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THE SLOVENIAN-CROATIAN BORDER QUESTION

The Ambassador dr. Jožef Kunič, member of the International Institute IFIMES and President of the Slovene Association for International Relations (SDMO) analyzes current events related to the unsolved question of the border between Slovenia and Croatia in his article »The Slovenian-Croatian Border Question«.

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Following the second World War, the border between Slovenia and Croatia in the territory of Istria was completely drawn anew. The first division was put forth by the creation of the Free Territory of Trieste on the 1st of September 1947. The river Dragonja was chosen to represent this border. Objections to this were made by the inhabitants of Mini-Škrila in 1948 and the inhabitants of Bužine in 1949. The Official Gazette of the Federal People's Republic of Yugoslavia (FPRY), no. 43 of the year 1953, determined the way of dividing cadastral municipalities and was followed by the Law on Regional and Municipal Territorialization of the People's Republic of Slovenia, in the Official Gazette of the PRS no. 24/55, a law which precisely determines the border of the Slovenian republic according to the outer borders of its cadastral municipalities. The surface area of Slovenia, according to this law, consists of 2,027,300 ha, 95 a, and 19m2. Of course, in certain areas, not just in Istria but elswehere as well, the inhabitants interpreted the state of the border in their own ways and thus *de facto* obtained parts of the territory which *de iure* belonged to the 'other' side. There are six of these so-called controversial areas, namely, the area around Hotiza, at Sekuliči by the Gorjanci mountain range, the peak of Mt. Trdin, the plot of land of Tomšič beneath Mt. Snežnik, the area around Dragonja, and the course of the border at sea.

For clarity's sake, we will deal with the border at sea and the border on land seperately, even though both constitute a single, uninterrupted border.

THE BORDER AT SEA

Experts should, through serious professional discussion amongst each other, come up with serious and argumentative answers to the following (and perhaps other) questions:

1. Is the statement that, during the existence of the Socialist Federal Republic of Yugoslavia (SFRY), there was no division between the Socialist Republics concerning the border at sea, that is, that all the sea belonged to all the Republics and Autonomous Provinces, compatible with the Constitution of the SFRY that was valid up until the day of collapse, that is, until the 25th June 1991?
2. Is it possible or likely that the Arbitration Committee set up by the European Union on the 27th of August 1991 (and which is popularly called 'Badinter's Arbitration Committee' or 'Badinter's Committee' in short) committed an error, or overlooked, in the 'Opinions of the Arbitration Committee', the part of the border between Slovenia and Croatia which is at sea (this being elaborated upon in the third point of the third opinion in this report) ?
3. Is the opinion of the Arbitration Committee, which was seemingly accepted with approval, in full, by both the Republic of Slovenia and the Republic of Croatia immediatelly after independence, yet now no longer seems to be, that is, is an opinion that was arrived upon by an EU-appointed committee, made up of five respected heads of supreme courts, so unclear that it can in no way be applied to the question of the border between the Republic of Slovenia and the Republic of Croatia at sea?

Before we answer the questions asked above, two details must be taken into consideration. A detail that is too often overlooked is the meaning of the legal principle of *uti possidetis*, this being that the state of affairs on a certain date, particularly chosen, becomes a limiting factor, and if the principle is called into effect, all history prior to said date is 'forgotten'.
Referring to historical arguments is in contradiction to the *uti possidetis* principle. This principle in reality does away with all historical arguments and disregards any nonsense and injustice done in the past, thereby preventing the rectification of these injustices. All that matters is the state of affairs on the chosen date.
The other detail we must call attention to is that rarely does only one subject administer a certain part of a certain territory. In many places in the SFRY, there were no precise boundaries between administrators, and thus there are more than just a few cases where one socio-political community, this being one Republic or its local administrative unit, administered one field and another Republic administered a second field, all this happening in one geographic area which was part of the territory of only one of the two Republics. It would appear logical that such a territory is ceded to the Republic which managed and administered more, if not the majority, of the area in question.

The answer to question a): The Constitution of the SFRY (article 5, paragraph 1): »The territory of the SFRY is unified, and is composed of the territories of its Socialist Republics.« From this it follows that there was no territory within the SFRY that also at the same time was not part of any of the Socialist Republics (SR). The sea was, like all other territory of the SFRY, unified but, according to the constitution, each specific point at sea belonged to one of the SRs. From the constitution, we can conclude

which part of which territory belonged to whom. »The working people and citizens exercise their sovereign rights in the Socialist Republics and Socialist Autonomous Provinces and – when determined by this constitution to be of common interest – in the SFRY.« Thus it clearly follows: all sovereign rights, aside from those transferred to the SFRY, are exercised on the territory of each specific SR. The territory on which the SR of Slovenia exercised its sovereign rights, aside from those transferred to the SFRY, therefore belonged to Slovenia (I intentionally use the diction of the Constitution of the SFRY, which today sounds anachronistic). In the part of its territory which is at sea, the SR of Slovenia exercised police supervision, ecological protection, control over economic exploitation of the sea, control over prohibited activities regarding protected species of fauna and marine flora, control over archeological activities at sea, etc.

It is undisputable that the interior of the Bay of Piran, all the way to the lines of shallow water at the coast of Savudrija, belonged to the SR of Slovenia, as it was she who carried out all of the aforementioned activites in this territory.

The activities carried out by Slovenia as part of exercising her sovereign rights, however, must not be confused with the activites carried out in the name of the entire federation. By this we mean those activites necessary for the carrying out the federation's constitutional rights and which were transferred to the federation from all the Socialist Republics and Socialist Autonomous Provinces by the constitution (see article 281). These activites could have been carried out by federal agencies or the agencies of any republic, that is, of the republic designated to carry out the activity by the federation, and, therefore, can we in no way conclude from these activites whether Slovenia (or Croatia) exercised its power and sovereign rights. These activities are connected to defense, protection of international borders, control of international travel by sea, control of travel by air, etc.

Often, the fact that Slovenian agencies carried out the task of controlling the state border is used as an argument for this area being the territory of Slovenia. The Slovenian argument based on the written directive of the former Yugoslav state regarding Slovenian Police supervision of 16 miles of the border with Italy simply carries no weight in determining where which SR exercised its sovereign rights, as we speak of carrying out federal directives and since these could have been, were the federation to say so, carried out by the agencies of any SR.

The case of the tanker Nonno Ugo, which was stranded on the 8th of March 1973 on the coast of Savudrija, near the settlement of Kanegra, is a case from which we cannot conclude that Croatia exercised sovereign power over this area of the Bay of Piran. While it is true that all formalities with the owner of the vessel were settled by the Port Authority of Pula, its Umag division to be more precise, and although it is equally true that control of the area of the incident, information collection from eyewitnesses, and interrogation of the ship's crew and captain were all carried out by instructions from, and under control of, the then-Republic Secretariat for Maritime Administration, Transport, and Communications in Zagreb, the fact of the matter remains that the incident was a question of international travel by sea, and this was, according to the constitution of the SFRY, a constitutional right, that is, a right of the federation. Thus, the republic's agencies *de facto* carried out the investigation only in the name of the SFRY, this in no way being an exercise of the republic's sovereign rights.

Often, one can encounter arguments, particularly from the side of Croatia, founded on supposed agreements on Croatian agencies carrying out some of the measures of control. Written documents confirming such agreements allegedly exist. Here emphasis must be placed on the fact that Slovene agencies never searched for nor needed any agreements with the Croatian government for operating in the area of the entire Bay of Piran. The fact that on the other hand, Croatia did require, and actively pursued, permission from Slovenia for the operations of its agencies in the Bay of Piran is merely evidence that only Slovenia exercised her sovereign rights in this area. Thus, this territory was Slovenian and from the side of Croatia *de facto* acknowledged to be Slovenian, or she would have never needed nor pursued the mentioned agreements. Of course, Slovenia could allow anyone to conduct any sort of operation or activity on its territory (if, of course, this was in accord with the legislation valid at the time). Even the viewpoint of prof. Vukas that »in many accidents at sea, the Slovenian government contacted Croatian agencies for help, that is, if the accident occured in the southern part of the Bay of Piran« (Vukas, 2004) simply confirms the fact that the southern part of the Bay of Piran was also under Slovene jurisdiction, since Croatian agencies came when they were called, and the entity with jurisdiction is the one who decides whom to call.

It is hardly a dilemma whether there is sound basis or not for calling into effect the *uti possidetis* principle suggested by the Arbitration Committee for dealing with the interior of the Bay of Piran. Therefore, regarding the Bay of Piran, we do not speak of determining a common border but, in accordance with the opinion of the Arbitration Committee, of a precise determining of the border's co-ordinates along the line that seperates the territory in question into the area where the SR of Slovenia exercised her sovereign rights and the area where the SR of Croatia exercised hers. This solution would be bad for Slovenia, since in the best case scenario she would only have access to the open sea at a single point, while it would be completely unacceptable to Croatia, since she would attain the coast of Savudrija (up to shallow waters) without the Croatian sea. It would be a highly impractical and illogical solution to have a coast with no sea. In no way would the Croatian public accept this. Here we must add that, according to UNCLOS (the United Nations Convention on the Law of the Sea, which came into effect on 16.11.1994), it is no longer possible to re-draw a border and have the coast belong to one state and the sea to another. But in this case, and this is a very important point, we do not re-draw the border; instead, we simply are trying to discover where the line that seperated the two territories passed. The blame for its impractical placement is to be shouldered by the former SFRY. Pursuing this solution would be for Croatia much worse than the solution offered by the »Drnovšek-Račan« agreement.

The »Drnovšek-Račan« agreement, the content of which was prepared in July 2001 and was immediately supported by the governments of both countries, was in essence a compromise that was based on the opinions of the Arbitration Committee.

Regarding the border on land, it is clear that neither of the two SRs fully exercised their sovereign rights to the exclusion of the other in the controversial areas, so a common border was drawn up by mutual consent. However, regarding the border at sea, Slovenia would give Croatia a part of the Bay of Piran, and Croatia would in turn give nothing to Slovenia, instead giving up some territorial waters to international waters. Each side thus lost something, but gained something more important – a mutually agreed upon state border. Domestic political interests, however, prevented the agreement from ever being ratified.

I do not have access to the transcripts of the sessions that hatched the last constitution of the SFRY, but precisely on the question of territories that would not belong to any of the republics, a heated debate arose. If the sea had not been divided, it would have belonged to the federation itself and no socialist republic would have exercised its sovereign rights on it nor would have the republics' police forces been in charge of controlling and patrolling the waters; the federation's agencies would have done this, that is, the Yugoslav People's Army, something that no republic that had access to sea would ever allow. The result of these heated debates was the famous fifth article of the SFRY Constitution, which in effect divided the sea and made every point at sea belong to one of the Socialist Republics.

The answer to question b): There were some claims, mostly from Croatia's side, that the opinions of the Arbitration Committee do not apply to the border at sea, which seems highly unlikely. It would be exceptionally strange that opinion no. 1, which states that the SFRY dissolved and that Croatia and Slovenia did not secede, would be held in such high regard, while opinion no. 3, which speaks of borders, including the border at sea, would be somehow less valid.

The answer to question c): The opinion of the Arbitration Committee is perfectly clear. It is as follows: »Except where otherwise agreed, the former boundaries become frontiers protected by international law. This conclusion follows from the principle of respect for the territorial *status quo* and, in particular, from the principle of *uti possidetis*. *Uti possidetis*, though initially applied in setting decolonisation issues in America and Africa, is today recognized as a general principle, as stated by the International Court of Justice in its Judgement of the 22nd of December 1986 in the case between Burkina Fase and Mali.« A priority of the opinion is that the newly formed states can come to mutual agreements regarding their border. If there is no agreement, then the *status quo* remains and the former boundaries become borders. It is also clear that the way to determine the territorial *status quo* is the principle of *uti possidetis* (and not *uti possidetis iuris* as some would claim) and this obviously shows the way the border should be determined; divisions of territory were not formally specified, or at least were not legally clear, in the time of the former SFRY, and there was no official agreement between the two republics. This means that the territory remains how it was, along with the rights exercised on it. If authority over a territory stems from a valid agreement or a legal act, then we speak of *uti possidetis iuris*, yet if it stems only from actual authority over a territory that is not accompanied by any formal acts or agreements, we speak of *uti possidetis de facto* (Dictionaire Diplomatique; pp. 1045-1050).

If appropriate legal acts, on the basis of which the Slovene police and other Slovene agencies had full control of all the Bay of Piran, exist, then the conclusion according to both principles is the same. If we discover that the sea was not divided by legal acts, yet that authority over the area (aside from those cases where it was transferred to the federation) was in fact exercised by the Slovene police and other Slovene agencies, then the principle of *uti possidetis iuris*, due to lack of legal formalities and acts, is not applicable; the princple of *uti possidetis de facto*, however, is applicable and gives a clear, doubt-free solution. Here we must note that some believe that the »border [at sea] between Slovenia and Croatia was never determined by a legal act or a print in the Official Gazette« (Deisinger; 2004), yet that the division of exercising sovereign rights was clear, which is more than a sound basis for calling into effect the *uti possidetis de facto* principle. It is a very important fact that regarding the border at sea, there is no contradiction between the principles of *uti possidetis iuris* and *uti possidetis de facto*. It is possible that one of the two is not applicable, but even then it does not oppose the other princple (unlike in the case of the border on land).

We must return now to the answer to question a). The sea during the time of the SFRY was divided.

On the basis of the Constitution of the SFRY it is obvious that the sea was divided among the SRs, and all that is needed is to carry out the process of delimitation, that is, to clearly identify the border point by point according to opinion no. 3 of the Arbitration Committee. According to this, one clearly finds the sovereignity of the Republic of Slovenia over the entire Bay of Piran, in accordance with the opinions of the Arbitration Committee. In all likelihood, the EU will support this, as it was the EU that appointed the Arbitration Committee and will be unwilling to admit that its committee either forgot about the sea, or presented an opinion that is useless.

When speaking of the Croatian tactics of bilateral relations, the fact is that Croatian politics and policies, in relations with Slovenia, was always based on two points. The first is the strategy of *fait accompli*, while the other is selective carrying out of agreements. Croatian diplomacy and politics was always highly skilled at implementing bilateral agreements only partially. The best example is the partial implementation of SOPS (the agreement on border traffic and co-operation, which came into effect on the 5th September 2001). In those elements of the agreement that benefit Croatia and maximize gains for her, Croatia strongly and firmly implements bilateral agreements. As soon as it comes to elements that do not maximize at least short-term Croatian interests, then these elements simply are not implemented.

In Croatia one can hear that there is little reason left for further negotiation with Slovenia regarding the border issue, since negotiation eventually and inevitably entails accepting and giving concessions. And the need for further concessions no longer exists. This mentality of selective implementation of agreements is very firm and essentially, there exists a national consent regarding it in Croatia (Gjenero; 2006). This model of selective implementation of agreements and the *fait accompli* model can

be clearly seen in the incidents occuring at the border at Dragonja. The Joras farm definitively belonged to Croatia according to the »Drnovšek-Račan« agreement, therefore, by insisting that the farm belongs to Croatia, Croatia herself practically endorses the »Drnovšek-Račan« agreement, despite the fact that she would never accept it. On the other hand, a typical *fait accompli* example is the building of a border station on controversial territory. It has been said that this building does not define the border. Nonetheless, it was at this 'unprovoking border' that the incidents regarding Mr. Podobnik and Joras' farm occured, when he walked past the official border station. The previous point of a border station not defining the border was promptly forgotten. Therefore, after building this border station, step by step, by selective implementation of agreements, the border was re-drawn which on this day should be uncontroversial and final.

Of course, one must ask the question of how to implement the opinions of the Arbitration Committee if Croatia claims that she accepts them, and yet obviously avoids them in the Bay of Piran. As a member of the EU and of NATO, Slovenia can with all seriousness demand the respecting of the Arbitration Committee's opinions set forth by the EU on 27.8.1991. Disregarding the opinions of the Arbitration Committee surely is 'not European' and therefore it is surely legitimate and in accordance with good diplomatic practice that Slovenia demands Croatia's acceptance of these opinions before she becomes a member of the EU. It seems that the only agreement that the two countries might agree on is the »Drnovšek-Račan« agreement. Very likely, neither country will be prepared to accept a worse deal, and neither country will be able to secure a better deal. In the case that there is no agreement, then it is appropriate to turn to the Arbitration Committee in accordance with the written promise from the letter from the 19th December 1991 (Kunič; 2007).

At this point, it is important to add that the opinion put out by the Arbitration Committee was composed from exceptionally well-regarded personalities, led by the esteemed Robert Badinter, and was politically supported by the EU; full compliance and respect of the opinion was, in fact, one of the conditions for recognition of Slovenia and Croatia.

The question of the border at sea between Slovenia and Croatia should be, and in my opinion has to be, settled by an impartial international institution, which above all should respect the undisputed fact that the sea in the times of the SFRY was divided amongst the then-Socialist Republics, and recognize the opinions of Badinter's Arbitration Committee.

THE BORDER ON LAND

Just as with the border at sea, the solution described in opinion no. 3 of the Arbitration Committee was accepted as a solution for the border on land.

Until a final agreement about the border is reached, neither Croatian nor Slovenian institutions should, with any action, in particular not with official action, claim or behave as if the border is clear and by doing so preclude the conclusions of a possible mutual agreement or the solutions proposed by appropriate institutions. Yet it often came to this in the Bay of Piran and on the left bank of the Mura river at Hotiza. Despite the presence of Slovene police forces, Croatian workers were working on land that, according to the principle of *uti possidetis* (referring to the state of affairs on 25.6.1991), most likely belongs to Slovenia, since only Slovenia *de facto* controlled this area and *de facto* had possession of it. The appropriate institutions did not react when a bridge over the Mura river was built and added upon in the controversial area. What is even less acceptable is the fact that representatives from both countries agreed that the floodbank on the left bank of the river should be repaired by workers from both countries; by this, the Slovene representatives again, in a way, gave support to the idea that the territory is not undisputably Slovene.

The issue of a mutually agreed upon state border between Slovenia and Croatia is of key importance for both states involved, but it can only be solved by an external, impartial institution. It is an issue that has been intensely abused for domestic policy gains, and any statements or actions other than non-professional, political populist opinions for what belongs to whom can only occur in the case that the governments of both countries are strong and are not facing elections just around the corner. That things will ever reach this situation is, however, very unlikely. But a final settlement regarding the issue will be very positive for both sides involved, as it will remove a difficult and problematic burden from the daily schedule. Any and every moment spent on waiting for a solution to pop up is in direct opposition to both Croatia's and Slovenia's national interest.

The excuse that when both countries will be EU members, borders will cease to exist, simply does not add up. Dreaming about the EU solving border questions is highly unrealistic. This is the direct consequence of not being familiar with the issues that long-term members of the EU share. The EU does not solve such questions, and has no intention of doing so either, which was confirmed last year by the European Commissioner for Enlargement Rehn. These are, after all, questions of a bilateral nature. It is true, however, that the EU would like as little of such questions to be left unsolved.**Bibliography:**

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