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PRINCIPLE OF UTI POSSIDETIS AND DELIMITATION ON THE DANUBE RIVER[2]

ABSTRACT

The border problem concerns drawing of inter-state borders between Croatia and Serbia – it had been institutionalised during the succession processes in the territory of the former SFR Yugoslavia when the international community accepted the opinion of the Arbitration Commission that inter-republic boundaries were international borders unless the parties concerned did not find some other solution. In this way, the Danube River became a border between Croatia and Serbia.[3] Since the boundary line had been drawn between Baranja and Bačka in 1945 the Danube successively meandered, its riverbed changed while it increasingly retreated from the east to the west. In this way, big areas of arable land became a part of Vojvodina. When the Yugoslav crisis broke out Croatia demanded that the area of about 7,000 hectares, which became a part of Serbia due to the movement of the Danube, should be returned to Croatia in accordance with the Austrian-Hungarian cadastre land surveying from the 19th century. The cadastre border had been mainly drawn along a part of the main course of the Danube, while a part of it had been drawn along the so-called Dunavci, what actually included its tributaries. In the 1990s, Serbia adopted the Law on Territorial Organisation and Local Self-Government that followed the earlier solutions from the Law on Establishment and Organisation of the Autonomous Province (AP) of Vojvodina that had been passed in 1945. According to the Law, a part of the cadastre communes from the Danube left bank became a part of the Republic of Serbia – Sombor, Beli Manastir (a part of Batina, Draž, Zmajevac, Kneževi Vinograd), Apatin, Bačka Palanka and a part of[4] Vukovar (a

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[3] According to the law mentioned above the Croatia-Serbia border was drawn along the temporary route of the Danube River from the Hungarian border all the way up to Ilok. See: *Službeni glasnik NR Srbije*, broj 28/1945.

[4] *Službeni glasnik Republike Srbije*, broj 47/1991.

part of Mohovo and Šarengrad). The Law followed the changes of the Danube course, but *per se*, it was not of a crucial factor for the international legal border demarcation between the two states. With the aim of implementing the process of border demarcation, the International Diplomatic Commission for Identification and Establishment of the Border Line and Preparation of the Treaty on the State Border was established. The Commission adopted the Protocol for Identification and Establishment of the Border Line. However, up to the present days the Inter-State Diplomatic Commission has not published the information on the results of the border demarcation on the Danube. It should be necessary to consider all relevant law argumentation that goes in favour of the Serbian part until the Treaty on the Border is concluded with Croatia.

Key words: Serbia, Croatia, Danube River, border line, principle *uti possidetis*

International law of succession of states and borders

By applying the rule resulting from the international practice, the entry into force of succession of states does not itself bring into question the internationally recognised borders.[5] Moreover, it is a general international rule that as for the international borders of the predecessor state new states are obliged to respect them on the basis of continuity in exercising authorities within the territorially recognised borders and not on the basis of succession of treaty relationships.[6] It is through the process of border delimitation that international law establishes an objective situation, which imposes an imperative obligation to successor states in case of succession. Exceptions to the rule are possible only if a consensus is reached.[7]

Rising of the question of borders can be significant for functioning of successor states in case they have been drawn according to the administrative and territorial divisions of the former state. For such cases traditional international law declines to apply the general rule regarding them as internal boundaries that up to the succession were subject to the regime of the public law of the former state. With cessation of the internal legal order and its effectiveness on the territory affected by succession, its administrative boundaries also cease to exist. The contemporary development of international law and the law of succession of states that regulates legal consequences of transition of states in space and time have brought about substantial changes to such a conception.

[5] Daniel P. O'Connell, State Succession in Muncipal and International Law, Cambridge University Press, 1967, vol. II, p. 273.

[6] The Effect of Independence on treaties, International Law Association, London, 1965, p. 352. Albert G. Pereira, La succession d"Etats en matičre de traité, Paris, A. Pédone, 1969, p. 110.

[7] As provided by Article 62, paragraph 2, item a of 1969 Vienna Convention on the Law of Treaties a fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty. See more in: Shabtai Rossene, The Law of Treaties, Guide to Legeslative History of the Vienna Convention, A.W. Sijthoff, Leyden, 1970, pp. 326–327.

Previously encouraged by the examples of decolonisation of Latin American countries, "border innovations" reached its climax in Africa in the second half of the 20th century. The famous principle of the territory that remains with its possessor at the end of the conflict – *uti possidetis*, *ita possideatis* originating in Roman private law was *per analogiam* transferred to international legal relations.[8] The concept confirmed the territorial divisions done by the colonial powers on these continents. Unchangeability of borders had been formerly formulated as the respect for successive rights resulting from the famous bull *Inter Caefera* issued by the Roman Pope Alexander VI in 1493 granting all lands in South America to Spain and Portugal. In time, the historical principle *sensu politico* gained legal meaning since it had served as means for delimitation and afterwards for actual demarcation of borders because the legal basis was incomplete. Since these were big administrative entities where states were still in their infancy, peoples were regrouping, while some areas were often unsettled, disputable situations were unavoidable. The *uti possidetis* principle was formally legally and officially proclaimed by the National Congress in 1848 in Lima in the Treaty of Confederation signed by New Granada, Ecuador, Peru, Bolivia, and Chile. As the "*uti possidetis 1810*" or "uti possidetis 1821", the principle was accepted by the arbitrary courts since those dates were the ones when states in South and Central America gained their independence. The first recognised case that was in international jurisprudence was the territorial dispute between Columbia and Venezuela in 1891.[9] In 1922, the Federal Council of Switzerland concluded that the *uti possidetis* principle enabled to establish a general rule not allowing occupation of "the land belonging to no one" (*terra nulius*). Basically, the principle was later adopted by the United States in the Monroe doctrine, while its validity was confirmed in the law of South American states.[10]

Although South American states anticipated the principle of inviolability of borders that existed at the moment when they gained independence there was a substantial

[8] In Roman law praetor issues the so-called interdictum in the procedure of protection of real estate possession (*interdictum uti possedetis*). The objective of interdictum was to keep the *status quo* of possession leaving *onus probandi* to the party that possessed no land. This is the origin of the term uti *possidetis, ita possideatis*. See. S. Ratner, "Drawing a Better Line: *Uti Possidetis* and the Borders of New States", *American Journal of International Law,* 1996, vol. 90, pp. 592, etc.

[9] Referring to the principle was practised as early as in the disputes between Bolivia and Peru in 1909 and Guatemala and Honduras in 1933, respectively. About 25 border lines were drawn in South America by applying this principle. See: Woolsley, L. H., Boundary Disputes in Latin America, American Journal of International Law, 1931, n°25, p. 324; Albert Guani, La solidarité internationale dans l"Amerique Latine, Recueil des Cours, Académie de Droit International, 1925, vol. 3, p. 296. As regards the inherited borders with Brazil, what was followed by lack of a proper legal basis the "*uti possidetis*" principle was primarily a direction towards drawing an effective border – "*uti possidetis de facto*". See, for example: John Bassett Moore, Brazil and Peru, Boundary Question, The Knickerbocker Press, New York, 1904, p. 32; The History and Digest of International Arbitrations to which the United States has been a Party, Washington, 1898, vol. II. p. 1991.

[10] United Nations, Reports of International Arbitral Awards (RIAA), 2008, pp. 231, etc.

difference between former Spanish and Portuguese colonies. In the case of countries that were under Spanish domination the legal basis for possession was confirmed through the application of the *uti possidetis juris* principle, while in the case of Portuguese colonial areas, and above all in the case of Brazil, the *uti possidetis de facto* principle was applied. It was based on the effective power exercised on the territory at the moment when the country gained its independence.

While for Spanish America the principle was applied "on historically based rights" or on the basis of establishing "constructive sovereignty" , for the areas that were under the Portuguese control the principle that was applied was facticity (*ex facto, jus oritur*). On the other hand, for the legally heterogeneous areas of Africa the principle implied the adoption of a formal request for effective occupation.[11] At the All-African People's Conference in 1958 in Accra African peoples appealed for abolishment of the artificial borders that had been drawn by the colonial powers. At the summit in Addis Ababa in 1963 in its Charter (Article 3, paragraph 3), the Organisation of African Unity accepted that the *uti possidetis* principle was of primary significance for the purpose of maintaining integrity of new states. Within the context of settling territorial and border disputes by adopting the Cairo Resolution of 1964 member states of the Organisation of African Unity solemnly committed themselves to respect of the existing borders after gaining of independence. By the adoption of the principle mentioned above the Organisation of African Unity prevented some future conflicts over territories on the African continent. The principle also prevented liberation aspirations of ethnic communities also making impossible secession of territories by force. However, although the *uti possidetis* principle played a historical role in carrying out the process of decolonisation first by legitimising the anti-colonial struggle for independence and then by stabilising new independent states in their internal and foreign policies the principle was not generally accepted but was applied only in South American, African and Asian regions.[12] By all this, the nature of the principle was dispositive, since new

[11] Anthony Allot, Boundaries and the Law in Africa, in: "African Boundary Problems", The Scandinavian Institute of African Studies, Uppsala, 1969, pp. 9-21. Francca Dias F.J. Van Dunem, Les frontieres Africaines, thesé, Marseilles-aix, 1969; Romain Yakemtchouk, L'Afrique en droit international, Librare générale de droit et de jurisprudence, Paris, 1971, pp. 83–85; Ian Brownlie, African Boundaries, in Legal and Diplomatic Encyclopedia, Oxford, 1979, p. 9. etc. Encyclopedia of Public International Law, Max Planck Institue for Comparative and International Law, Elsevier Science B.V., Amsterdam, 2000, vol. IV, p. 1260.

[12] *International Court of Justice Reports*, The Hague, 1986, pp. 469-565. However, it should be pointed out that in spite of the fact that various decisions were made by the court that took this principle as a starting point in delimitation, it is considered a transition mechanism in the period of change of territorial sovereignty. Basically, it cannot be regarded as an absolute value in time but possibly as a supporting instrument that helps overcome undesirable situations, what *ipso de jure* does not prejudice the final decision on borders. See more in: Malcolm N. Shaw, Peoples, Territorialism and Boundaries, *European Journal of International Law,* 1997, vol. 8, p. 478; See, for example, the cases: Guatemala v. Honduras (Boundary Arbitration), Opinion and Award of the Special Boundary Tribunal, *UN Reports of*

independent states were free to apply other principles for the settlement of territorial disputes by making agreements with other parties.

The jurisprudence of The Hague International Court of Justice was of key legal significance for the affirmation of the *uti possidetis* principle. In the case Burkina Faso v. Mali (Frontier Dispute) it pointed out that that principles was logically connected to the phenomenon of emancipation of states disregarding where the process of gaining independence itself took place. According to the Court's opinion its purpose was to prevent independence and stability of new independent states be jeopardised by possible civil wars that would be brought about by mutual border disputes after the withdrawal of the predecessor state – former capital. Taking into account such constellations the Court concluded that the range of the *uti possidetis* principle was general, or actually, that it was a general principle applied to new independent states with no retroactive effect date of gaining of their independence. In other words, it observed the situation in the field at the time of gaining of independence, thus "freezing" the basis for territory possession by "stopping the clock, but not turning it backward". Stressing that the principle overwhelmingly covers the legal void until the establishment of effective power as a basis of sovereignty the International Court of Justice points out that its primary goal is to secure territorial borders that existed at the moment when the state gained its independence. When borders were delimited by the same ruler between the colonies or various administrative entities the application of the principle was reflected in turning the administrative boundaries into international borders. This occurred in the case of the above mentioned French colonies in Western Africa. Regarding its role in ensuring stability (and when it conflicts with the right to self-determination) as the Court points out the *uti possidetis* principle will be the wisest course that will show the rationality of African states to maintain the territorial *status quo*.[13] By issuing this opinion, the International Court of Justice limited the application of the *uti possidetis* principle to decolonisation. However, in its interpretation it has substantially extended its application by implementing the *infra legem* principle of equity. In this way, the principle of unchangeability of borders has been extended to all situations that could be similar to those of gaining of independence as mentioned above. This makes this principle "universal" and it was transposed into a legal rule, which became obliging for new states that were not created in the process of decolonisation. This brought about far-reaching and complex legal consequences in the late 20th century.

International Arbitral Awards, vol II, pp. 1308, 1322. See the following case before the Permanent Arbitrary Court: Eritrea v. Yemen (Territorial Sovereignty and Scope of the Dispute), Award of the Arbitral Tribunal in the First Stage of the 9 October 1998. On the Internet: http://www.pca-cpa.org/Er/YeawardTOC.htm 20/12/2001.

[13] Burkina Faso v. Mali (Frontier Dispute), *International Court of Justice Reports,* Judgment of December 22, 1986, pp. 564, 568 etc. See: Malcolm N. Shaw, The Heritage of States: "The Principle of Uti Possidetis Juris Today", *British Year Book of International Law*, n°6, 1997, p. 75.

With disintegration processes that took place in Eastern Europe and the Soviet Union a dispositive regional customary rule was principally turned into a legal standard concerning delimitation between constituent parts of former complex states.[14] For political reasons internal boundaries were proclaimed to be international. In this way, the territorial *status quo* of new states was practically legally put in frames, while the existing state of affairs was actually "frozen" after the dissolution of the predecessor state. The legal foundedness of internal lines between the new states automatically became irrelevant. Up to that time, the *uti posseditis* principle had not been universally applied. It was neither followed by the consciousness that its application should be obligatory (*opinio juris*), but due to security reasons, for the collision of interests of different national communities in the achievement of the right to self-determination and overcoming crises that could follow after gaining of independence it was accepted as a "general" principle. In this way, in some cases it caused flagrant violation of the right to self-determination of peoples.

In the Yugoslav case, it is important to note that the creation of new states in the territory of the former Yugoslavia raised the question of justification of the republic boundaries – *de novo*.[15] As for the regulation of lines between the republics, the Arbitrary Commission of the European Community adopted relevant opinions.

Acting within the framework of rules and principles of international law the Arbitrary Commission defined in a new way the real situation concerning the territorial position and status of the borders between the republics of the former SFR Yugoslavia.[16] Taking

[14] Rein Mullerson, Law and Politics of States: "International Law on Succession of States", in Dissolution, Continutation and Succession in Eastern Europe, The Hague, 1998, pp. 19–21; Jiri Malenovsky, Problemes juridiques liés a la partition de la Tchécoslovaquie, y copmpris tracé de la frontiere, Annuaire francais de droit international, 1993, n° 39, p. 305.

[15] Milan Šahović, Raspad SFRJ i stvaranje novih država, in the proceedings: "Međunarodno pravo i jugoslovenska kriza, Institut za međunarodnu politiku i privredu u Beogradu, Beograd, 1996, str. 35. The author says: "Iako je danas praktično generalno prihvaćeno da princip *uti possidetis* juris predstavlja pravilo opšteg međunarodnog prava, nije dato detaljnije objašnjenje, nije razrađena pravna argumentacija kojom bi se objasnilo od čega se pošlo prihvatanjem teze o transformaciji administrativnih granica u međudržavne".

[16] In the Opinion No. 1 of the Arbitrary Commission of 29. 11. 1990 it was said that SFR Yugoslavia is „....in the process of dissolution...". Consequently, in the Opinion No. 3 it was pointed out that as soon as the process in SFRY led to the creation of one of more independent states the problems of borders, this especially including republic ones, should be settled in accordance with the set criteria (they were defined in the Opinion). In the Opinion No. 8 of 04. 07. 1992 it was said: "The process of dissolution had been completed and the SFRY no longer existed". The conclusion resulted from the recognition of Slovenia, Croatia, BH and the fact that Serbia and Montenegro passed the Constitution of FR Yugoslavia on 27. 04. 1992 as well as from a number of UN resolutions (resolutions No. 752, 757, 777 and 47/1). See: Matthew Craven, "The EC Arbitration Commission on Yugoslavia", *British Year Book of International Law,* 1995, p. 333; Alain Pellet, "La Commission d"Arbitrage de la Conferénce Européene pour la Paix en Yugoslavié", *Annuaire francais de droit international,* 1991, p. 329, ibid., 1992, p. 220, ibid., 1993, p. 286.

as a starting point the protection of territorial integrity of the new states and acknowledging the existing state of affairs in the Opinion No. 2 the Commission strictly limited the range of the right to self-determination within "the context of the unclear and unstable situation" pointing out the significance of the rules on maintaining the borders that existed at the moment when the new states acquired their independence (*uti possidetis juris*).[17] In accordance with this view, in the Opinion No. 3 the Arbitrary Commission insisted on accepting the administrative or actually internal boundaries as inter-state borders. Their dispositivity resulted from the fact that they represented "the demarcation lines that could be changed by free and mutual agreement" becoming international borders *a contrario*, "which are protected by international law". In one word, the *uti possidetis* principle works in the way that it freezes the legal basis for possession of territories at the moment of independence. This is supported by the principle of respect for territorial integrity resulting from the last Constitution adopted in 1974 (paragraphs 4 and 5 of the Constitution) that ensured unchangeability of the republic boundaries unless an otherwise agreement was freely made. In this way, the principle of delimitation of new states after the decolonisation in America and Africa *uti possidetis juris qui* that had been adopted earlier has in time turned into a universal legal principle for territorial delimitation that could be also applied to SFR Yugoslavia.[18] Accepting the *de facto* situation the Arbitrary Commission pointed out to the security function of this rule under the conditions that could lead to "fratricidal fights and endanger the independence and stability that has just been acquired by the new states".[19]

[17] The Opinion No. 2 of the Arbitrary Commission followed after Lord Carrington, President of the Conference for Implementation of Peace in Yugoslavia, considered the question of the right of the Serbs in Croatia and BH to self-determination. See: *International Legal Materials*, vol. 92, p. 168.

[18] In its decision of 22 December 1986 on "Case Concerning the Frontier Dispute" (Burkina Faso v. Republic of Mali) the International Court of Justice said that on the basis of the Special Agreement of 16 September 1983 the principle of unchangeability of borders inherited from the colonisation period was exclusively applied on the border dispute between Burkina Faso (former Upper Volta) and the Republic of Mali. It relied on the principle set in the Cairo Resolution of the Organisation of African Unity adopted in 1964. Considering that the range of the *uti possidetis* principle was general, the International Court of Justice emphasised that it predominantly covered the legal void until the establishment of effective power as a basis of sovereignty. The primary goal of the principle was to secure the territorial borders at the moment of independence. When they were delimitated on the part of the same sovereign between the colonies or various administrative entities the application of the principle was reflected in turning the administrative boundaries into international borders. This occurred in the specific case concerning the above mentioned French territories in West Africa. As the Court pointed out, bearing in mind its role in ensuring stability (and when it collides with the right to self-determination), the *uti possidetis* principle would be the wisest course that would show the rationality of African states to maintain the territorial *status quo*. Apart from the arguments mentioned above, it seems that the Court's decision was more based on the interpretations having a basis in the *infra legen* principle of equity. See: Judgement of 22 December 1986. *International Court of Justice Reports*, p. 565. (Case Summaries, para 1–15; 20–26).

[19] Opinion n°3 of Arbitration Commission, *International Legal Materials*, vol. 92, op. cit., p. 172.

As for the international borders of the former Yugoslavia, now being external borders of the new states, in the opinion of the Arbitrary Commission they should remain protected under international law in accordance with the principle reminded by the UN Charter, the Declaration relating to the principles of international law concerning friendship and co-operation of states in accordance with the UN Charter (Resolution No. 2625/XXV of the UN General Assembly) and in accordance with the Helsinki Final Act inspiring the Article 11 of the Vienna Convention on Succession of States in Respect of Treaties of 23 August 1978.[20] The analysis of this part of the opinion points to the specific exploration of the international legislation the Arbitrary Commission relied upon concerning unchangeability of international borders of SFRY after the succession. Actually, the international rule that succession of states does not encroach upon the issue of borders defined by the treaty, or upon rights and obligations concerning the border regime defined by the states confirmed the rule of international law that was codified in the Vienna Convention on Succession of States in Respect of Treaties.[21] As it has been derived from the legal practice and international legal doctrine it essentially relies upon the principle of sovereign equality of states, which are obliged to refrain from threats and use of force in their mutual relations (the rule is included in the Article 2 of the UN Charter). Unchangeability of borders is a principle that is confirmed by the Final Act and 1975 CESC Helsinki Declaration. As the international community rests upon the prohibition of interventionism that is directed against territorial integrity of states, it is the rule that the internationally recognised borders can be changed only by peaceful means and by agreement. The same view is assumed by the *Declaration on Principles of International Law concerning Friendly Relations* and *Co-operation among States* of 24 October 1970 concerning "demarcation lines".[22] The rule on inviolability was confirmed in the Paris Charter for a New Europe adopted in 1990. Moreover, it coincided with the collective consensus on the recognition of new states in the territory of SFR Yugoslavia. By adopting the Directives on Criteria for the Recognition of New States in Eastern Europe and the Soviet Union and the Declaration on Yugoslavia on 16 December 1991 the EC stipulated recognition of states by adoption of international legal standards, which incorporate the obligation of respect for territorial integrity and inviolability of borders of states.[23]

As for present international law that in the case of Yugoslavia passed a sort of political test, it comes out that by gaining independence that was recognised by foreign countries all former republics of the second Yugoslavia also acquired international recognition of their borders. The administrative borders were *via facti* "transformed" into international ones, while the international borders remained preserved by the rules of international law

[20] Opinion n°3 of Arbitration Commission, ibid., p.172.

[21] *Službeni list SFRJ,* br. 1/1980, dodatak Međunarodni ugovori.

[22] UN General Assembly Resolution n°2625 (XXV).

[23] UN Document n° S23293 of 17 December 1991.

on their unchangeability. As for the former one, however, this is actually a legal presumption that is generally applicable under the factual conditions at the moment of independence. However, it does not produce an absolute effect *ratione temporis* since, by the nature of things, it functionally suspends the effects that are legally based until it is convalidated. The change of the situation always depends on what the parties to a dispute can specifically do in order to prove the legal validity of the facts to which they refer.[24]

In the case of Serbia-Croatia delimitation on the Danube the approach mentioned above should be accepted as an initial step towards the creation of a legal title regardless of the existing basis that has already been established – effective power at the moment when the succession of states takes place.[25] Finding satisfying solutions commits one to make an extensive analysis of the legal materials on drawing of internal borders in the predecessor state while applying general international legal rules on delimitation on the so-called border waters.

Drawing borders on boundary waters

If one wants a secure border, the rule is to make it legal. The security specifically results from the legal basis that enables the state to refer to it in case of disputing its territorial right. For international law, the process of defining borders is a constitutive one.[26] Taking into account the historical arguments in favour of peaceful delimitation between Croatia and Serbia it should be reminded on the fact that international law has made a clear rule on drawing borders on the so-called boundary waters, this including the Danube in the part of the course that flows through these two states. Since it is undisputable that the state has a full control over its internal and national waters (*Fr .d'eaux interieures ou nationales; Ger. Eigengewasser; Eng. national waters*) giving rights to other states to use national waters should be based on the state will.[27] Drawing of borders on national waters that are a part of the territory that borders with other states implies the respects of general rules that have been established during a long-duration practice.

At first sight, it seems that it would be easy to draw a border along the Danube, since as a river it makes a natural border. However, in practice there are numerous and often

[24] Vesna Knežević Predić, „Princip *uti possidetis juris* u praksi međunarodnih sudova", *Međunarodni problemi*, Beograd, 2001, br. 4, str. 441.

[25] Gerald Fitzmaurice, "The General Principles of International Law", *Recueil des Cours Académie de Droit International* 1957. vol. 92, p. 148.

[26] Stephen B. Jones, *Boundary Making,* Washington, 1945, p. 5.

[27] As a part of the national territory, national waters are managed by the legal order of the state. There is a difference between national and international waters on which the right of free navigation of trade ships of all countries is stipulated by agreements. The right of navigation is officialism imposed on one hand by the geographic position of the water area being a border between countries and, on the other hand, by a need to develop traffic and trade.

very complex questions. For drawing borders on the rivers flowing through two or more states or on those that are the very borders between states the principle was set to divide unnavigable rivers in the middle of their riverbeds (*midium filium aquae*). Navigable rivers are divided by applying the principle of mid-channel (*Ger. Thalweg, Fr. fil de l'eau, Eng. mid-channel*). The first principle is based on the median that joins all points of the water course that are at equal distance from one and the other river bank. On the other hand, the mid-channel principle or *Thalweg* has been applied since the Middle Ages. It had been elaborated at the Rastatt Congress in 1797. It was accepted as an international legal standard in the Treaty of Luneville of 9 February 1801 where it served as a means for the division of the Rhine between Germany and France. *Thalweg* has proved to be the best criterion concerning downstream traffic when the water level of a navigable river is at its lowest point. Guided by the international treaty practice Max Huber, famous internationalist, noticed that in case no other agreement had been reached over drawing of borders on rivers, the median or mid-channel rule should be applied. The reasons for adopting median or the line of equal distance from the bank lie in their long use, which has quite possibly created a custom rule.[28] It would be, however, coherent to apply median as a general legal solution since it would imply deviation from the international practice. Actually, at some places a border line could leave the whole navigable part of a river to one state only, what would disable or limit navigation for other riparian states. For this reason mid-channel is today usually applied as a border line in navigable rivers. For two reasons there are exceptions to this rule. First of all, mid-channel is defined in different ways in the doctrine and in practice. Usually, it is defined as a continuous line joining the deepest points in the riverbed. The second reason is that courses of many rivers are unsteady, what makes changes in the position of their mid-channels. For this reason, periodical measurements are constantly made in order to establish exactly the position of the mid-channel.[29]

Drawing of borders on rivers also includes some specific questions. In practice, the following one is always posed: How should one draw borders on boundary rivers that change their courses? A custom rule on the change of the border is applied for gradual changes in the riverbed that have been caused by the evolutionary performance of the nature. In international law, accession (*accessio*) is the phenomenon that characterises the cases mentioned above.[30] Accession implies territorial changes that occur by gradual

[28] Max Huber, "Ein Beitrag zur von der Gebietshoheit an Grenzflüssen", *Zeitschrift für Völkerrecht*, 1907, p. 32. etc.

[29] Milan Bartoš, *Međunarodno javno pravo,* 1956, knj. II, op. cit., str. 25–26.

[30] Accession comes from Roman private law and it was embodied in international practice by Grotius. By the principle that the land that was naturally added to the bank belongs to the owner of the bank (*accessio cedit principali*) in the case of confiscation of the Spanish ship Anna in 1805 during the war between Great Britain and Spain judge Lord Stowell said before the British Prize Court that the ship had been confiscated in the area that belonged to the American territory. He accepted the request since the ship had been confiscated 3 miles beyond the continent's coast, but less than 3 miles from the coast

performance of natural powers or by man. In the former case, by gradual rolling down of a bank and accumulation of the material on the other side of the border river the territory increases over a longer period of time, thus extending the border. An abrupt rolling off a part of the bank and its incorporation in the other bank (*appulsio*) produces a similar effect. Overflowing (*aluvio*) can also bring about alteration of borders. The artificially made accession makes one part have an advantage over the other one. For example, drainage or lifting of the embankment makes the level of the water raised, what inevitably requires reaching an agreement on the change of borders since customs rules have not been built. On the other hand, in most case avulsions do not bring about the change of borders (*avulsio*). States can deviate from the principle mentioned above for the reasons of equity in using of water flows of border rivers stipulating a treaty clause on unchangeability of borders. Natural accessions can result from the creation of estuaries (*aestuarium*) or actually, forking what creates swampy bays and causes narrowing. River narrowing increases the land on the account of seas and lakes into which rivers empty. After the accession is made by the creation of estuaries the question of the border of the main course can be raised – *Thalweg*.[31] If a river has several branches, it is by the rule that the border is drawn along the branch with the mid-channel. Observing from the line of separation all side branches remain within the territory of the state on whose part they flow. A similar approach is applied on delta branches, what implies small triangle islands that are created by depositing large quantities of river materials (sand and pebble). By the rule, those island will belong to the state to which the river mouth belongs. As for river islands on the rivers where the border has been drawn by applying the mid-channel rule, they should remain within the territory of the state that was first granted the islands, regardless of the fact that the mid-channel has changed. The exceptions are only made in the cases when the islands are located on the very mid-channel line. In that case, the island is divided among riparian states. With the change of the mid-channel, it is assumed that the island will not change its legal status.

of the island that was located near the mouth of the Mississippi. See: "The Case Anna", C. Robinson's Admirality Reports, 1805, vol. 5, p. 373. Later in practice referring to the classic rules of accession was made for example in the dispute over the change of the Rio Grande river course between Mexico and the United States of America as well as in the border dispute between Honduras and Salvador. See: "The Chamizal Arbitration", American Journal of International Law, 1911, vol. 5, p. 782; Land,Island and Maritime "Frontier Dispute" (El Salvador v. Honduras), *International Court of Justice Reports*, 1992, pp. 351, 546.

[31] The main channel of the forking river was the subject of dispute over the Encuentro River (Argentina-Chile) in 1881. In that case, the length of the flow, size of the drained area, quantity of the water flow and other factors were taken into account.

Possible application of international legal rules on delimitation on the Danube

As borders are above all, a social phenomenon subject to social laws they are relative from the aspect of the so-called historical rights and international law has no adequate standards to be applied here.[32] In case of lack of form the law takes into account the factual situation that is produced by some state practice based on the genuine and unobstructed execution of effective power (*ex facto jus oritur*).[33] Prescription of the territorial title on the state borders is an agreement with the factual situation that is neither obstructed nor disputed by the other party.[34] The Serbia-Croatia border on the Danube is certainly not the case since there lacks a subjective element – legal consciousness on the obligation to respect it (*opinio juris sive necessitatis*).[35] For this reason, it is necessary to approach delimitation of the Danube on the basis of the general rules resulting from the long international practice of delimitation on navigable rivers. It seems that the mid-channel approach (*Thalweg*) would be the most appropriate for delimitation on the Danube.[36] The change of the Danube course westward or actually towards Croatia has occurred during a long historical period. In that sense, Croatia could not bring into question the application of the international rule mentioned above. As for delimitation of river islands and river branches of the Danube, the border should be defined in accordance with their position to the mid-channel. Gradual changes of the mid-channel do not bring into question the border line. As for new river islands that have been created in the meantime, delimitation should be carried out according to their position to the mid-channel as well as according to the fact whether they have been created gradually or abruptly. If the mid-channel principle could not be applied in all cases then the principle of equity should be implemented, these above all referring to the use of the Danube water flow and resources by applying the rules of neighbourhood law. In this sense, the arguments in favour of the earlier ownership of the land along the river bank should be of subsidiary and by no means of primordial legal importance in the final delimitation.

One should keep in mind that versatile regional co-operation and good neighbourly relations are priorities of Serbia's and Croatia's foreign as well as European Union integration policies. Occasional incidents between the parties do not deny the thesis on

[32] Yehuda Blum, *Historic Titles in International Law*, The Hague, 1965, p. 55.

[33] See: United States v. Netherlands, (Island of Palmas Case), A.J. I.L. 1928, vol. 32. p. 867.

[34] El Salvador v. Honduras (Land, Island and maritime Frontier Case), I.C.J. Reports, 1992, p. 351.

[35] Charles de Visscher, Les effectivites du droit international public, Paris, 1967, p. 111. The author concludes that for recognition, it is not sufficient to give a statement on effectivity of the governmental authority concerning the border line, but it also requires an agreement of the other part.

[36] J. W. Garner, "The Doctrine of Thalweg", *British Year Book of International Law,* 1935. n° 16, p. 177; Ruiz Fabri, "Regles cotumieres generales et droit international fluvial", *Annuaire Français de Droit International*, 1990, p. 818.

their *bona fide* acting. However, this makes impossible for each of them to be precluded in their territorial claims by taking unilateral opposite positions on the current territorial situation in a possible judicial case on the dispute (*Non licert venire, contra factum proprium*).[37] Integrated border management on the Danube presumes the conclusion of an international treaty on delimitation or the adoption of a collective declaration on the recognition of the existing "demarcation line of separation". Since no appropriate agreement has been reached, the two states should search solutions in *ad hoc* arbitrations or with the International Court of Justice.[38]

[37] Hersch Lauterpacht, *Private Law Sources and Analogies of International Law*, London, 1927, p. 280; "Cambodia v. Thailand (Temple of Preah Vihear Case)", *International Court of Justice Reports*, 1962, p. 696.

[38] As for the legal validity of unilateral acts defining borders, in the case of dispute between Great Britain and Norway over fishing the International Court of Justice established that sea delimitation always had its international legal aspect and it could not depend only on the will of the riparian state and its internal law. It is the fact that the act of delimitation is a unilateral one because a riparian state is entitled to take them but their validity is assessed according to their conformity with international law. See: "United Kingdom v. Norway (Fisheries Case)", Judgement of December 18, 1951, *International Court of Justice Reports*, 1951, p. 116.