

# Crossing Over

## A Perspective on Croatian Open Border Issues



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- Croatia has open border issues with four neighbouring states: Bosnia and Herzegovina, Montenegro, Serbia and Slovenia. Each case is at a different stage of the negotiation process.
- As a result of the Yugoslav dissolution and the wars in the 1990s, different bilateral issues emerged, border delimitation being only one of them.
- Border delimitation is agreed to follow boundaries between republics existent in the former Yugoslavia, while maritime borders needed to be determined since there were no formal boundaries between the republics at sea.
- None of these border issues, however, gravely burden relations between neighbours and all sides express will to resolve them on the basis of international law while respecting the principle of peaceful settlement of disputes.
- Border issues are always politically sensitive, even more so for countries with painful and complex histories. Political will to generate a compromise is not easy to build and sustain. It takes a lot of conscious effort, sincere commitment and abundant patience to build mutual trust.

## PREFACE

This study describes the status of open border issues that Croatia has with four neighbouring countries – Bosnia and Herzegovina (BiH), Montenegro, Serbia and Slovenia. The rationale for preparing the study is to serve public interest and provide reliable and comprehensive information on each of the four cases. An equally important reason, which transcends the presentation of facts and figures, is to contribute to the overall sense of goodwill in addressing bilateral disputes in a spirit of mutual respect and good-neighbourly relations. The background study does not advocate any particular outcome or propose any final solution. Rather, the goal is to contribute to the process of trust-building necessary for resolving as delicate and sensitive issues as border delimitation for each country are.

Unresolved bilateral issues are seen as a possible obstacle in the process of the European Union (EU) enlargement. It has been consistently noted that unresolved bilateral issues may slow down negotiations and could and were used to block the accession of a candidate country over issues not formally part of the EU's negotiation framework.<sup>1</sup> This has happened in the past and there is no way to ensure that it will not be repeated in the future. The EU's capacity to influence a member state that is blocking an acceding state over bilateral reasons is limited. The EU can try to offer its good services in facilitating a dialogue between the two countries, but it cannot be an arbitrator and it cannot impose any solutions to the parties although it may employ various diplomatic tools to accelerate a resolution. The concern that bilateral issues may put the enlargement process in jeopardy has become more prominent recently.

In 2014, Germany initiated the so-called Berlin process, a framework which, in light of the slowdown in the formal enlargement process, has been designed to reassure the countries in the Western Balkans (WB) of their European future and to re-energize the process of regional cooperation as one of the crucial elements of the region's accession to the EU. The regional cooperation in this framework has been sought through several channels – a connectivity agenda which, as its name suggests, aims to physically connect the region by investing in transport and energy infrastructure projects; the creation of the Regional Youth Cooperation Office simulating a successful Franco-German youth cooperation model; and engaging civil society organisations which share the

goal of their countries' EU future and are a domestic partner to the EU in implementing necessary reforms and meeting conditions that help realize this goal.

To demonstrate a will to improve regional cooperation, the six countries of the Western Balkans, encouraged by the EU, signed a Declaration on Regional Cooperation and the Resolution of Bilateral Disputes in Vienna in August 2015 in which they expressed their commitment to resolve all open issues in a spirit of good-neighbourly relations and with a commitment to European integration.<sup>2</sup> Moreover, the Vienna Summit resulted in the signing of two border delimitation agreements – one between BiH and Montenegro and another between Montenegro and Kosovo. The BiH-Montenegro treaty was consequently, although not without political turmoil, ratified in the parliaments of both countries. In the case of the border delimitation agreement between Montenegro and Kosovo, the Montenegrin parliament ratified it while the Kosovan parliament has so far failed to do so.<sup>3</sup>

## INTRODUCTION

Croatia entered the European Union on 1 July 2013. It was the second of the former Yugoslav countries to do so, following Slovenia in 2004. Bosnia and Herzegovina, Kosovo, Macedonia, Montenegro and Serbia are all aspiring EU members, and are currently at different stages of the integration process. Due to the nature of the dissolution of the former federation, each newly created state has faced the challenge of resolving a host of bilateral issues. Although a number of them have been successfully addressed, some still remain open.

One such issue is the process of border delimitation between the former republics. The Socialist Federative Republic of Yugoslavia (SFRY) consisted of six republics and two autonomous provinces. Inter-republican land boundaries were established within the federation. Maritime boundaries between republics were not formally established as the sea was considered federal waters. However, although the borders between republics were not formally determined, their respective

1 Bilateral Issues in the Western Balkans: A Threat to European Integration? 21 June 2016 <https://europeanwesternbalkans.com/2016/06/21/bilateral-issues-in-the-western-balkans-a-threat-to-european-integration/>

2 European Fund for the Balkans. "Joint Declaration Adopted by Western Balkans Foreign Ministers in Vienna – Countries Will Not Obstruct Neighbours' Progress in EU Integrations". 27 August 2015. <http://balkanfund.org/2015/08/joint-declaration-adopted-by-western-balkans-governments-representatives-in-vienna-countries-will-not-obstruct-neighbours-progress-in-eu-integrations/>

3 EU Parliament's Foreign Affairs Committee voted in favour of visa liberalization in July 2016 on the condition, among others, that the Kosovo parliament ratifies the border treaty signed with Montenegro.

authorities exercised control over the relevant areas under their jurisdiction. With the dissolution of Yugoslavia, the former exterior boundaries became international boundaries of the respective republics, while the former republican boundaries became exterior boundaries of the newly independent states, protected as such under international law. This principle, called *uti possidetis*, became the fundamental basis for clear border identification (*delimitation*) of the newly founded states. "When states are created from the dissolution or dismemberment of existing countries, it is presumed that the frontiers of the new states will conform to the boundaries of prior internal administrative divisions."<sup>4</sup> *Uti possidetis* doctrine, which in Latin means 'as you possess', was thus "established to ensure the stability of newly independent states whose colonial boundaries were often drawn arbitrarily."<sup>5</sup> The outbreak of armed conflict, however, compelled the involvement of the international community in this effort. The Council of Ministers of the European Economic Community established an Arbitration Commission as part of the Conference on Yugoslavia. This body became known as the Badinter Commission, after its chairman Robert Badinter, president of the French Constitutional Council. During its mandate, the Commission issued fifteen opinions on matters arising from the dissolution of the SFRY. Of these, the first three are especially relevant for the subject matter discussed. Principally, the Badinter Commission concluded that the SFRY was in the process of dissolution, that new independent states were likely to emerge from such a process, and that their international boundaries shall be those that existed within the former Yugoslavia. Through the application of the *uti possidetis* doctrine to the dissolution of Yugoslavia, the Commission afforded international legal protection to both former external boundaries of the federation, as well as to the formal internal republican boundaries. Hence, the *uti possidetis* doctrine became the basic principle upon which any identification of the border was to be concluded, in the absence of a different agreement and in accordance with the rules and principles of international law.

## ON THE PEACEFUL SETTLEMENT OF INTERNATIONAL DISPUTES IN GENERAL

A dispute is defined as "a disagreement on a point of law or fact, a conflict of legal views or interests, between two legal persons".<sup>6</sup> Since the outlawing of the use of force as a method for solving international disputes, various forms of peaceful settlement of disputes have emerged. They are listed in Article 33 of the UN Charter which states that "the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."<sup>7</sup> In practice, these methods of dispute settlement vary from negotiations, at one end of the spectrum, which are related to politics and compromise, and arbitration and judicial settlement on the other end which are related to the application of international law.<sup>8</sup>

The principal means of settling international disputes is generally negotiations. The parties use political and diplomatic means to try to reach a common position. Negotiations, by themselves, produce no obligatory effects. However, usually negotiations on border disputes, if successful, result in some form of an agreement between the parties which, after adhering to the relevant national procedures, becomes binding between the parties.<sup>9</sup> Generally, parties usually move on to other forms of dispute resolution when it becomes obvious that negotiations have proven fruitless.

In the middle of the spectrum there are mediation and conciliation, methods which are "hybrids where law may play a role, but elements of politics and of compromise are present."<sup>10</sup> The main distinctive element is participation of a third party in the 'negotiation process', with the extent of intrusion varying from lesser in mediation to greater in conciliation. The result of mediation and conciliation is not binding.<sup>11</sup>

At the end of the spectrum, there are arbitration and judicial settlement. They are similar to the degree that they both deliberate on the basis of law and their decisions are binding. Arbitration is most often conducted in *ad hoc tribunals* established for

4 Encyclopedia Britannica. More at <https://www.britannica.com/topic/international-law/The-responsibility-of-states#ref794968>

5 *Ibid.*

6 Brownlie, I., 1995. The Peaceful Settlement of International Disputes in Practice. *Pace International Law Review*. Vol. 7, Issue 2, Spring. 257-278, pg. 262

7 <http://www.un.org/en/documents/charter/chapter6.shtml>

8 *Op.cit.* (2). pg. 264

9 See Vienna Convention on the Law of International Treaties

10 *Op.cit.* (2). pg. 262

11 *Ibid.*

a particular dispute.<sup>12</sup> The parties define the forum and the rules of procedure. It is more flexible and allows the parties "to maintain more control over the proceeding".<sup>13</sup> Croatia has so far, in efforts to settle its border disputes, conducted negotiations with all the concerned countries and participated in an *ad hoc* arbitration with Slovenia.

## CROATIAN TERRITORIAL DISPUTES

After the proclamation of independence, the Republic of Croatia acquired new international frontiers, namely with Italy (at sea) and Hungary<sup>14</sup>, boundaries inherited as the former external borders of the SFRY, and with Bosnia and Herzegovina, Montenegro, Serbia and Slovenia boundaries inherited as former republican ones upon which this paper concentrates.

The identification of boundaries of the former SFRY republics has proven to be complex. This is primarily due to the fact that the sea was not considered a territory of a particular republic, but was regarded as federal waters. Thus, after the dissolution of Yugoslavia, the delimitation of maritime boundaries became a task of determining, rather than identifying the borders, given that within the former SFRY the maritime border between republics was not formally determined, although their relevant authorities exercised jurisdiction over the respective areas. Secondly, disputes also arose with respect to the factual determination of the borderline between the republics within the SFRY, which would then serve as a basis for the identification of the borders.

Current Croatian border disputes concern all four of its neighboring states that were the former SFRY republics. The border dispute with Bosnia and Herzegovina concerns two disputed points: one in the coastal area near Neum and one along the river Una. The dispute with Montenegro concerns delimitation within and outside of the Bay of Kotor, with Serbia a dispute over certain 'pockets' of land along the river Danube and with Slovenia a dispute over the land boundary, as well as a dispute over maritime delimitation within and outside of the Bay of Piran/Savudrija. None of these disputes have been resolved to this day.

## BOSNIA AND HERZEGOVINA



### Background information

The state border between the Republic of Croatia and Bosnia and Herzegovina is determined in an international bilateral agreement – the Treaty on the State Border between the Republic of Croatia and Bosnia and Herzegovina – signed in 1999 by the presidents of two states (hereinafter the Treaty). That was the first agreement on delimitation between any Yugoslav successor states, respecting international law and borders between the former republics. It has not been ratified by either of the parties to the dispute, but has been provisionally applied since its signature. A comprehensive work by an Interstate Diplomatic Border Commission was done regarding technical parts of the border delimitation. It defines a border line in length of 1001 km and includes 86 maps (1:25.000). It was conducted following the basic principles of the respect of the former republican borders with several minor adjustments. The border documentation was confirmed in 2005. The two sides have explicitly agreed that they should adhere to the Treaty in good faith and that the work aimed at ensuring the conditions necessary for its ratification should be continued.

A couple of issues with regard to some specific solutions in the Treaty have been internally raised on both sides. One is on the southern border, in the territory of the coastal area in the vicinity of Neum (Klek peninsula) and the other is on the northern land border along the river Una, from the settlement Ivanjska to the mouth of the river Una into the river Sava. Both those locations became disputed after the signing of the Treaty before its ratification was initiated in the respective parliaments of both states.

The total length of the BiH coast is 21.2 km, but since the coast is shaped as a letter 'z', BiH's coastal front

<sup>12</sup> Copeland, C.S., 1999. The Use of Arbitration to Settle Territorial Disputes. *Fordham Law Review*. Vol. 67, Issue 6. 3073-3108. pg. 3073

<sup>13</sup> *Ibid.*

<sup>14</sup> Former external borders of the SFRY.

amounts to only around 10 km.<sup>15</sup> Historically, this area belonged to the Dubrovnik Republic, which in 1718 sold it to the Ottoman Empire to create a corridor that would separate the Republic from the Venetians.<sup>16</sup> Similarly, the Ottoman Empire gained access to the sea in Sutorina further south in the Boka Kotorska Bay. During the republican delimitation within former Yugoslavia, the Neum – Klek area remained in BiH, while Sutorina<sup>17</sup> was allocated to Montenegro.<sup>18</sup> This was the pre-existing status in 1991. With the creation of new states, after the dissolution of the SFRY, BiH became a coastal state, due to its access to the sea at Neum – Klek area. The particularity of this coast is the fact that it is located between two parts of the Croatian coast. The Bosnian sea is, thus located within the internal waters of Croatia and the two countries needed to delimitate their maritime borders.

### Broader context

This peculiar geographical position resulted in several issues:

- Division of the Croatian land territory, whereby the municipality of Neum separates the Croatian territory;
- Bosnia and Herzegovina has to pass through Croatian internal waters in order to gain access to the high sea;
- Due to the geography of Neum, BiH has historically relied on the port Ploče in Croatia for maritime trade<sup>19</sup>;
- After the Croatian decision to build the 'Pelješac bridge'<sup>20</sup>, a question of enjoyment of the Bosnian innocent passage through Croatian internal waters arose.

Here it is important to point out that the issues outlined, although often brought into connection with the border dispute, are separate issues. They are the result of the specific geographical position of the two states and will remain so regardless of any agreement on the borderline.

15 Blake, G., H., Topolovic, D., 1996. The Maritime Boundaries of the Adriatic Sea. *Maritime Briefing. International Boundaries Research Unit*. Vol.1, No.8., pg. 34

16 Rudolf, D. 2007. Hrvatski tjesnaci između Bosne i Hercegovine i otvorenoga mora. *Poredbeno pomorsko pravo*. 46(2007), 161, 113-122. pg. 115

17 After the dissolution, Sutorina became the object of the dispute between BiH and FRY (later Montenegro). The dispute was solved bilaterally in August 2015. (<http://www.newsweek.rs/region/53424-reseno-pitanje-sutorine-bih-prihvatala-sporazum-o-razgranicenju-sa-crnom-gorom.html>)

18 *Op. cit.* (16). pg. 116

19 *Op.cit.* (15). pg. 39

20 The bridge is considered of strategic importance for Croatia as it would physically connect its territory and facilitate preparation for the entry into the Schengen area.

Given the division of Croatian land territory, it is now necessary to pass through BiH (the Neum municipality) in order to travel by road to the southern part of Croatia. This is one of the main motives behind Croatia's efforts to construct the Pelješac bridge. In terms of Bosnian connection to the high sea, Croatian straits in that area hold the status of internal waters<sup>21</sup> but since they are located between Croatian territorial sea and Bosnian internal waters and territorial sea, they have the status of international straits where innocent passage of foreign vessels is granted. When Croatia announced its intention to build the Pelješac bridge, BiH questioned its effect on the country's right to the enjoyment of innocent passage, in particular in relation to the height of the future bridge and the application of the *reasonably foreseeable ships* standard. Finally, a mutually acceptable solution was found where the height of the bridge would be 55m. Currently, Croatia is in the process of preparing the relevant documentation in order to apply for European Union funding for the construction of the bridge.

### Negotiations

With respect to border identification, the area at issue concerns the tip of the Klek peninsula and the two islets, as well as the respective sea belt stretching beyond the states' coasts. The second disputed point lies on the norther borderline at the river Una, between Croatia and BiH.

A significant step was made in 1999 when the presidents of the two states (F. Tuđman for Croatia and A. Izetbegović for Bosnia and Herzegovina) signed the earlier mentioned Treaty on the state border which has been provisionally applied ever since its signature. According to that agreement, in the Neum – Klek maritime area, a line was drawn in accordance with the equidistance principle between the Croatian and BiH territory. The boundary, with respect to the tip of the Klek peninsula and the Škoj islands, was determined for the purposes of the Agreement, on the basis of documents defining cadastral boundaries in 1974, which were presented by the Hydrographic Institute from Split. According to those documents, which were disputed later, these territories were registered as cadastral municipalities of BiH.<sup>22</sup>

21 In internal waters the state does not have to tolerate innocent passage – it holds the same status as land territory.

22 <http://www.slobodnadalmacija.hr/Hrvatska/tabid/66/articleType/ArticleView/articleId/183362/Default.aspx>; <http://www.slobodnadalmacija.hr/Hrvatska/tabid/66/articleType/ArticleView/articleId/183362/Default.aspx>

## Objections from Croatia

After the signing of the Treaty, the Assembly of Dubrovnik county officially protested, claiming that the tip of the Klek peninsula and two islets (Mali i Veliki Škoj), which fell under BiH sovereignty, in fact belong to Croatia. According to the regional authorities, this land belongs to Croatia in accordance with the principle of respecting the *uti possidetis* principle in 1991.<sup>23</sup> They claim that the AVNOJ boundaries of Bosnia and Herzegovina were drawn to reflect the condition at the time of the Berlin Congress. In 1947, there was a change to BiH's border with respect to Sutorina which was awarded to Montenegro. They further claim that there is no evidence of any further correction of the border with respect to the Klek peninsula and the border did not change anymore until 1991, nor has such change ever been requested or debated on in front of the relevant authorities.<sup>24</sup> In 1974, on the basis of the Act on State Survey and Real Estate Cadaster and the Ordinance on the measurement of cadastral land and its maintenance, commissions for the demarcation of cadaster municipalities were formed in order to establish a new cadastral measurement. The Dubrovnik county claimed that the tip of Klek peninsula and the islets were wrongly placed in the cadastral municipality of Neum.<sup>25</sup> By such identification of the border, according to the Dubrovnik county, the Joint Commission responsible for the identification of the border for the purpose of the 1999 Agreement overstepped its authority.<sup>26</sup> As a result of the expressed concerns, the Treaty was never ratified in the Croatian Parliament.

### *Constitutional considerations in case of ratification*

If the Treaty were submitted to the Croatian Parliament for ratification, consideration would need to be paid to the appropriate majority in accordance with the Croatian Constitution. According to one opinion, the substance of the Agreement is a change to the borders of the Republic of Croatia. If that is the case, a two-thirds majority would be needed for ratification in accordance with the Croatian Constitution.<sup>27</sup> There is another opinion, according to

which the Treaty does not change the borders, but rather establishes them for the first time. Hence, only a simple majority would suffice to ratify the Treaty in accordance with the Constitution.<sup>28</sup>

This difference of opinion derives from a disagreement on the application of the *uti possidetis* doctrine. According to one opinion, the Badinter Commission did not determine the borders between the new republics, but rather merely the principle upon which they will be determined. This means that despite the application of *uti possidetis*, particular points at the border still need to be established for the first time. That is the case with the Tuđman – Izetbegović Treaty, and thus a simple majority would suffice.<sup>29</sup>

Those who claim a two-thirds majority is needed are of the opinion that the tip of the Klek peninsula and the two islands were a part of Croatia in the former Yugoslavia. Thus, this represents the pre-existing condition at the time of its dissolution, to which *uti possidetis* is automatically applied, establishing the border along the lines of the former republican borders. Therefore, the decision of extending Bosnian sovereignty over the tip of Klek and the two islands would represent a change to the Croatian borders. In case the Treaty were put into the parliamentary procedure, where ratification would be rejected, it would signify an official rejection of the Treaty. The result would be reopening the negotiations with Bosnia and Herzegovina on the entire border in length of 1001 km, where new issues considered to be resolved so far, could be reopened.<sup>30</sup>

## Objections from BiH

Bosnia and Herzegovina claims their rights with respect to the tip of the Klek peninsula and the islets. Thus, they are in consent with the 1999 Treaty with respect to the Neum-Klek area. On the other hand, the location of fortress 'Zrinjski' located between the Hrvatska Kostajnica and the Bosanska Kostajnica on river the Una (at the northern border) fell under Croatian sovereignty according to the 1999 Treaty (based on the former inter – republican delimitation), which caused protests by Republika Srpska (RS) in BiH. The location is divided from the Croatian bank by the

23 Čosić, S., Kapetanić, N., Vekarić, N. 2012. *Prijevara ili zabluda; problem granice na području poluotoka Kleka*. Dubrovnik. Vlastita naklada Nenad Vekarić.

24 *Ibid.* pg. 54

25 *Ibid.* pg. 71

26 *Ibid.* pg. 94

27 Croatian Constitution, Art. 3: "The borders of the Republic of Croatia can be changed only through a decision by the Croatian Parliament"; Croatian Constitution, Art. 83(3): "The decision from Art. 8 of the Constitution, the Croatian Parliament takes through a 2/3 majority of all the representatives."

28 <http://www.vecernji.hr/hrvatska/neven-mimica-zasto-bosni-i-hercegovini-dajemo-otoke-449491>

29 <http://www.vecernji.hr/hrvatska/neven-mimica-zasto-bosni-i-hercegovini-dajemo-otoke-449491>

30 <http://www.vecernji.hr/hrvatska/padne-li-ugovor-to-bi-znacilo-novo-utvrđivanje-cijele-granice-s-bih-449886>

main channel of the river.<sup>31</sup> According to the Treaty, the disputed area belongs to Croatia, stipulated by the land registry documentation.<sup>32</sup> The RS claimed that the border should be drawn along the main channel of the river Una, bringing the island under the jurisdiction of BiH. Thus, the BiH Parliament also failed to ratify the Treaty.

### Current prospects

Since the Treaty was never ratified in either state, it is not in force, but has been provisionally applied since its signature without any problems in its application having been raised.<sup>33</sup> The two sides explicitly noted on a number of occasions that they should adhere to the Treaty in good faith and that the work aimed at ensuring the conditions necessary for its ratification should be continued.

In 2011, the Presidency of Bosnia and Herzegovina met with the then President of Croatia Ivo Josipović and the then prime minister Jadranka Kosor. The meeting resulted in four possible options for the final resolution of the dispute. The first option would be that parliaments of both countries ratify the existing Treaty. The second option would be to partially ratify the Treaty with respect to the undisputed territory after which they would approach the resolution of the dispute regarding the remaining territory. The third option would be to form a new Commission that would consider possible corrections of the borderline as outlined in the 1999 Treaty. The final option would be to resolve the dispute through arbitration or in front of the International Court of Justice.<sup>34</sup> However, no solution on the way forward has been agreed upon to this day.

## MONTENEGRO



### Background information

The Croatian-Montenegrin border dispute in the south of the Adriatic Sea concerns the identification of the border on land and its delimitation at sea. In 2002, Croatia and Montenegro (then FR Yugoslavia) signed a Protocol on an interim regime along the southern border between the two states, provisionally delimiting their land and maritime boundary. The land border is thus currently defined from the jointly agreed border three-point (Croatia - Bosnia and Herzegovina – Montenegro) until the promontory Konfin, based on the previous joint work done by Croatian and Yugoslav/Montenegrin experts. In the past, the most controversial point of the land boundary was the boundary at the Prevlaka peninsula, the most southern part of the region Konavle. The peninsula is 2.5 km long, with its width varying between 170 – 480m and the land surface is 93.33 hectares.<sup>35</sup> In the 1990s, during the dissolution of the SFRY, the peninsula had immense strategic value. The region itself was a geopolitically sensitive area during the war in the 1990s, because of its border with Montenegro and the Serb-controlled part of BiH in the hinterland.<sup>36</sup> The Bay of Kotor consists of a number of smaller bays, which due to their geography (location, shape and water depth) represent good natural harbors.<sup>37</sup>

For Croatia, the importance was emphasized by the geographic exposure of Dubrovnik and Konavle. The land area there is extremely narrow (average breadth between the coast and the BiH border is less than 5 km) with no islands at sea that could serve as shields.

31 Klemencic, M., 1990-2000. The Border Agreement between Croatia and Bosnia and Herzegovina: The first but not the last. IBRU Boundary and Security Bulletin. Winter 1999-2000. 96-101. pg. 98

32 <http://www.vecernji.hr/hrvatska/nova-vlast-spremna-ratificirati-sporazum-tudjmana-i-izetbegovica-435195>

33 Rudolf, D. Enciklopedijski rječnik međunarodnoga prava mora. Matica Hrvatska. Zagreb 2012. pg. 71

34 <http://www.vecernji.ba/rh-i-bih-spremne-na-novo-crtnanje-granice-oko-neuma-247302>

35 *Op.cit.* (12). pg. 41

36 *Ibid.* pg. 42

37 *Ibid.*

## Subject of the dispute

The maritime delimitation concerns the delimitation of the territorial sea within and outside of the Bay and consequently the continental shelf in the high seas of the Adriatic. As in other cases, the land boundary is important to determine the starting point for the delimitation of the maritime boundary. Generally, for maritime delimitation two factors need to be agreed upon: the starting point for delimitation (the land boundary terminus) and the method according to which the lines are going to be drawn. Maritime delimitation was considered important for both sides because it primarily concerned the control of the entrance to the Bay and securing navigation routes, but today the Bay has lost much of its former strategic importance due to Euro-Atlantic integration and good neighbourly relations. The exact border delimitation, however, will become important for Croatia after joining Schengen to control potential illegal migration.<sup>38</sup> Also, maritime border delimitation is important for the purpose of planning for explorations of oil and gas reserves in the Adriatic. Both countries consider granting concessions for exploration of potential hydrocarbon supplies from the seabed and its possible future exploitation.

## Negotiations

### *Pre-2006 period*

While some former republics sought independence, Montenegro initially remained with Serbia within a state called the Federal Republic of Yugoslavia until 2003, and then within the State Union of Serbia and Montenegro until 2006.

The Bay of Kotor was one of the important strategic bays during the war and Prevlaka was considered the key for controlling the entrance to the Bay. This was also an area of intense fighting, while its strategic geographical position prompted tough negotiations on the status of Prevlaka. Finally, an agreement was reached in 1992 between the Croatian president Franjo Tuđman and the Yugoslav president Dobrica Čosić regarding the security of Prevlaka, whereby the status would be resolved by demilitarization and the deployment of UN monitors. Following the agreement, Prevlaka was demilitarized and put under the control of the United Nations Protection Force (UNPROFOR).<sup>39</sup> UNPROFOR was replaced by UNCRO (United Nations Confidence Restoration Operation in Croatia) in 1995 and by UNMOP (United Nations Mission of Observers in Prevlaka) in 1996, in order to ensure the continued

observance of its demilitarization. The mission was terminated in December 2002, following the successful completion of its mandate<sup>40</sup>, which marked the end of the UN presence in Prevlaka.

Along with the withdrawal of UN troops from Prevlaka, the Protocol on the temporary regime along the southern boundary between Croatia and the Federal Republic of Yugoslavia was signed in 2002. The aim was to normalize relations between the two states and to demilitarize the wider area.<sup>41</sup> The signing of the Protocol was widely considered a sign of improved good-neighbourly relations, a big step for ensuring the stability of the region, and for starting its economic and touristic recovery.<sup>42</sup>

Croatia, however, points to the temporary character of the Protocol which cannot prejudge the final agreement on boundary delimitation. In other words, since the signature of the Protocol in December 2002, the temporary regime it installed has been applied only provisionally. Nonetheless, the agreement brought stabilization to the region and created conditions for its recovery and development.

### *Post-2006 period*

After Montenegro proclaimed its independence from the State Union of Serbia and Montenegro in 2006 and started the process of European integration, the framework for the solution of the border dispute changed profoundly. The border issue first arose in the framework of the dissolution of the SFRY and the subsequent war. The importance of the disputed area was viewed in terms of military strategy and later demilitarization. The parties to the dispute (Croatia and what was then the FRY) were in a position of heavily impaired diplomatic relations. The EU integration process of Croatia and Montenegro completely changed this framework, transforming the dispute into a bilateral issue between two friendly states, with good diplomatic relations, who share the same vision of Euro-Atlantic integration. During official bilateral visits of the highest state officials that took place in 2008, special emphasis was placed upon the agreement on solving the question of border delimitation through bilateral negotiations, in accordance with international law and the opinions of the Badinter Commission. A general agreement later on was reached on the referral of the matter to the International Court of Justice (ICJ).

38 Raos, V. 2013. Pomicanje granice EU na jugoistok i višestruki procesi teritorijalizacije. *Politička misao*. Issue 03. 33-55. pg. 50

39 *Op.cit.* (26), pg. 48

40 <http://www.un.org/en/peacekeeping/missions/past/unmop/>

41 Zorko, M., 2013. Konfliktni potencijal dobrosusjedskih odnosa: slučaj Hrvatske i Crne Gore. *Politička misao*. Issue 7. 51-75. pg. 64

42 <http://www.hrt.hr/arhiv/2002/12/10/HRT0012.html>



## Current prospects

In January 2015, the two Governments reconfirmed their agreement in principle on the referral of the dispute to the ICJ. Both countries confirmed their desire to approach the negotiations in *bona fide*, continuously pointing to the good-neighbourly relations between the two states. Positions of the states regarding delimitation at sea were not publicly defined,<sup>43</sup> but it can be assumed that delimitation in front of ICJ would concern maritime delimitation. As far as land delimitation is concerned, Croatia claims that the status of Prevlaka is not in question. The process with respect to the land boundary concerns the definite identification of the boundary and, with that, the initial points for maritime delimitation where Croatia supports the application of the equidistance line.

However, in early 2016, the two countries decided to renew their efforts to resolve the border issue bilaterally and, in case they failed to do so, agreed to refer the case to international institutions.<sup>44</sup> The two foreign ministers, Miro Kovač and Igor Lukšić, once again stressed that good-neighbourly relations are not affected by the still unresolved border issue.

## SERBIA



## Background information

The position of Croatia is that the border with Serbia is 325 km long and geographically stretches across/through the Danube area, from the three-point border (Croatia, Hungary and Serbia) to the Ilok/Bačka Palanka area, and the “green” area from Ilok/Bačka Palanka to the three-point border between Croatia, Bosnia and Herzegovina and Serbia.<sup>45</sup> The position of Serbia is that the border with Croatia is 262 km in length, out of which 138 km is the border on the river Danube, while in the Syrmia region the length of the border is 124 km.<sup>46</sup> In 1945, the so-called Đilas Commission proposed to delineate the border between Serbia and Croatia by reference to the Danube river. The proposed solution was described and provisionally determined in the Law on the Establishment and Constitution of the Autonomous Province of Vojvodina, on the basis of which Serbia bases its arguments on the border demarcation. The Croatian position is that the 1945 Law was of temporary character and was repealed by subsequent legislative provisions regarding the administrative-territorial arrangements of the republics. In other words, the two countries’ republican laws on administrative-territorial divisions determined the inter-republican border with reference to its administrative and cadastral borders, thus demarcating the border between Croatia and Serbia along the outer limits of their cadastral municipalities.<sup>47</sup>

43 Op.cit. (39) pg. 65

44 Ministry of Foreign and European Affairs, Croatia. Press Release. 19 February 2016. <http://www.mvep.hr/en/info-servis/press-releases/25680.html>

45 Pavličević, D., O granicama i razgraničenju s posebnim osvrtom na granice Republike Hrvatske. *Zbornik radova sa Međunarodnog znanstvenog skupa*. 99-109, pg. 105.

46 Interview in the Ministry of Foreign Affairs in Belgrade, October 2016.

47 Interview in the Ministry of Foreign and European Affairs in Zagreb, November 2016.

The origin of the existence of certain disputed areas along the Danube is the fact that the cadastral municipalities were determined at the end of the 19<sup>th</sup> and beginning of the 20<sup>th</sup> century, and have not changed to this day.<sup>48</sup> However, over the course of this time, the original river bed and river flow of the Danube changed as a result of artificial interventions.<sup>49</sup> Consequently, certain 'pockets' of land and riverine islands ended up on the 'wrong' side of the Danube. Since the borders of land registry municipalities were never adjusted to reflect the new riverbed of the Danube, the republican boundary remained the same and both Croatia and Serbia ended up with jurisdiction over land on the opposite side of the Danube river. It is precisely these pockets and riverine islands (adas) that are the subject of the dispute today.

### Subject of the dispute

The disputed land refers to some 115 km<sup>2</sup> of land on the eastern side of Danube which 'belongs to Croatia' and some 10 km<sup>2</sup> of land on the western side of the Danube which belongs to Serbia,<sup>50</sup> including two islands – Vukovarska and Šarengradska ada, for which Croatia claims property rights. Croatia bases its argument on the borderline of the cadastral municipalities, claiming it represented the pre-existing republican boundary in 1991, and that consequently through the application of the *uti possidetis* doctrine, those borders should be respected. According to Croatia, the provisional arrangement that resulted from the report of the Đilas Commission ended and was replaced by the later legislation which determined the territory of Serbia (and Vojvodina) by reference to the municipalities and their cadastral districts. At the same time, the cadastral borderlines remained unchanged even after the alterations in the riverbed of the Danube, and Croatia continued to exercise jurisdiction over those pockets on the eastern side of the river.<sup>51</sup> Thus, the position of Croatia is that, "while the border between the two countries in general follows the direction of the Danube in this section, crucially, the alignment of the boundary is not identical to that of the present course of the river."<sup>52</sup>

Serbia, on the other hand, claims that the border should follow the thalweg of the river Danube, basing the argument also on the recommendation of the

mentioned Đilas Commission regarding the determination of the border along the Danube. It bases its argument on the rule of international customary law according to which, when a river represents an international border, the border line should flow through the middle line of the river, and for navigational rivers, the borderline should be established at the middle of the navigational area of the river, the so-called thalweg.<sup>53</sup>

### Negotiations

As a result of the war between Croatia and the FRY, the territory in question was not addressed until after the signing of an Agreement on the Normalization of Relations between the Republic of Croatia and the Federal Republic of Yugoslavia in 1996. With the aim of enforcing the Agreement the parties, by means of a common statement issued on 11 November 2001 in New York, established an 'Interstate diplomatic commission for the identification-determination of the border line and the preparation of the Agreement on the state boundary between the Republic of Croatia and the Federal Republic of Yugoslavia'.<sup>54</sup> The first meeting of the interstate commission was held in Belgrade January 2002. It is through the work of this Commission that the temporary regime on the border between the Republic of Croatia and the Federal Republic of Yugoslavia (today Montenegro) was signed.<sup>55</sup>

In April 2002, the Ministers of Foreign Affairs signed a Protocol according to which "the basis for the identification – determination of the border line... is the former inter-republican border as it existed in the former Socialist Federative Republic of Croatia, between the Republic of Croatia and the Republic of Serbia and the Republic of Croatia and the Republic of Montenegro."<sup>56</sup> In April 2002, expert delegations from both sides exchanged topographic maps for the 'green land boundary,' which proved that no major differences exist in the identification of this part of the border. However, no formal agreement was reached. At the meeting in July 2003, the two sides agreed on the demarcation of two 'zero points,' one at Bajakovo and one at the Croatian/BiH/Serbian triangle, Račinovci near Brčko.<sup>57</sup>

After the independence of Montenegro in 2006, two different courses of negotiations continued, namely between Croatia and Serbia with respect to delimitation

48 Sršan, S. Sjeveroistočne granice hrvatske – povijesni pregled. Zbornik radova s Međunarodnog znanstvenog skupa. pg. 152

49 *Ibid.* pg. 152

50 Although the exact size of the disputed land varies, the general ratio is approximately 10:1 between Croatia and Serbia respectively.

51 For a review of documents supporting that claim, see Klemenčić, Schofield (reference 94)

52 Klemenčić, M., Schofield, S. 2001. War and Peace on the Danube: The evolution of the Croatia – Serbia boundary. Boundary and territory briefing. International Boundaries Research Unit. Vol. 3, No. 3. pg. 17

53 Andrassy, J., Bakotić, B., Seršić, M., Vukas, B. 2010. *Međunarodno pravo* 1, Zagreb. pg. 190

54 Babić, M. Uređenje granica i neka pitanja uređenja granice između Republike Hrvatske i Republike Srbije. *Zbornik radova s Međunarodnog znanstvenog skupa*. pg. 327

55 See border dispute with Montenegro in this publication.

56 *Ibid.* Art. 1, pg. 328

57 <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52004DC0257>

in the area of the Danube river and between Croatia and Montenegro with respect to the Bay of Kotor. As far as the Serbian-Croatian negotiations were concerned after 2002, no significant progress has been made since the two states disagreed on the method of identification of the republican boundary in the area of the Danube river. Croatia advocated the continuation of comparison of the cadastral records, pursuant to the 2002 Protocol and internal legislation in the former SFRY, whereas Serbia was of the view that the river Danube is the border pursuant to the aforementioned 1945 Law. On the last two meetings of the Diplomatic Commission, both held in 2011, the states exchanged aide-memoires on their position on the identification-determination of their common border, but made no further steps towards resolution of the dispute.

### Current prospects

It remains to be seen whether the two countries can resolve their dispute through negotiations, or whether they will resort to some form of arbitration or seek a resolution in front of the ICJ. The Croatian position is that the dispute should be referred to the ICJ once bilateral options have been exhausted.<sup>58</sup> Serbia has at times voiced concern that Croatia would block Serbia's EU accession progress, in the same manner Slovenia did with respect to Croatia. Croatia denies the possibility that it would use an open border issue to block neighbouring countries from EU accession. In June 2016, Croatian President Kolinda Grabar-Kitarović and Serbian Prime Minister Aleksandar Vučić signed a Declaration on improving relations and resolving outstanding issues between the two countries.<sup>59</sup> The Declaration consists of six items, one of which is the expressed commitment to accelerate the resolution of the border issue by "an active approach to prepare a state commission to determine the demarcation line between Serbia and Croatia".<sup>60</sup>

58 <http://m.slobodnadalmacija.hr/Novosti/Najnovije/tabid/296/Article-Type/ArticleView/articleId/279840/Default.aspx>

59 Hina. "Grabar-Kitarovic and Vucic sign Declaration on advancing relations". 20 June 2016. <https://eblnews.com/news/croatia/grabar-kitarovic-and-vucic-sign-declaration-advancing-relations-25976>. Interestingly, the website of the Office of the President contains no press release following the June meeting and the signing of the Declaration. The same is true for the Croatian Ministry of Foreign and European Affairs. The Government of Serbia has published a press release "Declaration on Serbia, Croatia relations signed". 20 June 2016. <http://www.srbija.gov.rs/vesti/vest.php?id=116937>

60 *Ibid.* Other items refer to renewing efforts to identify missing persons, the protection of minorities, the implementation of the succession agreement from 2001, cooperation in the fight against terrorism and regarding migration, as well as active participation in joint development and cross-border EU projects.

## SLOVENIA



### Background

The subject of the dispute between Slovenia and Croatia concerns the delimitation of the land boundary and the delimitation of the maritime boundary within the Bay of Piran/Savudrija Bay. The land boundary between Slovenia and Croatia is about 670 km long. It is one of the oldest boundaries in Europe, with the exception of the part of the boundary in Istria, delimited after WWII and the *London Memorandum* of 1954.<sup>61</sup> The Bay of Piran/Savudrija Bay is located within the Bay of Trieste in the northern part of Adriatic. Its surface is 17,8 km<sup>2</sup> and the depth of the sea is between 11 and 18 meters.<sup>62</sup> The precise demarcation of the land boundary also affects the initial point for the delimitation of the maritime boundary.

Although the entire land border is a subject of delimitation, earlier negotiations focused primarily on the river Dragonja. Dragonja represents the historical as well as the administrative boundary between Croatia and Slovenia. The root of the dispute lies in the fact that historically, it had two riverbeds: the old riverbed of Dragonja and the artificial channel St. Odorik, built by the Austrians in 1905.<sup>63</sup> Initially, Croatia claimed that the boundary follows the old riverbed of Dragonja<sup>64</sup>, while Slovenia claimed it was to follow the St. Odorik channel. The area between two riverbeds is around 2-3 km, but is

61 Rudolf, D. 'O državnoj granici između Republike Hrvatske i Republike Slovenije', str. 60

62 Mazur, N., Činčurak, B. 2007. Međunarodnopravna analiza razgraničenja Republike Hrvatske i Republike Slovenije u Piranskom zaljevu. Pravni vijesnik 23 (1-2). 221-246. pg. 228

63 *Ibid.* pg. 230

64 *Ibid.*

important for Slovenia as the airport Portorož was built there<sup>65</sup> and also because it marks the initial point for maritime delimitation.

Croatia claims that the maritime boundary should be established in accordance with the equidistance line within the bay, a principle outlined in the United Nations Convention on the Law of the Sea (UNCLOS). Slovenia disagrees, putting forward two main claims, first officially outlined in the Memorandum on the Bay of Piran in 1993. Slovenia claims a) the integrity of the Bay of Piran under Slovenian sovereignty and b) a territorial contact/exit to the high seas. According to the Croatian position, such a claim is contrary to international law.

The first official proposal on border delimitation came from the Slovenian side on 29 October 1991. The Draft on a Common Border suggested that the land border should be drawn along the channel of St. Odorik, and the maritime boundary through the middle of the Piran Bay (the equidistance line), up until the Italian border, a suggestion in line with the current Croatian position. But Slovenia changed its proposal and the new Draft Agreement on a State Boundary dating from 27 March 1992 proposed that the boundary be moved south from the river Dragonja and the channel of St. Odorik, which would result in the villages Mlini, Bužin, Škrilje and Škudelin falling under Slovenian jurisdiction. Croatia responded to the new Slovenian proposal with its own Proposal on Boundary Agreement, suggesting that the boundary should be drawn through the old river flow of Dragonja, the so-called St. Jeronim channel.

The main point of disagreement is thus centered around the applicable delimitation principle invoked by the two parties. Slovenia bases its argumentation upon the invocation of the principle of equity and historical rights, while Croatia points to the *uti possidetis* principle and the United Nations Convention on the Law of the Sea. Just as in the case with Montenegro, the rationale for establishing the maritime border is also driven by economic (oil and gas exploration, port regulations) and security (Schengen border) reasons.

## Negotiations

The history of Croatian-Slovenian boundary negotiations can be divided into four distinct phases. The first phase dates to the proclamation of independence until 2007 and can be broadly defined as a phase of bilateral negotiations. In 1999 Croatia issued a *Declaration on the State of Interstate Relations between Republic of Croatia and Republic*

*of Slovenia*.<sup>66</sup> The declaration restates the previously expressed Croatian position that the land boundary should go along St. Odorik channel and that maritime boundary should be delimited in accordance with the equidistance principle. It further states that coastal states have an obligation to refrain from any action that would exceed the equidistance line in the Bay, until the boundary is officially determined. Furthermore, if the positions with regard to the boundary maritime line would not be compatible, Croatian government has envisaged the possibility of seeking an advisory opinion from the International Tribunal for the Law of the Sea in Hamburg or another appropriate international institution.<sup>67</sup>

In 2001, the Croatian prime minister Ivica Račan and the prime minister of Slovenia Janez Drnovšek initialed the 'Račan – Drnovšek' agreement.<sup>68</sup> Although Slovenia supported the Agreement, it never entered into force. The Agreement was rejected by the Croatian Parliament, legal experts and the public.<sup>69</sup> It caused very serious domestic debates which bordered on the accusation of treason as it envisaged ceding of the territory which is contrary to the Croatian Constitution.

The second period began with Slovenia blocking Croatia's EU accession negotiations in 2008, claiming that Croatia in its accession process to the EU prejudged the state boundary in various internal documents dating from after 1991.<sup>70</sup> The blockade on EU accession negotiations was lifted in 2009 pending the signature of the Arbitration Agreement. The third phase represents the period after the signing of the Arbitration Agreement and its subsequent implementation, including the proceedings before the Arbitration Tribunal. This lasted until the new developments in the arbitration in the summer of 2015, which led to the Croatian withdrawal from the Agreement and the resignation of the

66 Deklaracija o stanju međudržavnih odnosa između Republike Hrvatske i Republike Slovenije. NN (32/99). Available at <http://www.propisi.hr/print.php?id=5068>

67 *Op.cit.* (123), pg. 235

68 Treaty between the Republic of Slovenia and the Republic of Croatia on the Common State Border. Available at [http://www.vlada.si/fileadmin/dokumenti/si/projekti/2010/Arbitrazni\\_sporazum/4.b\\_Drnovsek-Racan\\_EN.pdf](http://www.vlada.si/fileadmin/dokumenti/si/projekti/2010/Arbitrazni_sporazum/4.b_Drnovsek-Racan_EN.pdf)

69 The Chronology of the Border Dispute between Croatia and Slovenia. Ministry of Foreign Affairs and European Integration. Zagreb, 16 March 2009. Available at [http://www.esiweb.org/pdf/slovenia\\_CR%20MoFA-chronology.pdf](http://www.esiweb.org/pdf/slovenia_CR%20MoFA-chronology.pdf)

70 Rudolf, D. 'O državnoj granici između Republike Hrvatske i Republike Slovenije', pg. 60

65 *Ibid.*

Slovenian judge and the Slovenian representative in the arbitration, which marked the beginning of the fourth phase. For Croatia, the arbitration process has suffered irreparable damage due to the breach conducted by Slovenia.<sup>71</sup> The Slovenian side, in contrast, claims that the Tribunal has not lost its legitimacy and has capacity to deliver the final decision.<sup>72</sup> In June 2016, the Arbitration Tribunal issued a Partial Award deciding to continue the proceedings, with two new judges appointed to replace the Slovenian and Croatian judges that had resigned from the panel.

### The Arbitration Agreement

The Arbitration Agreement between the Government of Croatia and the Government of Slovenia was signed in Stockholm on 4 November 2009. It was ratified in the Croatian Parliament immediately and in the Slovenian Parliament after the *Decision on the Constitutionality of the Agreement* in front of the Slovenian Constitutional Court and following a national referendum on the acceptance of the Agreement.

The Agreement contains a Preamble and 11 articles. The parties agree to approach the settlement of the border "...recalling the peaceful means of the settlement of disputes enumerated in art. 33 of the UN Charter, affirming their commitment to the peaceful settlement of disputes, in the spirit of good-neighborly relations, reflecting their vital interests and welcoming the facilitation offered by the European Commission..."<sup>73</sup>

The mandate of the Tribunal is outlined in the article 3, according to which the Tribunal was to determine the following issues: first, the course of the maritime and land boundary between the Republic of Slovenia and the Republic of Croatia, second, the determination of Slovenia's junction to the High Sea, and third, the regime for the use of the relevant maritime areas.<sup>74</sup> The Tribunal was mandated to reach these decision by applying both international law, equity and the principle of good-neighborly relations.<sup>75</sup>

71 The Croatian Ministry of Foreign and European Affairs has published the information on the arbitration process explaining its reasons for withdrawal. It can be accessed at <http://www.mvep.hr/en/other/termination-of-the-arbitration-process/>

72 Information on the position of the Slovenian government regarding the arbitration can be accessed at the following link <http://www.vlada.si/en/projects/arbitration/>

73 Preamble of the Arbitration Agreement

74 Arbitration Agreement, article 3.

75 *Ibid.*, article 4.

### Breach of the Arbitration Agreement

Several months before the expected decision by the Tribunal,<sup>76</sup> first the Serbian newspaper<sup>77</sup> and then the Croatian newspaper<sup>78</sup> published articles and audio recordings revealing conversations between Simona Drenik, the Slovenian representative in the arbitration proceedings, and Jernej Sokolec, the Slovenian nominated arbitrator on the Tribunal. The recordings disclosed that the arbitrator and the representative had been coordinating their positions, discussing how to influence other members of the Tribunal to decide favorably for Slovenia and delivering to these members additional documentation, contrary to the rules of procedure.<sup>79</sup> Following the public disclosure of these recordings and the information of inclusion, both Sokolec and Drenik resigned without denying the conversations. Croatia saw this as a gross violation of the Agreement that irreparably impaired the independence and impartiality of the Tribunal and requested that the Tribunal suspend further proceedings.<sup>80</sup> In an attempt to regain the confidence in the impartiality of the Tribunal, Slovenia named the President of the International Court of Justice Ronni Abraham as a replacement for the Slovenian judge, but he resigned a few days later.<sup>81</sup>

Croatia, on the other hand, declared that the confirmed misconduct represented a serious violation of the Agreement, one that undermined the whole purpose of arbitration. The Croatian Parliament, at an extraordinary session and on a rare occasion of unity<sup>82</sup>, concluded that the principles of integrity, legality, independence and credibility have been systematically and gravely violated to the damage of Croatia.<sup>83</sup>

76 The decision was expected around December 2015

77 <http://www.kurir.rs/planeta/namazani-slovinci-pobeduju-hrvatska-izgubila-piranski-zaliv-clanak-1868919>

78 [http://www.vecernji.hr/nagradjeni\\_autori/ekskluzivno-donosimo-razgovor-arbitra-i-slovenske-strane-poslusajte-snimke-1015908](http://www.vecernji.hr/nagradjeni_autori/ekskluzivno-donosimo-razgovor-arbitra-i-slovenske-strane-poslusajte-snimke-1015908)

79 *Ibid.*

80 <http://www.mvep.hr/files/file/dokumenti/arbitraza/hr/150820-letter-from-fm-pusic-to-mr-pulkowski-pca-24072015.pdf>

81 <http://www.sloveniatimes.com/abraham-resigns-from-arbitration-tribunal>

82 All 141 deputies voted in favour of the Parliament's conclusion. See at <http://www.telegram.hr/politika-kriminal/sabor-danas-odlucuje-o-povlacenju-hrvatske-iz-arbitraze-sa-slovenijom-a-mi-donosimo-kratki-pregled-dogadanja/>

83 <http://www.vecernji.hr/hrvatska/sabor-o-izlasku-iz-arbitraznog-sporazuma-1016882>. Also, Goran Jutriša, "You got what you needed in the sea". The Arbitral Tribunal's Partial Award in the Croatian-Slovenian Arbitration: a Missed Opportunity", *Global Arbitration Review*, 2016

In June 2016, the Arbitration Tribunal issued a Partial Award where it held that Slovenia did act in violation of the provisions of the Arbitration Agreement by engaging in *ex parte* contacts with the state's originally appointed arbitrator.<sup>84</sup> It further concluded, however, that such violations were not of a nature to entitle Croatia to unilaterally terminate the Agreement, nor did they affect the ability of the Tribunal to render an impartial final award under its new composition. The Tribunal indicated it would consider the manner in which to proceed with a *de novo* consideration of all aspects of the case. In its deliberations, the Tribunal relied on its conclusion that the documentation circulated by the resigned Slovenian judge provided no new information on the case as well as on the fact that the Tribunal was now operating under a new composition, the neutrality of which had not been called into question.<sup>85</sup>

Croatia maintains its position that the arbitration process has been irreparably harmed and sees the Partial Award "...as a missed opportunity for the Arbitral Tribunal to restore confidence in independence and impartiality of its own work, as well as confidence in international arbitration as such."<sup>86</sup> Moreover, the nature of the breach in question is thought to be of such an extent that "...its object and purpose could no longer be accomplished."<sup>87</sup>

## THE EU AND BORDER DISPUTES

The former Yugoslav countries did not bring the issue of unresolved border disputes to the European Union. There are a number of border disputes within the European Union itself and many more exist in the world. The origins of most of the disputes are found in historical events and the manner in which the borders were established and altered in the past, which often resulted in unclear or 'unfair' demarcation lines, or the absence of such. The reasons behind states maintaining interest in disputed territories range from purely economic reasons to concerns over strategically important or sensitive areas to feelings of historic entitlement. The latter are often closely related to identity issues, which is particularly emphasized in states that recently gained independence and where a claim over territory is often related to the confirmation of statehood. In those cases, public opinion often represents a limitation to the negotiating mandate of governments. All of these elements can be found in the four open border issues Croatia has with its neighboring countries.

The member states of the European Union have over twenty unresolved border disputes, both among each other (such as the dispute between Spain and Portugal over the city of Olivenza, between the Netherlands and Germany over the Dollart Bay, between Poland and Denmark over the maritime border, between the United Kingdom and Spain over Gibraltar) and with third countries (such as the Danish-Canadian border dispute over the Hans Island). Some disputes have been resolved only recently, with Belgium and the Netherlands overcoming some territorial issues in 1993 and in 1996, and France and Luxembourg in 2004. Estonia and Latvia resolved their territorial disputes with Russia only after both countries became EU members. Border disputes of EU member states range both in terms of severity and character, with probably the most serious case being the Cyprus-Turkish dispute.

Furthermore, some former European colonial powers still have unresolved border disputes over their lands overseas, such as France in the Western and Southern Indian Ocean. French possession of several islands in the area, including the exclusive economic zones they generate, are disputed by Comoros, Madagascar, Seychelles and Mauritius. Moreover, the five square kilometers of Glorioso Islands along with the surrounding sea is claimed by four countries: France, Madagascar, Comoros and Seychelles.<sup>88</sup> States' interest in coastal territory is emphasized by their potential to generate sovereignty over certain areas of surrounding sea. Among many examples is the French-Canadian dispute over the tiny islands of St. Pierre and Miquelon

84 <https://pcacases.com/web/sendAttach/1785>

85 Permanent Court of Arbitration. Press Release. 30 June 2016. <https://pcacases.com/web/sendAttach/1785>

86 Ministry of Foreign and European Affairs. Press Release. 30 June 2016. <http://www.mvep.hr/en/info-servis/press-releases/press-release-on-arbitral-tribunal%E2%80%99s-decision-25852.html>

87 Ibid.

88 <http://www.geocurrents.info/geopolitics/contested-french-islands-and-sea-space-in-the-western-indian-ocean>

which lie south of Newfoundland. In the past, the dispute has mostly been about fishing rights, but the prospect of potential oil and gas reserves in the area has increased the interest of the involved countries once again.<sup>89</sup>

Some of the European border disputes are the result of the complicated European past after World War II and the formation and eventual dissolution of the USSR. Examples are the Estonian and Latvian disputes with Russia. Due to the difference in opinion over the Soviet past, the agreement between Latvia and Russia on border demarcation waited around ten years until ratified by Latvia.<sup>90</sup> The Romanian-Ukrainian border dispute in the Black Sea was solved in front of the International Court of Justice in 2009, but it took ten years of failed bilateral negotiations until the parties agreed to refer the matter to the ICJ.<sup>91</sup> Furthermore, within the EU itself, the Czech Republic and Poland have yet to resolve a dispute over some 900 acres of land dating back to the 1950s.<sup>92</sup>

## CONCLUSION

None of the four border cases is close to a resolution. Croatia and BiH signed the Treaty on border delimitation which is in application since 1999, but has not been ratified by either state. Experts believe that there are several ways to make progress on the basis of the existing Treaty. Unpacking the Treaty which identified the borderline along 1001 km would be the least sensible approach.<sup>93</sup> In the case of Montenegro, the two countries decided to re-initiate bilateral negotiations on its open border issue. The negotiations with Serbia are waiting to be relaunched. In the case of Slovenia, the parties have made significant steps in the long process of negotiations. However, at the present moment Croatia withdrew from the arbitration procedure, whereas Slovenia decided to adhere and wait for the Arbitration Tribunal's decision.<sup>94</sup> Whatever the future dynamic, the Croatian position is that border disputes should be resolved by the application of rules and principles of international law, namely the *uti possidetis principle* and respect for the defined cadastral municipalities' boundaries when it comes to determining the land

boundary, and the 1982 UNCLOS convention for delimitation at sea.<sup>95</sup>

Politically, none of the existing territorial disputes represent a threat to peace and security, nor do they significantly affect good-neighborly relations between the concerned states. However, as long as they remain present, they carry a potential of disrupting good-neighborly relations, distracting from domestic reform and becoming a strong tool in promoting a certain political agenda, often unrelated to the dispute itself. Border issues are always politically sensitive, even more so for countries with painful and complex recent histories. Political will to generate a compromise is not easy to build and sustain. It takes a lot of conscious effort, sincere commitment and abundant patience to build mutual trust. If insisting on resolving a border dispute, which otherwise triggers no serious frictions between neighbours, would cause more harm than good, then it is just logical to delay its resolution to a more appropriate political moment in time. It is with this concern in mind that the United Nations have come to support the notion that there is a duty to settle international disputes peacefully, but there is no duty to settle international disputes.<sup>96</sup>

The European integration process, a key driving force of reform, can contribute to the resolution of bilateral issues, including open border issues. Considering the region's turbulent past, the common political, economic and value-based European commitment can provide a conducive framework for reaching commonly acceptable solutions. Several examples mentioned earlier in the text attest to this statement. While the European integration process represents both a platform as well as a potential incentive for the resolution of border disputes, it cannot be used to force speedy solutions for territorial issues in disregard of international legal standards or to hamper in any way the accession process of candidate and potential candidate states. It is important to note that the countries concerned are not seeking a solution that would alter the borders, but one that clearly delimits them. Requests for alteration of borders would turn an 'open border issue' into territorial pretensions, a much more sensitive and dangerous approach. Once again, it seems common sense to underline that any solution should have a strong basis in international law, as a way to increase the credibility and the perceived fairness for any solution agreed. The neighbouring countries may not agree on border delimitation, but they agree upon where their disagreements lie

89 <http://www.rcinet.ca/en/2014/01/24/canada-france-territorial-dispute-heats-up-again/>

90 <http://news.bbc.co.uk/2/hi/europe/6498049.stm>

91 <http://news.bbc.co.uk/2/hi/europe/7867683.stm>

92 <http://www.telegraph.co.uk/news/worldnews/europe/czechrepublic/11452364/Czech-Republic-to-hand-over-900-acres-of-territory-to-Poland-in-border-dispute.html>

93 Interviews with experts in BiH and Croatia in October 2016.

94 Interview with Slovenian government officials, November 2016.

95 Interview with Croatian diplomats, November 2016.

96 United Nations, Handbook on the Peaceful Settlement of Disputes between States, OLA/COD/2394, 1992. <http://www.un.org/law/books/HandbookOnPSD.pdf>

regarding border delimitation. This is not insignificant as a basis for peaceful resolution in the future.

With respect to Croatia, the Declaration on the promotion of European values in Southeast Europe of 2011 states, *inter alia*, that "it is the firm position of the Republic of Croatia that open issues between states, which are of a bilateral nature as are for example border disputes, may not block the accession of candidate states to the European Union, since the beginning of the process to the entry into force of the Accession Agreement."<sup>97</sup> A political will to sustain this position will contribute to Croatia's realization of its national interests, at the core of which lies a peaceful and prosperous neighbourhood.

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97 Deklaracija o promicanju vrijednosti u Jugoistočnoj Europi, Narodne novine, broj 121/11.

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