How likely - and dangerous - is a Kosovo/Serbia "Land Swap" ?

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The presidents of Kosovo and Serbia, Hashim Thaçi and Aleksandar Vučić, have recently considered an exchange of territories ("land swap") between their two countries which would lead to Serbia's formal recognition of the independence of Kosovo (which unilaterally seceded from Serbia first in 1990 and then again in 2008). Both countries aspire EU membership but neither is likely to accede unless Serbia recognizes Kosovo. The EU could only admit a state which is recognized by all of its Member States; and Kosovo is not recognized by five EU Member States, primarily because Serbia, its former host state, does not recognize it. If Serbia were to recognize Kosovo, these five states are most likely to follow suit.

Of course, international and municipal law do not envisage "land swaps"; these are usually categorized as border changes or "corrections". In the case of Kosovo and Serbia, the envisaged borders changes are twofold: first, the border of Serbia would move southwards into northern Kosovo, to cover the areas mainly inhabited by Serbs and, second, (at the same time) the border of Kosovo would move eastward, from the bottom southeast corner of Kosovo, into the Preševo Valley, to cover the areas which are predominantly inhabited by Albanians. Currently, there is no specific indication which areas would be covered by the border changes and which demarcation lines the new borders would follow. In any case, there are no 'natural' geographic or demographic lines which could be used in the demarcation process. How the borders will be demarcated, who will decide on the demarcation, and whether any international bodies or experts would be called to participate in this demarcation project is still unclear.

At the present stage, this vagueness is understandable: the idea of a "land swap" is currently only "testing the waters" – gauging international responses to such an idea. And, as expected, the initial responses were varied: from outright rejection to a cautious welcome or, even positive excitement ("a very historic moment"). In the process of "testing the waters", no one – least of all the presidents of Kosovo and of Serbia, who had been advocating the "swap" – are considering the legal and constitutional procedures needed to effect such a change.

Legal/Constitutional Hurdles

Article 8 of Serbia's Constitution stipulates that the state borders are inviolate and may only be altered through the procedure appropriate for the amendment of the Constitution. According to article 203, this requires a two-thirds majority of the total number of deputies of the National Assembly. At the same time, article 18 (1) of the Constitution of Kosovo also demands for a two-thirds majority of all deputies of the Kosovo assembly for the ratification of any international agreement dealing with territory. Hence, the ratification of any bilateral treaty regarding the change of borders would face the same hurdle in both states: the requirement of a two-third majority of all deputies in both parliaments.

At the moment, this requirement cannot be met: the prime minister of Kosovo, Ramush Hardinaj, vehemently opposes any such change, at least as long as he merely holds a precarious majority in Kosovo's assembly. The Serbian government is facing a highly fractured opposition which has not yet rejected the "land swap" but the government does not currently hold a two-thirds majority to pass any such treaty either.

There are further legal obstacles in both Constitutions facing the ratification a treaty of this kind. Article 1 (3) of the Constitution of Kosovo states that

Kosovo shall "seek no union with any State or a part of any State". The envisaged change of borders appears to place Kosovo in union with a part of Serbia. Article 203 of Serbia's constitution requires that any changes of the preamble of the Constitution have to be put to a referendum of all citizens. Furthermore, the preamble states that the Province of Kosovo and Metohija are "an integral part of the territory of Serbia". Any decision to remove this reference would require a majority in the referendum; without a referendum, any decision recognizing that Kosovo is no longer an integral part of Serbia would be subject to a constitutional challenge.

In view of these hurdles, one can envisage at least three distinct scenarios of international response to a bilateral treaty between Serbia and Kosovo, concerning specific synchronized border changes.

Three Scenarios

First scenario

The treaty is signed but fails to be ratified in one or both parliaments. In consequence, the treaty remains unimplemented: no border changes take place.

In this scenario, the president and the government of Kosovo could claim that by signing the treaty, Serbia automatically recognized Kosovo's independence. The Serbian president could then neither confirm nor deny such a claim by the government of Kosovo. If Serbia did not reject the recognition of Kosovo anymore, it would open up a way for all EU countries to recognize Kosovo's independence as well. That means, as a result, the five EU Member Sstates which currently do not recognize Kosovo could be convinced to do so and the EU Commission would most certainly consider the matter of Kosovo's international recognition closed. The non-recognition of Kosovo would then no longer be an obstacle to the accession of either Kosovo (now recognized by all EU Member States) or Serbia which would then satisfy one condition for its accession.

In this scenario, the bilateral treaty was primarily a ploy that both signatories intentionally used to remove the obstacle of Kosovo's non-recognition for the accession process. For this scenario to succeed, both signatories needed to cooperate; in particular, Serbia's president and his government needed at least to refrain from opposing the claim that the signing of the treaty amounts to the recognition of Kosovo's independence.

Second scenario

In this scenario, the bilateral treaty is signed and ratified (in some way) but contains a clause specifying that Serbia's signature of the treaty does not imply its recognition of Kosovo; Serbia's recognition would follow once the treaty is implemented.

It is noteworthy that some EU Member States reject any "land swap" treaty and threaten to block any future accession of either state to the EU if the treaty is implemented. For example, the German government stated that it is against any changes of borders in the Balkans. In contrast to the German government, the US administration currently appears to be ready to recognize the change of borders).

In this scenario, in order to remove the threat of the blocked accession to the EU, either party can abandon the treaty and the corresponding land swap. This, however, would not remove the initial obstacle of non-recognition of Kosovo to their accession to the EU.

One possible outcome of this scenario is that one or both states decide that the conditions for accession to the EU are too onerous and the eventual accession is too uncertain. In consequence, they can also abandon plans for accession to the EU and seek economic and strategic partners elsewhere – in the USA, Russia and China. This would reduce the EU's capacity to influence policies and politicians in the region and thus to influence Serbia's government to recognize the independence of Kosovo.

Third scenario

No EU Member State opposes the border changes and threatens to block accession. Therefore, the two countries sign and implement the treaty on border changes. Serbia and all the EU Member States recognize Kosovo. A happy end or a dangerous scenario?

A dangerous Scenario?

The argument against this last scenario, repeated by some diplomats and statesmen, who were involved in the Balkan peace management in the past, is that a successful "land swap" will encourage other states in

the region to "change" borders in a similar way leading to a repetition of the violent conflict in the region. However, no evidence is presented which would indicate that successful implementation of a consensual bilateral Kosovo/Serbia border change would lead to or encourage attempts at unilateral territorial change by armed force in any other part of the Balkans.

There is some evidence *unrelated* to the current discussion of a possible land swap that the government and the population of Republika Srpska in Bosnia and Herzegovina would have preferred to secede from the present host state. At the same time, the Albanian population and their political leaders in Macedonia would prefer to transfer the territories on which they live to Albanian-majority countries, Albania or Kosovo. But there is no evidence that these groups possess an armed force with which these changes could be carried out and that they would receive, from Serbia or from Albania/Kosovo, any military or other support for that purpose.

Apart from the fact that, if ratified, such an agreement would be perfectly legal, it remains questionable how a consensual and non-violent territorial change agreed between two sovereign states in the region could lead to or encourage violent conflict elsewhere in the region. If this consensual territorial change was carried out *against* the wishes of powerful EU Member States such as Germany, this would rather indicate that the EU and its Member States do not have the political power to stop territorial change of which it does not approve.

Since the dissolution of Yugoslavia in 1991, the EU and the US acting together have been able to prevent any border changes in the Balkans they considered unacceptable. The third scenario would show that the EU or its Member States, without US support, are no longer able to do so. There are of course two options here: either the EU Member States can prevent this "swap" by threatening to block accession of the two parties (as envisaged in the second scenario) or they can appropriate this territorial border change as an EU project which can be carried out only with the approval and participation of the EU.

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