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## **Bridge over Troubled Waters: The Pelješac Project, China, and the Implications for Good-neighbourly Relations and the EU**

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### *Summary*

This single-case study seeks, first, to analyse the Pelješac bridge project's EU dimension, and the impact on the bilateral relations between Croatia and Bosnia-Herzegovina. The bridge is part of the so-called Road Connection to South Dalmatia, an infrastructure project linking the southern exclave of Croatia with the rest of the country. This article is going to reconstruct the considerable controversy between Sarajevo and Zagreb over the project. Second, this piece of research aims at highlighting the context of the bridge being built by a State-owned Chinese company and why the EU has been paralysed over the question of third-country bidders in national EU-wide public tenders. Lastly, this paper presents a recommendation on how the problem of maritime access to and from the territorial waters of Bosnia-Herzegovina through Croatian internal waters can be solved. The article demonstrates that the three issues of controversy related to the Pelješac bridge project can and must be unbundled to arrive at sustainable solutions for the region as a whole. The method employed in this article is process-tracing covering the period between 1999 and today based on interviews, documents, and secondary literature.

*Keywords:* Croatia, Bosnia-Herzegovina, Public Procurement, EU Enlargement, China

### **Introduction**

The Pelješac bridge project has been a matter of considerable controversy ever since its initial stages around 15 years ago.<sup>1</sup> Despite the fact that there is no major territorial issue between Croatia and Bosnia-Herzegovina on land, the exclave situ-

<sup>1</sup> I am particularly grateful to the Journal's anonymous reviewers and to Professors Susanne Pickel and Michael Kaeding at Duisburg-Essen University for their helpful comments and suggestions on an earlier draft of this article. All errors are mine. I feel highly indebted to the inter-

ation of the Dubrovnik area has rendered the Neum corridor and the link to mainland Croatia a salient item on the domestic political agenda in Croatia. Awarding the construction works for the bridge to a State-owned Chinese company has certainly caused some irritation in EU quarters, not least due to the EU funding the lion share of the project.

Yet, developments must be analytically unbundled. It is the aim of this article to reconstruct and analyse the streams of events in turn, and to trace the root-causes of a somewhat strained state of affairs – on a bilateral level, with regard to the role of China in the Western Balkans, and also EU-internally. This facilitates embracing the challenges ahead on the ground and pathways for defusing bilateral and international conflict alike.

This article is structured as follows: The first item of analysis deals with the Pelješac bridge project, its EU funding, and the tendering process. The second item addresses the issue of third-country bidders in EU public procurement and the particular challenge for EU Member States to come to terms with the role of China. The third issue treats the implications of the Pelješac bridge project on the predominantly maritime territorial issue between Croatia and Bosnia-Herzegovina. The concluding recommendations present avenues for the way forward.

The method employed in this study is process-tracing (see e.g. Trampusch and Palier, 2016; Gerring, 2011; Collier, 2011; and Bennet, 2010). It appears to be the appropriate method to distil meaningful context and the causal mechanisms from a dense layer of information related to several micro issues. Second, the availability of both (i) actors for interviews and (ii) documents renders process-tracing a suitable method.

With regard to data collection, *elite interviews* with a relatively small sample of respondents (Gerring, 2011: 15) play a central role in process-tracing. Actors are often the only source of first-hand testimony from people directly involved in the events (Tansey, 2007). As a result, they ideally produce “oral history” (Grele, 1996). For the purposes of this study, the author has conducted twelve interviews between September 2017 and January 2020.<sup>2</sup> *Documents*, draft and official ones, and undisclosed correspondence, as first-hand primary sources (Trampusch and Palier, 2016: 6),

viewees – politicians, civil servants, and academics – providing expert and anecdotal evidence and without whom this study would simply not have been possible. I also wish to thank Martin Schmaus and Timo Landenberger for producing the maps. Special thanks go to Damir Arnaut, Andrea Čović-Vidović, and Frank Hoffmeister.

<sup>2</sup> The interviewees were two politicians, six civil servants, national or European Commission, who all requested to remain anonymous, one economist, and three academics. For a full list see INTERVIEWS at the end of the article.

are an equally useful and indispensable instrument in a process-tracer's toolbox to pin-point developments.

This study's research question is: What are the specific circumstances, causal mechanisms/interdependencies, and actors with regard to the Pelješac bridge project as such, the role of China in relation to the EU and the Western Balkans, and the issue of maritime access of Bosnia-Herzegovina?

### *The Neum Corridor*

Croatia as a territorial entity strictly speaking is split into the large northern or mainland part and – divided by a small strip of territory of Bosnia-Herzegovina, the so-called Neum corridor – its southern exclave around the city of Dubrovnik including the Pelješac peninsula. Historically, the Neum corridor is a result of the late 17<sup>th</sup> and early 18<sup>th</sup> century, namely the 1699 Treaty of Sremski Karlovci and the 1718 Treaty of Požarevac where the Venice Empire ceded two buffer areas that separated it from the Republic of Ragusa (today Dubrovnik) to the Ottoman Empire (Fuerst-Bjeliš and Zupanc, 2007: 43; see also Klemenčić, 2001: 65).

Currently, the Dubrovnik exclave can be reached terrestrially by road through the Neum corridor of Bosnia-Herzegovina.<sup>3</sup> The distance is approximately 9 km with two border-crossing points each (Croatia and Bosnia-Herzegovina) on the northern end (Klek or Neum I) and the southern end (Zaton Doli or Neum II). Alternatively, the Dubrovnik area can be reached by ferry linking Ploče on the Croatian coast to Trpanj on the Pelješac peninsula, a time-consuming detour (author's field notes, 02 August 2018).

The Neum corridor currently is the only direct road link to Dubrovnik. The domestic goods transported are predominantly supplies for the Dubrovnik area meeting the needs of the local population and the local economy where tourism plays a great role. Not only large companies, but also local economic operators, such as craftsmen and farmers, form a considerable part of the corridor traffic. Whilst the Neum road transit used to be a bilateral matter for Croatia and Bosnia-Herzegovina, a special arrangement has been in operation since Croatia joined the European Union on 01 July 2013. The so-called Neum Regulation facilitates the customs checks and declarations that would otherwise be highly bureaucratic when leaving or entering the EU with its Customs Union binding on each and every Member State. In view of the local economy, the local goods, and the strong role of tourism, a lighter regime is in place. In essence, the goods' (that must not exceed 10.000 Euro in value) accompanying commercial documents are marked on exit (the consignments being sealed), and checked at re-entry with the crossing time being a maximum of

<sup>3</sup> Bosnia-Herzegovina has a coastline of approximately 27 km (European Commission Staff Working Document on BiH, 2019: 120).

20 minutes.<sup>4</sup> The scheme is considered to operate smoothly with 25 to 30 Croatian inspection officers each at the Klek and Zaton Doli crossings, relatively little waiting-time, and complying with the criteria of the Regulation (European Commission Report on the application of the Neum Regulation, 15 November 2015: 3-8).

### *The 1999 Treaty on the State Border*

On 30 July 1999, Croatia and Bosnia-Herzegovina signed the Treaty on the State Border. As for the land border, the parties chose to apply the principle of *uti possidetis*.<sup>5</sup> Article 2(1) reads:

The State border between the Republic of Croatia and Bosnia and Herzegovina is *determined on the basis of the state of the borders at the time of the end of the Socialist Federal Republic of Yugoslavia in 1991 and the mutual recognition of the Republic of Croatia and Bosnia and Herzegovina in 1992*, identified on the topographic map 1:25,000 and, *in practice, on the basis of the borders between border land-registry municipalities*, on the basis of the border towns and villages at the time of the 1991 Census and on the basis of the dividing line which divided the authorities of the Socialist Republic of Croatia and Socialist Republic of Bosnia and Herzegovina (emphasis added).

The sea border around Neum and the Klek peninsula is delimited by way of an equidistance line (see fig. 1 below) in remarkable brevity. Article 4(3) states:

The State border on the sea stretches along the *central line* of the sea between the territories of the Republic of Croatia and Bosnia and Herzegovina [...] (emphasis added).

Yet, the issue of freedom of navigation between the territorial sea of Bosnia-Herzegovina and the high seas in the Adriatic has not been addressed in the 1999 State Border Treaty (see III).

<sup>4</sup> The time limit is to ensure that a vehicle cannot stop on the way to take on board new or other goods. The 20-minutes period takes into account that there are four border-crossing points altogether.

<sup>5</sup> It must be noted that the boundaries of the Republics of the Socialist Federal Republic of Yugoslavia (SFRY) have never been established expressly. There have been no such legal acts, neither by the federal parliament nor by the parliaments of the Republics (Dragičević et al., 2013: 10; Milenkoski and Talevski, 2001: 93; Radan, 2000: 7). The land boundary was *de facto* governed by the limits of the cadastral units of the municipalities or districts in the border areas of the SFRY Republics. This 'cadastral delimitation', or 'administrative border', became the international border (principle of *uti possidetis*) after the independence declarations of Croatia in 1991 and of Bosnia-Herzegovina in 1992, and by the mutual recognition of both States. For the *uti possidetis* principle in the context of the dissolution of the SFRY see e.g. Sorel and Mehdi (1994) or Craven (1996: 388-389). For a critical view see Radan (1999: 147-151).

There has been some *ex-post* unease about the border treaty on either side, however.<sup>6</sup> As regards Bosnia-Herzegovina (BiH), resistance emerged in the Republika Srpska (RS), one of the two BiH entities needed for ratification. The RS protests mainly related to an island in the Una river between Hrvatska Kostajnica (Croatia) and Bosanska Kostajnica (BiH) which, according to the Treaty on the State Border, belonged to Croatia (Klemenčić, 2001: 98; interview Damir Arnaut, 25-01-2018), and to a larger section along the Una river up to its confluence with the Sava river where the border, according to the RS protests, should follow the median line of the river (Perković, 2013: 3; see also Šelo Šabić and Borić, 2016: 6-7). With regard to Croatia, the Dubrovnik-Neretva County Assembly questioned the borderline around Klek peninsula claiming an ancient boundary between the Ottoman Empire and Venice 1700-1805 and between the Ottoman Empire and Austria 1815-1918 (Klemenčić, 2001: 99; Šelo Šabić and Borić, 2016: 6). To that end, a diplomatic note was sent by Croatia to Bosnia-Herzegovina in 2006 (Perković, 2013: 3). Nevertheless, Croatia appears to recognise the 1999 sea border not least since an official visit of the Chair of the Presidency of Bosnia-Herzegovina and further government officials to the tip of the Klek peninsula and the islet of Veliki Školj in 2009 went smoothly. Further, regular patrolling of the maritime border by the authorities of Bosnia-Herzegovina has since remained unprotested by Croatia (interview Damir Arnaut, 07-05-2019).

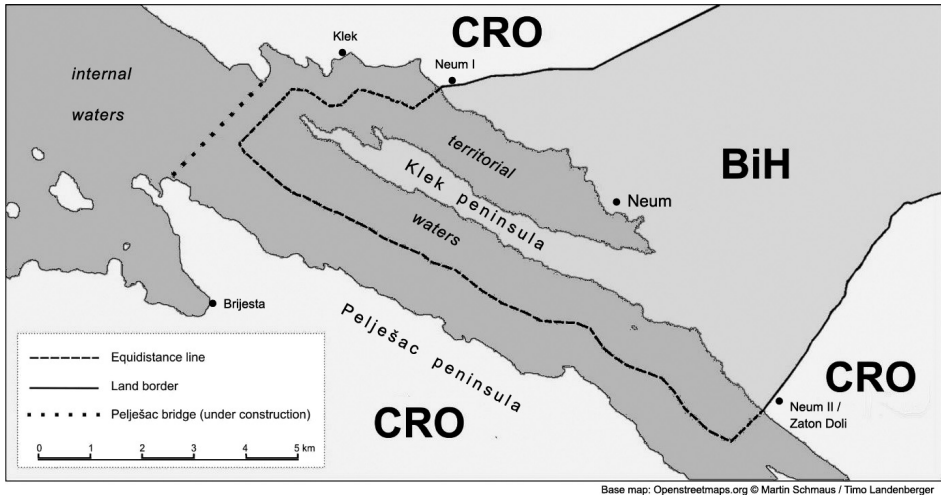
As a matter of fact, the 1999 Border Treaty between Bosnia-Herzegovina and Croatia has not been ratified yet. However, it is being applied in good faith by both sides (interview Damir Arnaut, 07-05-2019; interview senior Croatian civil servant, 25-01-2017; see also European Commission Staff Working Document on BiH, 2019: 84).

## I. The Pelješac Bridge Project

When looking at the Pelješac bridge project, it is useful to bear in mind the territorial shape of Croatia which tends to fuel fears of being endangered. In addition, the territorial past is more important than elsewhere. Croatia has a land border of more than 2000 km, and more than 1000 km of that border Croatia shares with Bosnia-Herzegovina. This is what renders Neum, the exclave situation of Dubrovnik, and the Pelješac bridge crucial issues. In a territorial sense, there is a discontinuity within the country (interview Dejan Jović, 02-11-2017).

<sup>6</sup> The European Commission Staff Working Document on BiH (2019: 84) very generally reads: "There are some open issues concerning the borderline at land and sea".

**Figure 1.** Location of the Pelješac bridge, land/sea border between Croatia and Bosnia-Herzegovina around Neum according to the 1999 Border Treaty, and maritime areas (schematic view)



### *A Rocky Road to EU Funding: The Road Connection to South Dalmatia*

The Pelješac bridge and its access roads, termed The Road Connection to South Dalmatia, has been a long-standing policy goal of many Croatian governments as the bridge would provide a full road connection of the Dubrovnik-Neretva County with mainland Croatia without recourse to the Neum Corridor. Despite a manageable and relatively light regime for the exit and re-entry controls of goods traffic through the Neum corridor in Bosnia-Herzegovina (see introduction above), the administrative resources and traffic disruptions are considerable.

The future bridge and its connecting roads are supposed to “cut travel time by more than 50 percent” due to the elimination of the need to use the Neum corridor (New bridge to improve road connections with Croatia’s south Dalmatia region, European Commission DG REGIO website). What is more, politically, with regard to a future participation of Croatia in the Schengen Area, “a key priority for the government, and the technical improvements are ongoing” (interview Andrej Plenković, 14-02-2018), an enclave situation with the special Neum corridor regime would clearly be untenable as regards free movement inside the Schengen Area. In fact, the European Commission has recently issued a positive recommendation on Croatia’s application for Schengen membership with regard to the country’s technical ability to apply the Schengen rules (European Commission press

release, 22 October 2019). It remains to be seen, however, at what point Schengen Member States are actually going to decide on new members.<sup>7</sup>

The range of the prospective Pelješac bridge over the Mali Ston canal is at 2.400 metres which makes it one of the longest suspension bridges in the world. The foundation conditions are rather unfavourable with the pillars having to go 100 metres into the sea-bed. In addition, there tend to be strong winds and there is considerable seismic activity (Obućina, 2019).

The construction works for the bridge started as early as 2007<sup>8</sup> after a joint technical working group composed of experts from Croatia and Bosnia-Herzegovina had agreed on the specifications of the bridge. According to the European Commission, the report and the minutes were validated by both governments and filed with the European Commission in December 2006 (interview European Commission DG REGIO senior civil servant, 04-05-2018). However, Bosnia-Herzegovina insists that the minutes of the expert group's agreement were never approved by either the BiH Council of Ministers or the BiH Presidency (interview BiH Presidency official, 11-05-2019). Nevertheless, the bilateral expert group had actually agreed that the height of the bridge was to be at 55 metres and the width between the bridge's pillars 200 metres. The original Croatian plans for the height had been at 48 metres and were subsequently amended at the request of Bosnia-Herzegovina (HINA news, 07 September 2017, quoting the Croatian Minister for Sea, Transport and Infrastructure; interview BiH Presidency official, 11-05-2019; interview Damir Arnaut, 10-01-2018).<sup>9</sup>

Although "it wasn't easy to explain to the Commission that this is a project that connects two parts of Croatia" (interview Andrej Plenković with Politico, 08-05-2019), the European Commission approved the EU co-financing of the Pelješac

<sup>7</sup> Bulgaria and Romania met the conditions to fulfil the application of the Schengen acquis in 2011. However, a decision on the actual Schengen membership of Bulgaria and Romania on the part of the EU Justice and Home Affairs Council (requiring unanimity amongst Schengen members) has been pending since (see e.g. European Parliament resolution on the full application of the provisions of the Schengen acquis in Bulgaria and Romania, 11 December 2018). With regard to Croatia, Slovenia has officially announced at various occasions, most recently in September 2019, that it supports enlargement of the Schengen Area, but that applicants would have to also meet other legal standards which included "respecting and implementing [...] international rulings" (STA News, 25 September 2019) which is a clear reference to Croatia's non-implementation of the 2017 Arbitral Award on the Croatian-Slovenian State border; see footnote 26.

<sup>8</sup> Prime Minister Ivo Sanader formally opened the construction works in Brijesta/Pelješac on 24 October 2007 (HINA news from that day).

<sup>9</sup> To the knowledge of the European Commission, no vessel with the height of 55 metres has ever approached Neum. This may be due to the fact that Neum currently has no commercial port (interview BiH Presidency official, 11-05-2019).

bridge on 07 June 2017 contributing 85 percent of the constructions costs from the EU budget (which is the maximum percentage of EU co-financing). According to the European Commission, the bridge

will significantly improve the everyday life of Croatians, through reducing the travel time between Dubrovnik and Split. The seamless connection will also greatly benefit tourism, [and] trade will reinforce the territorial cohesion of the South Dalmatia region with the other part of the country (European Commission press release, 07 June 2017).

There was a bilateral joint session of the governments of Croatia and Bosnia-Herzegovina on 11 July 2017, where the Pelješac bridge project was not mentioned (interview European Commission DG REGIO senior civil servant, 04-05-2018). However, on 06 September 2017, the President of the European Commission and the Commissioner for Regional Development received a copy of a letter from the Chairman of the Council of Ministers of Bosnia-Herzegovina addressed to the Prime Minister of Croatia. In that letter, the Chairman of the BiH Council of Ministers opposed the building of the Pelješac bridge on the grounds that the 1999 Border Treaty had not been ratified yet and the full demarcation thus had “not been finalised”, and that there were “open issues related to [...] the maritime boundary between the two States”, including the yet unresolved question of an “international waterway [...] between Bosnia-Herzegovina [...] and the high seas [...] in accordance with the United Nations Convention on the Law of the Sea” (for the issue of free navigation between Bosnia-Herzegovina and the high seas in the Adriatic see III). Further, the BiH Council of Ministers had not approved the minutes of the bilateral technical working group on the specifications of the bridge from December 2006 (letter from Denis Zvizdić to Andrej Plenković, 06 September 2017).

The European Commission subsequently enquired the “legality and regularity of the project and future expenditure related to it” of the Croatian Ministry of Regional Development and EU funds (letter from the European Commission DG REGIO to State Secretary Spomenka Đurić, 29 September 2017). Croatia replied by a letter from the Prime Minister from 17 October 2017 accompanied by an “Information Paper” on the 1999 Border Treaty with Bosnia-Herzegovina and the attached maps. The European Commission, however, did not consult Bosnia-Herzegovina on its position on the bilateral issues with Croatia during its inquiry (interview BiH Presidency official, 11-05-2019). The Commission, as appears to be established practice, solely relies on information provided by the Member State in question, i.e. Croatia (interview European Commission DG REGIO senior civil servant, 04-05-2018). However, had the application for EU funding of a “disputed project” come from an EU Candidate Country, the Commission would “never have accepted the funding” (interview European Commission senior civil servant in charge of the EU



accession negotiations with Croatia in 2008/2009, 22-09-2017).<sup>10</sup> The President of the European Commission, in his reply dated 03 January 2018, informed the Prime Minister of Croatia that the European Commission “can close, from a legal stand point, the incident related to the [Pelješac] project, as far as internal Commission/ EU procedures are concerned”. The letter went on to state that

in accordance with Article 77(4) of the Treaty on the Functioning of the European Union (TFEU), the geographical demarcation of borders falls under the competence of Member State, in accordance with international law and, since EU Institutions have no competence in this field, I invite you and your government, in a spirit of good-neighbourly relations with Bosnia and Hercegovina, to take all necessary action to solve any potential disagreement on border demarcation (letter Jean-Claude Juncker to Andrej Plenković, 03 January 2018).

On 10 April 2018, the European Union Delegation to Bosnia and Herzegovina sent a copy of the above letter from the President of the European Commission to the Prime Minister of Croatia to the BiH Ministry of Foreign Affairs and to the Chairman of the BiH Council of Ministers. According to the EU delegation’s diplomatic note,

[t]he European Commission [...] has considered that, according to the information provided, the [1999 State Border] Treaty is provisionally applied by the parties in an uncontested and friendly way since its signature (Note verbale, EU Delegation to Bosnia and Herzegovina to the BiH Ministry of Foreign Affairs, 10 April 2018).

On 12 January 2018, Croatia’s State road company Hrvatske ceste (HC) announced that the Chinese Road and Bridge Corporation (CRBC) was awarded the construction of the Pelješac bridge. CRBC’s offer was at 279 million Euro as compared to 351 million Euro of Austria’s Strabag. The offer of an Italian-Turkish consortium had not been taken into account due to an invalid bank guarantee (BIRN, 12 January 2018). The overall investment of the Road Connection to South Dalmatia (bridge and access roads) is 526 million Euro and the construction works for both the bridge and the access roads are scheduled to be completed by December 2022 (New bridge to improve road connections with Croatia’s south Dalmatia region, European Commission DG REGIO website). Eighty-five percent of the works for the bridge is co-financed by the European Union budget, and both the tender and the award are in the exclusive competence of Croatia. It is useful to note that the EU

<sup>10</sup> The Instrument for Pre-Accession Assistance (IPA) is designed for countries in the process of EU accession. EU funds are eligible for projects such as infrastructure works, administrative reform, or technical assistance.

level has no competence to look into national tendering procedures whilst they are ongoing. The European Commission may, however, assess *ex post* the correct implementation of a project's financing (interview European Commission DG REGIO senior civil servant, 04-05-2018).

On 23 April 2018, the contract between HC and CRBC for the bridge construction works was signed. Both Strabag and the Italian-Turkish consortium had lodged appeals before the Croatian State Commission for Supervision of Public Procurement Procedures (DKOM), but the appeals were rejected (interview European Commission DG REGIO senior civil servant, 04-05-2018). As for the access roads, HC awarded the works to the Greek company J&P-Avax on 28 February 2019. However, DKOM annulled HC's decision on 12 April 2019 on the grounds that the appeal of Strabag, one of the bidders, was substantiated. Strabag had contested the bid evaluation process and J&P-Avax' bid (HINA news, 13 April and 28 February 2019).<sup>11</sup> The tendering procedure appeared to come to an end on 09 October 2019 when the contracts for the Pelješac bridge access road and the Ston ring road were signed by the government and Strabag and J&P-Avax<sup>12</sup> following another Strabag appeal against the selection of J&P-Avax for the construction of the Ston bypass from early August 2019 (HRT news, 09 August 2019).

## **II. Third-country Bidders in EU National Public Tenders: The Chinese Question**

The fact that a Chinese company was awarded the construction works for the Pelješac bridge has attracted considerable mockery behind the scenes in EU quarters and some Member States. This is due to the fact that the lion share of the costs is virtually transferred straight from the EU budget into Chinese State coffers. Whilst the government considers the future bridge “a monument of EU membership” (interview Andrej Plenković with Politico, 08-05-2019) and “a strategic achievement that remains forever” (interview Andrej Plenković with Večernji list, 11-05-2019), the value added of the bridge project for the local economy in Croatia or European companies from the neighbourhood is fairly low since CBRC brought along its workers who had to be accommodated on a former cruise ship turned into a hotel (see Obućina, 2019). There is, however, some economic spill-over in the region

<sup>11</sup> Bidders alongside Strabag and J&P-Avax included Integral Inženjering and Euro-Asfalt of Bosnia-Herzegovina, GP Krk of Croatia, Aktor of Greece, Colas of France, and CRBC of China (who was awarded the construction of the actual bridge; HINA news, 13 April 2019).

<sup>12</sup> The Duboka-Šparagovići/Zaradeže section was awarded to Strabag, whilst the Ston ring road and the sub-sections Šparagovići/Zaradeže-Prapatno and Prapatno-Doli were contracted to J&P-Avax. The total length of the access roads is at approximately 30 kilometres (HINA news, 09 October 2019).

through local subcontractors or building material from the region (such as concrete from a company in Tuzla; interview Goran Šaravanja, 22-01-2020).

### *China's Economic and Political Role in the Western Balkans*

China can be considered a competitor of the EU economically<sup>13</sup> and politically on the world stage in general, and in particular in Southeast Europe.<sup>14</sup> It is not difficult to agree that China's activities in the context of the 'Belt and Road initiative' (BRI), "the largest infrastructure project of the 21<sup>st</sup> century" (Bernard, 2020: 63), launched in 2013 are "a commercial opportunity to use its economic muscle to garner regional influence". Then again, China "brings economic benefit and does not interfere in the internal political affairs". Yet, in the wider context of Chinese loans (as opposed to national and EU financing) for infrastructure projects in the region (such as a motorway project in Montenegro or a new railway link between Serbia and Hungary) there is growing concern, not least from the IMF and the World Bank, that the considerable rise of national debt may become unmanageable (The UK and the future of the Western Balkans, House of Lords Report, 10 January 2018: 26). The regional European BRI platform is the so-called "17+1" format bringing together a rather diverse group of countries including twelve EU Member States (Bulgaria, Croatia, Czech Republic, Estonia, Greece, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, and Slovenia) and five Western Balkans countries seeking EU membership (Albania, Bosnia-Herzegovina, North Macedonia, Montenegro, and Serbia). The most recent meeting took place in Dubrovnik, Croatia, hosted by the Croatian government, on 12 April 2019, where Greece joined the club.<sup>15</sup>

The strategic geographical location of the 17+1 countries is perfect for China's access to the EU market, its immediate neighbourhood in Southeast Europe, and as a key transit corridor for the BRI. In fact, the five Western Balkans countries have been increasingly targeted by Chinese companies as a result of their crucial geographical position rendering the countries a vital part of the Chinese Maritime Silk Road. It must be noted that China's aim clearly is "to boost its export of manufactured goods to Western Europe" (Zeneli, 2019: 7). This is being achieved through loans for infrastructure projects predominantly in the transport and energy sector. These loans represent 70 percent of Chinese investment in Western Balkan coun-

<sup>13</sup> For China's "soft power" in terms of cultural diplomacy, i.e. twinning agreements, Confucius Institutes, scholarships, or visa relaxation see Tonchev (2019).

<sup>14</sup> The influential roles of Russia, Turkey, the Gulf States, and the U.S. are beyond the scope of this paper. For a brief survey see Hänsel and Feyerabend (2018).

<sup>15</sup> Ahead of the meeting, Croatian Prime Minister Andrej Plenković and Chinese Premier Li Leqiang visited the Pelješac bridge construction site (BIRN, 11 April 2019).

tries since 2012. At the same time, Foreign Direct Investment in the region has been fairly low (China Global Investment Tracker AEI, 2019).

The underlying Chinese economic model is such that it aims at creating logistics corridors between the port of Piraeus<sup>16</sup> and Central Europe in building infrastructure networks in Southeast Europe financed by loans from State-owned Chinese investment banks (see e.g. Hänsel and Feyerabend, 2018: 4). A major project in this regard is the Belgrade-Budapest railway with an overall project cost of € 3 billion (Beckmann-Dierkes, 2018: 37) financed by the China Export-Import Bank with China Railway and Construction Corporation (CRCC) carrying out the works (Holzner and Schwarzhappel, 2018: 6-7). Other projects include a highway from Romania to Montenegro, and highways in North Macedonia and Montenegro. As for North Macedonia, the government accepted a Chinese State loan of € 580 million back in 2013 to build the Skopje-Štip and Kičevo-Ohrid strips (Pavličević, 2019: 258; Rey et al., 2018: 27). In Montenegro, the new highway Bar-Boljare is 85 percent, equalling € 380 million (Beckmann-Dierkes, 2018: 37), financed by China's Export-Import Bank and constructed by China's State-owned CRBC (Eder and Mardell, 2018) who is also building the Pelješac bridge in Croatia (see I.). The serious challenge arising from loan-financed projects is the debt servitude. By way of example, Montenegro has reached a debt level of 80 percent of GDP in 2019, up from 58 percent in 2013 (IMELUM, 2020: 27; see also Hurley et al., 2018: 12). Overall, the share of the region's public debt to China is remarkable.<sup>17</sup> According to figures from 2018, China is the single largest creditor to NATO member Montenegro with a share of 40 percent, North Macedonia owes 20 percent of its debt to China, followed by Bosnia-Herzegovina with 14 percent, and Serbia with 12 percent (Eder and Mardell, 2018).

In terms of foreign policy, and apart from the above-mentioned infrastructure corridor projects, China sees Serbia as a strategic partner in the region,<sup>18</sup> not least because it is the largest economy of the Western Balkans (Zeneli, 2019: 9). Projects that stand out are the acquisition of a sophisticated Chinese drone system for the Serbian army (TANJUG news, 18 September 2018; BETA news, 13 Novem-

<sup>16</sup> The China Ocean Shipping Company (COSCO) is going to invest 600 million Euro to turn Piraeus into Europe's biggest commercial harbour. COSCO bought a 51 percent stake in Piraeus port in 2016 after winning a 35-year concession to upgrade and run container cargo piers in 2009 (Reuters news, 11 November 2019).

<sup>17</sup> The only region in the world where China's position as a creditor has developed more dramatically is Africa. For a very recent and comprehensive account of the new role of China and the effects of its BRI projects on the ground in Africa see Hartmann and Noesselt (2020).

<sup>18</sup> For the historic roots of Sino-Serbian relations, the special relationship between China and Yugoslavia during the Cold War, see CEAS (2019).

ber 2018), “Beijing’s biggest sale of military equipment to Europe since the Cold War” (Vuksanović, 2019), or the “Safe City” initiative where the Chinese digital giant Huawei signed a contract with the city of Belgrade in 2017 over surveillance equipment including 1.000 high-definition cameras with facial and number plate recognition linked to a central database (Conley et al., 2019). There is growing concern, however, that large-scale surveillance potentially strengthens autocratic systems, and that facial recognition is prone to violate basic civil rights as it collects vast amounts of citizens’ biometric data (Foreign Policy, 18 June 2019). Besides, it is not difficult to see the “Safe City” project massively boost market opportunities for Chinese telecoms equipment not only in Southeast Europe. Lastly, joint Sino-Serbian police patrols appear not only to seek to protect Chinese tourists, but also major Chinese investments such as the steel mill in Smederevo (Vuksanović, 2019). To that end, albeit on a different note, State subsidies for foreign investors, as is the case with the Chinese investment at Smederevo, may complicate EU accession due to compliance issues with the strict EU competition rules (interview Goran Šaravanja, 22-01-2020).

EU Member States have only recently become aware that there is a new hybrid security threat by China in the Western Balkans. Chinese tech giants and Beijing’s State power are not different domains of business and the State respectively, but closely twinned. “It is a one-corporation model, and China has a lot more tools than Russia or Turkey.” Discussions on the challenges the EU is facing through China’s 17+1 format have been held since April 2019 (interview PSC member, 26-10-2019). The devastating decision of the European Council on 18 October not to open accession negotiations with Northern Macedonia and Albania, however, has stripped the EU off much of its credibility with regard to keeping rival players at bay.<sup>19</sup>

### *Third-country Bidders in Public Tenders of EU Member States*

As for the international framework of the EU’s public procurement regime, the plurilateral Government Procurement Agreement (GPA) under the auspices of the World Trade Organisation (WTO) is the main pillar. The GPA was concluded in 1994 and 20 WTO members including the EU are party to the agreement.<sup>20</sup> Whilst

<sup>19</sup> Enlargement-critical Member States such as Denmark or the Netherlands would have been ready to decouple the starting dates, i.e. to give the green light to North Macedonia and to postpone Albania with a reference to the existing merits-based approach. France, however, would block any opening of negotiations altogether regardless of North Macedonia fully meeting the EU criterion of settling the name dispute with Greece by means of the historic Prespa Agreement (author’s field notes, 17-10-2019). For the merits-based methodology see e.g. Blockmans (2017: 78-88) and Bickl (2019: 141-145).

<sup>20</sup> Armenia, Australia, Canada, EU (28 Member States), Hong Kong (China), Iceland, Israel, Japan, Liechtenstein, Moldova, Montenegro, Netherlands (with regard to Aruba), New Zealand, Nor-

the GPA contains several crucial rules on non-discrimination, transparency and judicial protection, some economic sectors can be subject to a reservation leading to non-participation of external bidders in the area concerned. The parties to the GPA have, however, engaged in sector openings and a new Protocol entered into force in 2014 (Hoffmeister, 2016: 77-79). Yet, major economies such as China, India or Brazil are *not* parties to the GPA (EPRS briefing international procurement instrument, 2017: 3) foreseeing reciprocal market access. There are, however, public procurement provisions with mutual market access in the EU's bilateral trade agreements with Canada, Chile, Columbia, Japan, Mexico, Peru, Singapore and South Korea. There is no bilateral trade agreement between the EU and China.

As for EU legislation currently in force, there is the Directive 2004/18 on public works, public supply and public service which, notably, contains no provisions on third-country bidders, and the Directive 2004/17 on utilities. The latter Directive does contain a provision on third-country bidders, but the criteria are too complex so that *de facto* they have not been applied in practice (Hoffmeister, 2016: 80-81). As for the state of play at the time of writing, EU countries are free to accept or deny third-country bidders in domestic tenders from States that are not party to the GPA or to a bilateral EU trade agreement.

Following up on the need for standards on third-country bidders, the European Commission presented a proposal for an International Procurement Instrument (IPI) in 2012 (interview European Commission DG REGIO senior civil servant, 04-05-2018). In a nutshell, the IPI would be governed by the EU's international trade policy for which the Union has an exclusive competence. The game-changer here is that EU Member States would be stripped off their competence to restrict the access of goods, services or tendering procedures. Rather, two pillars would apply. First, Member States can raise reciprocity concerns for contracts above 5 million Euro. However, such intention must be filed with the European Commission who would investigate into the alleged lack of reciprocity in a third country and take a decision. Second, the Commission could itself investigate non-reciprocity issues with regard to external procurement procedures (Hoffmeister, 2016: 83-84).

In January 2014, the European Parliament, one of the two co-legislators, adopted its position on the European Commission proposal to align the decentralised procedure with the centralised one and to exempt least-developed countries (LDCs) and developing countries from the scheme. Parliament's Committee on International Trade was mandated to start negotiations with the co-legislator. However, Council, i.e. the EU Member States governments, is fundamentally split on

way, Singapore, South Korea, Switzerland, Chinese Taipei, Ukraine, United States. For further information on the GPA parties see [https://www.wto.org/english/tratop\\_e/gproc\\_e/memobs\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm).

the IPI proposal. More than half of the Member States including Germany, Britain<sup>21</sup>, the Netherlands, Sweden, and several Central and Eastern European States, oppose the rationale of the IPI scheme on the grounds that it may be perceived as protectionist and foster a spirit of retaliation on the part of third countries. On substance, the above Member States oppose the centralized pillar and the powers vested in the European Commission to close EU market access for public tenders. Yet, other Member States, led by France and Italy, support the idea of an International Procurement Instrument scheme. A revised IPI proposal from the European Commission from 2016 scrapping the decentralized procedure, replacing the closure of the EU public procurement market by price penalties (in the form of top-ups on bids from third-market countries with no reciprocity market access), and exceptions for LDCs, did not change the blockade in Council, however (EPRS briefing, 2017: 5-6; Hoffmeister, 2016: 84-87). Nevertheless, the situation amongst Member States on the substance of the IPI concept has not changed since and the dossier is considered “unfinished business”. At the time of writing, it is an open question whether and when the debate in Council will resume (interview European Parliament official in charge of international trade, 30-01-2020). Recently, this regrettable state of affairs was indirectly confirmed by the then European Commissioner-designate for the Internal Market, when she spoke of “distortive effects of foreign subsidies and foreclosed public procurement markets” (Answers to the European Parliament, Questionnaire to the Commissioner-designate Sylvie Goulard, September 2019: 17).

Apart from the protectionist argument which certainly holds for national economies highly dependent on their own exports, there appears to be the budgetary argument. In times of the search for balanced budgets, projects must be affordable. With infrastructure projects in particular, third-country bidders tend to underscore the bids of EU companies. As already mentioned, China plays a predominant role in infrastructure projects, both for loan projects (which are beyond the scope of this study) and bids in public tenders. In 2009, by receiving the award for the construction of a motorway section in Poland, the Chinese Overseas Engineering Group (COVEC) was the first Chinese company to sign a contract for public works in an EU country (Kanarek, 2017).<sup>22</sup> In 2018, a Chinese company won the tender to build a 40 km highway stretch from Warsaw to Lublin, the project being 50 percent co-financed by the EU budget (PAP news, 06 July 2018). Elsewhere, however, things are

<sup>21</sup> The United Kingdom left the EU on 31 January 2020.

<sup>22</sup> COVEC, however, withdrew from the project two years later due to problems with subcontractors. In her single-case study on the COVEC investment, Kanarek demonstrates that it was a classical management failure based on miscommunication, cultural factors, and the complexity of the tendering provisions.

more complex: China agreed to build two reactors for the Cernavoda nuclear power plant in Romania back in 2013. To meet EU standards for national public tenders, the Romanian government put a public procurement procedure in place in 2014, but the deadline was so short that only one company registered a bid: the China General Nuclear Power Group (CGNPG). The European Commission has since been wary of granting EU co-financing (Foreign Policy, 11 April 2019).

### **III. Maritime Access for Bosnia-Herzegovina: Passage through Croatian Waters**

The boundary at land and at sea between Croatia and Bosnia-Herzegovina was settled at a relatively early stage through a bilateral treaty in 1999. It has not been ratified yet, but is being applied in good faith (see introduction).

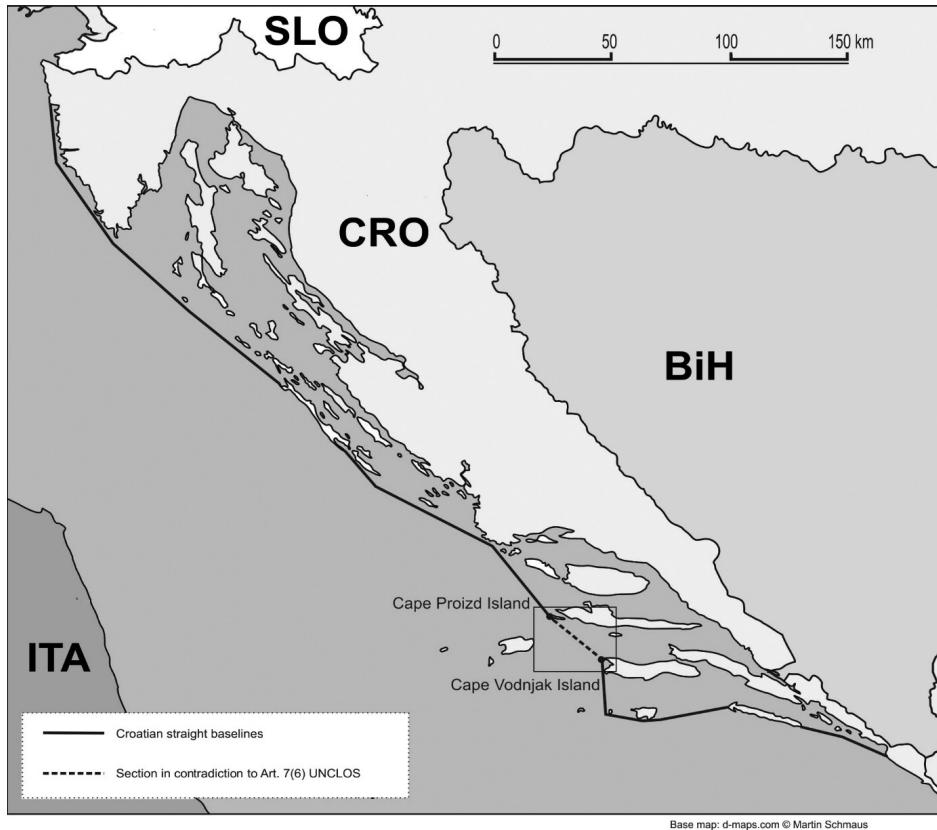
Regardless of the fact that Bosnia-Herzegovina to date has hardly any relevant maritime transport activities since the country currently relies on the nearby Croatian port of Ploče for the sea-bound import and export of goods (European Commission Staff Working Document on BiH, 2019: 120; interview European Commission DG REGIO senior civil servant, 04-05-2018), there is a point of contention as to the maritime areas for vessels going from Bosnia-Herzegovina to the high seas in the Adriatic and vice versa. As it happens, the straight baselines of Croatia run across the outer ends of the Dalmatian islands thus creating internal waters (of Croatia) landwards of the straight baselines.<sup>23</sup> As a result, vessels going from the high seas or the Croatian territorial sea to the territorial sea of Bosnia-Herzegovina to reach Neum or vice versa, have to go through Croatian internal waters (see fig. 2 on the next page).

It is useful to recall that there is no innocent passage in internal waters. The law-of-the-sea scholarship irrespective of the nationality of the author questions the legality of the Croatian straight baselines on the grounds that they violate Article 7(6) of the United Nations Convention of the Law of the Sea (UNCLOS). That provision rules out the enclosure of the territorial waters of a State by the straight

<sup>23</sup> In the international law of the sea, the baseline distinguishes the land-bound area of internal waters (over which the coastal State has unlimited sovereignty) from the sea-bound space of the territorial sea (where any vessel has a right of passage, so-called innocent passage, despite the territorial sovereignty of the riparian State). It is important to note that, unlike in territorial waters, the right of innocent passage does not apply to internal waters. The application of *straight baselines* means the possibility to draw lines joining specific points along the coast to level off innumerable indentations. As a result, straight baselines are drawn across water rather than along the coast (Rothwell and Stephens, 2016: 33-35; 44-5; Tanaka, 2015: 44-51). This is particularly relevant in the case of the Republic of Croatia and the former Socialist Federal Republic of Yugoslavia (SFRY).



**Figure 2.** Croatian straight baselines cutting off the territorial waters of Bosnia-Herzegovina



baselines of another State (see Grbec, 2015: 155-157; Arnaut, 2014: 165-167; Vu-  
kas, 2008: 187-188). At the same time, Article 8(2) UNCLOS stipulates that in-  
nocent passage does exist when baselines with a cut-off effect have been newly  
drawn.<sup>24</sup>

From a legal point of view, therefore, innocent passage for vessels to and from  
Neum does exist. Still, politically, the Croatian straight baselines may be seen as

<sup>24</sup> Art. 8(2) UNCLOS: “Where the establishment of a straight baseline [...] has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage [...] shall exist in those waters.” In its 1994 Maritime Code, Croatia took over the straight baseline system of the former SFRY. Legally, one can argue that these baselines were created de novo after the dissolution of the former Yugoslavia.

disregarding the existence of Bosnia-Herzegovina as a riparian State to the Adriatic altogether. BiH has informed Croatia on several occasions between 2007 and 2010<sup>25</sup> that it does not recognise Croatia's baselines between Cape Vodnjak Island and Cape Proizd Island, nor any internal waters that those baselines purport to create (Arnaut, 2014: 165-167; interview Damir Arnaut, 07-05-2019).

As a solution, Bosnia-Herzegovina aims at a corridor or junction safeguarding the freedom of navigation between the BiH territorial sea and the high seas in the Adriatic (see letter from Denis Zvizdić to Andrej Plenković, 06 September 2017). In practical terms, Sarajevo envisages "something similar to the Junction Area [...] between Croatia and Slovenia,<sup>26</sup> or the corridor negotiated between Monaco and France"<sup>27</sup> (interview BiH Presidency official, 11-05-2019). Regardless of a general trend to entertain a bilateral conflict for domestic reasons (interview Antonija Petričušić, 21-11-2019), the above notion also commands some support amongst the Croatian law of the sea establishment: If there was a mutual spirit of good faith, the corridor regime from the Croatia-Slovenia arbitration award may well serve as a blueprint (interview Vladimir-Đuro Degan, 21-11-2019).

The issue of maritime access for Bosnia-Herzegovina was most recently taken up in an official decision of the BiH Presidency, the only State organ entrusted with foreign policy decisions. In mid-July 2019, the unanimous "decision related to the construction of the Pelješac bridge" *inter alia* raised the following points:

<sup>25</sup> *Inter alia* at a meeting of the Presidency of Bosnia-Herzegovina and the Prime Minister of Croatia on 29 March 2007 in Sarajevo, and through a diplomatic note from Bosnia-Herzegovina to Croatia from 23 April 2009.

<sup>26</sup> The implementation of the binding settlement of the Croatia-Slovenia border dispute including the Junction Area, however, was subject to a lawsuit of Slovenia against Croatia before the EU Court of Justice filed in July 2018. The Court held a hearing on the Croatian inadmissibility motion at the beginning of July 2019. On 31 January 2020, the Court ruled it had no jurisdiction to hear the Case as neither the bilateral arbitration agreement nor the arbitration award formed an integral part of EU law. The Court noted, however, that the two parties had an obligation to implement the award under international law (see CJEU press release <https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-01/cp200009en.pdf>). For a detailed analysis of the border dispute, its conflict-management phases, the arbitral proceedings which derailed due to illegal communication between Slovenia and the Arbitral Tribunal, the Final Award, and the Slovenian lawsuit see Bickl (2019; 2017). For a critical legal appraisal of the Final Award see e.g. Degan (2019), Insolia (2019), Ferri (2018), and Oude Elferink (2017).

<sup>27</sup> In a bilaterally negotiated maritime delimitation agreement between France and Monaco from 1984, Monaco was granted a corridor of territorial sea in order not to be cut off the high seas. The delimitation method was *sui generis* and did not follow any established method of delimitation (Arnaut, 2002: 50). A similar solution had been applied by Gambia and Senegal in 1975 (Khan, 2019).

- (i) As there had not been an agreement between Croatia and Bosnia and Herzegovina prior to the construction of the bridge, the Presidency called for an immediate stop of the construction works;
- (ii) There had to be bilateral talks to solve the issue of maritime access for Bosnia and Herzegovina as currently the rights of BiH stemming from UNCLOS were violated;
- (iii) BiH retained the right to initiate a conciliation procedure under Art. 284 UNCLOS<sup>28</sup> in the spirit of the peaceful settlement of disputes, or ultimately a judicial procedure before the International Tribunal of the Law of the Sea (ITLOS), if there was no answer on the part of Croatia within 30 days (Decision of the Presidency of Bosnia and Herzegovina, 16 July 2019).

The following day, however, the President of the Republika Srpska (RS) withdrew its consent on the grounds that the Presidency decision was hazardous to the interest of RS, and thereby annulled the decision. The reasons of the *ex-post* refusal included that

- (i) The Presidency decision damaged the reputation of Bosnia and Herzegovina as one would have had to react *before* the start of the construction of the bridge and not whilst the works were already underway;
- (ii) The Presidency decision only focused on the maritime border with Croatia neglecting the open issue of the *land* border at Kostajnica (see introduction), a fact that damaged the relations with Croatia;
- (iii) There were no benefits for neither the RS nor BiH as a whole in blocking the completion of Pelješac bridge, not least because completion of the cross-border bridge at Gradiška ought not to be put at risk (Statement of the President of Republika Srpska, 17 July 2019).

It must be noted, however, that with the annulled decision due to the unanimity requirement and the two-thirds vote in the RS parliament backing the move of the RS President (Sarajevo Times, 24 July 2019), there is, as a result, neither an official call of the BiH Presidency on Croatia to enter into bilateral talks, nor the possibility to unilaterally initiate a dispute settlement procedure under UNCLOS or a judicial procedure before ITLOS. Yet, it remains to be seen whether and at what point in time unanimity in the BiH Presidency can be reached which would open up the opportunity to reach a final (presumably judicial) settlement of the issue of maritime access for Bosnia-Herzegovina.

<sup>28</sup> The provisions of Art. 284 UNCLOS trigger a conciliation procedure where a commission draws up a report including recommendations within 12 months. The parties can accept or reject the recommendations.

## Conclusion

This article has demonstrated that the Pelješac bridge project has raised and continues to raise several issues not free of controversy related to (i) the EU funding of the project, (ii) the question of third-country bidders in EU national public tenders, and (iii) the bilateral dispute between Bosnia-Herzegovina and Croatia over maritime access of BiH to the high seas in the Adriatic. The unbundling of these issues allows for an analysis of potential remedies and further action.

### *EU Funding of Disputed Projects*

It is an unquestionable fact that the European value-added impacting most visibly in EU Member States is infrastructure projects co-financed by the European Union. The Road Connection to Southern Dalmatia is a particular case in point. It is going to literally bridge the gap between mainland Croatia and the Dubrovnik exclave currently separated by the Neum corridor. Once a project has bilateral implications with a neighbouring State, however, the current EU-internal procedures for approving the project appear to be insufficient. As a matter of fact, the European Commission relies solely on the information provided by the EU Member State requesting EU co-financing of the project. Bilateral implications with a Candidate Country or third country are not assessed appropriately and the third country in question is not consulted, either. This can lead to an escalation of a bilateral dispute, unintended as it may be on the part of the European Commission.

Clearly, the current EU-internal operational framework must be revisited. Third countries naturally have no leverage in an EU funded project even when it is situated in their immediate neighbourhood. However, ways must be found to listen to their concerns. One has to bear in mind that bilateral disputes must be resolved *before* EU accession and it would be more than ironic if EU-funded projects contributed to aggravating rather than defusing a bilateral issue.

### *Third-country Bidders in EU Public Procurement Procedures*

The EU is at a crossroads when it comes to determining its stance towards China. At a time of crisis for multilateralism, there are new opportunities for the EU at the world stage. This must include a clear position towards all major players politically and economically. However, the inability to agree on a joint EU approach vis-à-vis third-country bidders in public tenders weakens the EU's competitiveness and makes the EU vulnerable politically, but also from a security point of view. The principle of mutual reciprocity is the key issue when looking at fair market access.

Admittedly, beyond the question of the sensitivity in third countries towards a potentially protectionist abuse of an International Procurement Instrument, it is not easy to reconcile the differing interests of EU Member States. Exporting countries

have other priorities than those who mainly profit from Chinese investment abroad. Yet, the EU must now come together and re-energize the decision-making on the IPI. The new EU Commission should present a new proposal concentrating on the principle of reciprocity where only those third countries can take part in an EU public tender which grant market access for bidders from the EU in their domestic market alike.

### *Maritime Access for Bosnia-Herzegovina and the State Border Treaty*

The issue of maritime access for Bosnia-Herzegovina must be solved. It is recommended, therefore, that Croatia addressed the issue of its straight baselines cutting off the territorial waters of Bosnia-Herzegovina. A first step could be an official declaration to the extent that access to and from the territorial sea of Bosnia-Herzegovina is regarded unhindered in terms of Art. 8(2) UNCLOS, and to engage in bilateral talks on how to solve the problem in a comprehensive way. Such talks could also entail discussing the concerns raised by both sides in the aftermath of the 1999 State Border Treaty as for demarcation of the land border.

A bilateral agreement would open the door for the ratification of the State Border Treaty both in Croatia and in Bosnia-Herzegovina. If no agreement can be reached, the matter could be referred to third-party judicial conflict resolution (arbitration, ICJ or ITLOS), ideally by mutual agreement. In that case, the new EU Commission and Member States should grasp the opportunity and not shy away from offering facilitation for the drafting of the mandate for a judicial procedure. There is some considerable expertise from the Slovenia-Croatia case and it should be used in the spirit of solving bilateral dispute ahead of EU accession negotiations which in the case of Bosnia-Herzegovina still seem a long way ahead, admittedly. Nevertheless, whatever option is more feasible, it would be a ripe moment and a great gesture of good-neighbourly relations a good 20 years after the conclusion of the original border treaty between Bosnia-Herzegovina and Croatia.

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