

5-1993

International Agreement Obligations After the Soviet Union's Break-up

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Recommended Citation

Lucinda Love, International Agreement Obligations After the Soviet Union's Break-up, 26 *Vanderbilt Law Review* 373 (2021)

Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol26/iss2/7>

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International Agreement Obligations After the Soviet Union's Break-up: Current United States Practice and Its Consistency with International Law

ABSTRACT

Focusing on the dissolution of the Soviet Union, the author explores whether international law is consistent with respect to the succession of states to treaty obligations. This Note examines whether the republics of the former Soviet Union are held bound by treaties made by the U.S.S.R.

The Note discusses whether the current practice of the United States regarding treaties with the former Soviet Union is consistent with international law. The author concludes that international law in this area is not well settled. The United States treatment of the former Soviet republics is consistent with some sources of law, but not others. Finally, this Note concludes that the United States policy has promoted stability in the region and has established international law in the process.

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I. INTRODUCTION

Several states, most notably the Soviet Union, recently have undergone dissolution. This restructuring raises the question whether, under international law, newly created states inherit the treaty obligations of their predecessors. This Note explores this question by examining the restructuring of the former Soviet Union and the emergence of the Russian Federation. In this context, perpetuation of treaty obligations depends primarily on two factors: first, whether the Russian Federation is the same legal entity as the Soviet Union or whether each of the fifteen former Soviet Republics is a new and independent state, and second, what theory of international law should be applied.

This Note examines the primary international law theories regarding the effect of state succession on treaty obligations. It then discusses the Vienna Convention on Succession of States in Respect of Treaties; the Vienna Convention on Succession of States in Respect of State Property, Archives and Debt; the Restatement (Third) of the Foreign Relations Law of the United States; and the past practices of states as possible sources of relevant international law. Next, this Note explains how treaties establishing membership in international organizations differ from other treaties. It then examines the short history of the former Soviet Union since its break-up and whether the United States is holding Russia and the other former Soviet republics responsible for the obligations

of treaties the Soviet Union made. It also discusses how Russia and the other republics have gained membership in international organizations. Next, the Note considers whether current practice is consistent with international law.

Finally, this Note concludes that (1) current practice regarding the Russian Federation's obligations; (2) with the exception of Russia, the United States generally has not followed customary international law with respect to the treaty obligations of the former Soviet Republics; (3) the United States policy regarding the Baltic states is consistent with customary international law only because the United States never recognized the incorporation of the Baltic States into the Soviet Union; (4) the United States policy of continuity of treaty obligations has promoted stability; and (5) the actions taken concerning the obligations of the former Soviet Union have changed customary international law of treaty obligations of successor states.

II. BACKGROUND—THEORIES AND SOURCES OF INTERNATIONAL LAW

A. *Theories of Succession in International Law*

When one government succeeds another international law provides that the change in government does not affect the state's rights, capacities, and obligations.¹ When one state succeeds another,² however, it is

1. LOUIS HENKIN ET AL., *INTERNATIONAL LAW CASES AND MATERIALS* 266-67 (2nd ed. 1987). The United States has long accepted this rule and has applied it since the United States and French revolutions in the 1700s. See 2 CHARLES C. HYDE, *INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* 1528 (2d rev. ed. 1947). "No principle of international law can be more clearly established than this: That the rights and obligations of a nation, in regard to other states, are independent of its internal revolutions of government." Herbert A. Wilkinson, *The American Doctrine of State Succession*, 4 *JOHNS HOPKINS U. STUD. HIST. & POL. SCI.* 97 (1934).

2. One definition of state succession is "the factual situation which arises when one State is substituted for another in sovereignty over a given territory." D.P. O'CONNELL, 1 *STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW* 3 (1967) [hereinafter *STATE SUCCESSION*]. Another definition is "a change in the possession of competence to conclude treaties with respect to a given territory." Sir Humphrey Waldock, Special Rapporteur on the Succession of States and Governments in Respect of Treaties, in his first report to the International Law Commission of the United Nations, U.N. Doc. A/CN.4/202, para. 2(a), draft art. 1. Yet another is "the replacement of one State by another in the responsibility for the international relations of territory." *Vienna Convention on Succession of States in Respect of Treaties*, art. 2, para. 1(b), U.N. Doc. A/CONF.80/31 (1978), reprinted in 17 *I.L.M.* 1488, 1490 (1978) [hereinafter *V.C.S.S.*].

less clear whether the new state assumes the rights, capacities, and obligations of the former state.

Although customary international law³ does not provide a general rule concerning state succession to treaty obligations, it acknowledges two doctrines. The first and oldest doctrine, universal succession, seeks legal continuity, whereas the second, the clean slate doctrine, leaves the successor state in a legal vacuum.⁴

The doctrine of universal succession resolves the problems that inevitably arise with political change by adopting the Roman idea of continuity of legal personality upon death.⁵ Under Roman law, rights and duties of the deceased passed to the heir.⁶ Because these legal rights and duties arose from a conception of natural rights, they continued to exist despite the change in the identity of their bearer.⁷ Similarly, the doctrine of universal succession regards the personality of the state as immutable, irrespective of changes in government, and neither revolution nor cession of territory affects the fundamental character and constancy of that personality.⁸ Under this doctrine, the successor state is the direct heir to the

State succession can occur in a variety of ways. States unify into federations or combine with other states. States secede and become new states. Former colonies secede and become newly independent states. Finally, states can dismember completely and give rise to newly sovereign entities. See 1 STATE SUCCESSION, *supra* at 4. Complete extinction of a state with no legal successor has not occurred, although it is theoretically possible such as through the sinking of an island state or through nuclear warfare. LORD ARNOLD D. MCNAIR, *THE LAW OF TREATIES* 589-90 (1961).

3. Customary law derives from state practices such as diplomatic acts; official statements of policy, either unilateral or in cooperation with other states; and acquiescence in the acts of other states. Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 VA. J. INT'L L. 282, 288 n.30 (1988). Usually a considerable period of time must pass before a practice becomes custom. See *id.* (citing J. L. BRIERLY, *THE LAW OF NATIONS* 62 (1962)). However, customary law may emerge in a fairly short time if the practice has widespread acceptance. If important states do not adopt a practice, the practice may fail to become general customary law although it might be "particular customary law" for the states that adopt it. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102 cmt. b (1987) [hereinafter RESTATEMENT].

4. Rosalie Schaffer, *Succession to Treaties: South African Practice in the Light of Current Developments in International Law*, 30 INT'L & COMP. L.Q. 593, 594 (1981).

5. 1 STATE SUCCESSION, *supra* note 2, at 9.

6. *Id.* Under Roman law, an heir was considered the same person as the deceased in all aspects of property ownership. If two groups of people formed a union, the rights of each group did not die but were shared by the new group. HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* 315, 319 (Francis W. Kelsey trans., 1925).

7. 1 STATE SUCCESSION, *supra* note 2, at 9.

8. *Id.*; see also Schaffer, *supra* note 4, at 594.

predecessor state's legal relationships, and the treaties of the predecessor devolve upon the successor.⁹ Other states may insist that the successor fulfill existing obligations and may condition recognition of the new state on the continuance of the legal relationship between them.¹⁰

The clean-slate doctrine, which emerged during the latter half of the nineteenth century, rejects all of the major premises of the universal succession theory.¹¹ Under the clean-slate doctrine, law is the expression of the sovereign's will.¹² When there is a change of sovereignty, the will of the former sovereign ceases to exist, and the legal order of the state collapses.¹³ The resulting legal vacuum lasts until the successor establishing its sovereignty and dictates its own will.¹⁴ Any continuity is purely voluntary and occurs only at the will of the successor state.¹⁵

The traditional clean-slate doctrine often does not reflect the practical reality of a succession. Although a successor state does not inherit the sovereignty of its predecessor, international law does impose on the successor state some responsibility for the obligations of the predecessor.¹⁶ Generally, rights and duties devolve upon a successor state.¹⁷ Under a "modified clean-slate" theory, which takes into account the realities of international law, newly independent states are not required to honor treaties entered into by their predecessors, but they may choose to suc-

9. LUNG-FONG CHEN, STATE SUCCESSION RELATING TO UNEQUAL TREATIES 15 (1974).

10. 1 STATE SUCCESSION, *supra* note 2, at 14. The theory of universal succession, which was prevalent until the middle of the nineteenth century, promoted stability in European international affairs during times of war and independence movements. States generally assumed that treaties would remain in effect regardless of any boundary changes. *Id.* at 11; *see also* OKON UDOKANG, SUCCESSION OF NEW STATES TO INTERNATIONAL TREATIES 123 (1972).

11. The clean-slate theory arose because the actual practice of the states was not in accord with the theory of universal succession. Unfortunately, the new theory did not accurately describe actual practice but rather represented a swing to the opposite extreme of the theory it replaced. Schaffer, *supra* note 4, at 595.

12. *Id.*

13. *Id.* Under the clean-slate doctrine, the ruler had independent sovereign power and was the embodiment of the state. There was no reason for the successor to bear the responsibilities of the prior state because there was no legal tie between the two. *See* 1 STATE SUCCESSION, *supra* note 2, at 15.

14. Schaffer, *supra* note 4, at 595.

15. *Id.* Under the clean-slate doctrine, territory and sovereignty are not transferable, and, therefore, the entire notion of state succession is fallacious. *Id.*

16. *Id.* at 596.

17. *See* 1 LASSA OPPENHEIM, INTERNATIONAL LAW 158 (H. Lauterpacht ed., 8th ed. 1955).

ceed to any or all treaties to which the predecessor was a party.¹⁸

1. Personal versus Dispositive Treaties

Underlying both doctrines of treaty succession is a historical distinction between personal and dispositive treaties. Personal treaties are contractual in nature and, therefore, depend on the continued existence of the parties.¹⁹ If one state disappears completely through annexation, dismemberment, or some other means, then that state is unable to fulfill the obligations of the treaty, and the treaty expires; however, if the state merely loses some of its territory, it retains its identity, and the treaty survives.²⁰

Dispositive treaties create rights in the land and survive all changes in sovereignty.²¹ The legal effect of a dispositive treaty is similar to that of a covenant running with land; the territory gains permanent status independent of the personality of the state exercising sovereignty.²² Dispositive treaties are more similar to a conveyance than to an agreement because the restrictions they impose create equitable property in the beneficiary state and limit the sovereignty of any state over the territory.²³ Thus, a successor state may receive the property only as conveyed, with any limitations included.²⁴ Examples of dispositive treaties are treaties of cession, boundary treaties, peace treaties,²⁵ and treaties that "pro-

18. See Schaffer, *supra* note 4, at 597, 624 n.168.

19. D.P. O'CONNELL, *THE LAW OF STATE SUCCESSION* 15 (1956) [hereinafter *LAW OF STATE SUCCESSION*].

20. *Id.*

21. *Id.* at 49; McNAIR, *supra* note 2, at 256. The distinction between personal treaties and real treaties which grant a permanent and indefeasible status on a territory was first drawn by Vattel:

We must not confound those treaties or alliances which, since they impose the obligation of repeated acts on both sides, can not remain in force except through the continued existence of the contracting powers, with those contracts by which a right is once for all acquired, independently of any subsequent acts of either party. EMERRICH DE VATTEL, 3 *LE DROIT DES GENS* 178 (Charles G. Fenwick trans., 1916).

22. See *LAW OF STATE SUCCESSION*, *supra* note 19, at 49-50. Treaties of this type survive regardless of what government or state has control over the land. Dispositive treaties create rights and servitudes which limit sovereignty. The servitudes are of two types: universal servitudes, which create a benefit for many states, and particular servitudes, which create a benefit for one state. *Id.* at 54, 56.

23. *Id.* at 49-50.

24. *Id.*

25. McNAIR, *supra* note 2, at 256. "[W]hen a State cedes a piece of territory over which it has granted to another State a right of transit or a right of navigation on a river, or a right of fishery in territorial or national waters, it cannot cede that territory unen-

vide for the neutralization or demilitarization of a region" or grant "rights of way over territory."²⁶

B. *The Vienna Convention On Succession of States in Respect of Treaties*

1. Identifying Sources of International Law Using the V.C.S.S. for Analysis

The 1969 Vienna Convention on the Law of Treaties sets forth the customary international law on the law of treaties and other international agreements that regulate states' behavior.²⁷ The Convention, however, explicitly excludes codification of treaty law governing state succession.²⁸ Filling the void created by that exclusion is the Vienna Convention on Succession of States in Respect of Treaties (V.C.S.S.),²⁹ which the International Law Commission adopted in 1978.

The V.C.S.S. will enter into force after fifteen states deposit an instru-

cumbered by that obligation." *Id.* at 656.

26. LAW OF STATE SUCCESSION, *supra* note 19, at 49. For a more complete discussion of servitudes, see 1 D.P. O'CONNELL, INTERNATIONAL LAW FOR STUDENTS 235-36 (1971).

27. RESTATEMENT, *supra* note 3, § 145. The Vienna Convention on the Law of Treaties, adopted May 22, 1969, U.N. Doc. A/C.3927 (1969), *reprinted in* 8 I.L.M. 679 (1969) [hereinafter Vienna Convention] was signed by the United States on April 24, 1970, but the Senate has not ratified it. See Robert E. Dalton, *International Agreements in the Revised Restatement*, 25 VA. J. INT'L L. 153, 153 n.2 (1984). Nonetheless, the United States and other nonparties to the Vienna Convention accept the treaty as law. See *id.* at 155. The Vienna Convention is designed to govern all other international agreements that regulate states' behavior in fields such as commerce, human rights, and environmental protection. Frankowska, *supra* note 3, at 285. The Restatement (Third) of the Foreign Relations Law of the United States generally accepts the Vienna Convention as a codification of customary international law governing international agreements even though the United States has not ratified the Convention. RESTATEMENT, *supra* note 3, § 145.

28. "The provisions of the present Convention shall not prejudice any question that may arise in regard to a treaty from a succession of States." Vienna Convention, *supra* note 27, art. 73, 8 I.L.M. at 707.

29. V.C.S.S., *supra* note 2. For history of the treaty, see [1974] 1 Y.B. INT'L L. COMM'N 157, U.N. Docs. A/CN.4/275, A/CN.4/278, and A/8710/Rev. 1.

The V.C.S.S. was adopted on August 23, 1978, by a vote of 82 in favor with 2 abstentions. From that date until February 28, 1979, the Convention was open for signature by the Conference in Vienna and subsequently remained open at United Nations Headquarters in New York until August 31, 1979. See *Recent Actions Regarding Treaties to which the United States is Not a Party*, 25 I.L.M. 1640 (1986) [hereinafter *Recent Actions*].

ment of ratification or accession with the Secretary-General of the United Nations.³⁰ Although the V.C.S.S. is not technically in force, it nevertheless may be binding as international law.³¹ Its authority as international law depends on whether the treaty embodies a previously existing rule or practice of international law,³² whether judges look to its articles as a source of law,³³ and whether the current practice of states is in accord with the treaty.³⁴

International agreements can create new customary international law that binds all states regardless of whether those states participated in the negotiations or became parties to the agreement.³⁵ For example, the

30. V.C.S.S., *supra* note 2, art. 49, 17 I.L.M. at 1514. As of this writing, 19 states have signed the Convention, and only 9 have ratified or acceded to it. Angola, Brazil, Chile, Czechoslovakia, Ethiopia, German Democratic Republic, Iraq, Madagascar, Niger, Pakistan, Paraguay, Peru, Poland, Senegal, Sudan, Uruguay, the Vatican, Yugoslavia, and Zaire have signed the treaty. In addition, Dominica, Egypt, Estonia, Ethiopia, Iraq, Morocco, Seychelles, Tunisia, and Yugoslavia have ratified or acceded to the treaty. *Recent Actions*, *supra* note 29, 25 I.L.M. at 1640.

31. Article 38 of the Statute of the International Court of Justice directs the International Court of Justice to apply:

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognized by civilized nations;
- (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Statute of the International Court of Justice, June 26, 1945, art. 38, para. 1(a)-(d), 59 Stat. 1055, 1060, T.S. No. 993.

Article 38 is considered the most authoritative statement on the sources of international law. *See Frankowska*, *supra* note 3, at 285 n.21.

Similarly, the Restatement (Third) of the Foreign Relations Law of the United States identifies the following as sources of international law: custom, international agreements, and common general principles. *RESTATEMENT*, *supra* note 3, § 102.

32. Although the treaty is not yet in force, comparable international law exists outside of the V.C.S.S. Article 7 recognizes this:

Without prejudice to the application of any of the rules set forth in the present Convention to which the effects of a succession of States would be subject under international law independently of the Convention, the Convention applies only in respect of a succession of States which has occurred after the entry into force of the Convention except as may be otherwise agreed.

V.C.S.S., *supra* note 2, art. 7, para. 1, 17 I.L.M. at 1492.

33. *See* Statute of the International Court of Justice, *supra* note 31.

34. *Id.*

35. Jonathan I. Charney, *International Agreements and the Development of Customary International Law*, 61 WASH. L. REV. 971, 971 (1986). There is even some support for the view that an international agreements not yet in force can be considered

leaders of the United States and Soviet Union signed the Second Strategic Arms Limitation Treaty (SALT 2), but the parties never ratified the treaty and, therefore, never converted it into a legally binding instrument.³⁶ Nevertheless, in May 1986, the United States charged the Soviet Union with violating the treaty and terminated it,³⁷ thereby treating this unratified agreement as a binding commitment.

The greatest number of clearly articulated international legal rules appears in treaties, draft conventions of the International Law Commission (ILC), and resolutions of the General Assembly of the United Nations.³⁸ The General Assembly created the ILC to codify preexisting customary law³⁹ and to develop general international law.⁴⁰ Although the ILC does not distinguish in the V.C.S.S. between the articles constituting codification of existing customary law and the articles constituting development, the introductory declaration⁴¹ states that the treaty will reflect existing international law.⁴²

Past state practice, especially by major world powers, provides additional support for the position that the theories in the V.C.S.S. embodies prevailing principles of international law.⁴³ Scholars observe states' practice over time to identify emerging international law,⁴⁴ but they dispute

current international law. *Id.*

36. SHABTAI ROSENNE, *DEVELOPMENTS IN THE LAW OF TREATIES 1945-1986*, 120 (1989). Governments will adhere to unratified treaties if they believe that the national interest so requires and if they can accomplish adherence without additional internal approval. *Id.* at 120-21.

37. *Id.* at 120.

38. ANTHONY A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 86 (1971).

39. *RESTATEMENT*, *supra* note 3, § 208, reporter's note 4.

40. Georges Abi-Saab, *The Development of International Law by the United Nations*, in *THIRD WORLD ATTITUDES TOWARD INTERNATIONAL LAW* 221, 227 (Frederick E. Snyder & Surakiart Sathirathai eds., 1987).

41. "The States Parties to the present Convention . . . [are] [c]onvinced, in these circumstances, of the need for the codification and progressive development of the rules relating to succession of States in respect of treaties as a means for ensuring greater juridical security in international relations." V.C.S.S., *supra* note 2, 17 I.L.M. at 1488.

42. "[T]he declaration may . . . be viewed as a form of state practice confirming the customary international law." *RESTATEMENT*, *supra* note 3, § 102 reporter's note 5.

43. See examples of practice given, *supra* in text accompanying notes 85-111.

44. D'AMATO, *supra* note 38, at 7.

The most widely quoted formula for proof of a customary rule of law was articulated by Judge Manley O. Hudson. He said the formula consists of:

[1] concordant practice by a number of States with reference to a type of situation falling within the domain of international relations; [2] continuation or repetition of the practice over a considerable period of time; [3] conception that the practice is

the amount of time needed to establish a custom.⁴⁵ Furthermore, the state's size and power partially determine the time required. The acts of a major power, sophisticated in international law, may be more significant than those of a smaller, less sophisticated state.⁴⁶ Similarly, more recent acts will be more persuasive than earlier ones in determining if custom exists.⁴⁷

2. Theories of Law in the V.C.S.S. Treating Different Instances of Succession

The V.C.S.S.⁴⁸ divides succession of states into three categories: when part of a territory cedes to another state,⁴⁹ when states secede to become independent,⁵⁰ and when parts of a territory unite or separate to form

required by, or consistent with, prevailing international law; [4] general acquiescence in the practice by other states; [5] the establishment of "the presence of each of these elements . . . by a competent international authority."

Id. at 7 (quoting [1950] 2 Y.B. INT'L L. COMM'N 26, U.N. Doc. A/CN.4/16).

"Opinio juris" is the requisite legal conviction states must have in addition to their practice to qualify that practice as evidence of customary international law. The fact that a convention of 79 states passed the drafted treaty may reflect the opinio juris of the states. This legal conviction also emerges in practice when a state does not act according to its best interest but acts according to a norm of the international community. See HENKIN ET AL., *supra* note 1, at 37.

45. Some scholars say that the time needed to form a custom varies "according to the nature of the case," while others urge that "a single precedent could be sufficient to create international custom." D'AMATO, *supra* note 38, at 58 (quoting Sir Humphrey Waldock, *General Course on Public International Law*, 106 R.C.A.D.I. 1, 44 (1962), and Gilberto Amado, [1950] 1 Y.B. INT'L LAW COMM'N 5).

46. "[W]hat gives a nation its voice in forming custom is not necessarily its military might or the amount of real estate it possesses, but rather its degree of sophistication in international law." D'AMATO, *supra* note 38, at 96; see also CHARLES DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 149 (1957). The acts of the United States are more persuasive than the acts of less powerful states as evidence of the formation of custom. D'AMATO, *supra* note 38, at 97.

47. D'AMATO, *supra* note 38, at 97.

48. The V.C.S.S. only applies to treaties concluded between states. Article 3 of the V.C.S.S. states "[T]he present Convention does not apply to the effects of a succession of States in respect of international agreements concluded between States and other subjects of international law." V.C.S.S., *supra* note 2, art. 3, 17 I.L.M. at 1491.

49. *Id.* part II, art. 15, 17 I.L.M. at 1496.

50. See *id.* part II-IV, arts. 15-38, 17 I.L.M. at 1496-1511. The complete definition of newly independent state in the V.C.S.S. is "a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible." *Id.* art. 2, para. 1(f), 17 I.L.M. at 1490.

different states.⁵¹ Part II of the V.C.S.S. provides that when there is partial cession of a state's territory, the treaties of the predecessor state cease to be in force with respect to that territory, and the successor state's treaties are extended to it.⁵² Part III of the treaty applies the clean-slate doctrine when states become newly independent.⁵³

A newly independent State is not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of the succession of States the treaty was in force in respect of the territory to which the succession of States relates.⁵⁴

Part IV of the treaty applies the universal succession theory⁵⁵ for the unification and separation of states. When two or more states unite to form one successor state, any treaties in force at the time of succession will remain in force with respect to that territory unless the parties agree otherwise.⁵⁶ When parts of a state separate to form successor states, treaties continue to be in force in each successor state, regardless of whether the predecessor state continues to exist.⁵⁷ If the treaty was binding on a geographic area which did not constitute the predecessor's entire territory, the treaty will bind only the successor state which has control over that area.⁵⁸ If a state continues to exist after part of its territory secedes, the predecessor's treaties will remain in force in the remaining territory unless the parties agree otherwise.⁵⁹

51. *Id.* part IV, arts. 31-38, 17 I.L.M. at 1506-11.

52. V.C.S.S. Article 15 provides as follows: "When part of the territory of a State . . . becomes part of the territory of another State: (a) treaties of the predecessor State cease to be in force in respect of the territory." *Id.* art. 15, 17 I.L.M. at 1496.

53. In fact, part III codifies the clean-slate doctrine. *Id.* part III, arts. 16-30, 17 I.L.M. at 1496-1505. A problematic aspect of the V.C.S.S. has been differentiating between newly independent states that fall under Part III and those that have seceded in a political dismemberment and fall under Part IV of the Convention. The commentary to the V.C.S.S. acknowledges the difficulty of determining when states may treat as a newly independent state a separated territory which becomes a sovereign state. See 2 UNITED NATIONS CONFERENCE ON SUCCESSION OF STATES IN RESPECT OF TREATIES: OFFICIAL RECORDS 53 (1978) [hereinafter U.N. CONFERENCE].

54. V.C.S.S., *supra* note 2, art. 16, 17 I.L.M. at 1496.

55. See *supra* text accompanying notes 5-10.

56. V.C.S.S., *supra* note 2, art. 31, 17 I.L.M. at 1506.

57. *Id.* art. 34(1)(a), 17 I.L.M. at 1509.

58. *Id.* art. 34(1)(b), 17 I.L.M. at 1509. The treaty will not remain in force if the states agree otherwise. *Id.* art. 34(2)(a), 17 I.L.M. at 1509.

59. *Id.* art. 5, 17 I.L.M. at 1492. Successor states may participate in treaties that were not in force or were signed and subject to ratification, acceptance, or approval if the predecessor state was a contracting party. The successor states must give notice of their intentions to the other participating treaty states. *Id.* arts. 36-37, 17 I.L.M. at 1510-11.

Of course, states may agree to terminate treaty obligations that would presumptively continue. Either party may claim as a ground for treaty termination that there has been a fundamental change of circumstances.⁶⁰ One example of this ground is where it appears from the treaty or some other source that the treaty's current application would be incompatible with the overall object and purpose of the treaty or would radically change the conditions of its operation.⁶¹

The V.C.S.S. codifies the theory of dispositive treaties, stating that a succession of states does not affect treaty-established boundaries⁶² or obligations and rights that restrict land use.⁶³ The only remaining question centers on what rights or obligations attach to the territory. No matter how dramatic the political changes within the various territories, a state may not invoke a fundamental change of circumstances as a ground for terminating a boundary treaty.⁶⁴

C. *The Vienna Convention on Succession of States in Respect of State Property, Archives and Debts*

The Vienna Convention on Succession of States in Respect of State Property, Archives and Debts⁶⁵ (V.C.S.S.P.) is the most comprehensive

60. Under article 62 of the Vienna Convention on the Law of Treaties, the change must have been of a fundamental character, must have been unforeseen, the circumstances must have been "an essential basis of the consent of the parties to be bound by the treaty," and the effect of the change must radically change the extent of the obligations of the party invoking the change as a ground for termination. Vienna Convention, *supra* note 27, art. 62, 8 I.L.M. at 702.

61. The V.C.S.S. embodies the same grounds of fundamental change of circumstances as the Vienna Convention. See V.C.S.S. *supra* note 2, art. 18(3). For similar wording see V.C.S.S. arts. 15(b), 17(2), 19(3), 27(5), and 30-37.

62. "A succession of States does not as such affect: (a) a boundary established by a treaty; or (b) obligations and rights established by a treaty and relating to the regime of a boundary." *Id.* art. 11, 17 I.L.M. at 1494.

63. A succession of States does not as such affect:

(a) obligations relating to the use of any territory, or to restrictions upon its use, established by a treaty for the benefit of any territory of a foreign State and considered as attaching to the territories in question;

(b) rights established by a treaty for the benefit of any territory and relating to the use, or to restrictions upon the use, of any territory of a foreign State and considered as attaching to the territories in question.

Id. art. 12(1), 17 I.L.M. at 1494-95.

64. See Vienna Convention, *supra* note 27.

65. The Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (V.C.S.S.P.), U.N. Doc. A/CONF.117/14 (1983), reprinted in 22 I.L.M. 306 (1983). The Convention was adopted on April 7, 1983, and was opened for signature the following day. The United States has not signed this Convention, nor have

articulation of international law in the area of state succession and debt.⁶⁶ Articles 40 and 41 are particularly relevant to the debt issues of dissolving states. Article 40 articulates the policy that when parts of the territory of a state separate and form a new state, the debt of the predecessor passes to the successor state in equitable proportion, taking into account the related property interests that the successor state receives along with the debt.⁶⁷ Although this article appears to apply when the separating parts of the predecessor state form a new state, paragraph (2) limits its applicability to instances where the separating part of a predecessor state unites with another existing state.⁶⁸ Article 41 utilizes the same formula for passing debt in equitable proportions to a successor state when a state dissolves.⁶⁹

Articles 40 and 41 do not provide for debt succession in the instance of dismemberment of portions of a state while the original state continues in existence. Most importantly, the V.C.S.S.P. places a premium on any agreement reached between the predecessor and successor state,⁷⁰ but indicates that without such an agreement, some other equitable division should be made.⁷¹

any other major industrialized states. The signatories include Algeria, Argentina, Egypt, Niger, Peru, and Yugoslavia. No states have ratified the Convention. *Recent Actions*, *supra* note 29, at 1640.

66. For a comprehensive discussion of the V.C.S.S.P., see P.K. Menon, *The Succession of States and the Problem of State Debts*, 6 B.C. THIRD WORLD L.J. 111 (1986).

67. Article 40 of the V.C.S.S.P. states:

When part or parts of the territory of a State separate from that State and form a State, and unless the predecessor State and the successor State otherwise agree, the State debt of the predecessor State shall pass to the successor State in an equitable proportion, taking into account, in particular, the property, rights and interests which pass to the successor State in relation to that State debt.

V.C.S.S.P., *supra* note 65, art. 40, para. 1, 22 I.L.M. at 324.

68. *Id.* art. 40, para. 2, 22 I.L.M. at 324 ("Paragraph 1 applies when part of the territory of a State separates from that State and unites with another State.").

69. Article 41 entitled "Dissolution of a State" states:

When a State dissolves and ceases to exist and the parts of the territory of the predecessor State form two or more successor States, and unless the successor States otherwise agree, the State debt of the predecessor State shall pass to the successor States in equitable proportions, taking into account, in particular, the property, rights and interests which pass to the successor States in relation to that State's debt.

Id. art. 41, 22 I.L.M. at 324.

70. *Id.* arts. 40, 41, 22 I.L.M. at 324.

71. *Id.* The rules embodied in these articles have been criticized as being impractical. If the predecessor state and successor state are unable to reach an agreement there is no provision for how the "equitable proportion" will be determined. P.K. Menon, *supra*

D. *The Restatement (Third) of the Foreign Relations Law of the United States*

The Restatement of the Foreign Relations Law of the United States (Restatement) reflects customary international law. Although the Restatement is not formally binding,⁷² it may effectively bind practices of the United States government.⁷³

Section 210 of the Restatement incorporates much of the V.C.S.S.⁷⁴ but divides succession into three categories that are somewhat different than those in the V.C.S.S.⁷⁵ The Restatement focuses on partial cession, total absorption of a state, and the creation of a new state from the territory of another.⁷⁶ The Restatement refers to partial cession as the "moving treaty-frontier rule"⁷⁷ and, like the V.C.S.S., treats the predecessor state's treaties as no longer being in force and extends the successor's treaties to cover the territory.⁷⁸ The next category focuses on the situa-

note 66, at 140.

72. Karl M. Meessen, Special Review Essays, *The Restatement (Third) of the Foreign Relations Law of the United States*, 14 YALE J. INT'L L. 433, 435 (1989). The Restatement reflects international law as scholars have interpreted it.

73. The Restatement gives evidence of the law that domestic courts look to for guidance. *Id.* at 434. The Restatement's importance outside of the United States emerges when the United States government has a dispute with a foreign government. The Restatement will be taken as an indicator of United States practice, and foreign governments will rely on the Restatement when it supports their case. This will make it difficult for the United States to argue a position contrary to what the Restatement articulates. *Id.* at 435; see also A.L.I. ANN. REP. 34 (1987) (reviewing the frequency with which United States federal and state courts cited the new Restatement during the first year subsequent to adoption).

74. RESTATEMENT, *supra* note 3, § 208 reporter's note 4.

75. This section is entitled "State Succession: International Agreements." *Id.* § 210. See reporter's notes accompanying this section, where comparisons are made between the V.C.S.S. and United States law.

76. *Id.* § 210.

77. *Id.* § 210(1) cmt. a.

78. Section 210(1) of the Restatement (Third) of the Foreign Relations Law of the United States reads:

(1) When part of the territory of a state becomes territory of another state, the international agreements of the predecessor state cease to have effect in respect of that territory and the international agreements of the successor state come into force there.

Id. § 210(1). Under United States domestic practice, there is no need for the Senate's consent to bring a treaty into force between the United States and the successor states that arise out of any secession or dismemberment. *Id.* § 210 cmt. h. Acceptance of the new state's duties and obligations is not a new agreement under United States law, it is an extension of the old agreement.

tion in which one state absorbs another state completely.⁷⁹ The international agreements of the absorbed state terminate and the absorbing state's agreements become effective in the territory.⁸⁰ The third category incorporates the modified clean-slate theory for situations in which part of a state secedes to become a new state.⁸¹ According to the Restatement, the new state does not succeed to any treaties of the predecessor state unless the state fulfills two conditions.⁸² First, the new state must indicate explicitly or implicitly a desire to adopt the treaty, and second, the other parties to that treaty must acquiesce.⁸³ The Restatement applies the modified clean-slate principle to both newly independent states and to states separated through secession.⁸⁴

E. *The Past Practice of States as Evidence of Custom*

1. The Effect of Secession, Political Dismemberment, and Federation on Personal Treaties

As a general principle, when a state fractionalizes through cession or secession and the predecessor state retains an international personality, the predecessor's treaty obligations survive.⁸⁵ Conversely, the new inde-

79. *Id.* § 210(2). A third-party state may refuse to recognize the absorption of territory and treat its agreements made prior to absorption as continuing in effect. This was the United States approach with respect to the treaties it made with the Baltic states before their annexation into the Soviet Union. *See id.* § 210 cmt. e.

80. *Id.* Section 210(2) reads:

When a state is absorbed by another state, the international agreements of the absorbed state are terminated and the international agreements of the absorbing state become applicable to the territory of the absorbed state.

The comments accompanying section 210 explain that absorption of a state is very similar to the merger of two or more states into a federal union, implying that this section would be applied in the instance of a unification. *Id.* § 210 cmt. c. There does not appear to be any V.C.S.S. equivalent to this category describing the merger of states into a union. *See V.C.S.S., supra* note 2, arts. 31-33, 17 I.L.M. at 1508-09 (dealing with unification of states).

81. RESTATEMENT, *supra* note 3, § 210(3).

82. *Id.*

83. *Id.*

84. *Id.* § 210 cmt. f. Like the V.C.S.S., the Restatement upholds dispositive and boundary treaties as binding on all parties notwithstanding other express articulations of law. *Compare id.* § 210(4) with V.C.S.S., *supra* note 2, arts. 11-12, 17 I.L.M. at 1494-95.

85. An example of evidence that the predecessor state has retained some international personality is the condition in which governmental and legal organizations concern one portion of the surviving territory. *See LAW OF STATE SUCCESSION, supra* note 19, at 31.

pendent states are not bound by any of the treaties of their predecessor, except for dispositive treaties.⁸⁶ Nevertheless, the new state may choose to assume treaty obligations in return for recognition by other states or for other political considerations.⁸⁷

Political dismemberment involves the destruction of a political state and the formation of several new states within the same territory.⁸⁸ There are varying degrees and differing manners of political dismemberment.⁸⁹ On one end of the spectrum is a dissolution of a union of fairly autonomous states.⁹⁰ The next position is the breakup of a centralized state into the original parts that formed it.⁹¹ At the other end of the spectrum is an integrated state that breaks into its constituent parts and then later into more fragmented portions of those parts.⁹²

The legal community generally does not allow the extinguishment of states without some other entity taking responsibility for the predecessor's actions⁹³ thereby promoting international stability. When a union of fairly autonomous states dissolves, the resulting states continue to abide by treaties the union made because most treaties are compatible with the state of affairs after the dissolution.⁹⁴ If a bilateral treaty ex-

86. MCNAIR, *supra* note 2 at 601; *see also* 2 STATE SUCCESSION, *supra* note 2, at 88.

87. For example, the United States did not succeed to the treaty obligations of Great Britain, but Great Britain kept all of its treaty obligations with other states upon the secession of the United States from its territory. *See* MCNAIR, *supra* note 2 at 601.

88. *Id.* at 591.

89. 2 STATE SUCCESSION, *supra* note 2, at 164.

90. *Id.* An example is the 1829-31 break-up of a union called Colombia into the states of New Granada, Venezuela, and Ecuador. *See id.* at 165-67.

91. Examples of this are the dismemberments of the United Arab Republic and the Federation of Mali. *Id.* at 169-72.

92. MCNAIR, *supra* note 2, at 606. One example is the 1919 breakup of the Austro-Hungarian Empire when the link between the two monarchies split and then each of the two states divided even further into smaller states. Fragmented elements then fused to make Czechoslovakia. Other fragments fused with dismembered elements of other states to form Poland, and part of the territory ceded to the existing states of Romania and Yugoslavia. *See* 2 STATE SUCCESSION, *supra* note 2, at 164, 178-82.

93. *See* 2 STATE SUCCESSION, *supra* note 2, at 4-6.

94. *Id.* at 165. The V.C.S.S. position is in accord with some other historical examples of dissolution of unions such as those of Norway and Sweden. When those states dissolved their union in 1905, both states notified third states that they considered themselves severally bound by the treaties entered into by the union unless the treaty was made specifically to apply to only one of the two lands. LAW OF STATE SUCCESSION, *supra* note 19, at 44-45. The V.C.S.S. position is also in accord with the dissolution of the union of Iceland and Denmark. Upon the dissolution of their union in 1944, Great Britain informed Iceland that it regarded all treaties made "by or on behalf of Iceland"

isted between the union and another state before the dissolution, then there is a rebuttable presumption that after the dissolution the bilateral treaty would remain in effect between all the constituent parts of the union and the third state.⁹⁵ This presumption is rebuttable more easily if "the field of power affected by the treaty was one within the reserved competence of the central government" and was not within the control of the members of the union.⁹⁶

When a centralized state breaks into several parts, the new states must abide by the treaties made during the existence of the union.⁹⁷ The reasoning is as follows:

When a union of two or more [s]tates dissolves so that the several constituent elements become fully sovereign while the central entity disappears the problem is different from that arising from independence or secession, inasmuch as there is no surviving holder of rights and obligations, yet the real beneficiaries of these rights and bearers of the corresponding obligations occupy its place . . . there is a functional devolution in the performance of legal actions from the central to the local authorities.⁹⁸

In the extreme case of an integrated state dissolving into constituent parts that subsequently subdivide even further, the resulting fragmented

during the Union to be still in force. Iceland was in agreement with this position. *Id.* at 45-46.

95. See 2 STATE SUCCESSION, *supra* note 2, at 165. For example, in the case of the dismemberment of the Austro-Hungarian Empire in 1919, Austria continued to be bound by the treaties of the dual monarchy, even though its territory was vastly diminished. *Id.* at 178-79. On the other hand, the new states, such as Czechoslovakia, in spite of being located within a portion of the territory of the old Empire, did not have to fulfill the treaty obligations of the Empire. *Id.* at 179-80. Poland was "reestablished" as a state and was also given a clean slate in the matter of treaties with the option of accepting treaty obligations as the price of recognition by other states. MCNAIR, *supra* note 2, at 604. The Restatement is in accord with this result. See RESTATEMENT, *supra* note 3, § 210.

96. 2 STATE SUCCESSION, *supra* note 2, at 165. This would be a good argument for the individual new states arising from the former Soviet Union to use in the instance that they did not want to adhere to treaties made by the Soviet Government. The republics could argue that the central Soviet government had the power to make treaties and the individual republics did not have a true democratic opportunity to give meaningful input or to stop ratification of treaties made under the Soviet government. One of the few examples of a union dissolution involved New Granada, Venezuela, and Ecuador, which were united from 1819 and 1829 under the name of Colombia. Between 1829 to 1831 the union dissolved, and Great Britain's legal advisors agreed that the three states inherited the treaty obligations of the former union. MCNAIR, *supra* note 2, at 606-07; LAW OF STATE SUCCESSION, *supra* note 19, at 43-44.

97. See 2 STATE SUCCESSION, *supra* note 2, at 169-72.

98. *Id.* at 164-65.

states start with a clean slate. If there is any semblance of the former state that may carry on its legal personality, however, the state presumptively survives and assumes the treaty responsibilities of the predecessor state.⁹⁹

The V.C.S.S. rejects the concept of a continuum of autonomy or amount of international personality different parts of the state enjoyed before the dismemberment which would then dictate policy on treaties.¹⁰⁰ Commentators have stated specifically that this type of differentiation is neither relevant nor necessary.¹⁰¹ Today, every dissolution of a state which results in the emergence of a new state should receive the same treatment regarding the continuance of treaties.

In cases involving independent states joining to form a federation, the individual treaties of the member states will remain in effect.¹⁰² Unless the states agree that one member of the union will make all the treaties for the union or that a centralized authority will preempt all treaties, the individual parties forming the union are free to negotiate the distribution of power and the role of the union structure.¹⁰³

2. The Effect of Decolonization on Personal Treaties

Most examples of recent state succession arise from this century's decolonization movement and the resulting formation of newly independent states. These cases necessarily raise the question of whether newly independent states must abide by the treaties of their colonial predecessors once they have gained independence or whether they will enjoy clean slates. Most newly independent states assert the clean-slate doctrine,¹⁰⁴ but in practice, only one state has ever denounced completely the treaties made by its predecessor state.¹⁰⁵

Many of the former British colonies accepted succession to all treaties

99. *See id.* at 178-79.

100. 3 U.N. CONFERENCE, *supra* note 53, at 94.

101. *Id.*

102. *See generally* MCNAIR, *supra* note 2, at 617-22 (providing examples of unitary states forming unions and the British Government's reaction to the situations).

103. For example, when Denmark and Iceland became a union of states, the agreement of union stipulated that Iceland would accept all of Denmark's foreign affairs agreements and that Denmark would continue to make decisions regarding Iceland's international relations. *Id.* at 620.

104. Schaffer, *supra* note 4, at 624 n. 168. For a discussion arguing that the clean-slate doctrine is the most widely accepted concept in practice, see YILMA MAKONNEN, INTERNATIONAL LAW AND THE NEW STATES OF AFRICA 250, 491 (1983).

105. 2 STATE SUCCESSION, *supra* note 2, at 113. In 1950, Israel took the position that it had succeeded to no British treaties.

administered by the Secretary-General of the United Nations¹⁰⁶ or to all treaties in general¹⁰⁷ upon gaining independence. The newly independent states would often achieve this by entering into a "devolution agreement" whereby they agreed before gaining independence to accept assignment of the treaty rights and obligations of Great Britain.¹⁰⁸

Other newly independent states have sought a middle ground between accepting all or rejecting all obligations and treaties, choosing instead to abide by their predecessors treaties for a set period, after which time the treaties were terminated.¹⁰⁹ Some newly independent states have found

106. These states include Cameroun, Ghana, Guinea, Ivory Coast, Malaya (Malaysia), Niger, Nigeria, Sierra Leone, Jamaica, and Trinidad and Tobago. *Id.* at 114.

107. These states include the Congo and Madagascar. *Id.*

108. CHEN, *supra* note 9, at 21-22; *see also* Schaffer, *supra* note 4, at 593, 597. The V.C.S.S. rejects the notion that a successor state will possess obligations and rights of the predecessor state based solely on a devolution agreement. Article 8 of the V.C.S.S. states: "Notwithstanding the conclusion of such a [devolution] agreement, the effects of a succession of States on treaties which, at the date of that succession of States, were in force in respect of the territory in question are governed by the present Convention." V.C.S.S., *supra* note 2, art. 8, 17 I.L.M. at 1493.

109. This procedure, known as the "Nyerere Doctrine," emerged when the Prime Minister of Tanganyika sent a letter to the Secretary-General of the United Nations declaring that his state would abide by the terms of all treaties of its predecessor, but only for a period of two years, at the end of which the treaties would terminate unless the parties otherwise agreed. 2 STATE SUCCESSION, *supra* note 2, at 116; Schaffer, *supra* note 4, at 602. The text of the letter read as follows:

The Government of Tanganyika is mindful of the desirability of maintaining to the fullest extent compatible with the emergence into full independence of the State of Tanganyika, legal continuity between Tanganyika and the several States with which, through the actions of the United Kingdom, the territory of Tanganyika was prior to independence in treaty relations. Accordingly, the Government of Tanganyika takes the present opportunity of making the following declaration:

As regards bilateral treaties validly concluded by the United Kingdom on behalf of the territory of Tanganyika or validly applied or extended by the former to the territory of the latter, the Government of Tanganyika is willing to continue to apply within its territory, on a basis of reciprocity, the terms of all such treaties for a period of two years from the date of independence (i.e. until December 8, 1963) unless abrogated or modified earlier by mutual consent. At the expiration of that period, the government of Tanganyika will regard such of those treaties which could not by the application of the rules of customary international law be regarded as otherwise surviving, as having terminated.

The Government of Tanganyika is conscious that the above declaration applicable to bilateral treaties cannot with equal facility be applied to multi-lateral treaties. As regards these, therefore, the Government of Tanganyika proposes to review each of them individually and to indicate to the depositary in each case what steps it wishes to take in relation to each such instrument—whether by confirmation of termination or confirmation of succession or accession. During such interim

that taking a middle ground regarding possible treaty obligations gave them an opportunity to form closer diplomatic ties by negotiating treaty rights and obligations on a one-on-one basis.¹¹⁰

The United States has taken a political approach rather than relying on the prior practice of other states. Upon the decolonization of African states, for example, whether or not a devolution agreement or unilateral declaration was in place, the United States endeavored to establish understandings with each of the new states to determine which treaties would remain in force.¹¹¹

F. *Treaties Establishing Membership in International Organizations*

International law governing treaty succession does not apply to treaties concerning membership in international organizations.¹¹² Rather, the constitution and rules of each international organization determine how a state succeeds to membership in the organization.¹¹³ The V.C.S.S. specifically states that the Convention does not apply to treaty sections concerning acquisition of membership.¹¹⁴ As a general rule, international organizations require that successor states apply for membership.¹¹⁵

The practice of the United Nations demonstrates that when two members form a federation, their continued participation in the United Na-

period of review any party to a multi-lateral treaty which has prior to independence been applied or extended to Tanganyika may, on a basis of reciprocity, rely as against Tanganyika on the terms of such treaty.

UNITED NATIONS LEGISLATIVE SERIES, MATERIALS ON THE SUCCESSION OF STATES 177-78 (1967), U.N. Doc. ST/LEG/SER.B/14, *reprinted in* Schaffer, *supra* note 4, at 602-03; *see also* CHEN, *supra* note 9, at 22. The V.C.S.S. rejects the argument that these unilateral declarations alone can create rights and duties for the successor state. V.C.S.S., *supra* note 2, art. 9, 17 I.L.M. at 1493-94.

110. Other newly independent states that have used unilateral declarations similar to the Tanganyika declaration include Uganda, Botswana, Lesotho, Nauru, Kenya, and Malawi. *See* [1969] 2 Y.B. INT'L L. COMM'N 64, U.N. Doc. A/CN.4/214. *See generally* 2 STATE SUCCESSION, *supra* note 2, at 116-22; RESTATEMENT, *supra* note 3, § 210 reporter's note 3.

111. RESTATEMENT, *supra* note 3, § 210 reporter's note 3.

112. V.C.S.S., *supra* note 2, art. 4, 17 I.L.M. at 1491-92.

113. RESTATEMENT, *supra* note 3, § 222 cmt. b.

114. Article 4 of the V.C.S.S. states:

The present Convention applies to the effects of a succession of States in respect of:

(a) any treaty which is the constituent instrument of an international organization without prejudice to the rules concerning acquisition of membership and without prejudice to any other relevant rules of the organization.

V.C.S.S., *supra* note 2, art. 4, 17 I.L.M. at 1491-92.

115. RESTATEMENT, *supra* note 3, § 222 reporter's note 2.

tions does not require special approval, but when a newly independent state or a state arising from dismemberment wishes to join, the General Assembly must approve the application.¹¹⁶ For example, in 1947, when Pakistan became a new state separate from British India, it notified the Secretary-General of the United Nations and requested that the United Nations automatically consider both India and Pakistan as members.¹¹⁷ Alternatively, Pakistan sought to gain formal admission to the organization.¹¹⁸ India inherited the majority of the territory and was viewed as continuing in the original U.N. seat while Pakistan was admitted through formal application proceedings.¹¹⁹ The United Nations General Assembly ruled that, as a general principle, when a new state is created, even one that constitutes part of the territory of a member, that state does not succeed to the right of membership but must apply for admission.¹²⁰ New states must follow formal procedures because

[m]embership of any international organization has as its essence a willingness to co-operate in the furtherance of schemes of international solidarity. Such a willingness cannot be assumed on the part of a new [s]tate whose territory falls within the ambit of these schemes.¹²¹

The General Assembly allowed India to retain its seat, proclaiming that a member state does not cease to be a member simply because its constitution or frontier has undergone changes.¹²²

III. CURRENT PRACTICE: THE UNITED STATES VIEW OF TREATY OBLIGATIONS AFTER DISSOLUTION

In 1991 the Union of Soviet Socialist Republics (U.S.S.R. or Soviet Union) broke into fifteen independent states: the Russian Federation, three Baltic states, and eleven other republics.¹²³ On January 1, 1992, the U.S.S.R. formally ceased to exist and eleven of the fifteen states formed a union known as the Commonwealth of Independent States.

116. UDOKANG, *supra* note 10, at 283-87.

117. *Id.* at 283.

118. *Id.*

119. Edwin D. Williamson, *Remarks at the Proceedings of the 86th Annual Meeting* (Apr. 1-4, 1992), 1992 AM. SOC. INT'L L. 10, 14 [hereinafter Williamson Address]. The U.N. admitted Pakistan through a formal application proceeding and the General Assembly drew up rules to use in similar cases in the future. *Id.*

120. UDOKANG, *supra* note 10, at 287.

121. LAW OF STATE SUCCESSION, *supra* note 19, at 65.

122. See UDOKANG, *supra* note 10, at 287; LAW OF STATE, *supra* note 19, at 6.

123. *Text of Accords by Former Soviet Republics Setting Up a Commonwealth*, N.Y. TIMES, Dec. 23, 1991, at A10 [hereinafter *Text of Accords*].

Councils of the heads of state and the heads of government of the eleven member nations¹²⁴ organized this loose federation which the Baltic states and Georgia chose not to join. The Commonwealth denies being a successor state to the U.S.S.R. and denies being a "super-state structure."¹²⁵ Likewise, Russian President Boris K. Yeltsin claims that the Russian Federation¹²⁶ is not the same state as the former Soviet Union.¹²⁷

Russia is distinguishable from all the other republics because the government of the Russian Federation alone arguably is a successor government to the Soviet Union.¹²⁸ The United States, however, treats Russia and the non-Baltic republics the same regarding most treaty obligations of the Soviet Union. The United States treats the treaty obligations of

124. The member states of the Commonwealth are Armenia, Azerbaijan, Belarus (formerly Byelorussia), Kazakhstan, Kyrgyzstan (formerly Kirghizia), Moldavia, Russia, Tadjikistan, Turkmenistan (formerly Turkmenia), Uzbekistan, and Ukraine. Georgia and the Baltic states of Estonia, Latvia, and Lithuania have not joined the Commonwealth. The governing body includes a "Council of the Heads of State" and a "Council of the Heads of Government." These bodies "shall be set up with a view to tackling matters connected with coordinating the activities of the states of the new commonwealth in the sphere of common interests." *Id.*

125. *Id.* The role of Commonwealth of Independent States in the international arena remains undefined. The text of the commonwealth agreement is somewhat vague, stating that the governing body of the commonwealth "shall be set up with a view to tackling matters connected with coordinating the activities of the states of the new commonwealth in the sphere of common interests." The agreement denies that the commonwealth is a state or a super-state structure. *Id.* The amount of power given to the Commonwealth may change as it appears that the federation is trying to establish itself as a quasi-European Community by opening up the membership to any states and by pledging allegiance to cooperate in forming a common Eurasian market.

The agreement holds that the commonwealth is "open, with the agreement of all its participants, for other states to join" if they "share the goals and principles of the commonwealth." "The allegiance to cooperation in the formation and development of the common economic space, and all-European and Eurasian markets is being confirmed." *Id.*

126. This Note uses the term "Russia" and the phrase "The Russian Federation" interchangeably. In texts concerning the republics' formation of the Commonwealth of Independent States, Russia refers to itself as a republic under the name of the Russian Federation. See *Text of Declaration: 'Mutual Recognition' and 'an Equal Basis'*, N.Y. TIMES, Dec. 22, 1991, at A12 [hereinafter *Text of Declaration*].

On April 17, 1992, the Russian Congress of People's Deputies voted to give "Russia" and "Russian Federation" co-equal status as the state's official name. *Commonwealth News in Brief*, FACTS ON FILE WORLD NEWS DIG., May 28, 1992, at 394 [hereinafter *Commonwealth News*]; Gregory Gransden, *Congress Renames Country Again*, UPI, Apr. 17, 1992, available in LEXIS, Nexis Library, UPF File.

127. See Alison Mitchell, *Yeltsin, on Summit's Stage, Stresses His Russian Identity*, N.Y. TIMES, Feb. 1, 1992, at A5.

128. See *supra* notes 207-18 and accompanying text.

Baltic states differently because the United States views the incorporation of the Baltics by the Soviet Union as an illegal act.¹²⁹

A. *Treaty Responsibilities*

The United States presumes that any agreements¹³⁰ in force between the United States and the Soviet Union at the time of the dissolution remain in effect with respect to all the republics except the Baltic states.¹³¹ In September 1991, United States Secretary of State James A. Baker outlined the conditions under which the United States would recognize new nations.¹³² One condition was the adherence to international obligations:

[W]e will welcome into the community of democratic nations those new political entities who believe in democratic values and follow democratic practices; who safeguard human rights, including equal treatment of minorities; who respect borders and commit to changes only through peaceful and consensual means; and who will adhere to international obligations and to the norms and practices of the Helsinki Final Act and the Charter of Paris.¹³³

In response to this, in the declaration of Alma Ata establishing the Commonwealth of Independent States, Russia and the other Commonwealth republics agreed to be bound by the international obligations of the Soviet Union.¹³⁴

129. See *supra* notes 139-49 and accompanying text.

130. This Note uses the terms "international agreement" and "treaty" interchangeably. International law does not distinguish between treaties and other types of agreements. See RESTATEMENT, *supra* note 3, § 301(1) (defining "international agreement" as used in the Restatement).

131. Williamson Address, *supra* note 119; *Memo to the Honorable Christopher S. Bond from Jonathan E. Stanford*, CONGRESSIONAL RESEARCH SERVICE (Feb. 13, 1992) [hereinafter *Service Memo*]. "[F]or example, . . . aviation and maritime treaties, tax treaties, commerce and navigation treaties, and other such agreements are still in force." *Id.*

132. James A. Baker, *America and the Collapse of the Soviet Empire: What Has To Be Done*, Address at Princeton University (Dec. 12, 1991) in 2 DEP'T. ST. DISPATCH, No. 50 [hereinafter *Baker Address*]. For treaties that the republics have signed with the United States since the time of the break-up, see IGOR I. KAVASS, CURRENT TREATY INDEX (11th ed., Fall 1992).

133. Baker Address, *supra* note 132.

134. *Text of Accords*, *supra* note 123, at A10. The text of the agreement reads, "Member states of the commonwealth guarantee, in accordance with their constitutional procedures, the fulfillment of international obligations stemming from the treaties and agreements of the former U.S.S.R." *Id.*

The agreement mimics all of the Baker requirements and states that the republics are "seeking to build democratic law-governed states" and that they seek to develop a "re-

The United States holds Russia and the non-Baltic republics to all treaties that continue to be relevant, provided that continuation of a given treaty is consistent with its object and purpose.¹³⁵ This is critical with respect to treaties concerning Soviet debt and arms control.¹³⁶

Because it is unclear at this time what agreements are in force, the United States plans to meet with Russia and each republic individually to determine on a case-by-case basis which agreements warrant modification or termination.¹³⁷ Until that time, the United States will operate on the assumption that all treaties remain in force.¹³⁸

The Baltic states—Estonia, Latvia, and Lithuania—receive distinctive treatment for several reasons. First, the Baltics existed as independent states prior to their annexation by the Soviet Union in 1940, an action the United States regarded as illegal and therefore never recognized as a binding incorporation.¹³⁹ The United States continued to recognize the

spect for human rights and freedoms, including the rights of national minorities, a conscientious fulfillment of commitments and other generally recognized principles and standards of international law” and that they will seek “peaceful settlement of disputes.” The republics agree to recognize and respect “each other’s territorial integrity and the inviolability of the existing borders.” *Id.*

In November 1991 eight of the Republics agreed to assume the debt of the Soviet Union if necessary. Those states included Russia, Byelorussia, Moldavia, Armenia, Turkmenia, Tadjikistan, Kazakhstan, and Kirghizia. Francis X. Clines, *8 Soviet Republics Said to Agree to Take on Entire Foreign Debt*, N.Y. TIMES, Nov. 20, 1991, at A12 [hereinafter *8 Soviet Republics*].

135. Telephone interview with Robert Dalton, Assistant Legal Advisor for Treaty Affairs, United States Department of State (Jan. 22, 1993) [hereinafter Dalton Telephone Interview].

For example, the United States Treaty with the Soviet Union describing the maritime boundary between the United States and the U.S.S.R. continues to be applicable to Russia but is not relevant to, and therefore does not bind, republics such as Kazakhstan. *Id.* For text of the “Agreement with the Union of Soviet Socialist Republics on the Maritime Boundary,” see Senate Hearing Doc. 101-22, 29 I.L.M. 942, 942-45 (1990), and for discussion see Senate Hearing Doc. 102-190 and Senate Exec. Rept. 102-13.

Also, the United States continued to hold Russia to the Jackson-Vanik Amendment, which imposes trade penalties on states with centrally planned economies and communist ideology that restrict the free emigration of their citizens, even after the fall of the Soviet Union and its Communist government and after the introduction of a market economy. United States officials urge that the law should be read as no longer applying to Russia. John Helmer, *Russia, U.S. Still Poles Apart on Trade Treaty*, AUSTL. FIN. REV., May 27, 1992, at 12.

136. See Clines, *supra* note 134, at A12; *Service Memo*, *supra* note 131.

137. Williamson Address, *supra* note 119, at 113.

138. *Id.*

139. RESTATEMENT, *supra* note 3, § 202 reporter’s note 6, 210 reporter’s note 7.

The United States supported the doctrine of nonrecognition of forcible seizure of terri-

sovereignty and independence of the Baltic states throughout the Soviet occupation,¹⁴⁰ and the Baltics maintained diplomats in the United States throughout this period.¹⁴¹ Second, the Baltics regained their independence in an act separate from and prior to the later disintegration of the Soviet Union.¹⁴² Finally, the Baltics were interacting in the international arena months before the Soviet Union officially ceased to exist.¹⁴³

tory. At the time of the annexation of the republics, the acting United States Secretary of State Mr. Sumner Welles, announced that nonrecognition would be applied to the process where "the political independence and territorial integrity of the three small Baltic republics . . . were to be deliberately annihilated." Statement by the Acting Secretary of State, Sumner Welles, *reprinted in* 3 DEP'T ST. BULL. 48 (1940); *see also* William J. Hough, III, Note, *The Annexation of the Baltic States and Its Effect on the Development of Law Prohibiting forcible Seizure of Territory*, 6 N.Y.L. SCH. J. INT'L & COMP. L. 301, 391 (1985) (providing a history of the Baltic states and the Soviet invasion).

140. Hough, *supra* note 139, at 408. In 1975, the United States House of Representatives passed a resolution declaring the United States would continue to recognize the independence of the Baltics. *Id.*

141. Telephone Interview with Mr. Martin Lacis of the Latvian Embassy (Feb. 18, 1993) [hereinafter Lacis Telephone Interview]; Telephone Interview with Mr. Lineas Orentas of the Lithuanian Embassy (Feb. 18, 1993) [hereinafter Orentas Telephone Interview]; Telephone Interview with Mr. Okke Metsmaa of the Estonian Embassy (Feb. 18, 1993) [hereinafter Metsmaa Telephone Interview]; Hough, *supra* note 139, apps. V & VI at 498-503 (continuing letters and declaration written by Charge d'Affairs of Lithuania and Latvia and by the Consul General of Estonia in Charge of Legation).

142. Mr. Robert Dalton of the United States Department of State, indicated in a telephone conversation that the United States views the Baltics gaining of their independence as an event separate from the complete dissolution of the Soviet Union. Dalton Telephone Interview, *supra* note 135.

The Baltic republics have distanced themselves from Russia and the other republics by not joining the Commonwealth. *See* Francis X. Clines, *Gorbachev 'Retirement' Is Sought, and Leader Is Ready to Resign*, N.Y. TIMES, Dec. 22, 1991, at A1 [hereinafter *Gorbachev "Retirement"*]; *Georgia Chief Urges Vote on His Role*, N.Y. TIMES, Jan. 6, 1992, at A6. The Baltic states also refused to have Soviet troops in their capitals. *See World-Wide*, WALL ST. J., Jan. 6, 1992, at A1.

143. Alessandra Stanley, *Baltic Countries Are Admitted to U.N. Assembly*, N.Y. TIMES, Sept. 18, 1991, at A8. The United States signed memoranda of understanding concerning diplomatic relations with Estonia on Sept. 4, 1991; Latvia on Sept. 5, 1991, and with Lithuania on Sept. 6, 1991. *See* KAVASS, *supra* note 132, at 169. Memorandum of Understanding Between the United States and Estonia Concerning Diplomatic Relations, Sept. 4, 1991, CONSOLIDATED TREATIES & INTERNATIONAL AGREEMENTS [CTIA] Dos. 91-178, at 513 [hereinafter *Estonian Memorandum*]; Memorandum of Understanding Between the United States and Latvia Concerning Diplomatic Relations, Sept. 5, 1991, CTIA Doc. 91-179, at 517 [hereinafter *Latvian Memorandum*]; and Memorandum of Understanding Between the United States and Lithuania Concerning Diplomatic Relations, Sept. 6, 1991, CTIA Doc. 91-180, at 521 [hereinafter *Lithuanian Memorandum*]. In these memoranda, the parties agreed to exchange ambassadors.

The Baltic republics insist their absorption by the U.S.S.R. was illegal and argue that only those agreements they signed before the 1940 annexation¹⁴⁴ and after gaining independence from the Soviet Union are valid.¹⁴⁵ The United States agrees with the Baltic states' position and does not hold them to the treaty obligations of the Soviet Union.¹⁴⁶ The United States regards treaties between the Baltic states and the United States that predate the incorporation of Estonia, Latvia, and Lithuania into the Soviet Union as continuing in force.¹⁴⁷ As a result, none of the treaty obligations of the Soviet Union are binding on the Baltic states unless they voluntarily choose to be bound.¹⁴⁸ The United States, therefore, will meet with each state to determine which agreements, if any, between the Soviet Union and the United States will apply to relations between the United States and the Baltic states.¹⁴⁹

B. *Obligations with Respect to Arms Treaties and Debt*

The driving force behind United States policy during the Autumn 1991 collapse of the Soviet Union was the United States desire for Russia to maintain control over all of the Soviet Union's nuclear weapons.¹⁵⁰ The conditions under which the United States would recognize new

144. *Service Memo*, *supra* note 132. The Restatement, however, interprets the United States nonrecognition of the annexation as meaning that the United States would not regard Soviet agreements that were effective only within the territory of the U.S.S.R. as binding on the Baltics. However, conventions on human rights and on the law of war, that generally bound the Soviet Union, are regarded as being binding upon the Baltic states. RESTATEMENT, *supra* note 3, § 210 reporter's note 7.

145. Officials at the embassies of all three Baltic states confirmed that their states are not bound by the agreements made by the Soviet Union but that they are all slowly reviewing the multitude of existing treaties that could apply in their states and are signing on to some of them. Laci Telephone Interview, *supra* note 141; Orentas Telephone Interview, *supra* note 141; Metsmaa Telephone Interview, *supra* note 141.

146. Dalton Telephone Interview, *supra* note 135; RESTATEMENT, *supra* note 3, at § 210 reporters' note 7.

147. *Id.* § 202 reporters' note 6.

148. It is assumed that the agreements conferring benefits on the Baltic States will continue in force. Dalton Telephone Interview, *supra* note 135. Nevertheless, "Fatherland," the political party of Estonia's new president, Lennart Meri, advocates ridding Estonia of all vestiges of the Soviet era. Presumably this includes all Soviet treaties. *Briefs: Estonian President See's Larger Role*, RUSSIA & COMMONWEALTH BUS. L. REP., Oct. 16, 1992, vol. 3, No. 12 [hereinafter *Estonian President*].

149. *Estonian President*, *supra* note 148. For treaties that the Baltic have signed with the United States after gaining their independence from the Soviet Union, see KAVASS, *supra* note 132.

150. Andrew Rosenthal, *Arms Issue Drives U.S. Soviet Policy*, N.Y. TIMES, Dec. 12, 1991, at A13.

states emerging from the Soviet Union included adherence to arms agreements.¹⁵¹ Secretary Baker specifically stated to the Commonwealth that all the republics must abide by the arms agreements¹⁵² as negotiated with Soviet President Gorbachev.¹⁵³ The international community echoed this stance when the United Nations Security Council attempted to insure stability in the area of nuclear weapons by passing a resolution which bound Russia to the terms of arms treaties the U.S.S.R. signed.¹⁵⁴ The situation is complicated by the fact that when the Soviet Union dissolved, four republics possessed strategic nuclear weapons in their territory—Russia, Ukraine, Kazakhstan, and Belarus.¹⁵⁵ The United States implored Yeltsin to control the potentially dangerous situation and to influence the Commonwealth to uphold disarmament agreements.¹⁵⁶ Russia responded by agreeing to supervise the disarming process.¹⁵⁷

The State Department maintains that the arms agreements with the Soviet Union remain in effect for the four republics possessing strategic nuclear weapons so long as they continue to possess the weapons.¹⁵⁸ The United States State Department held consultations with the former So-

151. Secretary of State James A. Baker gave an address at Princeton University on December 12, 1991, emphasizing five principles that constitute preconditions for United States recognition of governments. Secretary Baker had initially stated these on September 4, 1991, and continued to emphasize these throughout the fall 1991 course of upheaval occurring in the Soviet Union. Baker Address, *supra* note 132; see *Text of Accords*, *supra* note 123, at A10.

152. Thomas L. Friedman, *U.S. to Delay Post-Soviet Recognition*, N.Y. TIMES, Dec. 20, 1991, at A10.

153. *Id.*; see also *Service Memo*, *supra* note 131.

154. The Security Council passed a resolution on January 31, 1992, emphasizing the need for all member states to fulfill their obligations in relation to arms control and disarmament, to adhere to the nonproliferation treaty, and to ratify and implement all international and regional arms-control arrangements, especially the START and C.F.E. treaties. *Security Council Summit Declaration: 'New Risks for Stability and Security'*, N.Y. TIMES, Feb. 1, 1992, at A4.

155. Steven Erlanger, *Concession on Arms Pact Made by U.S.*, N.Y. TIMES, Jan. 3, 1993, at A8; see *Text of Accords*, *supra* note 123, at A10.

156. *Text of Accords*, *supra* note 123, at A10.

157. The plan is to first move all the nuclear weapons and eventually destroy them. See Francis X. Clines, *Old Leader and New Discuss Transition*, N.Y. TIMES, Dec. 24, 1991, at A8; Elisabeth Rubinfiel, *Minsk Meeting Sets Nuclear Arms Control*, WALL ST. J., Dec. 31, 1991, at A3.

158. *Service Memo*, *supra* note 131. The State Department has been in contact with the republics to discuss new proposals made after formation of the Commonwealth as well as arms-control agreements it had negotiated with the Soviet government. Eric Schmitt, *U.S. Considers Move to Cut Multiple-Warhead Missiles, Core of the Nuclear Force*, N.Y. TIMES, Jan. 23, 1992, at A1, A4.

viet republics near the time of the collapse of the Soviet Union to assure continued compliance with these agreements.¹⁵⁹ The State Department's legal advisor for treaty affairs stated that all the new states will be parties to multilateral agreements such as the Treaty on the Non-Proliferation of Nuclear Weapons (Non-Proliferation Treaty)¹⁶⁰ and that the existing bilateral agreements between the United States and the Soviet Union on military and strategic issues will remain in force as separate bilateral agreements between the United States and each of the relevant former Soviet republics.¹⁶¹

Prior to the United States assertion of its position, in the text of the accord establishing the Commonwealth, the states of the Commonwealth had agreed to adhere to the international agreements of the Soviet Union.¹⁶² Then, in May 1992, Russia, Ukraine, Kazakhstan, and Belarus each agreed to assume the obligations of the former Soviet Union under the Strategic Arms Reduction Talks (START I)¹⁶³ and to effectuate compliance with the Non-Proliferation Treaty as soon as possible.¹⁶⁴ The United States hoped that the republics would sign the Non-Proliferation Treaty¹⁶⁵ quickly to demonstrate their commitment to controlling

159. *Service Memo, supra* note 131.

160. Another State Department source, Reginald Bartholomew, the Under Secretary of State for International Security Affairs, told the Senate Armed Services Committee on February 5, 1992, that Russia would succeed the U.S.S.R. and that the other republics would file separate instruments of accession to the nonproliferation treaty. *Id.*

161. *Id.*

162. *Text of Accords, supra* note 123; see also *Agreements Establishing the Commonwealth of Independent States*, U.N. Doc. A/46/771 (1991), *reprinted in* 31 I.L.M. 138 (1992) [hereinafter *Agreements Establishing the Commonwealth*].

163. The treaty is also known as "START I" or the "Reduction and Limitation of Strategic Offensive Arms Treaty." For protocol to the START I treaty, see *Arms Accord Recognizes New World*, N.Y. TIMES, May 24, 1992, at A13. Under the terms of START I, the republics would transfer most of the nuclear weapons to Russia over the next seven years and remove the remaining weapons under the Non-Proliferation Treaty. Celestine Bohlen, *Ukraine, Stumbling Block at End of Nuclear Race*, N.Y. TIMES, Jan. 1, 1993, at A5.

164. To comply with the Non-Proliferation Treaty's limit on the number of nuclear weapon-states, Russia will succeed the Soviet Union as the "nuclear-weapons state" and the other states will become "nonnuclear-weapons states." Under the Non-Proliferation Treaty, the number of nuclear-weapons states is limited. See John B. Rhinelander, *Remarks at the Proceedings of the 86th Annual Meeting* (Apr. 1-4, 1992), 1992 AM. SOC. INT'L L. 7.

165. See *Russia Ratifies Nuclear Arms Pact with U.S.*, N.Y. TIMES, Nov. 5, 1992, at A8. Arguably, succession to the Non-Proliferation Treaty differs from the rules for succession to other treaties due to its limitation of the number of states that can possess nuclear weapons.

the threat of nuclear military force,¹⁶⁶ but momentum slowed during 1992. As of April 1993 Russia and the United States had ratified START I and the Non-Proliferation Treaty,¹⁶⁷ while the parliaments of the other two republics had yet to formally approve the two treaties.¹⁶⁸ Until this occurs, the more recent START II treaty, which calls for even further cuts in nuclear warheads, will not come into effect even if the legislatures in Moscow and Washington ratify it.¹⁶⁹

With respect to debt, the United States maintains that the republics are jointly and severally liable for the former Soviet Union's debt obligations.¹⁷⁰ The question remains as to how the republics will pay these debts. In October 1991 the twelve remaining Soviet republics signed a tentative agreement to accept joint and several liability for the debt and to pay it off in proportion to the sizes of their economies.¹⁷¹ One month later, Russia made an agreement with seven republics to assume the entire foreign debt of the Soviet Union if necessary.¹⁷² In December 1991 Russia went one step further and agreed to finance the Soviet payroll and to guarantee Soviet bank credits.¹⁷³ The United States does not want Russia to take full responsibility for the debt,¹⁷⁴ and other Western offi-

166. Belarus and the Ukraine had already agreed to join the Non-Proliferation Treaty through their signature on the agreement establishing the Commonwealth. *Text of Accords*, *supra* note 123.

167. Bohlen, *supra* note 163, at A5.

168. *Id.*; Sid Balman, Jr., *Nuclear Agreement May Be Pointless*, UPI, Dec. 30, 1992, available in LEXIS, Nexis Library, UPI file; Stephanie Nebehay, *U.N. Chief Calls for Nuclear Test Ban*, REUTERS LIBR. REP., Jan. 19, 1993. The Ukraine has been the most vocal in its reluctance to turn over to Russia the nuclear weapons in its possession. Ukraine is the third largest nuclear power after the United States and Russia and views the maintenance of nuclear weapons as the best guarantee against Russian aggression. Ukraine regards Russia as its only potential enemy. Serge Schmemmann, *Bush and Yeltsin Sign Pact Making Deep Missile Cuts*, N.Y. TIMES, Jan. 4, 1993 at A6 [hereinafter *Bush and Yeltsin*]; Steven Erlanger, *Yeltsin Offers Guarantees if Kiev Backs Arms Pact*, N.Y. TIMES, Jan. 16, 1993, at A3 [hereinafter *Yeltsin Offers*].

Ukraine is informally using ratification of START I as a bargaining chip in hopes of receiving guarantees of security, monetary compensation, and environmental assistance with disposal of the weapons. *Id.*

169. *Yeltsin Offers*, *supra* note 168, at A3; *Bush and Yeltsin*, *supra* note 168, at A1.

170. Williamson Address, *supra* note 119, at 15.

171. See Keith Bradsher, *Russia Balking at Liability for the Entire Former Soviet Debt*, N.Y. TIMES, Sept. 22, 1992, at A17 [hereinafter *Russia Balking*]. The republics agreed, for example, that if "even all but one republic stopped making payments, the remaining republic would be liable for the entire debt." *Id.*

172. *Id.*; *8 Soviet Republics*, *supra* note 134, at A1.

173. See *8 Soviet Republics*, *supra* note 134, at A1; *Service Memo*, *supra* note 119.

174. *Russia Balking*, *supra* note 171, at A17.

cials have been trying to pressure the other republics into taking some responsibility for the payment of the debt.¹⁷⁶ The United States is trying to promote the theory that the republics succeeded to the debts of the former Soviet Union collectively and an equitable portion of the debt should pass to each republic.¹⁷⁶ The ultimate allocation of the debt will depend upon what is found to be equitable by Russia and the other republics.¹⁷⁷

The United States will negotiate separately with the Baltics concerning any debt obligations that they may have inherited from the former Soviet Union.¹⁷⁸ All three Baltic states disclaim any responsibility for the debts of the former Soviet Union.¹⁷⁹ The Baltic states' Embassy officials

175. See Keith Bradsher, *Talks on Rescheduling Moscow's Debt Pit U.S. and Russia Against Germany*, N.Y. TIMES, Sept. 21, 1992, at A9 [hereinafter *Talks on Rescheduling*].

176. Williamson Address, *supra* note 119, at 15.

177. Russia and the other republics may negotiate to shift the entire debt burden to Russia. Russia has already agreed to repay Ukraine's share of the debt in exchange for Ukraine's claims to assets held by Russia, such as ownership in overseas embassies. Russia may make similar agreements with the remaining republics. Louis Uchitelle, *New Man, Old Burden: Moscow Owes \$86 Billion*, N.Y. TIMES, Dec. 16, 1992, at A14. Because equity does not allow the United States to draw up a specific allocation scheme, the United States can only encourage the republics to reach agreements among themselves. *Id.*

178. In each of the documents establishing full diplomatic ties with the United States, the Baltic states agreed that each would enter into negotiations with the United States to settle promptly any unresolved financial or property matters. The United States has agreed with each Baltic state that representatives of the states would meet to review the status of their treaty relations. See Estonian Memorandum, *supra* note 143, at 513; Latvian Memorandum, *supra* note 143, at 517; Lithuanian Memorandum, *supra* note 143, at 521. In November 1991 eight of the republics agreed that they would take the entire foreign debt of the Soviet Union if necessary. The Baltics states did not join in this agreement and are pursuing debt issues separately from the rest of the republics in attempts to garner their own place in the global economy. 8 *Soviet Republics*, *supra* note 134, at A1.

The United States general view on the subject is that when there is a succession of states, unless the predecessor and successor states have made an agreement as to the public debt of the predecessor, the responsibility for the debt remains with the predecessor. When part of a state becomes a separate state, however, the local public debt passes to the new territory. RESTATEMENT, *supra* note 3, § 209(2)(a), (c); see also V.C.S.S.P., *supra* note 65.

179. A Lithuanian embassy official indicated that his state has no responsibility for the debt obligations of the former Soviet Union due to the illegality of the annexation. Orentas Telephone Interview, *supra* note 141.

An Latvian embassy official explained that the issue of whether Latvia must assume any of the former Soviet Union's debts is not completely settled between Russia and Latvia, although Russia orally agreed that Latvia is not responsible for any debt. In all

indicated that Russia has agreed with the Baltic states to take full responsibility for the debt, and any negotiation to distribute the debt will be between Russia and the other republics.¹⁸⁰

C. *Membership in the United Nations and Other International Organizations*

Succession to membership in international organizations differs from succession to other types of international agreements because international organizations have their own governing procedures which take into account changes in territory or government.¹⁸¹ One example is Russia's assumption of the U.S.S.R.'s seat in both the General Assembly and in the Security Council.¹⁸² Russia accomplished this quite easily—Russian President Yeltsin simply wrote a letter to the U.N. Secretary General notifying him that Russia would take over the Soviet Union's seat and its other rights and obligations.¹⁸³ The Commonwealth's agreement that Russia should replace the U.S.S.R. in the U.N. and in other international organizations facilitated Russia's assumption of the Soviet Union's position.¹⁸⁴

probability, Russia will not require payment from Latvia in exchange for Latvia's promise not to seek repayment of foreign currency holdings of Latvia industries that the bank in Moscow seized when Latvia declared its independence from the Soviet Union. Lacis Telephone Interview, *supra* note 141.

An Estonian embassy official explained that Estonia denies being responsible for any debt of the Soviet Union because Estonia has not taken any assets of the former Soviet Union and Estonia will only accept liabilities if it receives some assets. Metsmaa Telephone Interview, *supra* note 141.

180. *Id.*

181. See Williamson Address, *supra* note 119, at 13.

182. *Soviet U.N. Seat Taken by Russia*, N.Y. TIMES, Dec. 25, 1991, at A6 [hereinafter *Soviet U.N. Seat*]. Russia, upon taking the seat of the U.S.S.R. in the United Nations, automatically assumed the Soviet Union's debt owed to the United Nations. See Paul Lewis, *U.N.'s Fund Crisis Worsens as Role in Security Rises*, N.Y. TIMES, Jan. 27, 1992, at A1; Paul Lewis, *With U.S. the Biggest Debtor, President Finds U.N. Skeptical*, N.Y. TIMES, Sept. 22, 1992, at A14 [hereinafter *U.S. the Biggest Debtor*].

183. Former Soviet Representative Yuri M. Vorontsov has become the Russian Federation's United Nations representative. Vorontsov said that Russia could automatically assume this power and there would be no further decisions of any U.N. body required for Russia to take the position. *Soviet U.N. Seat*, *supra* note 182, at A6.

184. The text of the agreement establishing the Commonwealth stated, "[m]ember states of the commonwealth support Russia in taking over the U.S.S.R. membership in the United Nations including permanent membership in the Security Council and other international organizations." *Text of Accords*, *supra* note 123.

Since becoming the successor member to the Soviet Union at the United Nations, Russia has exercised its position by attending a summit of the heads of government of the

The United States and the other permanent members of the United Nations Security Council welcomed Russia's assumption of the former Soviet Union's seat on the Security Council.¹⁸⁵ The United States concluded that Russia should occupy the Soviet seat in the Security Council because it constituted the dominant part of the former Soviet Union in geographic size, population, resources, and military strength.¹⁸⁶ Moreover, Russia is armed with nuclear weapons and a preeminent military force—attributes that warranted permanent member status in the first place.¹⁸⁷ France, the United Kingdom, and the United States may not have wanted to discuss the composition of the Security Council and were pleased that Russia was willing to assume a leadership position.¹⁸⁸ There have been suggestions recently that, considering the world's current balance of power, the U.N. should reevaluate the Security Council's membership.¹⁸⁹ Given the circumstances, these states may have attempted to avoid determining whether Russia was truly a successor government or if the U.S.S.R. had truly ended its legal existence.

Russia inherited the Soviet Union's seat in the Conference on Security and Cooperation in Europe, a non-U.N. organization without any formal procedure.¹⁹⁰ This ease of transition illustrates the international community's view of Russia as a successor government.¹⁹¹

Unlike Russia, the republics can gain membership in international organizations only by individual application. The Commonwealth Repub-

members of the Security Council and by signing agreements deposited with the United Nations. See Robert D. McFadden, *Bush and Yeltsin to Meet After U.N. Parley*, N.Y. TIMES, Jan. 31, 1992, at A1.

See Supplement to U.N. Doc ST.LEG/SER.E/10, XXVII.2(b) for the Russian Federation Acceptance on January 13, 1992, of the Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer.

185. Paul Lewis, *3 Western Powers Favor Russian Takeover of Soviet U.N. Seat*, N.Y. TIMES, Dec. 24, 1992, at A8 [hereinafter *3 Western Powers*].

186. Williamson Address, *supra* note 119, at 14.

187. *3 Western Powers*, *supra* note 185, at A8.

188. See *id.*

189. Japan and Germany each have expressed a desire to acquire a position on the Security Council due to their economic strengths. Some critics, however, suggest that with the unification of Europe only one seat should go to the European Community. *Id.*

190. Thomas L. Friedman, *10 Ex-Soviet Republics Gain Wider Recognition*, N.Y. TIMES, Jan. 31, 1992, at A6. Russia demonstrated its succession to the Soviet Union's seat in the Conference on Security and Cooperation in Europe by attending a meeting of the Security Council in January 1992. *Id.* Russia assumed the seat held by the Soviet Union. Agreements Establishing the Commonwealth, *supra* note 162, 31 I.L.M. at 138; see also *Commonwealth News*, *supra* note 126.

191. See *infra* part IV.C.

lics have gained membership in the U.N.¹⁹² and in other organizations such as the Conference on Security and Cooperation in Europe.¹⁹³

The Baltic states each applied for and received admission to the United Nations and the Conference on Security and Cooperation in Europe.¹⁹⁴ Within four months of their admission, the three Baltic states acceded to, accepted, or signed more than forty treaties, protocols, and conventions.¹⁹⁵ This suggests that from the perspective of the international organizations, these states have not inherited any standing by virtue of the past membership of the Soviet Union and are only now establishing themselves as legal entities.

The status of Belarus¹⁹⁶ and the Ukraine within the U.N. differs from that of the other republics because they were participants in the Conference of San Francisco which resulted in the creation of the United Nations, and they have always held their own seats in the General Assembly.¹⁹⁷ As a result, the two republics have been able to join U.N.

192. Alessandra Stanley, *Baltic Countries are Admitted to U.N. Assembly*, N.Y. TIMES, Sept. 18, 1991, at A8. In the commonwealth agreement, Byelorussia (now known as Belarus) and the Ukraine agreed to help the other commonwealth members gain full membership in the U.N. *Text of Accords, supra* note 123. The Agreement reads: "The Republic of Byelorussia, the Russian Federation and Ukraine will help other member states of the commonwealth settle problems connected with their full membership in the U.N. and other international organizations." *Id.*

193. Ten states, apart from the Russian republic, which inherited its membership from the Soviet Union, belong to the group. Georgia is the only remaining republic (other than the Baltic states) that has not obtained admission. The induction indicated the republics' formal acceptance as independent states in the European family of nations. (The Helsinki Final Act is the group's charter document that established principles on human rights.) Friedman, *supra* note 190, at A6.

The republics and Russia recently individually became members of the International Monetary Fund. The Soviet Union was not a member of that organization. Steven Greenhouse, *Lending Agencies Admit Ex-Soviets as Full Members*, N.Y. TIMES, April 28, 1992, at A1.

194. Stanley, *supra* note 143, at A8; Friedman, *supra* note 190, at A6. On September 17, 1991, the three Baltic states were admitted as new members to the U.N. General Assembly. See *Agreements Establishing the Commonwealth, supra* note 162, at 138. The Baltic states were admitted to the Conference on Security and Cooperation in Europe on September 10, 1991. *Id.*

195. For example, see the Supplement to U.N. Doc. ST/LEG/SER.E/9 as of December 31, 1991, for a list of the actions Estonia, Latvia, and Lithuania have taken.

196. Formerly known as Byelorussia.

197. Henn-Jüri Uibopuu, *International Legal Personality of Union Republics of U.S.S.R.*, 24 INT'L & COMP. L.Q. 811, 833 (1975).

The text of the accord establishing the Commonwealth of Independent States acknowledges that the two republics were members of the United Nations and expressed satisfaction that the two republics would continue to be members as "sovereign independent

organizations and have ratified or acceded to many conventions over the years; however, neither of the republics ever became a party to a treaty without the Soviet Union also becoming a party.¹⁹⁸ The two states have kept their seats in the organization and are continuing parties to agreements already signed through the United Nations.¹⁹⁹

IV. IS UNITED STATES POLICY CONSISTENT WITH INTERNATIONAL LAW?

A. *Treaty Responsibilities*

Whether or not the Soviet Union continues to exist in the personality of the Russian Federation, binding Russia to the international agreements agreed to by the former Soviet Union is consistent with international law as expressed in the V.C.S.S.²⁰⁰ Russia is bound by the former Soviet Union's treaties if enforcing the treaty would continue to be compatible with the purpose of the treaty²⁰¹ and if enforcement of the treaty would not radically change the conditions for its operation.²⁰²

For analysis under the Restatement, it is important to determine whether the Soviet state continued to exist after the dismemberment. If a state continues to exist, the capacities and duties of this state endure, regardless of any change in name or ideology.²⁰³ If there has been com-

states." This language implies that they were not free to make their own decisions in the United Nations before this time. *Text of Accords, supra* note 123.

198. Uibopuu, *supra* note 197, at 835. The republics were seen as pawns of the Kremlin and are just now becoming truly independent. *It's 'Soviet Mission,' Until Someone Calls*, N.Y. TIMES, Dec. 10, 1991, at A18; 3 *Western Powers, supra* note 185, at A8.

The Ukrainian and Byelorussian Soviet Socialist Republics were parties to WHO, UNICEF, and UNESCO as well as other international organizations. For a complete listing see Uibopuu, *supra* note 197, at 833.

199. Telephone Interview with Ms. Ann Reichel, Treaty Section, United Nations, Jan. 28, 1993 [hereinafter Reichel Telephone Interview]. Ukraine signed the Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution Concerning the Control of Emissions of Volatile Organic Compounds or Their Transboundary Fluxes on November 19, 1991. See Supplement to U.N.Doc. ST/LEG/SER.E/9, *supra* note 184.

For membership in international organizations other than the United Nations, Ukraine and Belarus will have to be admitted formally.

200. See V.C.S.S., *supra* note 2, arts. 34-35, 17 I.L.M. at 1509.

201. *Id.*

202. *Id.* art. 34, para. 2(b), 17 I.L.M. at 1509.

203. RESTATEMENT, *supra* note 3, § 208 cmt. a states that the rights and duties of a state "are not affected by a mere change in the regime or in the form of government or its ideology." *Id.*

plete dissolution of the Soviet Union and replacement by a number of independent states, none of which have the same legal personality as the Soviet Union, then Russia receives the same treatment as the other republics and is not bound by any international agreements of the Soviet Union.²⁰⁴

The United States takes the position of universal succession: upon the change in government, the Russian Federation's government replaced the government of the Soviet Union.²⁰⁵ A United States government policy writer recently articulated this position as follows:

The general presumption under international law is that the international agreements between two countries will remain in effect (unless revoked by successor governments) despite changes of regime or boundaries. The Soviet Union sometimes argued that agreements made by the Czarist regime were not binding on the U.S.S.R. The United States held, however, that prior agreements (including many dating from the nineteenth century) were still in force. In practice, the Soviets complied with this view.²⁰⁶

Russia has assumed the role of a successive government to the former Soviet government rather than that of a successor to a state that no longer exists.²⁰⁷ Although the Commonwealth states declared that the Soviet Union no longer exists as an entity under international law²⁰⁸ and

204. *Id.* § 208 cmts. a, b, and § 210(3).

205. *Service Memo*, *supra* note 131.

206. *Id.*

207. Evidence of this is the United States practice of working with whomever seemed to be in power. As of December 10, 1991, it was Gorbachev, and by December 12, it was Yeltsin. Thomas L. Friedman, *Gorbachev Rejects Move to Discard Kremlin Role; U.S. Keeps Link to Moscow*, N.Y. TIMES, Dec. 10, 1991, at A1; Rosenthal, *supra* note 150, at A13; *World-Wide*, *supra* note 142, at A1.

The United States treated Yeltsin as a successor leader who was inheriting the same power that Gorbachev had by keeping close ties and negotiations throughout the time of transition. See Patrick E. Tyler, *Yeltsin Asks Bush to Grant Russians Recognition by U.S.*, N.Y. TIMES, Dec. 24, 1991, at A1.

208. On December 8, 1991, in Byelorussia, the leaders of Russia, Ukraine, and Byelorussia made a declaration that "that the U.S.S.R., as a subject of international law and a geopolitical reality, is ceasing its existence." *Texts of Declarations by 3 Republic Leaders*, N.Y. Times, Dec. 9, 1991, at A8. For the full text of the agreement signed, see *Accord on Commonwealth of Independent States*, N.Y. TIMES, Dec. 10, 1991, at A19. See also Serge Schmemmann, *Declaring Death of Soviet Union, Russia and 2 Republics Form New Commonwealth*, N.Y. TIMES, Dec. 9, 1991, at A1.

The agreement forming the Commonwealth of Independent States included the phrase, "With the formation of the Commonwealth of Independent States, the Union of Soviet Socialist Republics ceases to exist." *Text of Declaration*, *supra* note 126, at A12.

Yeltsin portrayed himself as a man from a state other than the Soviet Union,²⁰⁹ what has taken place in effect is merely a change in name and a passage of power, status, and government structure from what was left of Gorbachev's Soviet Union to Yeltsin's Russian Federation.²¹⁰ As each of the Soviet republics declared their independence from Moscow, the central authority and government with superpower status remained in Moscow, which is located in the Russian Republic.²¹¹ Once it became apparent that each of the republics would achieve independent status, Yeltsin, as President of the Russian Republic, took control of the Kremlin's central organization in order to establish himself as the leader, to gain the support of the international community,²¹² and to secure the international legal standing of the Soviet Union for Russia.²¹³ After as-

209. Alison Mitchell, *supra* note 127, at A5. According to a Latvian embassy official, Russian officials alternatively portray Russia as a new state or as the same legal entity as the Soviet Union depending upon whether Russia chooses to take responsibility for problems and obligations of the former Soviet Union in particular circumstances. Lacin Telephone Interview, *supra* note 141. Russia has apparently seized all overseas assets of the Soviet Union, such as their embassies, without any offer to equitably distribute the assets with the other republics. *Id.*; Orentas Telephone Interview, *supra* note 141.

210. Within minutes of Mikhail Gorbachev's resignation as Soviet President on December 25, 1991, Russia symbolically took the power and responsibilities of the U.S.S.R. when the briefcase containing the "button" that could be used to launch the former Soviet Union's nuclear weapons was handed over to Russian President Boris Yeltsin and the red flag with the hammer and sickle was lowered over the Kremlin and replaced by the Russian flag. Practically, Russia took over what was left of the Soviet Union's superpower status. Elisabeth Rubinfiem, *Gorbachev Resigns as Soviet President with Dignity, Defiance and Warnings*, WALL. ST. J., Dec. 26, 1991, at A3 [hereinafter *Gorbachev Resigns*]. The European community has acknowledged Russia is the legal successor to the Soviet Union. Steven Greenhouse, *Europeans Act on Russia*, N.Y. TIMES, Dec. 24, 1991, at A8.

211. Once Yeltsin assumed power, his central authority and control has not shifted out of Moscow. For a discussion of the transition of power from Gorbachev to Yeltsin, see *Gorbachev Resigns*, *supra* note 210, at A3.

212. United States Secretary of State James A. Baker expressed concern for the possibility of the use of nuclear weapons in a divided country, but seemed reassured that there was much greater stability present in the Soviet Union as compared to Yugoslavia because "[t]he area is much larger, and we have government here and there is mutual agreement among them to go their separate ways, which you don't have in Yugoslavia." This reference to government referred to the control that both Gorbachev and Yeltsin were keeping over the situation. Keith Bradsher, *Noting Soviet Eclipse, Baker Sees Arms Risks*, N.Y. TIMES, Dec. 9, 1991, at A8 [hereinafter *Noting Soviet Eclipse*].

213. As early as December 1, 1991, Yeltsin took control of the Kremlin's finances by agreeing with Gorbachev that the Russian Republic would finance the Soviet payroll and guarantee Soviet state bank credits. See Serge Schmemmann, *The Soviet Shell; Yeltsin's Assumption of National Finances Suggests an End to the Kremlin's Authority*, N.Y.

suming control over the state,²¹⁴ he abolished some of the state structures of the Soviet Union,²¹⁵ declared support for a different form of government based on democratic principles, and formed a new but loose union with the states which had just seceded from the former union.²¹⁶ In effect, Yeltsin simply seized the power remaining in Moscow and changed the form of government.²¹⁷ The international community has accepted the Russian Federation as the legal successor to the government and power of the Soviet Union.²¹⁸

Since the break-up has consisted of the dismemberment of a state and a succession of governments with the predecessor state continuing to ex-

TIMES, Dec. 2, 1991, at A1.

The week before the Commonwealth of Independent States was formed, Yeltsin said Russia would take over the Kremlin complex of government buildings and signed a series of decrees to take control over the central agencies of the Soviet Union. Yeltsin signed a decree absorbing the Soviet Foreign Ministry into the Russian Foreign Ministry, taking charge of its property and forcing the resignation of Soviet Foreign Minister Eduard A. Shevardnadze. Other decrees ordered most remaining organs be placed under the Russian government including: the Interior Ministry; Gorbachev's presidential apparatus; the K.G.B. and its recent offshoot, the Soviet foreign intelligence service. Yeltsin also appointed a Russian representative to the European Community in Brussels and, reportedly, the Russian flag was flying over the Soviet Embassy in India. Serge Schmemmann, *Broad Turnout for Republics' Summit*, N.Y. TIMES, Dec. 21, 1991, at A5; Elizabeth Rubinfiien, *Gorbachev Slogs on as Political Future Dwindles to What May be a Few Days*, WALL ST. J., Dec. 20, 1991, at A6.

214. As early as the day after the first declaration made by the Commonwealth on Dec. 12, 1991, news analysts were interpreting Yeltsin's maneuvers as effectively taking over the Soviet Government and that in most matters, Russia was the Soviet Union. Celestine Bohlen, *The Union is Buried: What's Being Born?*, N.Y. TIMES, Dec. 9, 1991, at A1.

215. Yeltsin and Gorbachev met and decided that some of the government agencies such as the state bank would come under Russian control while others would be abolished. Elisabeth Rubinfiien, *Gorbachev Agrees to Cede Soviet Structures to Russia*, WALL ST. J., Dec. 18, 1991, at A3.

216. The text of the declaration made in Alma Ata, Kazakhstan, by the new Commonwealth of Independent States declared that the republics were "[s]eeking to build democratic law-governed states" that will have "respect of state sovereignty and sovereign equality." *Text of Declaration*, *supra* note 126, at A12.

217. United States Secretary of State James A. Baker observed after the first declaration of the republics that the Soviet Union was changing in form but the center of control remained. *Noting Soviet Eclipse*, *supra* note 212, at A8.

218. On December 24, 1991, the Russian republic notified the U.N. that it was going to take over the Soviet Union's seat in the Security Council and all of its other rights and obligations in the organization, and by February, Yeltsin was at the first meeting of the heads of government of the Security Council members. *Soviet U.N. Seat*, *supra* note 182, at A6; Paul Lewis, *Secretary General Asked to Make Proposals on Averting Wars*, N.Y. TIMES, Feb. 1, 1992, at A1.

ist, the traditional view of succession of states in the V.C.C.S.²¹⁹ and the Restatement²²⁰ indicate that Russia should continue to be bound by all treaties the Soviet government signed unless a fundamental change of circumstances has made the agreement inapplicable,²²¹ and, therefore, the United States policy is consistent with international law.

There is no overriding consensus under international law as to whether the non-Russian republics should be bound by the former Soviet Union's treaties. The United States practice of arguing that treaties are binding upon the republics is inconsistent with the Restatement which calls for new states to receive a clean slate²²² and have the option to become party to the international agreements.²²³ Current practice is also inconsistent with customary practice. Relying on international law as evidenced through custom, the fourteen non-Russian republics should not be bound by the Soviet Union's personal treaties.²²⁴ Their only obligations should arise out of dispositive treaties, such as arms control treaties, and by their own election to be bound.

Conversely, under the provisions of the V.C.S.S., the new states would continue to be bound by the Soviet Union's treaties if a treaty was in force for that part of the territory at the time of succession, unless the states agreed otherwise, or if the treaty was incompatible with the object of the treaty, or if conditions for the operation of the treaty changed radically.²²⁵

219. V.C.S.S., *supra* note 2, art. 35, 17 I.L.M. at 1509.

220. Russia is bound by the rights and obligations of the Soviet Union because there has been a succession of government. RESTATEMENT, *supra* note 3, § 208 reporters' note 2.

The Soviet Union challenged the distinction between succession of governments and succession of states after the October Revolution of 1917. The new government argued that it was a new state and was not bound by the obligations of Czarist Russia, including its debt. The United States held that the prior agreements were still in force and the Soviets complied with this view. *Id.*; *Service Memo, supra* note 131.

221. See *supra* text accompanying notes 203-04 (discussing the difference between successive states and successive governments); see also HENKIN ET AL., *supra* note 1, at 490.

222. RESTATEMENT, *supra* note 3, § 210(3).

223. Section 210(3) of the Restatement states:

When part of a state becomes a new state, the new state does not succeed to the international agreements to which the predecessor state was party, unless, expressly or by implication, it accepts such agreements and the other party or parties thereto agree or acquiesce.

Id. With multilateral conventions, notice is sent to the depositary and the consent of the other parties is presumed. *Id.* cmt. g.

224. See *supra* notes 86, 91-92, 96-99 and accompanying text.

225. This does not apply if:

The analysis of whether the Baltic states should be treated the same as the other non-Russian republics regarding international obligations hinges on the legal status of these states. Assuming the former Soviet rule over the Baltics was legal, the analysis that determined the obligations of the non-Baltic republics applies. Conversely, if the Soviet Union exercised illegal control of the Baltics, then the states should not be bound by actions taken by the Soviet Union.²²⁶

The United States disregards the time during which the Baltics were a part of the Soviet Union. Consequently, the United States disregards Soviet actions which would otherwise have created international obligations for the Baltics.²²⁷ Assuming illegal occupation, it is consistent with international law to bind the Baltic states to agreements made by the Soviet Union.²²⁸

B. *Obligations With Respect to Arms Treaties and Debt*

International arms control agreements and public debts arguably are dispositive agreements that attach to the territory, and their obligations therefore remain regardless of changes in the ruling power over that territory.²²⁹ Both the V.C.S.S. and the Restatement find dispositive treaties binding regardless of what party is in power. The Restatement states that "territorial agreements" continue to be binding regardless of rules governing state succession to other types of international agreements.²³⁰ The V.C.S.S. makes similar reference to obligations relating to the use of territory that will benefit other states or all states.²³¹ Therefore, the United States position that all of the states of the former Soviet Union are bound by arms agreements is in accordance with international law of dispositive treaties.

(a) the States concerned otherwise agree; or

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

V.C.S.S., *supra* note 2, art. 34, 17 I.L.M. at 1509.

226. RESTATEMENT, *supra* note 3, § 210 reporter's note 7.

227. The Baltics get a clean slate by the United States. *See supra* notes 139-49 and accompanying text. Prior to the Baltic states' independence from the Soviet Union, the United States maintained diplomatic relations with each of them. RESTATEMENT, *supra* note 3, § 202 reporter's note 6.

228. RESTATEMENT, *supra* note 3, § 210 reporter's note 7.

229. *See supra* notes 19-26 and accompanying text.

230. RESTATEMENT, *supra* note 3, § 210(4).

231. *See supra* notes 62-63 and accompanying text; V.C.S.S., *supra* note 2, art. 12, para. 2(a), 17 I.L.M. at 1494-95.

Under the Restatement, the new states may inherit any local public debt of the Soviet Union if it owed that debt to another state, to an international organization, or to private foreign sources.²³² Generally, a state that incurs a public debt retains responsibility for it as long as that state continues to exist.²³³ If so much territory is lost through fragmentation that enforcement of the entire debt against the remaining state would be unfair, the debt should be apportioned among the remaining state and the new states that have come into existence on the territory of the former state.²³⁴

Under the V.C.S.S.P.,²³⁵ Russia and the new republics must agree to some type of equitable distribution of the public debt of the former Soviet Union, taking into account whether the republics are being given any property rights of interests associated with the debt.²³⁶

The United States takes the position that the republics should divide the debt of the former Soviet Union equitably²³⁷ although only Russia and seven other republics agreed to shoulder the foreign debt.²³⁸ The agreement on debt repayment, signed one month before the official dissolution of the Soviet Union, calls for the republics to be jointly and severally liable.²³⁹ Every republic except Russia recently stopped making payments, so now Russia is being held liable for the entire debt.²⁴⁰ Debt negotiations with the Western states focus on Russia due to its willingness to work toward payment of the Soviet Union's debt, but other industrialized states are pressuring the other republics to help.²⁴¹ Ukraine acknowledged its debt and reached an agreement with Russia to release its claims to Soviet assets in exchange for Russia's assumption of the Ukraine's portion of the Soviet debt.²⁴²

The United States position is that equitable distribution of the Soviet Union's debt is consistent with the available evidences of international

232. RESTATEMENT, *supra* note 3, § 209(2)(c) cmt. b.

233. *Id.* § 209 cmt. e.

234. *Id.* § 209 reporter's note 6. This occurred with the dismemberment of the Austro-Hungarian Empire. See V.C.S.S.P., *supra* note 65.

235. *Id.*

236. *Id.* arts. 40(1), 41, 22 I.L.M. at 324.

237. Williamson Address, *supra* note 119.

238. 8 *Soviet Republics*, *supra* note 134, at A1.

239. *Id.*

240. *Russia Balking*, *supra* note 171, at A17.

241. *Talks on Rescheduling*, *supra* note 175, at A9.

242. Uchitelle, *supra* note 177. It is currently unclear if the Baltic States will be held responsible for any of the foreign debt of the Soviet Union. See *supra* notes 178-80 and accompanying text.

law. Because Russia inherited the vast portion of the Soviet Union, Russia will be held responsible for the largest portion of the debt. The other republics may negotiate to exchange their debt responsibility for relinquishment of claims they have against Soviet property.²⁴³

It appears that the United States does not seek partial repayment from the Baltics for the Soviet foreign debt.²⁴⁴ This position is inconsistent with international law which requires an equitable distribution of the debt if the Baltics now own local property rights or interests that have attached debt.²⁴⁵ However, if the Baltics will not receive any property interests or rights in return for taking a portion of the Soviet Union's debt, then not holding these states liable is consistent with international law.

To the extent that the benefits of the debt assisted the area and encouraged its development, the Baltics should be held responsible for the local public debt. The United States should argue that debt runs with land, but it should make exceptions to this rule based on the legitimacy of the government in power.

C. *Membership in the United Nations and Other International Organizations*

The current practice of allowing the Russian Federation to retain the positions in the U.N. and other international organizations previously occupied by the former U.S.S.R. is consistent with the custom of these organizations because the legal personality of the U.S.S.R. survived its changes in government, name, and territorial boundaries.²⁴⁶ Moreover, in the agreement forming the Commonwealth of Independent States, the republics agreed that Russia should take the place of the U.S.S.R. in the United Nations and other international organizations.²⁴⁷ The Russian Federation obtained the seat of the Soviet Union in part because of the agreement of the Commonwealth states, but more importantly because the United Nations viewed Russia as the same state as the Soviet

243. This is the opinion of Latvian Embassy official, Mr. Martin Lacis. Lacis Telephone Interview, *supra* note 141; *see also* Uchitelle, *supra* note 177.

244. See Williamson Address, *supra* note 119; *Russia Balking*, *supra* note 171, at A17.

245. See Williamson Address, *supra* note 119, at 15.

246. When India was allowed to keep the United Nations seat British India held and Pakistan was required to be formally admitted into the organization, this was in accordance with the devolution agreement between these two states and the United Kingdom, which stated that all international organization memberships would devolve to India. *Id.*

247. *Text of Accords*, *supra* note 123, at A10.

Union.²⁴⁸ If it were not the same state with the same legal personality, then Russia would have had to apply for United Nations membership in its own right.²⁴⁹

The policy of the U.N. and other organizations, such as the Conference on Security and Cooperation in Europe, requiring individual application of the new states is consistent with all sources of international law allowing each organization to develop its own membership rules. Consistent with international law and past procedure of the U.N., the new republics and the Baltic states are required to go through formal admission procedures to become members of the United Nations and other international organizations.²⁵⁰

V. CONCLUSION

The reaction of the international community toward the treaty obligations of the republics that resulted from the dismemberment of the former Soviet Union is establishing what will become customary international precedent for many years to come. The magnitude of the break-up and the number and power of the parties involved increase the precedential value of the Soviet dissolution. Before the dismemberment, no generally accepted international law existed on the subject of treaty obligations with respect to treaty succession. After the diplomatic process between the United States and the republics is complete, customary international law will shift from supporting the law as written in the Restatement to supporting the position embodied in the Vienna Convention on Succession of States in Respect of Treaties. In the case of dismemberment and the survival of the predecessor state, treaties will continue in force for the surviving state and will be binding on the new states as well.

The United States will evaluate treaty obligations one at a time with each of the individual republics, making sure that each state knows its rights and obligations. The United States made it clear that Russia and the republics would be held to international arms-control treaties and

248. In a telephone conversation with Ms. Ann Reichel of the United Nations' Legal Department, she stated that as far as the United Nations was concerned, the Russian Federation is the same state as the Soviet Union but with a name change. Concerning the treaties that the Soviet Union signed at the U.N., Russia is considered to be the signatory. There has been no more fanfare than if a state had decided to change its name. See Reichel Telephone Interview, *supra* note 199.

249. See *supra* text accompanying notes 112-15.

250. The exception to this is Belarus and the Ukraine. Each of these states gained membership in the United Nations upon its formation. See *supra* notes 196-99 and accompanying text.

other treaties that involve significant national security interests.

Russia and the republics are responsible for the debt of the Soviet Union. The need for international peace and economic stability necessitated this stricter course. The United States was forced to encourage the republics' responsibility to satisfy the concerns of the rest of the world in a time of transition and potential instability.

Since the United States and the Soviet Union created and engaged in the nuclear arms race, the break-up of one party increased the potential for a power vacuum that could have been filled with chaos. To combat that potential danger, the United States leaders worked to insure stability by helping to keep a strong force in the Kremlin and by working with the leader who seemed to be in control. The Baker approach of laying down principles that the republics had to follow to gain recognition was an especially effective catalyst to the agreement between the Commonwealth states. The republics accepted the obligations in large part because both the republics and the United States knew that there was not much choice but to accept the treaty obligations if the new republics desired recognition. Moreover, by taking immediate responsibility for the obligations of the Soviet Union, the republics are able to take advantage of the accompanying treaty rights. The republics have enjoyed almost immediate acceptance into the international community of states and are reaping benefits from their actions in the form of aid and concessions on debt repayments from the rest of the world. While Russia has inherited the superpower status of the Soviet Union, the other republics have gotten some of the status through the loosely structured Commonwealth.

While the United States has not demonstrated that it has acted solely out of a feeling of obligation to adhere to international law in evaluating what treaty obligations shall bind the republics, the United States decision to follow the universal succession theory was actually the best policy given the circumstances of uncertainty and the goals of promoting stability. Moreover, it was wise for the United States not only to demand acceptance of treaty obligations, but also to soften that stance once the republics acquiesced. Now that the republics will be sitting down with the United States on a one-to-one basis, they can forge closer relations which will lead to better mutual understanding in the future. Perhaps the United States treatment of the dissolution of the Soviet Union will help to more clearly define international law because of the important position in world affairs occupied by the United States and the Soviet state in prior to its dissolution.

Lucinda Love

