

11-1990-cv
Yugoimport v. Republic of Croatia, Republic of Slovenia

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2012

(Argued: August 29, 2012 Decided: February 10, 2014)

Docket No. 11-1990-cv

THE BANK OF NEW YORK,
Interpleader-Plaintiff,

v.

YUGOIMPORT,
Interpleader-Defendant-Appellant,

v.

REPUBLIC OF CROATIA, REPUBLIC OF SLOVENIA,
Interpleader-Defendants-Appellees.

B e f o r e: WINTER, SACK, and RAGGI, Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York (Alvin K. Hellerstein, Judge) granting summary judgment to the Republics of Croatia and Slovenia. The Bank of New York commenced this interpleader action to determine ownership of funds held in an account frozen pursuant to executive order during the Bosnian War. The district court found that the depositor was an agency of the former

1 Socialist Federal Republic of Yugoslavia and that the funds were
2 subject to division among the Yugoslav successor states pursuant
3 to a multilateral treaty. Yugoimport, a Serbian instrumentality
4 purporting to be sole successor-in-interest of the original
5 depositor, appeals. We affirm.

6
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11
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18 Appellees.

19
20 WINTER, Circuit Judge:

21 The Bank of New York commenced this interpleader action to
22 determine ownership of \$2,551,785.37 plus interest held on
23 deposit in an account in the name of the Federal Directorate of
24 Supply and Procurement ("FDSP"), an entity organized under the
25 laws of the former Socialist Federal Republic of Yugoslavia
26 ("SFRY"). The account was frozen in 1992 pursuant to executive
27 order during the Bosnian War.

28 The Interpleader-Defendants, Yugoimport and the Republics of
29 Croatia and Slovenia, all -asserted competing claims to the
30 funds. Yugoimport, a Serbian entity, claimed full ownership of
31 the disputed funds as successor-in-interest to the FDSP. The

1 Republics of Croatia and Slovenia contend that the funds should
2 be divided among the states succeeding the SFRY pursuant to a
3 multilateral treaty, the Succession Agreement. See Agreement on
4 Succession Issues Between the Five Successor States of the Former
5 State of Yugoslavia, June 29, 2001, 41 I.L.M. 3 (2002). The
6 district court granted summary judgment to the Republics. We
7 hold that interpretation of the Succession Agreement is governed
8 by the Vienna Convention and that the FDSP was an agency of the
9 SFRY. As such, the funds are subject to division under that
10 Agreement. We, therefore, affirm.

11 BACKGROUND

12 a) Historical Context

13 We summarize only the facts relevant to this appeal. Those
14 seeking a more detailed account should go to the district court's
15 opinion. Bank of N.Y. v. Yugoimport SDPR J.P., 780 F.Supp.2d
16 344, 346-49 (S.D.N.Y. 2011).

17 This case arises from the violent breakup of the SFRY. The
18 ethnic, racial, and religious tensions of the Balkans, and the
19 consequences of these tensions spanning generations, have been
20 the subject of commentary so extensive and well-known as not to
21 require citation. While somewhat controlled after World War II,
22 these tensions erupted into bloodshed with the weakening of
23 communist states in the 1980's. Beginning in 1989, the

1 constituent states of the SFRY sought independence, leading to
2 nearly a decade of armed conflict. Slovenia formally declared
3 independence on June 25, 1991. Croatia, Bosnia-Herzegovina, and
4 Macedonia followed suit shortly thereafter. See Yucyco, Ltd. v.
5 Republic of Slovenia, 984 F. Supp. 209, 212- 213 (S.D.N.Y. 1997)
6 (describing the collapse). On April 27, 1992, the remaining
7 territories, Serbia and Montenegro, issued a joint declaration
8 formally dissolving the SFRY and establishing themselves as the
9 "Federal Republic of Yugoslavia" ("FRY"). See id. The FRY
10 purported to be the sole successor of the SFRY. See id. The
11 other Republics disputed the FRY's claim, and the United Nations
12 Security Council issued a resolution declaring that the claim was
13 not "generally accepted" by the world community. U.N.S.C. Res.
14 757, U.N. Doc. S/RES/757, 31 I.L.M. 1427, 1454 (May 30, 1992).
15 Additionally, the Security Council denied the FRY's request to
16 step into the shoes of the SFRY for the purpose of continuing the
17 SFRY's U.N. membership. U.N.S.C. Res. 777, U.N. Doc. S/RES/777,
18 31 I.L.M. 1427, 1473 (Sept. 19, 1992).

19 In December 1995, due in large part to American efforts and
20 armed NATO intervention, representatives of Bosnia-Herzegovina,
21 Croatia, and the FRY signed the Dayton Accords, bringing a
22 qualified measure of peace to the region. The three Republics
23 agreed to recognize and respect each other's sovereignty and

1 authorized the deployment of a U.N.-led multinational military
2 implementation force in Bosnia. See General Framework Agreement
3 for Peace in Bosnia and Herzegovina ("Dayton Accords"), Bosn. &
4 Herz.-Croat.-Fed. Repub. Yugo., Dec. 14, 1995, 35 I.L.M. 75, 89,
5 92 (1996).

6 Because the Dayton Accords did not address a number of
7 issues arising from the breakup of the SFRY, Annex 10 of the
8 Accords established the Office of the High Representative to
9 assist in the implementation of the peace. Id. at 147. The High
10 Representative was to be appointed by the U.N. and was charged
11 with overseeing the creation of mutual agreements among the
12 signatory states concerning various issues. Id. One such issue
13 was distribution of financial assets of the SFRY. See U.N.S.C.
14 Res. 1022, U.N. S/RES/1022, 35 I.L.M. 259, 260 (November 22,
15 1995).

16 After the signing of the Dayton Accords, armed conflict
17 between the FRY and Kosovars and continuing sole-successor
18 sentiments in the FRY stymied the ability of the signatory states
19 to reach an agreement. See Carsten Stahn, The Agreement on
20 Succession Issues of the Former Socialist Federal Republic of
21 Yugoslavia, 96 Am. J. Int'l L. 379, 379 (2002). On June 29,
22 2001, after NATO intervention in the Kosovo conflict and
23 political shifts weakened FRY sole-successor sentiments, the

1 emerging successor states, under the supervision of the High
2 Representative, finally came to an agreement.

3 b) The Succession Agreement

4 The Succession Agreement recognizes five SFRY successor
5 states -- Croatia, Slovenia, Bosnia-Herzegovina, Macedonia, and
6 the FRY. See Succession Agreement, 41 I.L.M. at 3.¹ It contains
7 seven Annexes, each of which deals with the division of
8 particular types of assets and/or liabilities. Annexes C and G
9 are relied upon by the parties.

10 Annex C deals with the division of "financial assets and
11 liabilities." Article 1 of Annex C defines the financial assets
12 of the SFRY to include "accounts and other financial assets in
13 the name of the SFRY Federal Government Departments and
14 Agencies." Id. at 25. Article 5 provides that SFRY's foreign
15 financial assets, including funds held in foreign banks, shall be
16 distributed in the following proportions: Bosnia and Herzegovina
17 15.50%; Croatia 23.00%; Macedonia 7.50%; Slovenia 16.00%; and the
18 FRY 38.00%. Id. at 27.² Whether the funds at issue here were

¹ In June 2006, Serbia and Montenegro separated into independent states. Montenegro agreed that it would not be deemed a successor state to the SFRY or a party to the Succession Agreement.

² Although Article 5(1) does not expressly include the assets of SFRY agencies in its definition of "foreign financial assets," there is no dispute that the distribution scheme set forth in Article 5(2) applies to foreign-held assets of SFRY agencies. The general definition of "financial assets" embodied in Article 1 -- which includes the assets of SFRY agencies -- applies to the foreign financial assets addressed in Article 5. Succession Agreement, 41 I.L.M. at 25.

1 held in the name of an SFRY "agency" -- i.e. FDSP -- for purposes
2 of the Succession Agreement is the principal issue in this
3 appeal.

4 Annex G deals with private property. Article 1 thereof
5 states that "[p]rivate property and acquired rights of citizens
6 and other legal persons of the SFRY shall be protected by
7 successor States in accordance with the provisions of this
8 Annex." Id. at 35. We mention this provision only because
9 Yugoimport attaches importance to it. However, if the funds were
10 held in the name of an SFRY agency, Annex G would be
11 inapplicable; if not, Yugoimport would succeed on this appeal
12 even without Annex G.

13 c) The FDSP/Yugoimport

14 We trace the history of Yugoimport in mind-numbing detail
15 because the nature of its governance and functions is critical --
16 decisive, actually -- to the disposition of this appeal.

17 We begin with a summary that will suffice for casual
18 readers, who can then move on to the next section. Yugoimport
19 functioned primarily as an arms dealer for the successive
20 sovereign states referred to generally as Yugoslavia, from 1949
21 until the events giving rise to this case. It was owned,
22 controlled, managed, and supervised at all times by the
23 government -- in particular, by officials responsible for
24 national defense. Its earnings were put to public purposes.

1 We now turn to the details. The original Yugoimport was
2 created on June 27, 1949 by the Federal People's Republic of
3 Yugoslavia (the "FPRY").³ Basic Law on State Business
4 Enterprises (Act No. 5585/49) (June 27, 1949). Its enabling
5 statute described it as "[a] state business . . . of state-wide
6 significance" created to engage in the "import and export of all
7 types of goods." Id. arts. 1, 3. Yugoimport's initial assets
8 were provided by the FPRY's Minister of Finance, id. art. 2, and
9 it operated under the administrative and operational supervision
10 of the FPRY's Ministry of Foreign Trade. Id. art. 4.

11 On July 28, 1971, after the FPRY became the SFRY, a new law
12 established the basic form and substance of SFRY agencies. See
13 Law on Organizational Structure and Scope of Operations of
14 Federal Administration Bodies and Federal Organizations, art. 1
15 (Act No. 1045/71) (July 28, 1971) (hereinafter referred to as the
16 "Law on Agencies"). One such agency was the Federal Secretariat
17 of National Defense. Id. arts. 3, 5. In 1974, the SFRY amended
18 the Law on Agencies in several ways. See Act on the Amendment of
19 the Act on the Organization and Scope of Functions of Federal
20 Administrative Authorities and Federal Organizations (Act No.
21 21/74) (April 26, 1974) (hereinafter referred to as the "Amending

³ The FPRY was the predecessor state of the SFRY. It existed from 1946 to 1963. Like the SFRY, the FPRY was a socialist state headed by Josip Broz Tito from 1963 to 1980.

1 Act"). Article 3 of the Amending Act set forth amendments
2 pertaining to the SFRY Federal Secretariat of National Defense.
3 One amendment merged Yugoimport into a new sub-agency known as
4 the "Federal Directorate of Trade and Special Purpose Commodity
5 Reserves" or the "Federal Office for Trading and Reserves of
6 Special Purpose Goods" (the "Federal Office for Trading and
7 Reserves"). See id. art. 3; Statute of the Public Enterprise
8 "Yugoimport-SDPR," art. 2 (FRY Gazette No. 89/9) (Jan. 27, 1997)
9 (FRY) (describing the merger in 1974 of Yugoimport into the
10 Federal Office for Trading and Reserves). The Amending Act
11 further stated that the Federal Office for Trading and Reserves
12 was "established within the Federal Secretariat of National
13 Defense for the purpose of performing tasks associated with the
14 sale and accumulation of commodity reserves . . . for the
15 national defense." Amending Act, art. 3 (Act. No. 21/74). In
16 other words, the Federal Office for Trading and Reserves was the
17 SFRY's arms dealer.

18 In 1991, the SFRY reconstituted the Federal Office for
19 Trading and Reserves as the Federal Directorate for Commerce of
20 Special Purpose Products. See Law on the Federal Directorate for
21 Commerce of Special Purpose Products, art. 24 (SFRY Gazette No.
22 11/91) (1991). It is undisputed that sometime between 1991 and
23 1996, the Federal Directorate for Commerce of Special Purpose
24 Products came to be known as the Federal Directorate of Supply

1 and Procurement, or the FDSP.⁴ For the sake of clarity, we will
2 refer to the entity solely as the FDSP and its enabling law as
3 the "FDSP Enabling Law" or simply the "Enabling Law."

4 The Enabling Law that created the FDSP set forth its
5 function and management structure. See id. The Enabling Law
6 also required management, in agreement with the Federal Executive
7 Council, to establish within six months a governing "statute"
8 that would describe with greater particularity the FDSP's
9 business activities and administration. Id. arts. 16, 17, 23.
10 Once created, the statute could be changed only with approval of
11 the Federal Executive Council. Id. art. 4. The statute
12 promulgated thereunder, Statute of the Federal Directorate for
13 Commerce of Special Purpose Products (Act. No. 750-3) (May 8,
14 1991) (SFRY) (hereinafter referred to as the "FDSP Statute" or
15 "Statute"), is akin to articles of incorporation. We draw upon
16 both the Enabling Law and the Statute to determine the defining
17 characteristics of the FDSP.

⁴ The parties agree that the Federal Directorate for Commerce of Special Purpose Products and the FDSP are the same entity, governed by the same organizational laws. Additionally, the 1996 statute reconstituting the FDSP as Yugoimport, discussed infra, states that Yugoimport "keeps up the legal continuity of the Federal Directorate of Supply and Procurement established with the Law on the Federal Directorate of Supply and Procurement ("Official Gazette of SFRY" 11/91)." Statute of the Public Enterprise "Yugoimport-SDPR," art. 2 (FRY Gazette No. 89/9) (Jan. 27, 1997). Despite referring to the entity as the FDSP, the citation refers to the enabling law pursuant to which the Federal Directorate for Commerce of Special Purpose Products was established.

1 The primary function of the FDSP remained the procurement
2 and trading of arms and military equipment on behalf of the SFRY.
3 FDSP Enabling Law, art. 1 (11/91) ("The [FDSP] . . . performs
4 activities that are in the interest of the . . . [SFRY] in the
5 area of foreign trade commerce with armaments and military
6 equipment."); see also FDSP Statute, art. 8 (Act No. 750-3)
7 (describing with greater particularity the FDSP's activities "in
8 the area of armaments and military equipment"). The FDSP was
9 allowed to undertake other lines of business subject to approval
10 from the Federal Secretariat for People's Defense and only so
11 long as such undertakings did not impact its business dealings in
12 armaments and military equipment. FDSP Enabling Law, art. 3
13 (11/91); FDSP Statute, art. 9 (Act No. 750-3). The FDSP was
14 required to "direct its work in accordance with the plans for the
15 development and equipping of the military," FDSP Statute, art. 12
16 (Act No. 750-3), and it was the FDSP's "responsibility . . . to
17 organize and prepare for action in cases of immediate war danger
18 . . . [and] to perform other tasks and activities that are in the
19 interest of general people's defense." Id. art. 38. The Federal
20 Secretariat for People's Defense supervised the FDSP's
21 performance of national-interest functions, and the FDSP
22 submitted quarterly and annual reports to the Federal Secretariat
23 for this purpose. FDSP Enabling Law, art. 19 (11/91). Due to

1 the nature of the FDSP's work, the Enabling Law required that all
2 employee positions within the FDSP be staffed exclusively with
3 active military personnel. Id. art. 18.

4 The FDSP was organized as a juridical entity with the
5 "status of a legal person." Id. art. 4. It guaranteed its
6 obligations with its own property, FDSP Statute, art. 2 (Act No.
7 750-3), and it was empowered to act "on its own behalf and own
8 account" and on others' behalf and account pursuant to contract.
9 FDSP Enabling Law, arts. 7, 8 (11/91); FDSP Statute, art. 10 (Act
10 No. 750-3). The mutual rights and obligations of the FDSP and
11 "those on whose behalf . . . it perform[ed] foreign trade
12 commerce and services . . . [were] determined by contract." FDSP
13 Enabling Law, art. 8 (11/91).

14 The FDSP was managed by a Director and a Council (the "FDSP
15 Council"), both of which were appointed, supervised, or removed
16 by the Federal Executive Council. Id. arts. 9-15. The FDSP
17 Council consisted of a representative of each of the following:

- 18 1) Federal Secretariat for People's Defense
- 19 2) Federal Secretariat for Foreign Affairs
- 20 3) Federal Secretariat for Foreign Economic
- 21 Relations
- 22 4) Yugoslav National Bank
- 23 5) The Yugoslav Association of Industries for
- 24 Armament and Military Equipment; and
- 25 6) A representative from the employees of the
- 26 [FDSP].
- 27

28 FDSP Statute, art. 24 (Act. No. 750-3). The Director was also a

1 member of the FDSP Council. FDSP Enabling Law, art. 11 (11/91);
2 FDSP Statute, art. 25 (Act. No. 750-3).

3 The Director was responsible for, among other things,
4 business decisions, hiring and staffing decisions, and managing
5 the FDSP's preparation for national defense. FDSP Statute, art.
6 22 (Act. No. 750-3). The FDSP Council was responsible for

- 7 1) Pass[ing] the strategic plan;
- 8 2) Pass[ing] a plan for foreign trade
- 9 commerce and a financial plan;
- 10 3) Pass[ing] a decision for the permanent and
- 11 long-term investments of the [FDSP];
- 12 4) Decid[ing] upon the long-term acquiring of
- 13 funds; [and]
- 14 5) Perform[ing] other tasks defined by the
- 15 law . . .
- 16

17 Id. art. 26. The FDSP Council was also empowered to "decide[] on
18 changes in status (splitting, merging, and acquiring)" subject to
19 approval from the Federal Executive Council. Id. art. 3.

20 The FDSP's earnings were to be used to "replenish the funds
21 spent and to provide for personal, common, and general social
22 needs and responsibilities." Id. art. 16. If it produced a net
23 surplus or profit in a given year, the Director and FDSP Council
24 were to determine the division of profits in the course of
25 preparing the annual report. Id. art. 19. If the FDSP
26 experienced a liquidity problem or a loss, the FDSP Council was
27 to inform the Federal Secretariat for People's Defense and the
28 Federal Executive Council. Id. art. 21.

1 Because the FDSP operated out of Belgrade, Serbia, the FRY
2 was able to control its physical assets during the armed conflict
3 described supra. In 1996, the FRY formally reconstituted the
4 FDSP as Yugoimport SDPR. The government enacted a new
5 organizational law in September 1996, and the Belgrade Business
6 Court issued a decision purporting to merge the two entities in
7 early 1997. See Law on the Public Enterprise "Yugoimport-SDPR"
8 (PR. Nr. 291) (Official Gazette of SRY No. 46/96) (Sept. 27,
9 1996) (FRY). Like the FDSP, Yugoimport SDPR was created pursuant
10 to an enabling "law" and its functions and management structure
11 were set out more precisely in a governing "statute" enacted by
12 the managing board. See Statute of the Public Enterprise
13 "Yugoimport-SDPR," preamble (FRY Gazette No. 89/9) (Jan. 27,
14 1997) (FRY), promulgated under Law on the Public Enterprise
15 "Yugoimport-SDPR," (Official Gazette of SRY No. 46/96). The
16 primary function of Yugoimport SDPR remained the procurement and
17 trading of weapons and military equipment. Law on Yugoimport-
18 SDPR, arts. 2, 4 (46/96).⁵ Initial funding was provided by the
19 state, id. art. 5, and the federal government was empowered to:
20 (i) approve the governing statute and any changes made to the

⁵According to the governing statute, "Yugoimport-SDPR deal[t] with other activities as well." Statute on Yugoimport-SDPR, art. 4. The statute listed several hundred activities, ranging from the "production, processing and refrigeration of animal meat" to publishing books and bookbinding to the "retail trade of household appliances, radios, and tv sets." Id.

1 statute thereafter; (ii) the development plan and working
2 program; (iii) any increases or decreases in basic capital; (iv)
3 any plans to acquire or sell real estate; (v) annual financial
4 plans and investment decisions; and (vi) any changes to the
5 organizational structure. Id. art. 15.

6 Yugoimport SDPR was managed by a Director, a Managing Board,
7 and a Supervisory Board. Id. art. 8. The Director was appointed
8 and subject to dismissal by the federal government. The Managing
9 Board consisted of eight members, five of which were appointed
10 and subject to dismissal by the federal government. Id. arts. 9,
11 14.⁶ And the Supervisory Board consisted of a president,
12 appointed and subject to dismissal by the federal government, and
13 two members. Id. arts. 12, 17, 20. The enabling law permitted
14 [Yugoimport] to be organized as a "stock-sharing company," but
15 required that the state retain at least 51 percent ownership.
16 Id. art. 16.

17 Following the dissolution of the FRY, Yugoimport has
18 continued to operate in Serbia, presumably reorganized under
19 Serbian law or adopted thereunder.

20 d) The Disputed Funds

21 In 1991, the FDSP opened a deposit account with the Bank of
22 New York. On May 30, 1992, the United States, pursuant to an

⁶ The remaining three members were elected by Yugoimport SDPR employees.
Id. arts. 9, 14.

1 Executive Order issued by President George H.W. Bush, froze "all
2 property, and interests in property, in the name of the [SFRY] or
3 the [FRY] . . . in the United States," including property in the
4 name of their "agencies, instrumentalities and controlled
5 entities, and any person acting or purporting to act for or on
6 behalf of any of the foregoing." Exec. Order No. 12808, 57 F.R.
7 23299, Sec. 2, 4(c) (May 30, 1992). On July 20, 1992, the Office
8 of Foreign Assets Control, a division of the Department of
9 Transportation, published a notice containing a list of "entities
10 owned or presumed to be controlled by the [FRY]." Office of
11 Foreign Assets Control General Notice No. 1, 57 F.R. 32051-02
12 (July 20, 1992). The FDSP was on the list. Id. The asset
13 freeze remained in place until February 2003. This litigation
14 commenced shortly thereafter.

15 e) Procedural History

16 In light of Yugoimport's and the Republics' competing claims
17 of ownership of the funds, the Bank of New York filed this
18 interpleader action on April 14, 2003 in New York state court.
19 Pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. §§
20 1441(d) and 1446, Slovenia removed the case to the Southern
21 District of New York, where it was initially assigned to Judge
22 Charles S. Haight.

1 The bank deposited the disputed funds into the district
2 court's registry and, on June 2, 2004, obtained a discharge from
3 this action. Judge Haight ordered limited discovery on the issue
4 of the FDSP's status as an SFRY agency, which is of course
5 critical to the application of Annex C of the Succession
6 Agreement. On July 31, 2006, the Republics moved for summary
7 judgment or, in the alternative, for a stay to allow the Standing
8 Joint Committee under the Succession Agreement to make a
9 determination regarding whether the funds were subject to
10 division.⁷ On September 22, 2006, Yugoimport cross-moved for
11 summary judgment and opposed the Republics' motion to stay,
12 arguing that it was not subject to the jurisdiction of the
13 Standing Joint Committee. On May 11, 2007, Judge Haight stayed
14 the case so that the Standing Joint Committee could decide the
15 issue. Bank of New York v. Yugoimport SDPR J.P., No. 03 Civ.
16 9055, 2007 WL 1378426, at *10-11 (S.D.N.Y. May 11, 2007)
17 (hereinafter "Yugoimport I").

⁷ Article 5 of the Succession Agreement sets forth dispute-resolution methods that the successor states are to use in the event of disagreement:

If the differences [over interpretation] cannot be resolved . . . the States concerned shall either (a) refer the matter to an independent person of their choice, with a view to obtaining a speedy and authoritative determination of the matter . . .; or (b) refer the matter to the Standing Joint Committee.

41 I.L.M at 5. The Standing Joint Committee, established by Article 4 of the Succession Agreement, consists of senior representatives of each successor state. Id. at 4.

1 In the fall of 2008, the case was reassigned to Judge Alvin
2 K. Hellerstein, who lifted the stay because, in the interim, the
3 successor states had not appointed any members to the Standing
4 Joint Committee and it had never met. On April 29, 2011, the
5 district court granted the Republics' motion for summary judgment
6 and held that the funds were to be divided among the successor
7 states. It based this holding on its conclusion that Yugoimport
8 was an agency, as a matter of law, under Annex C of the
9 Succession Agreement. Bank of New York v. Yugoimport SDPR J.P.,
10 780 F. Supp. 2d 344 (S.D.N.Y. 2011) (hereinafter "Yugoimport
11 II").

12 DISCUSSION

13 We review a grant of summary judgment de novo. K&A
14 Radiologic Tech. Serv's, Inc. v. Comm'r of the Dep't of Health of
15 New York, 189 F.3d 273, 278 (2d Cir. 1999) (citing Bogan v.
16 Hodgkins, 166 F.3d 509, 511 (2d Cir. 1999)).

17 a) Application of the Succession Agreement

18 When subject matter jurisdiction is based on the Foreign
19 Sovereign Immunities Act (the "FSIA"), 28 U.S.C. §§ 1441(d),
20 1446, 1603(a), we apply the choice-of-law rules of the forum
21 state, here New York, with respect to all issues governed by
22 state substantive law. Barkanic v. Gen. Admin. of Civil Aviation
23 of the People's Republic of China, 923 F.2d 957, 959 (2d Cir.

1 1991).⁸ New York courts adopt a "center of gravity" approach to
2 choice-of-law questions in contract cases. This approach
3 requires application of the law of the jurisdiction with the most
4 significant interest in, or relationship to, the dispute. Lazard
5 Freres & Co. v. Protective Life Ins. Co., 108 F.3d 1531, 1539 (2d
6 Cir. 1997) (Brink's Ltd. v. South African Airways, 93 F.3d 1022,
7 1030-1031 (2d Cir. 1996) (citing In re Allstate Ins. Co. &
8 Stolarz, 81 N.Y.2d 219, 227 (1993))); Auten v. Auten, 308 N.Y.
9 155, 160-61 (1954). To determine the jurisdiction with the
10 greatest interest in the dispute, New York courts consider "a
11 spectrum of significant contacts, including the place of
12 contracting, the places of negotiation and performance, the
13 location of the subject matter, and the domicile . . . of the

⁸ The FSIA, 28 U.S.C. §§ 1330, 1332, 1391(f), 1441(d), 1602-1611, grants foreign sovereigns general immunity from suit in the U.S., id. § 1604, unless the action falls under one of several enumerated exceptions. Id. §§ 1605-1607. Where an exception applies, district courts have original jurisdiction over the action, id. § 1330, and if the action was brought in state court, the foreign sovereign may remove it to the district court of the district encompassing the state in which the action is pending. Id. § 1441(d).

Congress did not intend that the FSIA establish substantive rules of liability. See Barkanic, 923 F.2d at 960 (quoting Verlinden v. Cent. Bank of Nigeria, 647 F.2d 320 (2d Cir. 1981), rev'd on other grounds, 461 U.S. 480 (1983)). The FSIA operates as a pass-through, granting federal courts jurisdiction over otherwise ordinary actions brought against foreign states. It provides foreign states and their instrumentalities access to federal courts only to ensure uniform application of the doctrine of sovereign immunity. Id. at 960-961.

Because the FSIA creates federal question jurisdiction but does not supply any substantive law of liability, see Verlinden, 461 U.S. at 491-93, choice of law problems arise in the FSIA context. The FSIA contains no express choice of law provision, but Section 1606 provides that a foreign sovereign "shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. In Barkanic, we found that the goal of like-treatment is best served by applying the state choice of law rules if the action is governed by state substantive law. Barkanic, 923 F.2d at 959.

1 contracting parties." Brink's, 93 F.3d at 1031 (citing In re
2 Allstate, 81 N.Y.2d at 227). New York choice-of-law rules also
3 "require[] the court to honor the parties' choice [of law
4 provision] insofar as matters of substance are concerned, so long
5 as fundamental policies of New York law are not thereby
6 violated." Woodling v. Garrett Corp., 813 F.2d 543, 551 (2d Cir.
7 1987).

8 The countries with the strongest interest in the present
9 dispute are the successor states. All of them, except for non-
10 party Macedonia, have ratified or acceded to the Vienna
11 Convention on the Law of Treaties (the "Vienna Convention"),
12 opened for signature May 23, 1969, 1155 U.N.T.S. 331, reprinted
13 in 8 I.L.M. 679, which contains a set of interpretive rules
14 regarding treaty interpretation.⁹ Prior to its dissolution, the
15 SFRY was also a party to the Vienna Convention. Moreover,
16 Article 9 of the Succession Agreement provides that the

⁹ The Vienna Convention was adopted on May 22, 1969 by the United Nations Conference on the Law of Treaties. http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en (last visited Jan. 16, 2014). To date, 113 nations are parties to the Convention and 45 nations are signatories to it. Id.

The SFRY signed and ratified the Vienna Convention on May 23, 1969. Id. After the dissolution of the SFRY, Slovenia became a party on July 6, 1992; Croatia on October 12, 1992; Bosnia-Herzegovina on September 1, 1993; and Serbia on March 12, 2001. Id. All the pertinent countries became parties to the Vienna Convention prior to the finalization of the Succession Agreement on June 29, 2001. See Vienna Convention, art. 4, 1155 U.N.T.S. at 334 (explaining that the Convention does not apply retroactively to treaties already in force); Chubb & Son, Inc. v. Asiana Airlines, 214 F.3d 301, 308 n.5 (2d Cir. 2000) (same).

1 Succession Agreement is to be interpreted in accordance with
2 international law, of which the Vienna Convention is an integral
3 part. See supra n.9; Succession Agreement, art. 9, 41 I.L.M. at
4 9. Therefore, under New York's choice-of-law principles, we
5 apply the interpretative rules set forth in the Vienna
6 Convention.

7 To reiterate, the issue is whether the FDSP was an agency of
8 the SFRY as that term is used in the Succession Agreement. The
9 term agency is not defined in the Succession Agreement, and
10 neither party has supplied a definition under SFRY law. Under
11 the Vienna Convention, terms in a treaty are to be interpreted in
12 accordance with their ordinary meaning. Vienna Convention, art.
13 31(1). A term's ordinary meaning is generally derived from the
14 language in which the treaty was drafted. See id. art. 33
15 (providing that treaties authenticated in two or more languages
16 "are equally authoritative in each language," and where language
17 divergences create ambiguity, courts should adopt the meaning
18 which "best reconciles the texts"). The Succession Agreement was
19 drafted in English. In at least one instance where a concept was
20 apparently not susceptible to English translation, i.e.,
21 "dwelling rights," the Agreement provided Croatian, Slovenian,
22 and Serbian versions to clarify its meaning. Succession
23 Agreement, Annex G, art. 6, 41 I.L.M. at 36. The absence of such
24 non-English versions of the term agency indicates that there was

1 no intended meaning beyond the plain-language English definition.
2 Therefore, we construe the term "agency" in accordance with
3 generally-accepted international principles and its ordinary
4 meaning in English.

5 A principal-agent relationship is "created by express or
6 implied contract or by law, in which one party (the agent) may
7 act on behalf of another party (the principal) and bind that
8 other party by words or actions." AGENCY (1), Black's Law
9 Dictionary (9th ed. 2009). The fact that FDSP was organized as a
10 corporation does not preclude it from being deemed an SFRY agency
11 under the Succession Agreement. The definition of "federal
12 agency" in Black's Law Dictionary expressly includes government
13 corporations: "A department or other instrumentality . . . ,
14 including a government corporation." AGENCY (3), Black's Law
15 Dictionary (9th ed. 2009).

16 As the district court observed, "there is nothing
17 inconsistent, or even unusual, about a state employing the
18 corporate form to create an agency." Yugoimport II, 780 F. Supp.
19 2d at 356. Quite the contrary, many governments have public
20 corporations that function as agencies. As the district court
21 pointed out in an impressive string cite, almost all of the fifty
22 U.S. states have corporations that function as agencies. Id. at
23 358; see also 1 Fletcher Cyc. Corp. § 57 ("A 'public' corporation

1 . . . may be defined as a corporation that is created by the
2 state as an agency in the administration of civil government.”).

3 For the purposes of determining which entities are entitled
4 to sovereign immunity, the FSIA, the Canada State Immunity Act,
5 and the European Convention on State Immunity all adopt broad
6 definitions of agency that expressly include public corporations.
7 See 28 U.S.C. § 1603(b) (“An ‘agency or instrumentality of a
8 foreign state’ means any entity (1) which is a separate legal
9 person, corporate or otherwise, and (2) which is an organ of a
10 foreign state or political subdivision thereof, or a majority of
11 whose shares or other ownership interest is owned by a foreign
12 state or political subdivision thereof . . .”); Canada State
13 Immunity Act, R.S.C. 1985, c. S-18, § 2; European Convention on
14 State Immunity Explanatory Report, Art. 27 ¶ 107-109 (noting that
15 “proceedings are frequently brought . . . not, strictly speaking,
16 against a State itself, but against [] legal entit[ies]
17 established under the authority of the State and exercising
18 public functions” and that such entities “may be . . . State
19 agencies, such as national banks or railway administrations”).

20 Under any reasonable understanding of the term, there is no
21 doubt that the FDSP was an agency of the SFRY, as the exhaustive
22 description of its origins, ongoing governance, and role showed.
23 It was, at all times, controlled by the government; its

1 management consisted of government officials; it was subject to
2 supervision by the Federal Secretariat of People's Defense and
3 the Federal Executive Council; its earnings were to be used not
4 only to "replenish[] funds spent" but also "to provide for
5 personal, common, and general social needs and responsibilities";
6 and management could not alter the FDSP Statute without approval
7 from the Federal Executive Council. FDSP Enabling Law, arts. 19,
8 12, 15, 16 (11/91); FDSP Statute, art. 16 (Act. No. 750-3).
9 Moreover, the FDSP served a purpose so elemental to a nation-
10 state government as to render any suggestion that it was not an
11 SFRY agency risible.

12 A compelling reason for the existence of nation states is to
13 strengthen military defense, as the American experience
14 demonstrates. The FDSP was the SFRY's arms dealer, charged with
15 equipping the SFRY's military forces according to strategic needs
16 determined by the SFRY. It was required to coordinate its work
17 with the government's military planners, and it was the FDSP's
18 "responsibility" to supply the military to meet its perceived
19 needs. Even in the SFRY -- a socialist state where many
20 enterprises were owned and controlled by the government -- the
21 FDSP was clearly a governmental agency because of the important
22 national-interest functions it performed.

1 In an effort to avoid this plain language interpretation,
2 Yugoimport submitted several pieces of extrinsic evidence,
3 including: (i) an affidavit of Dr. Veroljub Dugalić, a former
4 FRY Minister of Finance who served as a delegate in the
5 negotiations of the Succession Agreement and as an FRY (and now
6 as a Serbian) representative in the Annex C Committee on the
7 Distribution of Financial Assets and Liabilities; (ii) documents
8 purporting to represent the drafting history of the Succession
9 Agreement; and (iii) letters submitted by the Ministers of
10 Finance of Bosnia-Herzegovina and Serbia.¹⁰ Yugoimport contends
11 that the district court was able to grant summary judgment only
12 by failing to consider or by not crediting this evidence.
13 However, none of these items could properly have been taken into
14 consideration under the interpretive rules set forth in the
15 Vienna Convention.

16 Under the Vienna Convention, external evidence may be
17 considered only in limited circumstances. Article 31 provides

18 A treaty shall be interpreted in good faith
19 in accordance with the ordinary meaning to be
20 given to the terms of the treaty in their
21 context and in the light of its object and
22 purpose.

23 Vienna Convention, art. 31(1).

¹⁰ We need not reach the issue of whether this extrinsic evidence, even if considered, would be sufficient to alter the result. As discussed supra, the nature and functions of the FDSP may well have dictated the result we reach.

1 Yugoimport contends that the extrinsic evidence proffered is
2 necessary to interpreting the Treaty in "context and in the light
3 of its object and purpose." Id. However, this argument fails
4 because the Vienna Convention expressly sets forth in Article 31
5 the materials that may be considered to discern that context and
6 purpose. Context may be evaluated by consulting: (i) the text
7 of the treaty, including its preamble and annexes; (ii) "[a]ny
8 agreement relating to the treaty which was made between all the
9 parties in connection with the conclusion of the treaty"; and
10 (iii) "[a]ny instrument which was made by one or more parties in
11 connection with the conclusion of the treaty and accepted by the
12 other parties as an instrument related to the treaty." Id. art.
13 31(2) (emphasis supplied). A court may also consult: "(a) [a]ny
14 subsequent agreement between the parties regarding the
15 interpretation of the treaty or the application of its
16 provisions; (b) [a]ny subsequent practice in the application of
17 the treaty which establishes the agreement of the parties
18 regarding its interpretation; and (c) [a]ny relevant rules of
19 international law." Id. art. 31(3) (emphasis supplied). There
20 is an obvious preference of the Vienna Convention toward
21 consideration only of those materials that were ratified,
22 adopted, or somehow endorsed by all the treaty parties. Because
23 the documents proffered by Yugoimport are not traced to all the

1 successor states, the district court should not have considered
2 them or afforded them weight in determining the context of the
3 treaty or its object and purpose.¹¹

4 Yugoimport next contends that such evidence is properly
5 before the court because the treaty is ambiguous. Article 32 of
6 the Vienna Convention states:

7 Recourse may be had to supplementary means of
8 interpretation, including the preparatory
9 work of the treaty and the circumstances of
10 its conclusion, in order to confirm the
11 meaning resulting from the application of
12 article 31 [ordinary-meaning analysis], or to
13 determine the meaning when the interpretation
14 according to article 31: (a) [l]eaves the
15 meaning ambiguous or obscure; or (b) [l]eads
16 to a result which is manifestly absurd or
17 unreasonable.

18
19 Vienna Convention, art. 32 (emphasis added). Under this Article,
20 courts may consider certain, limited types of external evidence
21 only to confirm the ordinary meaning of the text, or where the
22 ordinary meaning is ambiguous or would lead to absurd results.
23 External evidence may not be admitted to create ambiguity where
24 there is none or to compel an interpretation different from the
25 text's ordinary meaning.

¹¹ Yugoimport also cites Article 31(4) for the proposition that "special meaning shall be given to a term if it is established that the parties so intended." Id. art. 31(4). However, as discussed above there is no indication that the parties intended a special meaning for "agency."

1 Yugoimport contends that the treaty is ambiguous because:
2 (i) the term agency is undefined, and (ii) Annexes C and G, when
3 read in conjunction, create an ambiguity. We find that the
4 Succession Agreement is not ambiguous in this regard. A failure
5 to include a precise definition of agency does not render the
6 contract ambiguous with regard to the term "agency," at least so
7 far as a body intended to arm the SFRY's military is concerned.
8 Furthermore, we perceive no relevant conflict between Annexes C
9 and G. Annex C calls for the division of assets of governmental
10 agencies. Annex G does not inform the definition of agency in
11 Annex C. It provides that "private property" of legal persons
12 shall be respected. Although Yugoimport may have been organized
13 as a legal person, it was a public corporation that functioned,
14 as intended, as an SFRY agency. Under no discernible principles
15 were its funds "private property." Therefore, Annex G does not
16 dictate otherwise.

17 b) An Afterword

18 Although the decisive issue on this appeal is disposed of
19 above, we address Yugoimport's argument that its corporate form
20 shields it from application of Annex C of the Succession
21 Agreement. Yugoimport contends that because the FDSP was
22 organized as a corporation, under United States federal common
23 law it is not subject to the Succession Agreement unless it is
24 deemed to be an "alter ego" of the SFRY.

1 Yugoimport relies principally on First National City Bank v.
2 Banco Para El Comercio Exterior de Cuba ("Bancec"), 462 U.S. 611
3 (1983). At issue in Bancec was whether Citibank could maintain a
4 counterclaim against Bancec, Cuba's fully-owned foreign-trade
5 agent, for actions taken against Citibank by the Cuban
6 government.¹² Bancec's successor maintained that it was
7 organized as an independent juridical entity under Cuban law and
8 therefore could not be liable for actions of the Cuban
9 government. The Supreme Court agreed that "government
10 instrumentalities established as juridical entities distinct and
11 independent from their sovereign should normally be treated as
12 such." Id. at 626-27. The Court refused, however, to treat the
13 Cuban organizational law as decisive. According "conclusive
14 effect to the law of the chartering state in determining whether
15 the separate juridical status of its instrumentality should be
16 respected would permit the state to violate with impunity the
17 rights of third parties under international law while effectively
18 insulating itself from liability in foreign courts." Id. at 621-

¹² Bancec filed suit against Citibank in the Southern District of New York to recover on an unpaid letter of credit. Bancec had executed a series of contracts whereby it purchased sugar from another instrumentality of the Cuban government and then sold the sugar as export to a private company. Citibank issued the letter of credit on behalf of the private company as consideration for the sugar. Shortly after the issuance of the letter, Cuba nationalized all property belonging to American citizens and entities in Cuba, including Citibank's branch offices in Cuba. When the letter of credit became due, Citibank credited the amount due to Bancec's account but then applied the account balance to setoff the value of Citibank's lost Cuban branches. After Bancec initiated the action, Citibank counterclaimed seeking setoff based on the Cuban government's seizure of its assets. Id. at 613-16.

1 22. The Court ruled that foreign instrumentalities organized
2 under foreign law as independent juridical entities are entitled
3 to a presumption of independence, but this presumption can be
4 overcome by equitable veil-piercing or alter-ego analysis under
5 federal common law. Id. at 626-30.

6 To the extent that Yugoimport's arguments suggest that
7 Bancec controls interpretation of the Succession Agreement as to
8 whether FDSP was an "agency" of the SFRY, the argument fails.
9 The purpose of treaty interpretation is to give effect to the
10 intent of the contracting states. Bancec's alter-ego analysis
11 applies to the unilateral acts of a single sovereign and attempts
12 to reconcile the oft-conflicting goals of giving respect to the
13 acts of other sovereigns while avoiding results that amount to
14 the rewarding of fraud. Bancec's analysis simply has nothing to
15 do with interpretation of the Succession Agreement.

16 Moreover, assuming the FDSP was organized as an independent
17 juridical entity or corporation,¹³ nothing in Bancec suggests
18 that the FDSP's legal form insulates it from the Succession

¹³ This assumption is likely correct. The FDSP was organized as a juridical entity with the "status of a legal person." FDSP Enabling Law, art. 4 (11/91). It was empowered to act on its own behalf and enter into contracts, id. arts. 7, 8, and it guaranteed its obligations with its own property, FDSP Statute, art. 2 (Act. No 750-3). The organizational laws also suggest that the government intended for the FDSP to be funded by its own commercial activities. See id. art. 16 (providing that earnings were to be used to "replenish funds spent"); id. art. 21 (providing that the FDSP Council was to inform the Federal Secretariat for People's Defense and the Federal Executive Council if the FDSP experienced a liquidity problem or a loss in any given year).

1 Agreement. Such a result would be contrary to both corporate law
2 and the principles of comity animating Bancec. Bancec
3 establishes two analytic components, a presumption of
4 independence and alter-ego analysis, that operate in tandem.

5 Contrary to Yugoimport's suggestion, the Court's concern
6 about the diversion of an instrumentality's assets was not
7 motivated by a desire to protect instrumentalities for their own
8 sake; the recognition of the independent status afforded to
9 instrumentalities is derivative of, and incidental to, the
10 underlying purpose of the presumption, which is to give respect,
11 but not conclusive effect, to foreign sovereigns' policy
12 decisions. Id. at 626-27 (observing that the presumption is
13 based on "[d]ue respect . . . for foreign sovereigns" and
14 "principles of comity between nations").¹⁴

15 The presumption may be overcome by alter-ego analysis, i.e.
16 if the instrumentality was so extensively dominated by the

¹⁴As the Court explained, governments create juridical entities for a variety of important governmental purposes. Instrumentalities run as distinct economic enterprises are often exempt from the budgetary and personnel requirements applicable to other government agencies. Bancec, 462 U.S. at 624. Such instrumentalities also enjoy a greater degree of flexibility and independence from political control than typical agencies. Id. By delegating certain activities to such instrumentalities, governments may easily waive sovereign immunity with respect to the instrumentalities' activities, enabling third parties to deal with the instrumentality with confidence that judicial relief will be available should the need arise. Id. at 625. Most importantly, it is often easier to obtain large-scale financing using entities with distinct debt structures. Id. at 625-26. Disregarding corporate form would frustrate these objectives. In the case of a developing country, diversion of an instrumentality's assets to satisfy debts of the sovereign could stymie investment and cause third-parties dealing with the instrumentality to demand government guarantees. See id.

1 sovereign that a principal-agent relationship existed and where
2 respecting the corporate form of the instrumentality "blindly . .
3 . would cause . . . injustice." Id. at 629, 632; see Frontera
4 Res. Azerbaijan Corp. v. State Oil Co. of the Azerbaijan
5 Republic, 582 F.3d 393, 400 (2d Cir. 2009). The party seeking to
6 overcome the presumption of independence bears the burden of
7 proof. Zappia Middle East Constr. Co. Ltd. v. Emirate of Abu
8 Dhabi, 215 F.3d 247, 252 (2d Cir. 2000). This burden evinces the
9 measure of respect due foreign sovereigns. Alter-ego analysis is
10 simply a back-stop measure that prevents foreign sovereigns from
11 using their business laws to immunize themselves from third-party
12 liability.¹⁵ It defies logic to apply it where, as here, there
13 is no third-party seeking redress and Bancec is relied upon
14 solely to shield the instrumentality from the foreign state that
15 owns it.

16 For the foregoing reasons, we hold that Bancec has no
17 bearing on the issue of whether the FDSP was an agency as that
18 term is used in the Succession Agreement. And, because
19 Yugoimport cannot show as a matter of law that it was not an
20 agency, its motion for summary judgment was properly denied.

¹⁵ In Bancec, the Cuban government could not have brought suit in the U.S. without waiving its sovereign immunity with respect to counterclaims. Bancec, 462 U.S. at 630; see also 28 U.S.C. § 1607(c) (foreign states waive their sovereign immunity with respect to counterclaims "to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state."). Failure to apply alter-ego analysis would have permitted the Cuban government to circumvent Section 1607(c).

CONCLUSION

For the reasons stated herein, the district court's order and opinion are AFFIRMED.