Original scientific paper UDC 341.222(497.11)

Duško Dimitrijević, PhD, Senior Research Fellow*
Institute of International Politics and Economics, Belgrade

A REVIEW OF THE ISSUE OF THE BORDER BETWEEN SERBIA AND CROATIA ON THE DANUBE

Summary: *After the succession of SFR Yugoslavia the territory of the federal state passes to the new states on the basis of the pre-existing administrative boundaries. This consequence follows from the application of the decolonization principle of uti possidetis which in the case of delimitation between Serbia and Croatia has the limited effect of freezing the territorial status quo existing at the moment of independence of states. Because the clear legal title has not existed on boundary river Danube in the predecessor state, the principle could be understood only in retrospective historical context which not precludes the parties from citing the contents of any indicia of title. It means, if Serbia and Croatia failing to conclude an agreement in relation to delimitation on Danube, they must allow application of another general international rule. This fits the principle of mid-channel (thalweg), which preserves to each state equality of right in the beneficial use of the Danube.*

Key words: *Danube river, delimitation, internatnional law, succession of SFR Yugoslavia, principle of uti possidetis, Serbia, Croatia*

JEL classification: K33, Z18, F50

1. Succession of States and State Borders

A state succession does not imply the questioning of internationally recognized borders.[1] It is a common rule of international public law that successor states are obliged to respect the international borders of the preceding states in accordance with the continuity in carrying the state competence out within internationally recognized borders, and not on basis of mere fact of succession into contractual relationship.[2] One may reach a conclusion that through the process of

* E-mail: dimitrijevicd@diplomacy.bg.ac.rs

1 Daniel P. O'Connell, *State Succession in Muncipial and International Law*, Cambridge University Press, vol. II, 1967, 273.

2 Andre Pereira, *La succession d'Etats en matiere de traité*, Pédone, Paris, 1969, 110; The Effect of Independence on treaties, International Law Association, London, 1965, p. 352.

delimitation of borders the international public law creates an objective situation that becomes a mandatory provision that binds the successor states in cases of state succession. Exceptions to the above-mentioned provisions might be formed solely on basis of consensus, novatio of the existing legal relation, i.e. by reaching an agreement with different contents.[3] The initiation of the issue of borders may be significant for the existence of the states successors in cases when their borders had been formed on basis of administrative-territorial borders of preceding states. The traditional international public law refused to apply the general rule to such cases, considering that the rule would be applied to internal borders that used to be subjected to the regime of internal public law of the preceding state. Once the internal legal system had been interrupted and it ceased to be effective in the territory subjected to succession, the administrative borders should cease at the same time. The contemporary developments of international public law, especially in the field that regulates the consequences of state transition in time and space, lead to substantial shifts in this subject matter.

Originally initiated in the instances of decolonization of states in the Latin America, "the border innovations" reached a culmination in Africa in the 2nd half of the 20th century. The well-known principle of retaining the territorial possession – *uti possidetis, ita posideatis*, that sanctified the territorial divisions that had been imposed by the colonial powers in the above-mentioned continents, has considerably contributed to the changes in regulation of delimitation of borders.

While in the Spanish Americas the principle had solely been applied on basis of "historically based rights" to territories or on basis of establishing a "constructive sovereignty",[4] in the territories of the legally heterogeneous Africa, this prin-

[3] According to sub-clause a, clause 2 of article 62 of 1969 Vienna Treaty on Contractual Law not even a substantial change of circumstances that has occurred once an agreement on borders had been concluded may provide a reason for cessation of or withdrawal from the agreement. For more details see: Shabtai Rossene, *The Law of Treaties, Guide to Legislative History of the Vienna Convention,* Leyden, A.W. Sijthoff, 1970, pp. 326–327.

[4] The concept on respecting the immutability of borders of former colonies in South and Central America has been *per analogiam* transferred from the Roman private law that had prohibited the confusion of property *(interdictum uti possidetis).* In reality the concept is based on the successive rights derived from the *Inter Caetera*, Charter of the famous Pope Alexander the 6th Borghia from 1493. This Charter had divided the Spanish and Portuguese possessions in the South America. The historic principle in the political sense has in the course of centuries acquitted a legal significance as it served as an instrument of delimitation, and later on de facto delimitation of historic borders for which states did not have a complete legal title. The disputes have been inevitable in the Latin America as territories had been large administrative units of the Spanish Empire, the states were still developing, population was regrouping and wide spaces have not been populated. The above- mentioned principle has formally been proclaimed by the Congress in Lima in 1849 as part of the "The Agreement on Confederation" that had been concluded by the New Granada, Ecuador, Peru and Bolivia. Arbitration have proclaimed the same principle as *uti possidetis 1810* or *uti possidetis 1821*, and the "critical data" represented the dates when particular territory had acquired its' independence. Parties to the fol-

ciple has anticipated a formal request for effective occupation.[5] The principle of *uti possidetis* had played a positive historic role in the field of state succession in the function of maintaining a territorial *status quo*. The above- mentioned principle provided legitimacy to the anti–colonial struggle for independence and then provided a basis for stabilization of the newly established states in the fields of internal and external policies.[6] The process of transformation of the administra-

lowing disputes have based their claims on the principle: Colombia versus Venezuela in 1891, Bolivia versus Peru in 1909 and Guatemala versus Honduras in 1933. Some authors claim that over 25 border lines in the South America have been determined on basis of principle of respecting the immutability of administrative borders. E.g. see L. H. Woolsley, "Boundary Disputes in Latin America", 25 *American JIL* (1931), pp. 324, etc; A. Guani, "La solidarité internationale dans l'Amérique Latine", *Recueil des Cours de l'Académie de la Haye* (1925), 296. In regards to the inherited borders with Brazil, in absence of valid legal title, the principle *uti possidetis* has been used as the predominant sign board directing towards determination of effective borders – *uti possidetis de facto*. E.g. see John B. Moore, *Brazil and Peru, Boundary Question*, The Knickerbockers Press, New York, 1904, 32; *The History and Digest of International Arbitrations to which the United States has been a Party*, Government printing office, 1898, Washington, vol. II, p. 1991.

5 Anthony Allot, "Boundaries and the Law in Africa", in: Carl G. Widstrand (ed.), *African Boundary Problems*, Uppsala, The Scandinavian Institute of African Studies, 1969, 9-21; Fernando José de França Dias Van Dunem, Les frontières Africaines, Université d'Aix-Marseille. Faculté de droit et des sciences économiques d'Aix-en-Provence, 1969; Romain Yakemtchouk, L'Afrique en droit international, Librairie générale de droit et de jurisprudence, Paris, 1971, 83-85; Ian Brownlie, "African Boundaries", in: *Legal and Diplomatic Encyclopedia,* University of California Press for the Royal Institute of International Affairs, Berkeley, 1979, 9, etc ; Frank Wooldridge, "Uti possidetis doctrine", in: R. Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. IV, Elsevier science b.v., Amsterdam, 2000, 1260.

6 At its' Summit in Adis-Abeba in 1963 the Organization of African Unity had accepted that principle *uti possidetis* has to be applied in order to secure the integrity of the newly - established states and incorporated the principle in clause 3 of article 3 of its' Charter. In 1964 the OAU member states have adopted a Resolution and solemnly obliged themselves to respect the existing borders after acquiring the independence. See: AHG/RES16/I of the OAU. In the *Frontier Dispute Case* (Burkina Faso v. Mali) the Division of the International Court of Justice pointed out that above - mentioned principle is logically connected with the emancipation of the states, regardless of the site where the independence process takes place. Its' purpose is to protect and preserve stability, independence, and prevent possible fratricidal conflicts that would have been caused by the mutual denial of borders once the preceding state had withdrawn its' power. This confirmed the universal character of the principle. See ICJ Reports (1986), 469-565. However, one should point out that the universality of the principle has often been challenged in various international judicial instances. Various adjudication and court decisions, besides accepting the principle as the starting point in the issues of delimitation, see it as a historic–transitory mechanism at the time of alternation of territorial sovereignty. One can not see the principle as an absolute rule, set for all times, one should rather see it as an auxiliary instrument that may be used to overcome undesirable situations, without *ipso iure* prejudicing the final decision on borders. For more details see: Malcolm N. Shaw, Peoples, "Territorialism and Boundaries", 8 *EJIL*, 1997, p. 478; E.g. see the following cases: *Boundary Arbitration Case* (Guatemala v. Honduras), Opinion and Award of the Special Boundary Tribunal, UN Reports of

tive borders into international ones at the beginning of process of disintegration in the Eastern Europe and Soviet Union turned this principle into the general principle of delimitation between constitutive parts of former composite states.[7] The borders between former Yugoslav republics have been proclaimed the international borders, thus providing legal framework for the territorial *status quo* of the new states. In practice, this meant "freezing" the situation that came into existence after the "separatist dissolving".[8] Thus, the legal foundation of the internal lines became automatically irrelevant. This was done because of the security reasons, primarily due to collision of interests of various ethnic communities that were trying to realize their right to self-determination. This was also done in order to overcome the potential crises that may develop in the region once the former parts of federative state had achieved their independence.[9] Basically, one should understand this principle as "the initial step towards the potential legal title", regardless of the fact that at the moment an actual basis–effective authority over particular territory at the moment of succession of a state–exists.[10] In spite of the fact that consent to the new international status of the borders had in principle been expressed, the problems of delimitations are not solved in a conclusive manner. From a logical point of view, the afore-said problems exist as long as states successors to the Socialist Federative Republic of Yugoslavia don't reach a compromise on the delimitation of the controversial borders. That in fact means that all the interested parties should be obliged to determine the existing facts on basis of the rules of international public law. Under particular circumstances, the principle *uti possidetis* has a retroactive effect, which doesn't exclude determination of course of evolution of setting up internationally recognized borders.[11] If

International Arbitral Awards, vol. II, pp. 1308, 1322; Territorial Sovereignty and Scope of the Dispute (Eritrea v. Yemen), Award of the Arbitral Tribunal in the First Stage of the 9 October 1998.

7 Rein Mullerson, "Law and Politics of States: International Law on Succession of States", in *Dissolution, Continuation and Succession in Eastern Europe*, Martinus Nijhoff, The Hague, 1998, pp. 19-21; J. Malenovsky, "Problemes juridiques liés a la partition de la Tchécoslovaquie, y copmpris tracé de la frontier", 39 *AFDI*, 1993, pp. 305–336.

8 *Frontier Dispute Case* (Burkina Faso v. Mali), ICJ Reports, Judgment (December 22, 1986), pp. 564, 568. The Court reached the conclusion that the principle *uti possidetis* has no retroactive effect; it merely "stops the clock without setting it back in time".

9 Arbitration Commission Opinion No. 3, 31 ILM, 1499.

10 Gerald Fitzmaurice, "The General Principles of International Law", *Recueil des Cours de l'Académie de la Haye*, 1957, p. 148.

11 *Gulf Fonesca Case* (El Salvador v. Honduras), ICJ Reports (1992), 388, 586-587. In Court's opinion, once the principle *uti possidetis* achieves its' goal in the moment a state had achieved its' independence, by means of turning the administrative borders into international frontiers, those frontiers don't automatically become safe borders. In cases of dispute the Court takes in account the other arguments, such as the principle of effectively, as well as legal acts that provide legal titles–the legal acts on which the *uti possidetis* principle is *de facto* based on in the moment of state succession. Effective authority over the terri-

one intends to find appropriate solutions, one is obliged to analyze extensively historic and legal materials pertaining to transformation of internal borders into international. One also has to scientifically systematize the knowledge on the territorial–administrative organization of the predecessor state, as that organization provides basis for the legal consequences of the state succession.

2. Determination of Border between Croatia and Serbia in the former Yugoslavia

It is not easy to provide answers to the questions which state organs in the 2nd Yugoslavia had drawn borders between Yugoslav Republics and on basis of which principles and legal titles. In the course of WW2 under the leadership of the Communist Party of Yugoslavia, "national committees of liberation" have been formed on the parts of territory that had been liberated by Communist guerrillas. Gradually, those provisional organs of authority have transformed into permanent organs of territorial power over the territories that had been liberated from the Axis occupation.[12] In November 1942 the Antifascist Council of National Liberation of Yugoslavia AVNOJ had been set up. AVNOJ represented the initial shape of the revolutionary authority that has been used by the Communist Party for omnipotent realization of its' program in the fields of internal and external policies. In order to achieve an international recognition, the Executive Committee of AVNOJ worked with dedication on speedy organization of authority and power, through setting up of new "regional and provincial representative bodies of nations and ethnicities of Yugoslavia". Those bodies were the origins of future federative units. Communists maintained that the territorial and national issues in the future Yugoslavia should be solved by the means of federalization of the country. The federalist policy in the course of Revolution had reached its' peak as early as June 1943, when at Plitvice the Antifascist Council of National Liberation of Croatia (ZAVNOH) has been formed. At the same period of time the Head Council of National Liberation of Serbia did not have a chance to transform itself into an official political-territorial organi-

tory in dispute may confirm the legal title, or challenge it. The effective authority may also supplement the legal title in cases when the effective authority and the formal legal title are not corresponding to each other. In the course of analysis of evidence *ratione temporis*, the Court shall estimate the effectively in the moment when a state had been formed and afterwards, with the mandatory appraisal of the acts which the parties to the dispute have taken over the particular periods of time.

12 As early as February 1942 in the liberated territory of Foča the first councils of national liberation began their work. At that time the Politburo of the Communist Party of Yugoslavia has adopted the well-known Foča Regulations that represent the first buds of the new authority that had been established in Yugoslavia in a revolutionary manner.

zation.[13] On the 2nd Session of AVNOJ in Jajce, November 29th and 30th 1943, the Communists made a revolutionary break with the Kingdom of Yugoslavia. The revolutionary authorities have proclaimed the Law on Name of the State and State Symbols and declared that the future Yugoslav state community shall be "democratic and federative".[14] The decision that Yugoslavia should be organized on basis of federalist principles formally led to the constitution of Croatia at the third session of ZAVNOH that took place on 9 May 1944 in Topusko. The decision on the constitution of Serbia was made on 11 November 1944 at the session of the Great Antifascist Assembly of National Liberation of Serbia in Belgrade.[15] After the liberation, at its Third Session that took place from 7 to 10 August 1945 AVNOJ accepted the decision of the First Assembly of Vojvodina of 31 July 1945 as well as the decision made by Regional Assembly on integration of Vojvodina. Analysing the historiographical and legal documents it can be concluded that neither during the revolution AVNOJ as a supreme legislative and executive representative body nor later the Interim National Assembly of the Democratic Federal Yugoslavia and then the Constituent Assembly, which took place on 29 November 1945 adopted any official legal document that would establish and define the administrative boundaries between the Yugoslav federal units.[16] In the light of relations that had existed at that time, solely political centers of power presiding over the Communist Party of Yugoslavia could have adopted the above-mentioned decision in the course of WW2 and Axis occupation, or immediately after the end of war. One such decision had been brought out in public. It is the decision that had been adopted on July 1st 1945 by Commission of Politburo of the Central Committee of Communist Party of Yugoslavia,[17] on provi-

[13] Dragoslav Janković et. al. (eds.), above n.54, p. 465; *Zbornik dokumenata i podataka o narodnooslobodilačkom ratu jugoslovenskih naroda*, vol. I-IX, Vojnoistroijski institut, Beograd, 1949–1969.

[14] The Decision of the 2nd Session of AVNOJ in Jajce, adopted on November 29th 1943 recognized the right of each Yugoslav nation to self- determination, including the right to secession or unification with the other nations. These provisions were aimed at securing the full equality of nations in the 2nd, liberated Yugoslavia. See: *Prvo i Drugo zasedanje AVNOJ-a*, Stvarnost, Zagreb, 1963, pp. 231, 241-243.

[15] Dragoslav Janković et. al. (eds.), above n.40, p. 478.

[16] AVNOJ has explicitly prohibited breaking up or transfer of parts of territory of Yugoslavia to other neighbouring states. Even though it confirmed the discontinuity in the field of constitutional law, AVNOJ insisted on continuity with the Kingdom of Yugoslavia in the field of international public law. In opinion those who had created the AVNOJ decisions, the historic validity of those decisions should be evaluated in accordance with the character of the Socialist Revolution, from which *eo ipso* "the self- determination of nations" has been derived. See: Svetomir Škarić, *Evolucija ustavnosti u socijalističkoj Jugoslaviji: Dva veka savremene ustavnosti*, SANU, Beograd, 1990, p. 599.

[17] Presidency of AVNOJ had on June 19th 1945 appointed a mixed Commission for delimitation between Vojvodina and Croatia. Milovan Đilas has presided over the work of that Commission.

sional separation between Vojvodina and Croatia.[18] In its' conclusion that has been submitted to the Presidency of AVNOJ, the Đilas Commission had drawn a "provisional border", starting at state border with Hungary, along the Danube up to the border between Bačko Novo Selo and Bukin (Bačka Palanka region). The border continued across the Danube between the villages Opatovac–Mohovo, Lovas, Babska, towns of Tovarnik, Šid, Podgrađe–Ilinci, Adaševci–Mala Vašica, Lipovac–Batrovci, Strošinci–Morović.[19]

The Commission decided that regions of Subotica, Sombor, Apatin and Odžak on North-East in Bačka district should be transferred to Vojvodina on economic and ethnic grounds. The regions of Batina and Darda between the Danube and Drava river in Baranja became part of Croatia due to the national structure of it's' population. The regions of Vukovar, Šid and Ilok in Srem have been divided on basis of geographic and ethnic principles, as well as on grounds of economic significance for each federative unit.[20] According to the presented facts, one may conclude that the issue of internal borders had been put forward in the "troubled times" of forming the revolutionary authority, thus the internal administrative border couldn't have been transformed into international border. Even though constitutional status of federal units of Yugoslav federation has shifted from centralized–unified to decentralized–"separatist" (starring with

[18] Miodrag Zečević et. al. (eds.), *Frontiers and Internal Territorial Division in Yugoslavia*, Srboštampa, Belgrade, 1991, p. 22. Line of demarcation between Vojvodina and Croatia that had been based on this provisional decision failed to take into consideration either the pre–WW2 presence of Serbian population in the territory, or the forceful expulsion of that population during the WW2. The authors claim that they based the research on data from the official documents from the Archives of the Memorial Centre "Josip Broz Tito" in Belgrade.

[19] The above-mentioned division left region of Šid–Opatovac, Lovas, Tovarnik, Podgrađe, Adaševci, Lipovac, Strošinci with agricultural areas in Croatia while the villages Mohovo, Babska, town of Šid, Ilinci, Mala Vašica, Batrovci, Morović with neighbourhood belonged to Vojvodina. For sources see: Archives of Memorial Centre "Josip Broz Tito" in Belgrade.

[20] The division predominantly complied with the solutions prescribed by Đilas Commission and the Law on Establishment and Organization of Autonomous Province of Vojvodina. See: 28 Official Gazette of the People's Republic of Serbia (1945). According to the more recent Croatian sources the territorial delimitation from 1945 mainly complied with the historic borders and the ethnic principle. Commission's decision on incorporation of Kotar, Batina and Darda to the federative Croatia is given as an example confirming the above-mentioned conclusions of Croatian historians. E.g. see Josip Vrbošić, "Državnopravna pripadnost Baranje Republici Hrvatskoj i što u ovom trenutku znači tzv. Oblast Srema i Baranje", in: *Jugoistočna Europa 1918–1995*, Hrvatski informativni centar, Zadar, 1995, pp. 60-64. Allegedly, an exception had solely been made in regards to Ilok, where the population, whose ethnic structure had been changed (during WW2), requested incorporation of territory into Croatia, but the Commission ignored that request. See: Ljubo Boban, *Hrvatske granice 1918–1991*, Školska knjiga, Zagreb, 1992, p. 55; Mladen Klemenčić et. al. (eds.), "An Unhappy birthday in former Yugoslavia: a Croatian Border War", 2 *Boundary and Security Bulletin*, 1995, pp. 47-54. The issue has been briefly presented in authors' article: Ethnicity, Nationalism and the Changing Status of Eastern Slavonia (http://www.nuim.ie/staff/dpringle/igu_wpm/mladen.pdf).

1946 Constitution, continuing with 1963 Constitution and ending with 1974 Constitution), their territorial status, from jurists' point of view, was based on dogma of immutability of borders between republics.[21]

3. Status of Borders after the Succession of Socialist Federative Republic of Yugoslavia

Revolutionary proclaimed Yugoslav federation of equal nations and ethnicities within republics and autonomous provinces after WW2 has, due to opportunist reasons, served as an ideal political mechanism for territorial revisionism and sanctification of administratively set borders towards the end of 20th centuries. Based on model of the Soviet theory of "fluctuating territory", the Yugoslav constitutional praxis has consistently developed into 2 directions. First, in accordance with the proclaimed right to self-determination, constitutions had declared the right to secession, and subsequently the laws on decentralization of the state have made the constitutional norms on territorial integrity relative. For the 2nd Yugoslavia the beginning of the process of realization of right to self-determination, as part of general international public law, meant the disintegration of its' state territory. The absence of compromise and dialogue on peaceful solution of Yugoslav crises had been encouraged the Yugoslav republics to promulgate unilaterally independence.[22] In Yugoslav case the independence that had been proclaimed in a voluntarist manner brought about the international recognition of the new states,[23] and subsequently leads to justification of borders between the

[21] The last Constitution of the 2nd Yugoslavia from 1974 prescribed that territory of republics cannot be altered without their consent. In regards to internal borders, republics decide on changes of border by consent and in accordance with decisions of their assemblies. The Constitution prescribes that Federal Assembly is competent to decide on external, international borders of Yugoslavia. However, the possibility of establishing oneself and limiting one's territoriality did not limit republics' right to decide on withdrawal from the Yugoslav Federation. E.g. see Jovan Đorđević, *Ustavno pravo*, Savremena administracija, Beograd, 1978, pp. 613-614.

[22] Slovenia proclaimed its' independence at a referendum in December 1990. The referendum was followed by Declaration of Independence on June 25th 1991 that had been suspended on 3 months, and has been confirmed on October 8th. Croatia proclaimed its' independence at a referendum in May 1991. The referendum was followed by Declaration of Independence on June 25th 1991 that had been suspended on 3 months, and has been confirmed on October 8th. Macedonia became an independent state after it had adopted its' new Constitution on November 17th 1991. In Bosnia and Herzegovina the date of independence is connected with the official proclamation of results of the referendum on independence, which happened on March 6th 1992. For more details see: Milenko Kreća, "O datumu sukcesije, par kritičkih napomena o mišljenju n°11. Badenterove Arbitražne komisije", in: *Nasleđe i naslednici Jugoslavije*, Pravni fakultet, Beograd, 1994, p. 74.

[23] European Community had recognized Slovenia, Croatia and Bosnia and Herzegovina and they became members of the United Nations (UN General Assembly resolutions No. 46/236; 46/237; 46/238), while the UN Security Council postponed the adoption of "Former

republics–*de novo*.[24] One of the principal issues after the origination of the new states in the territory of the 2nd Yugoslavia was the delimitation between the former republics. The European Community's Arbitration Commission has adopted opinion on the merit of this issue. That is to say, the Badintere Arbitration Commission has, acting within the framework of rules and principles of international public law, "redefined" the factual situation pertaining to the territorial status and status of borders of republics of Former Socialist Federative Republic of Yugoslavia in a novel manner.[25] In connection with the current situation and on basis of principle of protection territorial integrity of the new state, the

Yugoslav Republic of Macedonia" into membership of UN until April 8th 1993 (UN Security Council Resolution No. 817). For more details see: Roland Rich, "Recognition of States: The Collapse of Yugoslavia and the Soviet Union", 1 European JIL vol. 4, 1993, pp. 36-66. On December 16th 1991 the EC had adopted "Declaration on Yugoslavia" that has been accompanied by the well- known document "Guidelines on Recognition of the New States in Eastern Europe and in the Soviet Union", thus modifying the historic practice of recognition of states. EC adopted the method of application that had been confirmed by the Arbitration Commission. EC's recognition was based on conclusion that breaking up of Yugoslavia is a political fact, that the process is immutable, thus "Federal authorities" are emanation of Serbia and Montenegro that have no authority to represent the whole of former Yugoslavia. Furthermore, the successor states have not been admitted into the UN until Yugoslavia had transformed itself into Federal Republic of Yugoslavia, adopting the new Constitution that excluded other republics from the FRY. See: Marc Weller, "International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia", 86 *American JIL*, 1991, p. 596.

[24] Milan Šahović, *Raspad SFRJ i stvaranje novih država: Međunarodno pravo i jugoslovenska kriza*, Institut za međunarodnu politiku i privredu, Beograd, 1996, p. 35. Author maintains that, "even though the principle *uti possidetis juris* is nowadays universally recognized as a rule of general international public law, no detailed explanation of the rule is provided. The Arbitration Commission and the EC failed to provide an elaborate legal argumentation explaining the basis for accepting the hypothesis on transformation of internal administrative borders into international ones".

[25] In its' opinion No. 1 that had been adopted on November 29th 1991, the Arbitration Commission pointed out that Socialist Federative Republic of Yugoslavia is "in the process of dissolution". Accordingly, it its' opinion No. 3 the Arbitration Commission maintained that as soon as process in the Socialist Federative Republic of Yugoslavia ended in creation of one or more independent states, the problems of borders, especially borders amongst former republics, shall be solved on basis of criteria defined in opinion. In its' opinion No. 8 that had been adopted on July 4th 1992, the Commission maintained that "the process of dissolution had been completed and that the SFRY no longer existed". The Commission has derived this conclusion from the recognitions of Slovenia, Croatia and Bosnia and Herzegovina, and the fact that Serbia and Montenegro have adopted the Constitution of Federative Republic of Yugoslavia on April 27th 1992. The Commission furthermore based the above-mentioned conclusion on number of the UN resolutions (res. 752, 757, 777, 47/1). See: Mark Craven, "The EC Arbitration Commission on Yugoslavia", 66 *British YIL*, 1995, p. 333; Alain Pellet, "La Commission d'Arbitrage de la Conferénce Européene pour la Paix en Yugoslavié", 37 *AFDI*, 1991, pp. 329-348; Ibid, 38 *AFDI,* 1992, pp. 220-238; Ibid, 39 *AFDI*, 1993, pp. 286-303.

Arbitration Commission adopted opinion No. 2, and strictly limited the scope of right to self-determination in the "context of unstable and unclear situation". It stressed the significance of rule of preservation of borders that had existed in the moment when the new states have gained independence *(uti possidetis juris).*[26] In accordance with the above- mentioned point of view, in its' opinion No. 3 the Arbitration Commission has insisted on recognition of internal administrative borders as inter-state borders. The arrangement of the above-mentioned borders is derived from the fact that they represent "lines of demarcation that may be altered on basis of free and mutual agreement", and, *a contrario*, those borders thus become international frontiers "protected by international public law". Simply, the effect of principle *uti possidetis* is to "freeze" the legal title for possession of territory in the moment when a new state has achieved independence. This interpretation may have been substantiated by the idea that the principle of respecting the territorial *status quo* may also be derived from the 1974 Constitution of Socialist Federative Republic of Yugoslavia (clauses 2 and 4 of article 5). The above-mentioned Constitutional clauses prescribed for irreversibility of borders of Yugoslav republics, unless the consent for change of borders was freely expressed. Thus the formerly recognized principle of delimitation of the new states after the decolonization in America and Africa, *uti possidetis juris qui*, has become a universal legal principle on territorial delimitation that may be applied to the Socialist Federative Republic of Yugoslavia too.[27] Accepting the *de*

[26] Arbitration Commission has adopted its' opinion No. 2 after Lord Carrignton, in capacity of the Chairmen of the Conference for Implementation of Peace in Yugoslavia, had posed the question on the right of Serbian population in Croatia, and Bosnia and Herzegovina to self-determination. See: 92 ILM, p. 168.

[27] The Division of International Court of Justice that had been presided over by Mohammed Bedjaoui, in its' decision that has been adopted on December 22nd 1986 in *Case Concerning the Frontier Dispute* (Burkina Faso v. Republic of Mali) pointed out that in accordance with September 16th 1983 Special Agreement, solely the principle of "irreversibility of borders that had been inherited from the colonial times" shall be applied to the dispute. The above- mentioned principle that was to be applied to the border dispute of 2 former colonies, Burkina Faso (former Upper Volta) and Republic of Mali (former French Sudan), was relying on the principle that had been proclaimed in 1964 Cairo Resolution of Organization of African Unity. Considering that the principle *uti possidetis* has a general scope, the International Court of Justice maintained that the above- mentioned principle potently covers the legal gap until the establishment of effective authority as basis for sovereignty. The primal aim of the principle is to preserve the territorial borders that had existed at the moment when the new states have gained independence. In cases when a single colonial sovereign had delimited the borders between its' colonies, the principle is implemented through transformation of administrative borders into international ones. This is exactly what has happened with the 2 former French colonies in the Western Africa. Therefore, pointed the Court out, bearing in mind principle's significance for maintenance of stability (even in cases when principle is in conflict with the right to self-determination), the wisest course of action is to apply the principle that demonstrates the decision of African states to preserve territorial *status quo.* However, in spite of all the above-mentioned arguments, the Court adopted its' decision in accordance with inter-

facto situation, the Arbitration Commission has stressed the security function of this principle in circumstances that may lead to "fratricidal fights and endanger the stability and recently acquired independence of the new states".[28] In regards to international borders of former Yugoslavia that have become external borders of the new states, the Arbitration Commission maintained that those borders should enjoy the protection of international public law, in accordance with the principle embodied in the UN Charter. The protection of the afore-mentioned borders can also be derived from the Declaration on Principles of International Public Law Pertaining to Friendly Relations and Cooperation Amongst States in Accordance with UN Charter (Resolution 2625/XXV of UN General Assembly). Finally, the international protection of the borders of the new states can be derived from the Helsinki Final Act that had inspired the article 11 of Vienna Convention on Succession of States in Respect to Treaties (August 23rd 1978).[29]

When analyzing this part of Commission's opinion, one should concentrate on the concrete research of the rules of international public law that Badintere stated as the basis for the opinion on immutability of international borders of Socialist Federative Republic of Yugoslavia after succession. Namely, article 11 of Vienna Convention on State Succession Pertaining to the Treaties has sanctified the principle of international public law prescribes that the succession of states does not encompass the issues of borders that had been determined by treaties, nor the rights and duties pertaining to border regime that had been determined by treaties.[30] This principle is derived from legal practice and the theory of international public law, and it is essentially based on the principle of sovereign equality of states that also prescribes for states' obligation to refrain from threats and use of force in their relationship (article 2 of UN Charter). The 1975 Helsinki Final Act and the Declaration o CESC have also sanctified the principle of immutability of borders. Since the international community is based on prohibition of interventionism aimed against territorial integrity of states, it is prescribed that internationally recognized borders may be altered exclusively in a peaceful manner, on basis of mutual consent of the interested parties. The Declaration on Principles of International Public Law Pertaining to Friendly Relations and Cooperation Amongst States from October 24th 1970 repeated the same principle pertaining to the "lines of demarcation".[31] The 1990 Paris Charter for New Europe confirmed the rule on immutability of borders. Furthermore, it coincided with the collective consensus on recognition of new states that

pretations that were predominantly based on the principle of equity *infra legem*. See: ICJ Reports, Judgment of 22 December 1986, 565; Case Summaries, para 1–15; pp. 20-26.

28 Opinion No. 3 of Arbitration Commission, 92 ILM, p. 172.

29 Opinion No. 3, ibid.

30 1 Official Gazette of the Socialist Federal Republic of Yugoslavia, suppl. International Treaties (1980).

31 GA Res 2625 (XXV).

have been formed in the territory of Socialist Federative Republic of Yugoslavia. EC adopted "Guidelines on Criteria for Recognition of States in Eastern Europe and Soviet Union" and Declaration on Yugoslavia on December 16th 1991, conditioning recognition of new states with their acceptance of basic principles of international public law, amongst others obligation to respect territorial integrity and inviolability of state borders.[32] In accordance with the valid provisions of the international public law that had been subjected to a particular political test in case of Yugoslavia one may assume that all former republics of the 2nd Yugoslavia have acquired internationally recognized borders, once they had gained independence. *Via facti*, the internal administrative borders have been transformed into international frontiers, while the international borders had remained preserved, in accordance with the provisions of international public law on immutability of international borders. However, the first case basically represents a particular legal presumption that may be generally applicable to the situations in moment when new states gained independence. Still, this presumption does not have an absolute effect *ratione temporis*, as, in itself; it functionally suspends the effect of legal title until the moment the title has been confirmed. The confirmation of the legal title, on the other hand, always depends on concrete capability of particular party to the dispute to prove the validity of the facts it had based its' claims on.[33] On basis of above-mentioned facts that had been presented, one may conclude that in particular cases the title, to say the least, had had particular legal deficits in the moment of state succession. One should evaluate the effectively in the moment when a state had gained independence, and after that time period, not merely in the light of social causes, but in the light of real events that should, *inter alia*, confirm the existence of a particular right. From this one must necessarily derive the claim for carrying the delimitation between particular successor states out, as the current situation with borders gives rise to particular disputes that represent a threat to peace and security in the region. One should seek solutions for the afore-said disputes by means of peaceful settlement, using the resources provided by the international public law. 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. 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.

[32] UN Doc. S23293 of 17 December 1991.

[33] Vesna Knežević Predić, "Princip *uti possidetis juris* u praksi međunarodnih sudova", 4 *Međunarodni problemi*, 2001, p. 441.

4. Border Issue among Serbia and Croatia on Danube

The border problem concerns drawing of international border 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 compromise solution. In this way, the Danube River became a border between Croatia and Serbia.[34] 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 approximately 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.[35] 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 Vinogradi), Apatin, Bačka Palanka and a part of Vukovar (a 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. Prior to conclusion of the Border Agreement, Croatia and Serbia should carefully analyze all relevant legal arguments that are in favour of their claims. Besides all the above-mentioned data, one should bear in mind that particular rules and common principles on

[34] According to the Law on Establishment and Organization of Autonomous Province of Vojvodina 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: 28 Official Gazette of the People's Republic of Serbia (1945).

[35] 47 Official Gazette of the Republic of Serbia (1991).

delimitation in cases when borders consist of "Frontier Rivers" have been formed in the course of continuous international legal practice.

5. Drawing Border 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.[36] Taking into account the historical arguments that speak 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 giving rights to other states to use national waters should be based on the state will.[37] 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 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).* 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.[38] Guided by the international treaty practice

[36] Stephen B. Jones, above n.9.

[37] 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 servitude 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.

[38] The ICJ repeated in its 2005 decision on the boundary between Benin and Niger, a clause of its 1999 decision in the Botswana v. Namibia case, stating: "Treaties or conventions which define boundaries in water courses nowadays usually refer to the *Thalweg* as the boundary when the watercourse is navigable and to the median line between the two banks when it is not, although

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.[39] 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.[40]

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, this phenomenon calls accretion or accession (*accessio*).[41] Accretion implies territorial changes that occur by gradual 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

it cannot be said that practice has been fully consistent". See: *Frontier Dispute* (Benin v. Niger), ICJ, Judgment of 12 July 2005 (http://www.icj-cij.org/docket/files/125/8228.pdf).

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

40 Milan Bartoš, *Međunarodno javno pravo*, Kultura, Beograd, vol. II, 1956, pp. 25-26.

41 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 of the island that was located near the mouth of the Mississippi. See: *The Case Anna*, C. Robinson's Admiralty Reports, vol. 5, 1805, 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, 5 American JIL, 1911, 782; *Land, Island and Maritime Frontier Dispute* (El Salvador v. Honduras), ICJ Reports, 1992, pp. 351, 546. According to some authors, there is a clear distinction between accession and accretion. For example see: J. W. Donaldson, "Paradox of the moving boundary legal heredity of river accretion and avulsion", *Water Alternatives* (2011), pp. 155-170.

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 boundary 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*.[42] 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.

6. Possible solution for 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.[43] 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*).[44] Prescription of the territorial title on the state borders is an agreement with the

[42] 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.

[43] Yehuda Blum, above n. 11.

[44] *Island of Palmas Case* (United States v. Netherlands), 32 *American JIL,* 1928, p. 867.

factual situation that is neither obstructed nor disputed by the other party.[45] 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*).[46] 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.[47] 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.[48]

---

45 *Land,Island and Maritime Frontier Dispute* (El Salvador v. Honduras), ICJ Reports, 1992, p. 351.

46 Charles de Visscher concluded 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. See: Charles de Visscher, above n.14.

47 J. W. Garner, "The Doctrine of Thalweg", 16 *British YIL*, 1935, p. 177; E. Lauterpacht, "River Boundaries: Legal aspects of the Shatt-al-Arab Frontier", 9 *ICLQ*, 1960, p. 208-236; H. Ruiz Fabri, "Règles cotumieres générales et droit international fluvial", 36 *AFDI*, 1990, 818, etc.

48 Duško Dimitrijević, "Open Border Issues among States successor of the SFR Yugoslavia", in: Edita Stojić Karanović (ed.), *European history along the Danube – as resource for sustainable development*, Institute of international politics and economics, Belgrade, 2009, p. 8; "Međunarodnopravno razgraničenje Srbije i Hrvatske na Dunavu", in: Nevenka Jeftić Šarčević, Slavica Đerić Magazinović (eds.), *Serbia in contemporary geo-strategic surroundings*, Institute of International Politics and Economics, Institute for strategic research, Media Centar Defence, Belgrade, 2010, pp. 48-63; "International Legal Aspects of Border Delimitation on Boundary Rivers: The Case of the Danube", in: *On Borders: Comparative Analyses from South-eastern Europe and East Asia*, vol. 17, Research Institute for World Languages, Osaka University, 2011, pp. 20-30.

7. Conclusion

The problem of territorial delimitation between Croatia and Serbia on Danube River has been initiated after the succession of SFR Yugoslavia. Following the demarcation of administrative line between Croatia and Serbia 1945th in the framework of the Yugoslav Federation, the Danube River had altered its' riverbed, withdrawing Westwards from the East, thus *de facto* incorporating large areas of fertile land in territory of Vojvodina, Serbian northern province. During the process of dissolution of the former Yugoslavia, on basis of the report of the European Community Arbitration Commission, UN Security Council had adopted Resolution no. 777 which confirmed the principle *uti possidetis* by which have been announced that former administrative borders between former Yugoslav Republics became international borders. By virtue of this principle, the Danube became *de facto* border between Croatia and Serbia. However, in previous period, application of the principle of *uti possidetis* has limited effect of freezing the territorial *status quo* existing at the moment of independence of the successor States. Because the clear legal title has not existed in the former Yugoslavia, the principle could be understood only in retrospective historical context which not precludes the parties from citing the contents of any indicia of title.[49] Therefore, Croatia requests the return of territory of approximately 7000 acres that had been "transferred" to Serbia due to alternation of Danube's riverbed. Croatia bases this claim on measurements from cadastral survey register that had been carried out in 19th century by the Austrian-Hungarian Empire's officials. Those mainly went along the main current of Danube, and partially along Danube tributaries. On the other side, Serbia follows the changes of current of Danube and insists on the application of international law rule for delimitation of border at Danube River along the main current *(Thalweg)* that proved to be the best in regards to downstream transport when the water altitude is at lowest point. The application of the *Thalweg* as a general principle of delimitation preserves to each limitrophe state equality of right in the beneficial use of the Danube which may be important to unravel the actual confused boundary stands. On this argument, it seems that the mid-channel approach (*Thalweg*) would be the most appropriate for delimitation on the Danube. This principle may be applied to delimitation of border at the Danube, with possible correction on basis of principle of equity pertaining to use of Danube's water currents. 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

[49] "On the one hand, the centrality of *the uti possidetis juris* rule gives prominence to the stability of the boundary at the critical date and the consequent 'freezing' of the territorial title. On the other, rivers as natural boundaries have an inherent tendency to movement, hence possibly endangering the stability referred to". See: Fabio Spadi, "The International Court of Justice Judgment in the Benin-Niger Border dispute: The interplay of titles and Effectivites' under the *Uti possidetis juris principle*", 18 *Leiden JIL*, 2005, p. 792.

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 could not be of primordial legal importance in the final delimitation.[50] 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. Serbia and Croatia have chance to improve their bilateral cooperation through iintegrated border management on the Danube. It presumes conclusion of an international treaty on delimitation or the adoption of a collective declaration on the recognition of the existing "demarcation line of separation". Two neighboring states with the existing dispute over Danube are less likely to engage in cooperative management of shared water resources. Occasional incidents between the parties do not deny the thesis on 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.[51]

References

- Allot, A.: "Boundaries and the Law in Africa", in: Carl G. Widstrand (ed.), *African Boundary Problems*, Uppsala, The Scandinavian Institute of African Studies, 1969.
- Bartoš, M.: *Međunarodno javno pravo*, Kultura, Beograd, vol. II, 1956.
- Boban, Lj.: *Hrvatske granice 1918–1991*, Školska knjiga, Zagreb, 1992.

[50] Vladimir Đ. Degan, "Međunarodno pravo kao osnova rješavanja preostalih sporova na području bivšeg SFRJ", 12 *ADRIAS*, 2005, p. 48.

[51] Hersch Lauterpacht, Private Law Sources and Analogies of International Law (London, Longmans, 1927), 280; *Temple of Preah Vihear Case* (Cambodia v. Thailand), ICJ Reports, 1962, p. 696; 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: *Fisheries Case* (United Kingdom v. Norway), Judgement, 1951, ICJ Reports, 1951, p. 116.

- Brownlie, I.: "African Boundaries", in: *Legal and Diplomatic Encyclopedia*, University of California Press for the Royal Institute of International Affairs, Berkeley, 1979.
- Craven, M.: "The EC Arbitration Commission on Yugoslavia", 66 *British YIL*, 1995.
- De França Dias Van Dunem, Fernando José: *Les frontières Africaines*, Université d'Aix-Marseille. Faculté de droit et des sciences économiques d'Aix-en-Provence, 1969.
- Degan, V. Đ.: "Međunarodno pravo kao osnova rješavanja preostalih sporova na području bivšeg SFRJ", 12 *ADRIAS*, 2005.
- Dimitrijević, D.: "International Legal Aspects of Border Delimitation on Boundary Rivers: The Case of the Danube", in: *On Borders: Comparative Analyses from South-eastern Europe and East Asia*, vol. 17, Research Institute for World Languages, Osaka University, 2011.
- Dimitrijević, D.: "Međunarodnopravno razgraničenje Srbije i Hrvatske na Dunavu", in: Nevenka Jeftić Šarčević, Slavica Đerić Magazinović (eds.), *Serbia in contemporary geo-strategic surroundings*, Institute of International Politics and Economics, Institute for strategic research, Media Centar Defence, Belgrade, 2010.
- Dimitrijević, D.: "Open Border Issues among States successor of the SFR Yugoslavia", in: Edita Stojić Karanović (ed.), *European history along the Danube – as resource for sustainable development*, Institute of international politics and economics, Belgrade, 2009.
- Donaldson, J. W.: "Paradox of the moving boundary legal heredity of river accretion and avulsion", *Water Alternatives*, 2011.
- Đorđević, J.: *Ustavno pravo*, Savremena administracija, Beograd, 1978.
- Fitzmaurice, G.: "The General Principles of International Law", *Recueil des Cours de l'Académie de la Haye*, 1957.
- Garner, J. W.: "The Doctrine of Thalweg", 16 *British YIL*, 1935.
- Guani, A.: "La solidarité internationale dans l'Amérique Latine", *Recueil des Cours de l'Académie de la Haye*, 1925.
- Huber, M.: "Ein Beitrag zur von der Gebietshoheit an Grenzflüssen", *Zeitschrift für Völkerrecht*, 1907.
- Klemenčić, M. et. al. (eds.): "An Unhappy birthday in former Yugoslavia: a Croatian Border War", 2 *Boundary and Security Bulletin*, 1995.
- Knežević Predić, V.: "Princip *uti possidetis juris* u praksi međunarodnih sudova", 4 *Međunarodni problemi*, 2001.
- Kreća, M.: "O datumu sukcesije, par kritičkih napomena o mišljenju n°11. Badenterove Arbitražne komisije", in: *Nasleđe i naslednici Jugoslavije*, Pravni fakultet, Beograd, 1994.
- Lauterpacht, E.: "River Boundaries: Legal aspects of the Shatt-al-Arab Frontier", 9 *ICLQ*, 1960.

- Malenovsky, J.: "Problemes juridiques liés a la partition de la Tchécoslovaquie, y copmpris tracé de la frontier", 39 *AFDI*, 1993.
- Moore, J.: *Brazil and Peru, Boundary Question*, The Knickerbockers Press, New York, 1904.
- Mullerson, R.: "Law and Politics of States: International Law on Succession of States", in *Dissolution, Continuation and Succession in Eastern Europe*, Martinus Nijhoff, The Hague, 1998.
- O'Connell, D. P.: *State Succession in Muncipial and International Law*, Cambridge University Press, vol. II, 1967.
- Pellet, A.: "La Commission d'Arbitrage de la Conférénce Européene pour la Paix en Yugoslavié", 37 *AFDI*, 1991.
- Pereira, A.: *La succession d'Etats en matiere de traité*, Pédone, Paris, 1969.
- Pereira, A.: *The Effect of Independence on treaties*, International Law Association, London, 1965.
- Rich, R.: "Recognition of States: The Collapse of Yugoslavia and the Soviet Union", *1 European JIL,* vol. 4, 1993.
- Rossene, Sh.: *The Law of Treaties, Guide to Legislative History of the Vienna Convention*, Leyden, A. W. Sijthoff, 1970.
- Šahović, M.: *Raspad SFRJ i stvaranje novih država: Međunarodno pravo i jugoslovenska kriza*, Institut za međunarodnu politiku i privredu, Beograd, 1996.
- Shaw, M. N.: "Peoples, Territorialism and Boundaries", 8 *EJIL*, 1997.
- Škarić, S.: *Evolucija ustavnosti u socijalističkoj Jugoslaviji: Dva veka savremene ustavnosti*, SANU, Beograd, 1990.
- Spadi, F.: "The International Court of Justice Judgment in the Benin-Niger Border dispute: The interplay of titles and Effectivites' under the *Uti possidetis juris principle*", 18 *Leiden JIL*, 2005.
- *The Case Anna*, C. Robinson's Admiralty Reports, vol. 5, 1805.
- Vrbošić, J.: "Državnopravna pripadnost Baranje Republici Hrvatskoj i što u ovom trenutku znači tzv. Oblast Srema i Baranje", in: *Jugoistočna Europa 1918–1995*, Hrvatski informativni centar, Zadar, 1995.
- Weller, M.: "International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia", 86 *American JIL*, 1991.
- Wooldridge, F.: "Uti possidetis doctrine", in: R. Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. IV, Elsevier science b.v., Amsterdam, 2000.
- Yakemtchouk, R.: *L'Afrique en droit international, Librairie générale de droit et de jurisprudence*, Paris, 1971.
- Zečević, M. et. al (eds.): *Frontiers and Internal Territorial Division in Yugoslavia*, Srboštampa, Belgrade, 1991.

Paper received: September 17th, 2012
Approved for publication: September 27th, 2012

Originalni naučni rad

Dr Duško Dimitrijević, naučni savetnik
Institut za međunarodnu politiku i privredu, Beograd

PITANJE GRANICE IZMEĐU SRBIJE I HRVATSKE NA DUNAVU

Sažetak

Pitanje povlačenja državne granice između Srbije i Hrvatske postavljeno je još tokom procesa raspada SFR Jugoslavije. Arbitražna komisija za bivšu Jugoslaviju povodom ovog pitanja iznela je mišljenje br. 3, po kojem će „demarkacione linije između Hrvatske i Srbije, moći da se menjaju samo putem slobodnog i međusobnog dogovora", a ako se strane ne dogovore suprotno, „ranije granice poprimaju karakter granica koje štiti međunarodno pravo". To je zaključak na koji upućuje princip poštovanja teritorijalnog statusa quo i naročito princip uti possidetis juris qui. S obzirom na to da do dogovora oko uređenja granice između Srbije i Hrvatske nije došlo primenom navedenih principa, granica je zatečena linija koja prati međurepubličku demarkaciju izvršenu u periodu nakon Drugog svetskog rata. Prihvaćeno rešenje, međutim, nema značenje razgraničenja u međunarodnopravnom smislu, već posredno izvedene administrativno-pravne demarkacije unutrašnjih granica između dve federalne jedinice bivše SFR Jugoslavije. Radi identifikacije i utvrđivanja međudržavne granice, Srbija i Hrvatska su još 2002. godine osnovale mešovitu komisiju koja je dobila zadatak da pripremi ugovor sa opisom granične linije između ove dve susedne zemlje. Komisija je usvojila Protokol o načelima za identifikaciju – utvrđivanje granične linije i pripremu Ugovora o državnoj granici između Republike Hrvatske i Savezne Republike Jugoslavije. Do danas komisija nije objavila nikakve zvanične podatke o rezultatima razgraničenja. Potreba razvoja i stabilizacije dobrosusedskih odnosa između Hrvatske i Srbije pretpostavlja međunarodnopravno regulisanje granice na Dunavu. Pre konačne delimitacije međutim, bilo bi potrebno da se preispita sva relevantna pravna argumentacija. U tom smislu, u predmetnom radu iznosimo samo par ključnih zapažanja vezanih za međusobne teritorijalne zahteve, kao i činjenice koje mogu biti od značaja za međunarodnopravnu delimitaciju.

Ključne reči: *Dunav, delimitacija, međunarodno pravo, sukcesija SFR Jugoslavije, princip uti possidetis, Srbija, Hrvatska*

JEL klasifikacija: K33, Z18, F50