the present case it is not necessary to rule on the effectiveness of this remedy in general. Even assuming that it could be effective in another context, it was not capable of providing appropriate and sufficient redress to the present applicants for the following reasons.

As to the effectiveness of a petition to the Slovenian Constitutional Court to initiate constitutionality review of the 1997-2009 stay of proceedings, it is true that such a petition of two Croatian savers has been successful in the sense that the Slovenian Constitutional Court has declared the stay of proceedings unconstitutional enabling the continuation of all civil proceedings regarding this issue (see paragraph 38 above). However, they were not awarded any compensation or any other redress. Furthermore, the fact that their civil proceedings have then resumed is not sufficient in itself to render a petition to the Constitutional Court an effective remedy since the Court has already found (see paragraphs 83 and 84 above) that civil proceedings were either not capable of providing appropriate and sufficient redress or did not offer reasonable prospects of success to the applicants.

As to the effectiveness of a petition to the Slovenian Constitutional Court to initiate constitutionality review of the provision limiting the State's liability to "old" foreign-currency savings in the old Ljubljanska Banka's domestic branches, that provision is incorporated in the Basic Constitutional Charter Constitutional Act 1991 which is not subject to a review by that court (see paragraph 36 above).

(d) Civil action against the old Ljubljanska Banka in the Croatian courts

86. The Court has earlier held that in cases concerning the redistribution of liability for "old" foreign-currency savings among the successor States of the SFRY, such as the present case, claimants can reasonably be expected to

seek redress in fora where other claimants have been successful located in any of the successor States (see *Kovačić and Others*, cited above, § 265). It is true that some savers at the Zagreb branch of the old Ljubljanska Banka have been paid back their "old" foreign-currency savings from a forced sale of that bank's assets located in Croatia (see paragraph 32 above). However, the Slovenian Government have not been able to demonstrate that any saver at the Sarajevo branch has been successful in the Croatian courts. The Court therefore considers that neither this remedy offered reasonable prospects of success to the applicants.

2. *As regards the Tuzla branch of Investbanka*

(a) Claim to the competent bankruptcy court in Serbia

87. Although hundreds of clients of Bosnian-Herzegovinian branches of Investbanka lodged such claims with the competent bankruptcy court, none of them has so far been successful (see paragraph 35 above). Accordingly, it follows that this remedy did not offer reasonable prospects of success to Mr Šahdanović.

(b) Civil action against Investbanka in the Serbian courts

88. While it is true that in the early 1990s a small number of savers at branches of Serbian-based banks located outside Serbia obtained judgments in the Serbian courts ordering the banks to pay their "old" foreign-currency savings (see the facts in *Šekerović v. Serbia* (dec.), no. 32472/03, 4 January 2006), the Serbian Government have failed to show that any such judgment had in fact been enforced before the statutory termination of all enforcement proceedings concerning this issue in 1998. Therefore, this remedy was not capable of providing appropriate and sufficient redress to Mr Šahdanović.

(c) Application for withdrawal on humanitarian grounds

89. The Court notes that "old" foreign-currency savings may have been withdrawn in the early 1990s on limited grounds, notably to cover medical or funerary expenses (see paragraph 33 above). As there is no indication, let alone proof, that Mr Šahdanović had any such expenses at the relevant time, this remedy was not available to him.

3. *Conclusion*

90. Having regard to the above, the applicants had no effective remedy at their disposal for their complaints under Article 1 of Protocol No. 1. As Slovenia is liable for "old" foreign-currency savings in Ljubljanska Banka Ljubljana's Sarajevo branch and Serbia for "old" foreign-currency savings in Investbanka's Tuzla branch (see paragraphs 68 and 70 above), the Court finds that there has been a breach of Article 13 by Slovenia with regard to

Ms Ališić and Mr Sadžak and by Serbia with regard to Mr Šahdanović. As a result, it dismisses the Governments' objections in respect of the applicants' failure to exhaust domestic remedies (see paragraph 51 above). As regards the other respondent States, the Court finds that there has been no breach of Article 13.

IV. FINAL CONCLUSION AS TO ARTICLE 1 OF PROTOCOL No. 1

91. In the light of the preliminary conclusion as to Article 1 of Protocol No. 1 set out in paragraph 74 above and the conclusion as to the applicants' alleged failure to exhaust all domestic remedies set out in paragraph 90 above, the Court concludes that there has been a breach of Article 1 of Protocol No. 1 by Slovenia with regard to Ms Ališić and Mr Sadžak and by Serbia with regard to Mr Šahdanović. The Court further concludes that there has been no breach of that Article by any of the other respondent States.

V. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

92. Article 14 of the Convention reads as follows:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

93. The applicants alleged a breach of Article 14 taken in conjunction with Article 13 of the Convention and Article 1 of Protocol No. 1, relying in essence on the considerations underlying their complaints under the latter provisions taken alone. Having examined the Governments' observations and having regard to its conclusions regarding Article 13 and Article 1 of Protocol No. 1 in paragraphs 90-91 above, the Court considers that there is no need to examine the matter under Article 14 taken in conjunction with those Articles as regards Serbia and Slovenia and that there has been no violation of Article 14 as regards the other respondent States.

VI. APPLICATION OF ARTICLE 46 OF THE CONVENTION

94. The relevant part of Article 46 of the Convention reads as follows:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution. ..."

A. The parties' submissions

95. The Serbian, Slovenian and Macedonian Governments as well as the applicants objected to the application of the pilot-judgment procedure in this case. The Bosnian-Herzegovinian Government argued that the present case was suitable for that procedure as it concerned around 130,000 savers at the Sarajevo branch of the old Ljubljanska Banka, around 132,000 savers at the Zagreb branch of that bank who had not transferred their savings to Croatian banks (see paragraph 32 above) and around 132,000 savers at Investbanka's branches in Bosnia and Herzegovina. The Croatian Government maintained that it was difficult to tell, at this stage, whether the case was suitable for the pilot-judgment procedure or not.

B. The Court's assessment

1. General principles

96. The Court reiterates that Article 46 of the Convention, as interpreted in the light of Article 1, imposes on the respondent States a legal obligation to apply, under the supervision of the Committee of Ministers, appropriate general and/or individual measures to secure the applicants' rights which the Court found to be violated. Such measures must also be taken in respect of other persons in the applicants' position, notably by solving the problems that have led to the Court's findings (see *Lukenda v. Slovenia*, no. 23032/02, § 94, ECHR 2005-X). This obligation was consistently emphasised by the Committee of Ministers in the supervision of the execution of the Court's judgments (see ResDH(97)336, IntResDH(99)434, IntResDH(2001)65 and ResDH(2006)1).

97. In order to facilitate effective implementation of its judgments, the Court may adopt a pilot-judgment procedure allowing it to clearly identify structural problems underlying the breaches and to indicate measures to be applied by the respondent States to remedy them (see Rule 61 of the Rules of Court and *Broniowski v. Poland* [GC], no. 31443/96, §§ 189-94, ECHR 2004-V). The aim of that procedure is to facilitate the speediest and most effective resolution of a dysfunction affecting the protection of the Convention rights in question in the national legal order (see *Wolkenberg and Others v. Poland* (dec.), no. 50003/99, § 34, ECHR 2007-XIV). While the respondent State's action should primarily aim at the resolution of such a dysfunction and at the introduction, if necessary, of effective domestic remedies in respect of the violations in issue, it may also include *ad hoc* solutions such as friendly settlements with the applicants or unilateral remedial offers in line with the Convention requirements. The Court may decide to adjourn the examination of similar cases, thus giving the respondent States an opportunity to settle them in such various ways (see, among many authorities, *Burdov v. Russia (no. 2)*, no. 33509/04, § 127,

ECHR 2009). If, however, the respondent State fails to adopt such measures following a pilot judgment and continues to violate the Convention, the Court will have no choice but to resume the examination of all similar applications pending before it and to take them to judgment in order to ensure effective observance of the Convention (see *E.G. v. Poland* (dec.), no. 50425/99, § 28, ECHR 2008).

2. Application of the principles to the present case

98. The violations which the Court has found in this case affect many people. There are more than 1,650 similar applications, introduced on behalf of more than 8,000 applicants, pending before the Court. Accordingly, the Court considers it appropriate to apply the pilot-judgment procedure in this case, notwithstanding the parties' objections in this regard.

99. While it is in principle not for the Court to determine what remedial measures may be appropriate to satisfy the respondent States' obligations under Article 46 of the Convention, in view of the systemic situation which it has identified, the Court would observe that general measures at national level are undoubtedly called for in the execution of the present judgment.

Notably, Slovenia should undertake all necessary measures within six months from the date on which the present judgment becomes final in order to allow Ms締Ališić, Mr Sadžak and all others in their position to be paid back their "old" foreign-currency savings under the same conditions as those who had such savings in domestic branches of Slovenian banks. Within the same time-limit, Serbia should undertake all necessary measures in order to allow Mr Šahdanović and all others in his position to be paid back their "old" foreign-currency savings under the same conditions as Serbian citizens who had such savings in domestic branches of Serbian banks.

As regards the past delays, the Court does not find it necessary, at present, to order that adequate redress be awarded to all persons affected. If, however, either Serbia or Slovenia fails to apply the general measures indicated above and continues to violate the Convention, the Court may reconsider the issue of redress in an appropriate future case against the State in question (see, by analogy, *Suljagić*, cited above, § 64).

100. It must be emphasised that the above orders do not apply to persons who, although in the same position as the present applicants, have been paid their entire "old" foreign-currency savings by other successor States, such as those who were able to withdraw their "old" foreign-currency savings on humanitarian grounds (see paragraphs 17 and 33 above), or to use them in the privatisation process (see paragraph 22 above), and those who were paid their savings in Ljubljanska Banka Ljubljana's Zagreb and Skopje branches by the Croatian and Macedonian Governments (see paragraphs 32 and 39 above). Serbia and Slovenia may therefore exclude such persons from their repayment schemes. However, if only a part of one's "old" foreign-currency

savings has thus been paid, Serbia and Slovenia are now liable for the rest (Serbia for "old" foreign-currency savings in all branches of Serbian banks and Slovenia for such savings in all branches of Slovenian banks, regardless of the location of a branch and of the citizenship of a depositor concerned).

101. Lastly, the Court adjourns the examination of all similar cases for six months from the date on which the present judgment becomes final (see, by analogy, *Suljagić*, cited above, § 65). This decision is without prejudice to the Court's power at any moment to declare inadmissible any such case or to strike it out of its list in accordance with the Convention.

VII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

102. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

103. The applicants claimed the payment of their "old" foreign-currency savings with interest in respect of pecuniary damage. The Court has already made orders in this regard in paragraph 99 above.

104. Each of the applicants further claimed 4,000 euros (EUR) in respect of non-pecuniary damage. The Bosnian-Herzegovinian, Croatian, Serbian and Macedonian Governments argued that the claims were unjustified. The Court, however, accepts that the applicants sustained some non-pecuniary loss arising from the violations of the Convention found in this case. Making its assessment on an equitable basis, as required by Article 41 of the Convention, it awards the amounts claimed (that is, EUR 4,000 to Ms Ališić and the same amount to Mr Sadžak to be paid by Slovenia and EUR 4,000 to Mr Šahdanović to be paid by Serbia).

B. Costs and expenses

105. The applicants also claimed EUR 59,500 for the costs and expenses incurred before the Court. The Bosnian-Herzegovinian, Croatian, Serbian and Macedonian Governments maintained that the claim was excessive and unsubstantiated. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. That is, the applicant must have paid them, or be bound to pay them, pursuant to a legal or contractual obligation, and they must have been unavoidable in order to prevent the violation found or to

obtain redress. The Court requires itemised bills and invoices that are sufficiently detailed to enable it to determine to what extent the above requirements have been met. Since no bill of costs has been submitted in the present case, the Court rejects this claim.

C. Default interest

106. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Dismisses* by six votes to one the Governments' objections as to the applicants' failure to exhaust domestic remedies;

2. *Holds* unanimously that there has been a violation of Article 1 of Protocol No. 1 to the Convention by Serbia with regard to Mr Šahdanović;

3. *Holds* by six votes to one that there has been a violation of Article 1 of Protocol No. 1 to the Convention by Slovenia with regard to Ms Ališić and Mr Sadžak;

4. *Holds* unanimously that there has been no violation of Article 1 of Protocol No. 1 to the Convention by the other respondent States;

5. *Holds* unanimously that there has been a violation of Article 13 of the Convention by Serbia with regard to Mr Šahdanović;

6. *Holds* by six votes to one that there has been a violation of Article 13 of the Convention by Slovenia with regard to Ms Ališić and Mr Sadžak;

7. *Holds* unanimously that there has been no violation of Article 13 of the Convention by the other respondent States;

8. *Holds* unanimously that there is no need to examine the complaint under Article 14 of the Convention taken in conjunction with Article 13 of the Convention and Article 1 of Protocol No. 1 with regard to Serbia and Slovenia and that there has been no violation of Article 14 of the Convention taken in conjunction with Article 13 of the Convention and Article 1 of Protocol No. 1 with regard to the other respondent States;

9. *Holds* unanimously that the failure of the Serbian and Slovenian Governments to include the present applicants and all others in their position in their respective schemes for the repayment of "old" foreign-currency savings represents a systemic problem;

10. *Holds* unanimously that Serbia must undertake all necessary measures within six months from the date on which the present judgment becomes final in accordance with Article 44 § 2 of the Convention in order to allow Mr Šahdanović and all others in his position to be paid back their "old" foreign-currency savings under the same conditions as Serbian citizens who had such savings in domestic branches of Serbian banks;

11. *Holds* by six votes to one that Slovenia must undertake all necessary measures within six months from the date on which the present judgment becomes final in accordance with Article 44 § 2 of the Convention in order to allow Ms, Ališić, Mr Sadžak and all others in their position to be paid back their "old" foreign-currency savings under the same conditions as those who had such savings in domestic branches of Slovenian banks;

12. *Decides* unanimously to adjourn, for six months from the date on which the present judgment becomes final, the examination of all similar cases, without prejudice to the Court's power at any moment to declare inadmissible any such case or to strike it out of its list in accordance with the Convention;

13. *Holds* unanimously
(a) that Serbia is to pay Mr Šahdanović, within three months from the date on which the present judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 4,000 (four thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

14. *Holds* by six votes to one
(a) that Slovenia is to pay Ms Ališić and Mr Sadžak, within three months from the date on which the present judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 4,000 (four thousand euros) each in respect of non-pecuniary damage, plus any tax that may be chargeable;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

15. *Dismisses* unanimously the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 6 November 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Nicolas Bratza
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Zupančič is annexed to this judgment.

N.B.
T.L.E.

DISSENTING OPINION OF JUDGE ZUPANČIČ

I regret that I cannot follow the majority judgment. For a number of reasons, only some of which are outlined in this dissent, it is my considered opinion that the outcome of this judgment by the *ad hoc* Chamber will, before the Grand Chamber, most certainly prove not to be in accordance with the letter and the spirit of the Convention.

If we begin with the Protocol No. 1, Article 1, paragraph 1 provision of the Convention, we see that its purpose is to protect *bona fide* possessions, legitimate expectations, arguable claims, etc. However, in this case we are, in the final analysis, safeguarding the speculative impact and the defects of a Communist state-run pyramid scheme of state-wide proportions. The scheme had been set up by the now defunct Yugoslav regime—then in dire need of hard currency funds. More importantly and from the moral point of view, since the LB bank and/or the Republic of Slovenia had not set up this Ponzi scheme, they are decidedly not the Madoffs of the story!

In the worst case scenario, in which the LB Bank and by implication the Republic of Slovenia were to be liable for the, to put it bluntly, "theft" of the depositors' money –, it would still not make sense to reimburse the depositors with the absurd 12% on the initial deposits. Ethically speaking, this share of the reimbursement claim had been a speculation of the naïve, as usual, investors in the said Communist Ponzi scheme.

In banking and in similar succession situations, *the territorial principle* applied and implemented in order to reimburse debts owed in a particular country, mirrors the well-known economic consideration that the moneys received from depositors' deposits are invested, in terms of the so-called 'book money', in the very *territory* in which the bank had been functioning as a debtor vis-à-vis the bank's depositors, but especially as a creditor vis-à-vis numerous enterprises that the same bank had concurrently financed through its loans. The majority judgment, to put it differently, is in violation of the territorial principle.

The territorial principle maintains that the creditors – i.e., the savers of the bank – are to be reimbursed for their deposits in the region, area or territory in which the compounded commercial loans derived from their deposits were in fact extended to different enterprises. As put in the oft-cited and seminal article on the Yugoslav succession: *"[...] the territorial principle clearly serves as the general rule on state succession related to tangible movable property."* (see, Carsten Stahn, *Agreement on Succession Issues of the Former Socialist Federal Republic of Yugoslavia*, 96 Am. J. Int'l L. 379 (2002)). We shall see straightaway why this is logical and therefore fair.

One must understand that all banks have always been functioning in this mode of speculative assessment of their future risks, based on which the depositors' money is multiplied in a virtual fashion in extending the loans far beyond the capital of initial deposits ('book money'). 'Virtual' here means that the 'book money' is literally borrowed from the future and is in this sense 'virtual money'.

Thus the hard-currencies deposited and converted into the 'book money' were extended as credit to enterprises *in the territory* or to the individual *in the territory* that were willing and capable of repaying and to paying a normal interest rate on the loan they were taking from the bank. Of course, the interest paid may never be as high as 12%. This tends to prove that the said pyramid scheme – was just that.

This well-known mode of banking, however, is to be seen in the light of the then moribund Marković government and in the light of the impending financial and federal state breakdown, of which the very Communist hard-currency Ponzi scheme had been a clear warning sign for all to see and to take into account.

It is also obvious that any 'run on the bank' will immediately end in the bankruptcy of the bank. Every bank is essentially a speculative delay operation as is also true of every pyramid scheme, Ponzi scheme, etc. — except that in honest banking the loan–repayment cycle is realistic. Thus, for example, the Tudjman regime in Croatia abruptly closed down the LB Bank on its territory, which had implied – as it would for any bank – an immediate liquidation of the LB Bank. In such a situation, all the debts of all the depositors are instantly called in, whereas the loans are still in the long-term process of repayment. In other words, the closing of the bank by the *fiat* of the regime will cause an immediate default of the bank – especially vis-à-vis its individual depositors, creditors.

The territorial principle denotes the dynamic view of the banking function: it is guided by the idea that the determinative aspect of the bank's function is its continual placement of its own loans in a particular territory. When the territory in question is therefore considered to be the main criterion for repayment, this has its own justified logic that cannot be comprehended from the simple private law perspective of Article 1, paragraph 1 of Protocol No. 1.

In the event that the bank is unable to repay its depositors, only depositors from that territory, irrespective of their citizenship, etc. will be covered by the state guarantee –, for the obvious macroeconomic reason that the book money originally derived from the depositors' deposits has in fact been invested and has *stayed in* the territory in question. There it had stimulated economic activity, etc.

It thus makes sense, when the talk is of succession, that the successor states likewise cover their territories with their guarantees as the central authority, in this case the Central Bank in Belgrade, had not fulfilled its own guaranteeing function. If such is the logic, it is easy to understand that it also makes sense for the six successor States to underwrite their depositors' claims – each one on its own territory.

This is in fact what happened at least to some extent, i.e., in so far as Croatia has largely reimbursed the depositors of the LB Bank on its territory. One might ask the question whether the State of Croatia has done this out of pure good heartedness vis-à-vis their own citizens –, or has there perhaps been in this move a built-in macroeconomic justice, which the Croatian state when coming into being has duly taken into consideration. In other words, were it not for the logic of the territorial principle in the first place, why would the Croatian state take over part of the debt of LB Bank for all those citizens who wished to be reimbursed by the Croatian state?

In any event, the logic of the territorial principle is obvious on both sides of this case. We wish to reiterate the simple idea that individualised justice, as considered by Protocol No. 1, has its fully compatible complement in Aristotle's distributive justice built into the territorial principle.

In pectore, I have for many years harboured another question because there is another travesty in this case: viz. the issue in the present adversary setting is thoroughly miscomprehended. The dispute is confused because this is not, as it ought to be, an interstate case. Unmistakeably, the atypical private law issue would in the *interstate* adversary backdrop have rightly developed into an expected, natural, and logical interstate succession issue. This would result in a far clearer perspective on the case. Why is it that not one of the respondent States has filed, in the European Court of Human Rights, an interstate action against the Republic of Slovenia? Why is it that the respondent States hide behind the individual complainants when everything points to the fact that these are succession questions? I think the answer is clear.

Another of my major objections to this majority judgment derives from the actual composition of the present *ad hoc* Chamber, in which four of the members, i.e., a simple majority at least, are from the creditor states, one of the members is from a fellow debtor state, whereas there are only two other members of the panel who are not, in one sense or another, national judges in the case. We understand perfectly well the usual procedural logic of the Convention to the effect that the national judge of the country concerned must in all cases be a member of the panel in order to facilitate the assessment of the case. However, in a situation in which we have seven successor States addressing what is essentially a succession problem, the logic of the presence of the national judge in each particular case will result in an *ad hoc* composition, as in the present one, in which the plaintiffs' 'representatives' have a clear majority over the influence of the defendants' 'representatives'. This is absurd since it was discernible from the very beginning that the interests of the plaintiffs will instruct the outcome of the *ad hoc casu* majority judgment. Fortunately, the Convention's sacrosanct separate opinion philosophy will here save the day in as much as the case clearly must be examined in the Grand Chamber. In the Grand Chamber, the composition with the presence of all national judges will be attenuated in the group of 17 judges, i.e., the bearing of the plaintiff's interests will likewise be less decisive. I wish to emphasise, that I have no doubts about my colleagues' impartiality, while keeping in mind of course that conscious impartiality when it comes to contemplating national interests has its own objective confines. However, even if it were not for the numeric prevalence in the *ad hoc casu* panel as such, the so-called 'appearances' will make it obvious that such a panel will not, to the outside world, appear objective and impartial.

For years I have maintained, and still do, that the issue in this case is best documented in the now famous Professor Jürgen's Report (*Repayment of the deposits of foreign exchange made in the offices of the Ljubljanska Banka not on the territory of Slovenia, 1977-1991*, Doc. 10135, 14 April 2004, Report, Committee on Legal Affairs and Human Rights, Rapporteur: Mr Erik Jürgens, Netherlands). The sense of the report, at 20 & 21, is as follows:

> "The economic conclusion must be that the original deposits had, in 1991, in fact ceased to exist. The depositors had, attracted by the high interest rates, run a risk by depositing their money in banks within the SFRY. When this risk was recognised, they were reassured by the guarantee given by the SFRY government that the deposits would be repaid with accumulated interest. But this guarantee evaporated at the moment the SFRY was dissolved, unless and inasmuch the successor states were willing to take over this guarantee. This was duly realised, but the different successor states did it in different ways. Slovenia [...] took over the guarantee for FE savings deposited in banks on its territory, expecting the other republics to do the same."

The timing of this judgment is particularly bad because negotiations between Slovenia and Croatia at least are now moving forward and are run by expert bankers of the two countries who understand the problem. The judgment will be misunderstood as final and it will be as a matter of course and on both sides politically misinterpreted.

If one considers paragraph 58 of the judgment in which the Slovenian government criticised Croatia for having refused to resolve the issue by IMF arbitration in 1999; for having refused to discuss it in the standing joint committee; for having agreed to continue Bank for International Settlements negotiations, allegedly under the pressure of the EU only in 2010; for having reneged on that offer after the closure of the EU accession negotiations in 2011; and lastly for making it impossible for LB Bank Zagreb Branch to engage in regular banking activities and thus generate additional assets (see para. 58 of the majority judgment). These allegations of the Slovenian government have not been properly answered by the Croatian government, neither have they been addressed by the majority judgment. It follows inexorably that the villain in this story is not Slovenia, because Slovenia has tried at least five times to decently negotiate this succession problem with Croatia – but to no avail. Of course, it is impossible to know whether this time, despite everything, the Croatian government is serious or not. One would hope at least that this time the negotiations could in fact move forward because, as pointed out above, they are now run by two experts who understand the problem. Moreover, Croatia's entry into the European Union is conditioned upon the success of these negotiations. We reiterate that the judgment is badly timed because it will create a political impression as to who is now in the winning position, despite the fact that the case might be going to the Grand Chamber, and needs no longer to show benevolence and a constructive attitude in the ongoing negotiations.

In this context, we must call attention to the essence of the *Kovačič* case judgment, which was before the Grand Chamber on a pure technicality, and carries its real message in the concurring opinion of the former judge, Professor George Ress, a world-renowned specialist in international law, i.e., a specialist on succession. In *Kovačič*, the question had not been addressed in the judgment, but Professor Ress had articulated the message in his concurring opinion. That message was essentially the same as the one found in the Jürgen report, i.e., that the issue cannot be properly resolved by a judgment between private parties and the State. Unless this was to be an interstate case, it can only be resolved by negotiations in the context of a future succession agreement.