

Essay

THE CONUNDRUM OF THE PIRAN BAY:

SLOVENIA V. CROATIA—THE CASE OF MARITIME DELIMITATION

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ABSTRACT

Drawing borders between countries has historically been a very demanding task, often underpinned by deeply-rooted emotions that suppress the argumentative dialogue and reasoning and in too many cases has led to long-term general deterioration of relationships which may devolve into war. As the title suggests, the focal point of this paper will be a legal assessment or a legal prediction of the outcome of the maritime border delimitation dispute between Slovenia and Croatia in the northernmost part of the Adriatic Sea, namely in the Piran Bay. The paper will be structured into four parts. In the first part the authors will present the factual context of the dispute, followed by a presentation of the legal arguments that both countries have laid on the table so far. In the third hermeneutical part, these legal arguments will be applied to the factual context assessed in light of valid international law and especially the existing jurisprudence on international juridical and non-juridical bodies, including the practice of other states in similar cases. In the last part the authors will predict the outcome of the case as if they were the arbitrators or the judges of a tribunal to whom the dispute between Slovenia and Croatia will most likely eventually be referred to.

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I. INTRODUCTION

Drawing borders between countries has historically been a very demanding task, often underpinned by deeply-rooted emotions that suppress the argumentative dialog and reasoning and in too many cases has led to long-term general deterioration of relationships which may devolve into war. With the benefit of historical hindsight it can be claimed that delimitation is essentially and crucially a sensitive political question. However, political questions cannot be solved within a vacuum allowing arbitrary and one-sided measures based on the maxim of the rule of the most powerful. Political questions have to be resolved within the realm of law. The role of the law—and by speaking about sovereign states we are primarily and foremost in the field of international law—is to enable, to facilitate, and to safeguard a peaceful political discourse the result of which, if it remains within the valid framework of the legal discourse, is a legally valid and acknowledged outcome.

It is this policy context that the content of the present paper will be put in. As the title suggests, the focal point of this paper will be a legal assessment or a legal prediction of the outcome of the maritime border delimitation dispute between Slovenia and Croatia in the northernmost part of the Adriatic Sea, namely in the Piran Bay. The paper will be structured into four parts. In the first part the authors will present the factual context of the dispute, followed by a presentation of the legal arguments that both countries have laid on the table so far. In the third hermeneutical part these legal arguments will be applied to the factual context and assessed in light of valid international law and especially in light of the existing jurisprudence on international juridical and non-juridical bodies, including the practice of the states in similar cases. In the last part the authors will predict the outcome of the case as if they were the arbitrators or the judges of a tribunal to whom, as we will see *infra*, the dispute between Slovenia and Croatia will most likely eventually be referred to.

Before we proceed with laying out the facts, attention should be drawn to the multi-layered nature of the Piran Bay dispute. Slovenian coastal sea covers only a small portion of the Adriatic Sea, the southern part of the Gulf of Trieste. Its coastline is approximately 46 km long. After World War I, the Italian administration replaced the previous Austrian administration in this part of Slovenia. In 1947, the Paris Peace Conference established the Free Territory of Trieste that was later divided between Italy and Yugoslavia by the 1954 London Memorandum. Trieste, with its completely Slovenian surroundings, was annexed to Italy, while the ethnically mixed area to the south went to Yugoslavia. The borders between former Yugoslav republics were set only on the land, not on the sea.

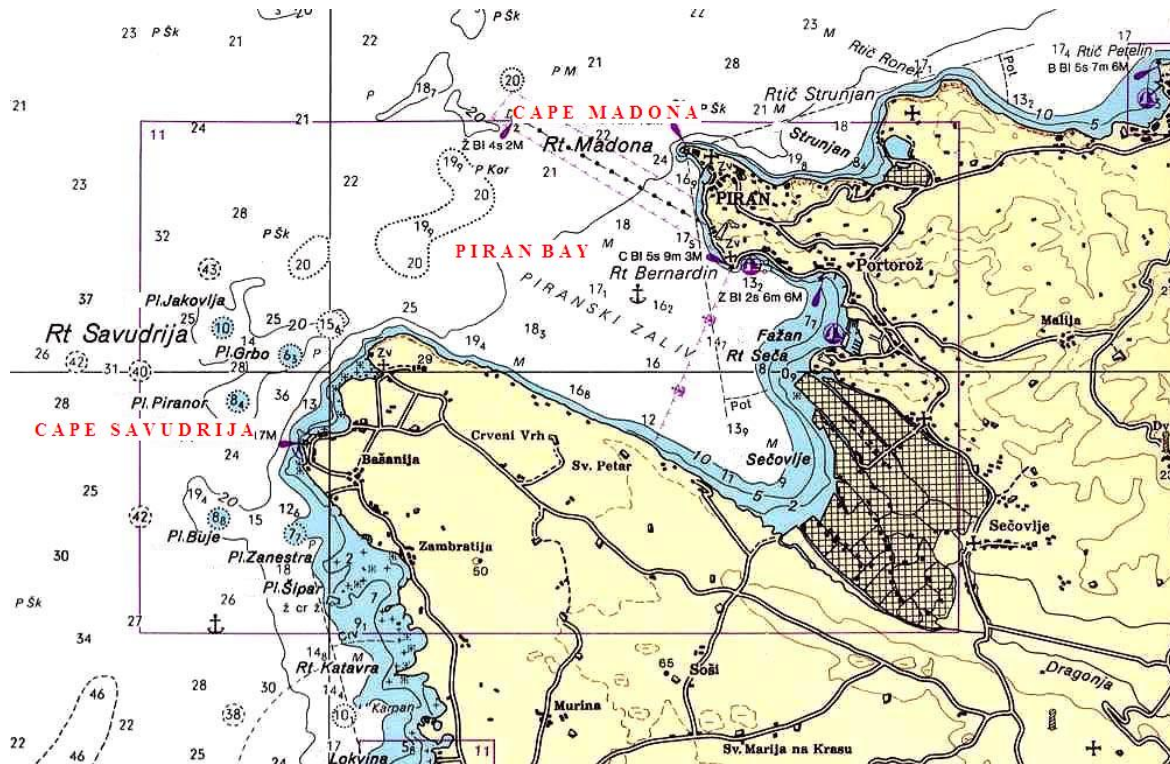
It is submitted that the conundrum of the Piran Bay cannot be validly and justly resolved if it is not assessed in a three-layered context. In other words, the question of delimitation in the Piran Bay includes the question of the coastal border in the Bay and especially in the mouth of the Dragonja River; the delimitation of the territorial sea in the Bay itself; and the question of existence or nonexistence of direct contact of Slovenian territorial sea with the high seas. Additionally, all these layers have to be put in the broad historical context of the maritime and mainland delimitation between Italy and the former Federal Socialist Republic of Yugoslavia. Without considering this historical context, the roots of the dispute in the Piran Bay cannot be properly comprehended and assessed.

II. FACTUAL CONTEXT OF THE CASE

The disputed maritime delimitation area—the Piran Bay—is located in the northernmost part of the Adriatic Sea which is embraced by three countries—Italy, Slovenia, and Croatia—and is called the Trieste Bay. The Adriatic Sea forms part of the larger Mediterranean Sea. The Piran Bay is located within the Trieste Bay locked between the Peninsula of Savudrija and the Peninsula of the town of Piran, which is known as the Cape

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Madona. On its north-west side along the Italian coast, the area of the Piran Bay is limited by the state maritime border between Italy and the former Yugoslavia. On the eastern side, it is limited by the Slovenian coast which runs, in part, from the mouth of the Dragonja River to the Peninsula of Savudrija, and is under Croatian sovereign jurisdiction.



Picture no.1: Piran Bay locked between the adjacent coasts of Savudrija Peninsula (Croatia) and of the Peninsula of the Town of Piran (Slovenia). Dnevnik, <http://www.dnevnik.si/meja/pomka.jpg> (last visited Apr. 15, 2006).

The core of this maritime boundary dispute between Slovenia and Croatia has to be traced back to the time prior to their declarations of independence. The two countries declared their independence from Yugoslavia in June 1991 and received international recognition a few months later. The creation of two new independent states, of course, immediately called for a clear definition of the borders between them. During the time of the Yugoslav federal state, the borders between the republics¹ were merely administrative in nature. However, after the fall of Yugoslavia, these administrative borders were proclaimed state borders based on the international law principle *uti possidetis iuris*² and their valid legal status in the time of *status quo*—aimed at its peaceful preservation—was also confirmed by the Badinter Arbitration Commission.³

¹ Yugoslavia was a federal state consisting of six republics (Slovenia, Croatia, Bosnia and Herzegovina, Serbia, Montenegro, and Macedonia) and two autonomous regions (Vojvodina and Kosovo).

² This principle defines borders of newly independent states on the basis of their previous administrative frontiers. It was first applied in the early nineteenth century to the newly independent states in Latin America, which could not change their inherited colonial boundaries. This principle was further applied during the decolonization process of Africa.

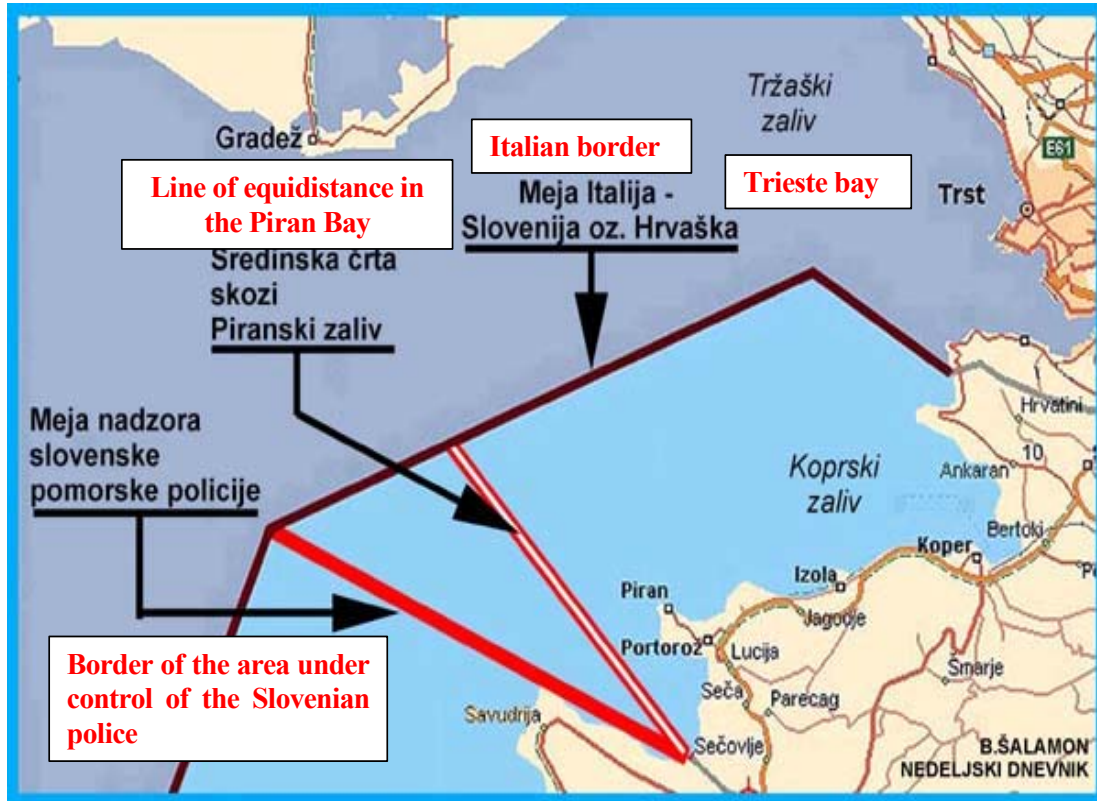
³ See Conference on Yugoslavia, Arbitration Commission, Opinion No. 3, Jan. 11, 1992, 31 I.L.M. 1488. See also Danilo Türk, *Recognition of States: A Comment*, 4 EUR. J. INT'L L. 66 (1993), available at <http://www.ejil.org/journal/Vol4/No1/art5.html>.

Therefore, the land borders between Slovenia and Croatia are by and large not disputed, with the sole exception of some “hot spots”⁴ which permanently cause growing tensions between the two countries. The reason for this may be found in the fact that the former administrative borders were borders of the bordering Croatian and Slovenian municipalities, which were determined by the borders of local settlements which were defined and confirmed in the land registry books. Since these land registry books are relatively old—dating back to the years of the Austro-Hungarian Empire—and stable, there are very few cases in which their content would overlap or be contradictory. In those cases where there are some overlaps and contradictions in these books or, for example, where the rivers have in fact changed their currents, we can refer to these as hot spots.

However, the hottest spot is certainly located in the Piran Bay since—in contrast to the land borders—the sea borders between the republics in Yugoslavia were never determined and are nonexistent. The only border which exists in the Trieste Bay, which is relevant for our paper, is the border with Italy that was agreed to by Italy and ex-Yugoslavia in the so-called Osimo Agreements. The Agreements came into force in April 1977 and were taken over by Slovenia with the exchange of notes in July 1992.⁵ The maritime border with Italy, which they define, cuts the Trieste Bay approximately in the middle. This is important due to the geographical constellation of the Trieste Bay and the Piran Bay within it. Namely, as picture no. 2 shows, if the Piran Bay was delimited by the principle of equidistance so that the maritime border would be drawn in the middle of the Bay, such a delimitation would turn the existing Slovenian territorial waters into a box caught between the Italian and Croatian territorial seas, whereas Croatia would retain a direct maritime border with Italy.

⁴ There are at least three such hot spots: the border on the Mura River in the far northeast of Slovenia around the area of the Hotiza border crossing, the Trdinov vrh—a strategically important mountain some 30 kilometers from Croatia’s capital and the so-called “disputed territory” in the valley of the Dragonja River at its entrance in the Piran Bay, which will be discussed in more detail later.

⁵ See Ministry of Information, *Osimski sporazumi z vidika članstva Slovenie v Evropski uniji*, <http://evropa.gov.si/evropomocnik/question/440-103/> (last visited Oct. 20, 2006), and Ministry of Foreign Affairs of Slovenia, *Anniversary of the Osimo Agreements*, <http://www.uvi.si/eng/slovenia/background-information/osimo/> (last visited Apr. 15, 2006).



Picture no. 2: Trieste Bay and the Italian border as established by the Osimo Agreements. The red line shows the border of the area that has been under control of the Slovenian police and which obviously widely transgresses the equidistance red and white line in the middle of the Piran Bay. Dnevnik, <http://www.dnevnik.si/meja/m1.JPG> (last visited Apr. 15, 2006).

Having said that, it is now appropriate to present the political and above all legal claims Croatia and Slovenia have made in regard to the delimitation in the Piran Bay, having in mind all three contextual layers underlying the delimitation. This, however, does not mean that the description of the factual context is complete. On the contrary, since the legal position of both countries differs also in the assessment of the factual situation—which is in turn mirrored in their political and legal claims—we will point to these disputed facts in the following parts of this paper.

III. LEGAL AND POLITICAL CLAIMS AND ARGUMENTS OF BOTH SIDES

A. Arguments on the Slovenian Side

The arguments of the Republic of Slovenia regarding Piran Bay—which have been published very recently in form of the non-paper White Book by the Slovenian Ministry of Foreign Affairs—can be structured into four parts. From the very outset of the dispute, the Slovenian side has maintained that it expects Croatian authorities to respect the border situation of June 25, 1991—the date the two countries declared independence from the former Yugoslavia—and the accord on avoiding incidents that the two governments signed in June 2005. The most straightforward Slovenian argument is that Slovenia has sovereignty over the whole Piran Bay and, therefore, the maritime border needs to be set according to the principle of equity with due regard to the relevant circumstances. The legal and political claims of the Republic of Slovenia can be found in the 1993 Memorandum on the Piran Bay of August 7,

1993—adopted by the Slovenian parliament—and in the *Drnovšek-Račan Agreement* of July 20, 2001,⁶ where negotiations were based on the assumption that the solution needs to be based on the second paragraph of the Article 15 of the United Nations Convention on the Law of the Sea (hereinafter UNCLOS). The *Drnovšek-Račan Agreement* on the other hand brings a decision regarding delimitation in the Bay of Piran and the Dragonja River valley. Since it has not been ratified by the Croatian side, the *Agreement on the Trans-Border Commerce and Cooperation* between Slovenia and Croatia facilitates the well-being of the population living in the border area. This Agreement at least provides a legal safety net preventing the deterioration of the situation for the local population on both sides of the border in the Piran Bay.

The Slovenian side submits that the Croatian side unilaterally changes the previous conditions. The Slovenian claims to the Piran Bay, as drafted in these two legal documents and in various statements of Slovenian officials and legal academics, may be summarized as follows:

First, Slovenia claims sovereignty over the whole Bay of Piran. It has submitted that it has been exercising jurisdiction since the entry into force of the Osimo Accords in 1975 over the whole Bay from the control point 5,⁷ both in the former federation and thereafter. The legal evidence can be found in the Pula Agreement and Instructions of the Police Directorate of the Republic of Slovenia⁸ on exercising police control. The important point in this respect is that Slovenia has had economic and police control over Piran Bay which was under its jurisdiction prior to and also after independence. The control was extended to the line Savudrija Promotory-T4 to the south. Slovenia therefore argues that it should retain jurisdiction over the whole Piran Bay, which is exemplified also by various protest notes of the Slovenian Ministry of Foreign Affairs.⁹ Slovenia also argues that the maritime dispute needs to be resolved also in light of undefined land borders between Slovenia and Croatia. It also submits that the Croatian jurisdiction over the Savudrija Peninsula may be in question in light of the historical presence of Slovenes around that area, as well as in light of other historical circumstances.¹⁰

Second, Slovenia claims that the equidistance approach cannot be applied in the Piran Bay and that the special circumstances rule should be applied instead. Slovenia argues that the final agreement on maritime boundaries needs to be drafted in the light of the *Drnovšek-Račan Agreement* or even by making the 2001 agreement provisionally applicable.¹¹ The Slovenian and Croatian Prime Ministers signed this agreement in 2001. Under general international law a

⁶ See Matej Zelnik, Vpliv notranje politike na diplomatsko akcijo: primer sporazum Drnovšek-Račan (Impact of the Internal Policy Affairs on the Diplomatic Action: Example of the Drnovšek-Račan Agreement) 51 (graduate thesis, University of Ljubljana), available at <http://dk.fdv.uni-lj.si/dela/Zelnik-Matej.PDF>. Since the official version of the Drnovšek-Račan Agreement is extremely difficult to obtain, the authors rely mainly on media reports from news conferences that were held immediately after the signing of the Agreement. See also media reports by the Slovenian daily newspaper DELO, http://www.delos.si/index.php?sv_path=41,35,199470 (last visited Apr. 9, 2007). For Croatian media reports see: <http://vijesti.hrt.hr/ShowArticles.aspx?CategoryId=76&ArticleId=871> (last visited Apr. 9, 2007); <http://arhiv.slobodnadalmacija.hr/20040327/novosti01.asp> (last visited Apr. 9, 2007).

⁷ See Picture No. 4, *infra*.

⁸ Instructions of the Police Directorate of the Republic of Slovenia, June 1999.

⁹ See, e.g., Ministry of Foreign Affairs protests against the increase of mussel farms in the Bay of Piran, July 11, 2003, available at www.uvi.si.

¹⁰ In the recent weeks there have been rumors both in the Slovenian and Croatian press that the former Slovenian and Croatian presidents Milan Kučan and Franjo Tuđman discussed a possibility, allegedly proposed by the Croatian President, that Croatia would lend the Savudrija Peninsula to Slovenia for a very long period, hence solving the maritime dispute. While the Croatian ex-President has passed away, Slovenia seems to be confirming the existence of these talks.

¹¹ In light of the new developments this statement needs to be qualified to a degree that the Slovenian side now maintains that this was the only agreement actually reached, that it was a good basis for the final solution, but since Croatia refused to ratify it, the agreement is not binding on the Slovenian side either—and the *status quo* of June 25, 1991 remains the relevant point of departure in any future negotiations.

signature signifies explicit consent to be bound.¹² Pursuant to the Vienna Convention on the Law of Treaties (hereinafter VCLT) Articles 18, 24 (4) and 25, a signature normally constitutes a legal act by which each state accepts certain legal circumstances. The Croatian signing of the *Drnovšek-Račan Agreement* also shows that its delegates have agreed upon the text and were willing to endorse it. Slovenia rests its argument also on the international legal obligation of Croatia not to defeat the object and purpose of a treaty prior to its entry into force, which Slovenia states Croatia already did. Under VCLT Article 18, a state is obliged to refrain from acts which would defeat the object and purpose of the treaty when it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty.¹³

Slovenia also submits that the equidistance line approach cannot be applied in all circumstances. In the *North Sea Continental Shelf* cases (between the Federal Republic of Germany and Denmark respectively the Federal Republic of Germany and the Netherlands), the International Court of Justice (hereinafter ICJ) held that customary law required continental shelf delimitation to be conducted on the basis of equitable principles and taking account of relevant circumstances.¹⁴ The equitable principles or relevant circumstances approach was later confirmed by ICJ in its trilogy of judgments.¹⁵ This shows that one cannot mechanically apply the equidistance line approach without regard to the circumstances of the respective case. UNCLOS Article 15 states that the “[median line] provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit territorial seas of the two States in a way which is at variance therewith.” Slovenia submits that the historic title and certain special circumstances do exist in the case of the maritime border dispute in Piran Bay. The Croatian side, similarly, at the very beginning of the negotiations adopted the position that the equidistance line is not important. Also, the *Drnovšek-Račan Agreement* stipulates that 80% of the Piran Bay would belong to Slovenia and the rest to Croatia, as picture no. 3 illustrates. The border would accordingly start in the middle of the mouth of the Dragonja River approximately 270 meters from the Savudrija Peninsula, which is under Croatian jurisdiction. As from there, the border would be drawn in form of a straight line until the point located some 1200 meters from the Croatian coast and around 3600 meters from the Slovenian coastline.

The Agreement itself implies that the Croatian government was willing to disregard the equidistance principle when delimiting the maritime area in Piran Bay. The *Drnovšek-Račan Agreement* was not implemented by the countries due to widespread opposition in Croatia, which has since then rejected the document. The Agreement also allowed for the re-characterization of Croatian waters as open sea, creating a direct connection between the Slovenian territory and the high seas. The Croatian Prime Minister at that time signed the Agreement as an appropriate decision for Croatia, which was later overshadowed by the nationalistic claims in the Croatian Parliament. The principle *pacta sunt servanda*, which is enshrined in VCLT Article 26, provides that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.” The importance of this principle was

¹² VCLT Article 12 provides that “[t]he consent of the state to be bound by a treaty may be expressed by signature, exchange of instruments constituting the treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.”

¹³ VCLT Article 18 provides that:

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

- (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or
- (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

¹⁴ *North Sea Continental Shelf* (F.R.G. v. Den./F.R.G. v. Neth.), Judgment, 1969 I.C.J. 3, 53, ¶ 101(C)(1) (Feb. 20).

¹⁵ See *Continental Shelf* (Tunis. v. Libya), Judgment, 1982 I.C.J. 18, 41, ¶ 32 (Feb. 24); *Continental Shelf* (Libya v. Malta), Judgment, 1985 I.C.J. 13, 22, ¶ 17, 44–45, ¶¶ 57–58 (June 3).

confirmed by the ICJ in the 1997 *Gabčikovo-Nagymaros* case.¹⁶ The Slovenian side notes that Croatia should also take into consideration that a treaty needs to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose. It argues that object and purpose of the signed *Drnovšek-Račan Agreement* have been grossly disregarded by the Croatian side in its National Assembly.

In December 2005, Croatia extended the borders of its fishing zone to the middle of the Piran Bay, provoking a protest from the Slovenian Foreign Ministry. As a response, the Slovenian government on January 5, 2006 adopted a decree on the Slovenian fishing area that encompasses the whole of the disputed Bay as well as the open seas included in its protective ecological zone in the Adriatic.¹⁷ The decree is seen as a direct response to the decision taken by Croatia to extend the borders of its fishing zone to the middle of the Bay.¹⁸ The decree divides the Slovenian fishing area into three zones: Zone A incorporates internal waters covering the whole Bay of Piran; zone B covers territorial waters adjacent to the Italian and Croatian borders; and zone C covers the Slovenian ecological zone at the open seas. As the maritime border between Slovenia and Croatia is the subject of a dispute between the countries, Slovenia has used a provision from the border agreement reached by the former prime ministers of Slovenia and Croatia, Janez Drnovšek and Ivica Račan, as the southern limits of zone B. The Slovenian Foreign Ministry issued a statement¹⁹ where it described the decree as a temporary solution and as being in place only until the two countries either implement the fishing provisions from the bilateral border transport and cooperation agreement or reach a border deal. It has to be added, however, that due to political pressure by the EU, Croatia had to declare its exclusive economic zone noneffective as against the EU Member States, which in particular means against Slovenia and Italy. The Croatian declaration hence effectively remains toothless and can be essentially seen as yet another attempt to disrupt the agreed *status quo* of June 25, 1991.

Furthermore, Slovenia asserts that the border at the sea must thus be determined pursuant to the second paragraph of UNCLOS Article 15, taking into account the historic title and the other special circumstances as well as the principle of equity. However, it has to be noted that in order to invoke historic title, international jurisprudence does not require all four conditions for historic title to be fulfilled cumulatively. There are special circumstances at stake which justify the application of historic title to the Piran Bay. As is also apparent from its name, the Bay has historically belonged to the Piran municipality. Since 1893, the latter has owned both sides of the Bay, including the Savudrija Peninsula which was bequeathed to it by Antonio Caccia in 1893. Only after World War II, in 1945, the communist rulers of Croatia and Slovenia—under circumstances as of yet unexplained—seem to have agreed that Savudrija goes to Croatia. Yet Slovenian maps in geography books of the 1950s still showed the Savudrija Peninsula as part of Slovenia, with the border drawn much more southernly from the present border on the Dragonja River. Moreover, the historical documents of the Catholic Church indisputably prove that the parishes on the Savudrija Peninsula always—from the eleventh century until 1954—belonged to the bishopric of Piran, more accurately the bishopric of Koper both presently in Slovenia. This sufficiently proves that the Piran Bay should be considered a historical bay. In addition, further geographical, economical, cultural, and political circumstances exist that support Slovenia's historical connection to the Bay.

Third, the Slovenian side submits that it has a right to maintain direct access to the high seas at least in form of a special corridor formed as a chimney, which would be 3600

¹⁶ *Gabčikovo-Nagymaros Project* (Hung. v. Slov.), Judgment, 1997 I.C.J. 7, 68, ¶ 114 (Sept. 25).

¹⁷ Ministry of Foreign Affairs of Republic of Slovenia, <http://www.ukom.gov.si/eng/slovenia/publications/slovenia-news/2766/2779/index.text.html> (last visited May 9, 2007).

¹⁸ *Id.*

¹⁹ *Id.*

meters wide and would have a size of about 46 square kilometers.²⁰ The chimney would create a triangle of Croatian territorial waters between the former federal border with Italy and the corridor whereby Croatia would keep its border with Italy. During all the negotiations between the countries in recent years it was clear that it is the former federal sea that is being divided and that a compromise needs to be reached: If Slovenia keeps the access to the high seas, Croatia keeps its territorial contact with Italy. The *Drnovšek-Račan Agreement* merely confirms the delimitation from June 25, 1991. The sea corridor would create an access to international waters and would also confirm Slovenian national and territorial sovereignty at the sea. Croatia will in any case keep its maritime border with Italy.

Fourth, the density of population on the Slovenian side of the Piran Bay suggests that the claim for Slovenian control over the whole Piran Bay is justified. The Bay and the whole Slovenian coast are heavily populated. The coastal region is an area of 44 square kilometers with a population of almost 80,000 people (232 inhabitants/km), which means that the population density of the area is more than twice the national average. Most of the population (over 80%) lives within the 1.5 kilometer wide strip along the coast, which is 46 km long. This plainly argues in favor of Slovenian control over the entire Bay. This concentration of population and activities, which include transport, industry, commerce, tourism and fishery, represents a major concern in the coastal area. Besides that the Slovenian coast has a well-developed tourist infrastructure. The area has 21,000 tourist beds (that is 27% of all tourist capacities in the country), most of them in Piran, receiving about 400,000 tourists a year.

Fifth, Slovenia rejects the categorical statements of Croatian officials and especially academics that UNCLOS Article 2 precludes settlement of the dispute in the way just described.²¹ The Croatian side considers that Article 2 falls within peremptory norms of international law or norms of *ius cogens* nature, which, however, is not based on any legal arguments or case law from international tribunals. To argue that UNCLOS Article 2 is a *ius cogens* norm would undermine the whole concept of *ius cogens* norms. The status of *ius cogens* norms derives from the importance of their content to the international community as a whole. Genocide, torture, racial discrimination, slavery and forced labor, forced disappearances, war crimes, crimes against humanity, and self-determination are some examples of peremptory norms of international law. Those norms are already clearly accepted and recognized in state practice as *ius cogens* norms or peremptory norms of international law. It is highly unlikely that UNCLOS Article 2 would ever achieve the status of a peremptory norm. Violations of *ius cogens* norms are strictly prohibited in international law. Because of the importance of the values that they protect, those principles (prohibitions) have evolved throughout the decades into peremptory norms or *ius cogens* norms²² of international law, that is, norms that enjoy a higher rank in the international hierarchy than treaty law and even normal/ordinary customary law.²³ As the ICJ held in the *Barcelona Traction* case, such obligations are “by their very nature the concern of all States and, in view of the importance of the rights involved, all States can be held to have a legal interest in their protection.”²⁴ To claim that UNCLOS Article 2 is a peremptory norm of international law would be an overstatement and would undermine the whole concept whose main purpose is to safeguard the most basic human rights norms.

²⁰ See Picture No. 3, *infra*.

²¹ UNCLOS Article 2 reads as follows:

1. The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.
2. This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil.
3. The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.

²² Laid down by the 1969 VCLT, Articles 53 and 64.

²³ See Prosecutor v. Furundzija, Case No. IT-95-17/1-T, ¶ 139 (Dec. 10, 1998).

²⁴ See *Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, Judgment, 1970 I.C.J. 3, 32, ¶ 33 (Feb. 5).

B. Arguments of the Croatian Side

The most straightforward political and legal claims of the Republic of Croatia have been first spelled out in the *Position of the Republic of Croatia in the Delimitation of the Piran Bay and the Connected Issue of the Dragonja River Area*²⁵ and in the *Declaration on the Inter-State Relations between the Republic of Croatia and the Republic of Slovenia*²⁶ issued by the Croatian National Assembly in 1999. In the latter, the Croatian National Assembly states that the Croatian government and the negotiators should follow UNCLOS Article 15 and demand that the maritime border in the Piran Bay should be drawn according to the principle of equidistance, which means in the middle of the Bay. It is further stated that as long as the border is not ultimately settled, both coastline countries—Slovenia and Croatia—should withstand from any exercise of sovereign authority transgressing the line of equidistance. In the meantime the *Agreement on Trans-border Commerce and Cooperation* between the two states should be adhered to in order to provide for the well-being of the local population living in the border area.²⁷

The claims of Croatia relating to the Piran Bay, as presented in these two documents, in the statements of Croatian officials, and in statements made by academics and journalists were a response to the Slovenian White Book, and have been gathered in a non-paper Blue Book. These claims can be summarized as follows:

First, Slovenian claims of sovereignty over the entire Piran Bay are unfounded and contrary to international law. The Piran Bay should be delimited according to the principle of equidistance, meaning that half of it would be under Croatian and half of it under Slovenian sovereign control. Second, Slovenian claims to direct contact with the high seas—even in the form of a special corridor—are unfounded and again contrary to the international law of the sea. Third, Croatia has to keep the maritime border with Italy. Fourth, the *Agreement on Trans-Border Commerce and Cooperation* is a satisfactory legal basis which prevents any significant or even utterly radical deterioration of the position of the local population on both sides of the Piran Bay, especially of the fishermen.²⁸

The Republic of Croatia has based its political claims on the mentioned UNCLOS Article 15.²⁹ The latter provides that, failing an agreement between the states, the border should be drawn along the median line (first paragraph) unless there could be invoked some historic title or other special circumstances which call for a different delimitation of the territorial sea (second paragraph). However, there are various interpretations of Article 15 and of the relationship between its first and second paragraph, but before we embark on them it is

²⁵ Stajališta Republike Hrvatske glede utvrđivanja državne granice u Piranskom zaljevu i s tim u svezi u području rijeke Dragonje (1993) *available at*

http://www.pravnadatoteka.hr/pdf/aktualno/hrv/20021015/Turkalj_Razgranicenje_teritorijalnog_mora.pdf.

²⁶ See Deklaracija o stanju međudržavnih odnosa Republike Hrvatske i Republike Slovenije, Narodne novine (Official Journal of Croatia) No. 32/99, Apr. 2, 1999, at 1089–90.

²⁷ For the excerpt of this text in Croatian, see Kristian Turkalj, *Razgranicenje teritorijalnog mora između Hrvatske i Slovenije u sjevernom Jadranu (Piranski zaljev)*, *at*

http://www.pravnadatoteka.hr/pdf/aktualno/hrv/20021015/Turkalj_Razgranicenje_teritorijalnog_mora.pdf (last visited Apr. 15, 2006).

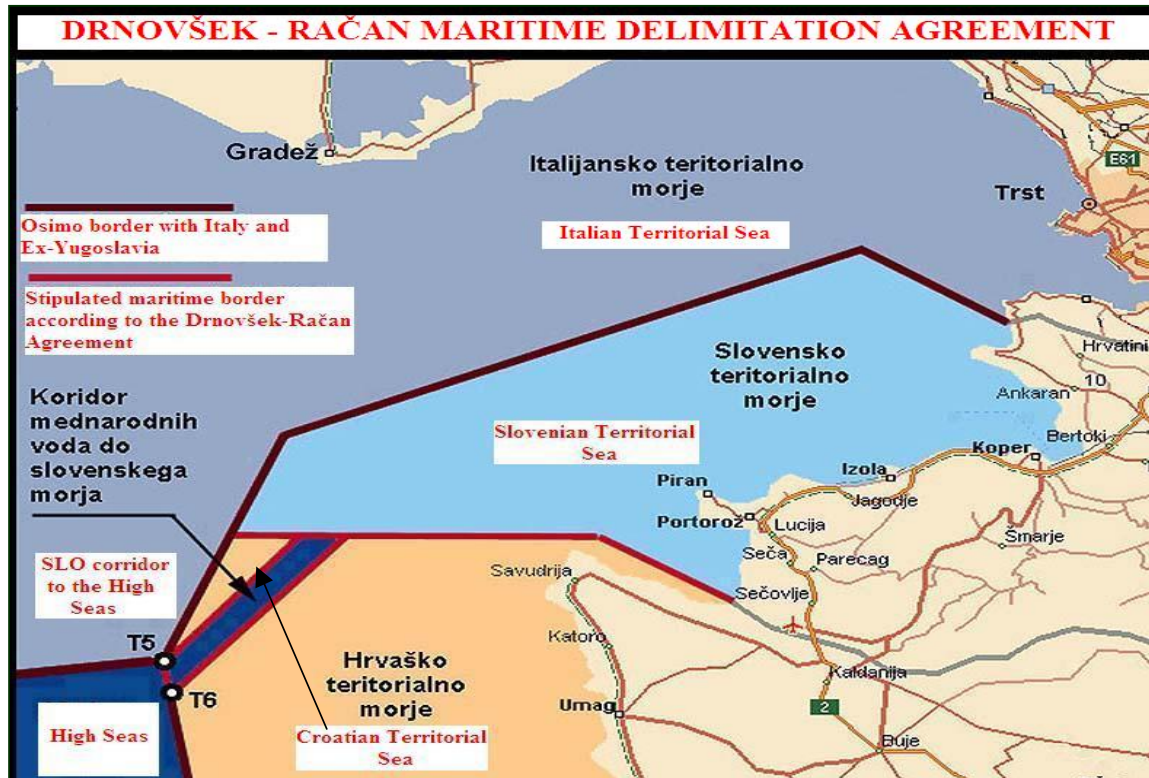
²⁸ See Turkalj, *supra* note 28 at 29–31.

²⁹ Article 15: Delimitation of the territorial sea between the opposite or adjacent coasts.

Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.

necessary to stress that an agreement about the delimitation in the Piran Bay and in the pertaining Dragonja River valley has in fact already been reached.

According to the so-called Drnovšek-Račan agreement, named after the Slovenian and Croatian prime ministers, around 80% of the Piran Bay would belong to Slovenia and the rest to Croatia. Following this Agreement, as the picture No. 3 shows, the border in the Piran Bay would start in the middle of the mouth of the Dragonja River some 270 meters from the Peninsula of Savudrija, which is part of Croatia. From there the border would be drawn in a straight line until the point located at some 1200 meters from Croatian coast and 3600 from Slovenian coastline. From this point the border would be drawn according to the meridian principle until it would reach the border with Italy defined by the Osimo agreements.



Picture No. 3: Drnovšek-Račan Maritime Delimitation Agreement.

Public domain source (courtesy of Dnevnik), <http://www.dnevnik.si/meja/mejaa%20copy.JPG>. Last visited April 15, 2006. The picture has been refurbished with English translation by the authors.

The Osimo border would set a final limit to the Slovenian territorial sea. The latter would be connected to the high seas via special corridor in a form of a chimney, which would be 3,600 meters wide and would measure around 46 square kilometers. Within the corridor there would be a legal regime of the high seas, and the states have stipulated that neither of them would be allowed to proclaim an exclusive economic zone. Between the Osimo border with Italy and the corridor would remain a triangle of Croatian territorial waters, which would enable Croatia to maintain a border with Italy.

The Agreement in its "mainland part" also defined and confirmed the territorial border between Croatia and Slovenia *inter alia* in the Dragonja River valley. The border in Dragonja River valley should be on the river itself as this has been defined in the land-registry books of the bordering Croatian and Slovenian local municipalities. However, flanking the most

downstream part of the river's main current are four villages³⁰ whose status has been contentious during the years. Both Croatia and Slovenia claimed sovereignty over the villages due to the overlapping land-registry books of the local municipalities.³¹ According to the Agreement, these villages should be ceded to Croatia, so that the border would clearly remain on the Dragonja River without transgressing it. Since these villages are predominantly populated by the people of Slovenian origin, this move of the Slovenian government was seen as a compromise, and as an element of a good will for an exchange for a greater part of the Piran Bay.



Picture No. 4: The disputed territory in the Dragonja River valley at its entrance in the Piran Bay. Public domain source (courtesy of Dnevnik), <http://www.dnevnik.si/meja/>. Last visited April 15, 2006. The picture was refurbished with English translation.

The agreement ceding the villages to Croatia was signed by the prime ministers, endorsed by the governments of the both countries, and ratified by the Slovenian Parliament in accordance with the constitutional requirements. However, the Croatian Parliament failed to follow its Slovenian counterpart in ratifying the Agreement. Consequently, the Agreement is not formally binding on the states. In the following years, the Slovenian government has insisted on its adoption. The Croatian government has renounced the Agreement repeatedly as far as the delimitation of the sea is considered, but it has complied with the mainland part by insisting that the four villages in the disputed part of the Dragonja River valley remain part of Croatia.

Since the attempted Agreement has not been ratified by both countries and thus has not become binding on them, the Croatian side, as mentioned above, resorts to the UNCLOS Article 15. However, there are various interpretations of the actual meaning of this article. Some claim that the principle of equidistance in delimitation of territorial sea, spelled out in the first paragraph of Article 15, is a general principle, which must always be applied unless

³⁰ These are: Škrile, Škudelin, Bužin in Mlini. See Picture No. 4, *supra*.

³¹ It is undisputed that these villages have always been registered in the Slovenian land-registry books, whereas it is claimed that Croatia has only ex-post facto changed its registers in order to strengthen its negotiating positions and again to distort the *status quo* of June 25, 1991.

superseded by a subsequent agreement.³² The second paragraph, providing for a historic title and special circumstances, is accordingly understood as a mere exception to the general rule. This exception, like all exceptions, must be construed strictly and narrowly, and moreover, the state which invokes the second paragraph bears the burden of proving the existence either of a historic title or special circumstances.³³

On the other hand, according to a competing interpretation of Article 15, the second paragraph must be read as a single rule, rather than as an article providing for a general rule and a limited exception to it. The prime example of this interpretation was offered by the Arbitration Tribunal in the *English Channel case*, wherein it was stressed that the question of existence of special circumstances is a question of law that the court or arbitral tribunal has to address *proprio motu* (on its own motion).³⁴

From the position taken by the Croatian authorities, and from the academic papers written in this regard, it is apparent that Croatia has opted for the first interpretation and has conducted its activities accordingly. The majority of academic voices in Croatia thus claim that the border in Piran Bay has to be set in the middle of the Bay.³⁵ Primarily, they stress that the border in the Bay has never been determined and that the Bay has never been controlled solely by one state (either Slovenia or Croatia) but rather that each country has exercised jurisdiction on its own respective side of the Bay. As the Slovenian political and legal arguments presented in Part III.1. *supra*, have shown, there exists a factual dispute in regard of the historical control of the Piran Bay. The Slovenian side claims that the Bay has historically been part of the Piran local municipality and that Slovenian police have controlled the entire Bay from the very beginning of the Federal Republic of Yugoslavia up till now.³⁶ The Croatian side contradicts that account by referring to some police and military procedures in the Piran Bay from which it is allegedly apparent that the authorities in the ex-socialist republics thought that the Bay was shared by halves.³⁷ Additionally, Croatia invokes the historical title and rights of the Istria fishermen who have allegedly historically been fishing in the Piran Bay and have made use of its other economic resources as well. It is said that there is much evidence of Croatian administrative and judicial authorities exercising control in the “Croatian half” of the Bay.³⁸ This evidence includes Croatia’s firm refusal of Slovenia’s reliance on the *uti possidetis iuris* principle in the Piran Bay. Croatia contends that this principle can apply only when some kind of border (*e.g.* administrative) has already existed, which is not the case in the Bay. Finally, there is no proof that Slovenia has had the entire Piran Bay only under its own sovereign control.³⁹ During the former Yugoslavian regime, the sovereignty over the entire Adriatic Sea—and thus including the Piran Bay—has been exercised by the federal government and the sovereignty of the republics was not delimited. It can be concluded on this basis that the

³² See Turkalj, *supra* note 28 at 12-13. This position is generally advocated and practiced by both the Croatian government and state organs which are drawing the support from the Prof. Vladimir Ibler who is considered the academic authority on international law in Croatia. For his position see Tribina Pravnog fakulteta u Zagrebu, *O Granici na moru između Hrvatske i Slovenije*, Bilten No. 9 at 332 (Barbić ed., 2003) available at http://www.pravo.hr/isite_view_3/Download/2006/03/10/1-godisnjak.pdf.

³³ See, *e.g.*, Caflisch, L., *Maritime Boundaries, Delimitation*, in *ENCYCLOPÆDIA OF INTERNATIONAL LAW VOL. III*, 300, 301 (P. MacAlister Smith ed., 1992).

³⁴ See *English Channel Arbitration* (France v. UK, 1979) 18 IN. LEG. MAT. 397.

³⁵ See Barbić, *supra* note 33 at 311 *et seq.*

³⁶ See Instructions . . . Slovenia, *supra* note 8.

³⁷ See Jožef Kunič, *Slovensko-Hrvaška Meja*, International Institute for Middle East and Balkan Studies, available at <http://www.ifimes.org/default.cfm?Jezik=si&Kat=09&ID=303> (summarizing the Croatian military procedures and arguments based thereon).

³⁸ See Turkalj, *supra* note 28, at 26. See also Discussion within the Croatian Association of Lawyers (Oct. 17, 2005) available at www.pravo.hr/PRAVO/8_dogadanja/klub/granice.pdf (in Croatian).

³⁹ See Turkalj, *supra*, note 28 at 27.

sovereignty in the Piran Bay was therefore exercised jointly and simultaneously by Croatia and Slovenia.⁴⁰

The strongest Croatian legal argument is, however, based on UNCLOS Article 2,⁴¹ which provides that the sovereignty of the state extends beyond its land territory to the sea, including its territorial waters. This argument, which is in itself not contentious and is widely supported by the international law jurisprudence, concludes that the land territory determines the sovereignty on the pertaining territorial waters. In the context of the Piran Bay, according to the Croatian arguments, this approach means that the Piran Bay can not be a historical bay and that every Slovenian claim to draw the boundary in a way to exercise the sovereign jurisdiction over the entire Bay is contrary to the conventional and customary international law and its principles.⁴² The Croatian side does not stop here, but further argues that UNCLOS Article 2 is a *ius cogens* norm, since the entire conventional and customary international law of the sea—which is otherwise in its entirety *ius dispositivum*—stands or falls on this provision of Article 2. International legal rules on contractual obligations between the States and the conclusion of the international agreements⁴³ imply that every agreement between Croatia and Slovenia in which one side cedes some of its territorial waters to the other or cedes waters under the legal regime of the high seas (which would extend in front of the Croatian coast like the chimney corridor), in the area that would be defined as the Croatian territorial waters but for the agreement, would be in the breach of the UNCLOS Article 2 *ius cogens* rule and thus null and void.⁴⁴

This claim is the strongest Croatian argument against the potential Slovenian corridor and thus against the Slovenian express claim to a direct contact of its territorial waters with the high seas. The Croatian side additionally claims, that even if UNCLOS Article 2 is not of a *ius cogens* nature, Croatia is under no international law obligation to grant Slovenia a direct access to the high seas. It is claimed that international practice as far as the sea corridors are considered is very scarce. Even the existing practices, such as the agreement between France and Monaco⁴⁵ and the French corridor in the Atlantic Ocean,⁴⁶ are so different in the practical and overall contextual sense that they cannot be applied to the case of Piran Bay.⁴⁷ First, the Slovenian ships would have enjoyed the right to a free passage through the Croatian territorial waters to the high seas, and therefore no corridor is needed. Furthermore, the geographical constellation is such that Slovenia, even if it was granted by Croatia to extend its territorial waters to touch the high seas, could not have done that since the Slovenian territorial waters would then stretch more than 12 miles. An extension of over 14 miles, from the first point at the

⁴⁰ *Id.* at 28.

⁴¹ The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.

⁴² See Turkalj, *supra* note 28.

⁴³ VCLT Article 53 (Treaties conflicting with a peremptory norm of general international law (*ius cogens*) provides: A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

⁴⁴ See also Turkalj, *supra* note 28, at 9. The author is referring to the prominent Croatian Prof. of international law V. Ibler, who himself repeats his *ius cogens* thesis in the *supra* cited discussion in the Croatian Association of Lawyers.

⁴⁵ Maritime Delimitation Agreement between the Government of His Most Serene Highness the Prince of Monaco and the Government of the French Republic, February 16, 1984, available at <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/FRA.htm>. Last visited April 15th 2006.

⁴⁶ See Decision of the Court of Arbitration for the Delimitation of Maritime Areas Between Canada and France, June 10, 1992, available at http://www.cnsopb.ns.ca/resources/coordinates_13.html (last visited April 15, 2006).

⁴⁷ See Turkalj, *supra* note 28, at 27.

Slovenian coastline, would be contrary to the UNCLOS Article 3 defining the limits of the territorial sea.⁴⁸

With respect to the Slovenian claims based on the historical title and the special circumstances allegedly present in the case of the Piran Bay, the Croatian side straightforwardly argues that at least one of the four cumulative conditions for the declaration of the historical Bay is not fulfilled. Namely, one part of the coastline of the Bay belongs to Croatia, and there are no noteworthy special circumstances.⁴⁹ For the latter, it is argued that they are by and large not defined in international law and they are thus very porous. In any case, it is the duty of Slovenia, which relies on these special circumstances, to prove them.⁵⁰

At the end of the day, the Croatian side concludes, that since there are no special circumstances and no resort to a special historical title is possible, the rule of equidistance should be adopted and the Bay should be divided down the middle. This solution would be the most just, and would be most consistent with the practice of other countries under similar circumstances. The Croatian side proposed that failing the delimitation agreement, the case should be referred to an independent judicial or arbitration tribunal for its resolution within the valid legal framework of international law.⁵¹

IV. EVALUATION OF THE CLAIMS IN THE LIGHT OF THE APPLICABLE INTERNATIONAL LAW AND PRACTICE

The maritime delimitation in Piran Bay may be resolved in the light of applicable international law principles. The principle of equity and relevant circumstances connected to the case of Piran Bay should be respected. The case law of the International Court of Justice shows that in disputes relating to maritime delimitation, equity is not a method of delimitation, but solely an aim that should be borne in mind in effecting the delimitation. However, that the result to be achieved must be equitable, as required by current international law, is not the same as delimiting in equity. The ICJ stated in the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case that, “the equidistance method is not the only method applicable to the present dispute, and it does not even have the benefit of a presumption in its favor. Thus, under existing law, it must be demonstrated that the equidistance method leads to an equitable result in the case in question.”⁵²

Slovenia argues that the maritime border should be set according to principles of equity, whereas Croatia disputes this argument and submits that the line of equidistance would be the most appropriate solution. The ICJ stated in the *North Sea Continental Shelf* cases that, “equity does not necessarily imply equality,” and in a delimitation exercise “there can never be a question of completely refashioning nature.”⁵³ Although certain geographical peculiarities of maritime areas to be delimited may be taken into account by the Court, it is only to be considered as a relevant factor, if necessary, for the purpose of adjusting or shifting the provisional delimitation line. It is submitted that the potential arbitration panel may take into consideration relevant circumstances, including the existence of an historical bay. As the ICJ decided in the *North Sea Continental Shelf* cases, the Court is not required to take all such geographical peculiarities into account in order to adjust or shift the provisional delimitation line. The court held, “[i]t is therefore not a question of totally refashioning geography whatever the facts of the situation but, given a geographical situation of quasi-equality as between a

⁴⁸ *Id.* at 27.

⁴⁹ *Id.* at 30-36.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Continental Shelf (Libya v. Malta)*, Judgment, 1985 I.C.J. 13, 47 ¶ 63.

⁵³ *Gabčikovo-Nagymaros*, *supra* note 16, at 49 ¶ 91.

number of States, of abating the effects of an incidental special feature from which an unjustifiable difference of treatment could result.”⁵⁴

For all the above reasons, the use of the equidistance method of delimitation cannot be obligatory as between the Parties in the context of maritime border delimitation in the Piran Bay.

The Piran Bay does not pose a problem merely because the shores of the Bay touch two States. What presents a problem is the precise character of the sovereignty that the two coastal states could enjoy in these waters. An enclosed pluri-State Bay presents the need of ensuring practical rights of access from the high seas for all the coastal States. This need is especially present where the channels for entering the Bay must be available for common user, as in the case of an enclosed sea. It may be argued that Piran Bay is an historic bay and therefore a closed sea. If the Piran Bay is an historic bay, it is necessary to determine the closing line of the waters of the Bay. It may be argued that the waters over a certain line are historic waters and subject to the joint sovereignty of both coastal states. Since the practice of both coastal states accepts that there needs to be littoral maritime belts subject to the single sovereignty of each of the coastal states, but with mutual rights of innocent passage, there are rights of passage through the remaining waters of the Bay. The Piran Bay waters are internal waters and they could be under potential agreement subject to a special and particular régime, not only of joint sovereignty but of rights of passage. It could be appropriate to regard the waters of the Bay, insofar as they are the subject of the condominium or co-ownership, as *sui generis*.⁵⁵

The authors must ascertain whether there are other reasons that might have called for a necessary adjustment of the equidistance line in order to achieve an equitable result. We came to the conclusion that there are plentiful reasons in the present case from economic to historical. Firstly, Croatia disputes the Slovenian claim about the sovereignty of the entire Piran Bay and it is a supporter of a more relatively formulaic “equidistance/special” circumstances approach. Slovenia, on the other hand, argues for a more flexible approach, namely equitable principles/relevant circumstances approach. While Slovenia relies on the *uti possidetis iuris* principle in the Piran Bay, Croatia is stating that this principle can be applied only when some kind of a border has already existed, there is proof that Slovenia has had the entire Piran Bay under its exclusive sovereign control. The authors would, however, submit that Slovenia has exercised control over the whole Piran Bay which is proved by the presently still existing line of police control according to which Croatia receives 278m of a sea-belt alongside the coast of Savudrija Peninsula. In these circumstances, the authors claim that the equidistance line could not represent an equitable result for the delimitation of the Piran Bay area in respect of which potential arbitration could be asked to give a decision.

It has been submitted that the strongest Croatian legal argument is based on UNCLOS Article 2, which provides that the sovereignty of the state extends beyond its land territory to the sea, including its territorial waters and Croatia claims that it has reached *ius cogens* status. In the context of the Piran Bay, according to the Croatian arguments the most important question in this respect is UNCLOS Article 2 *ius cogens*. The application of Article 2 is essential because the concept of *ius cogens* reflecting the fundamental norms of the international community binds dissenters and is instrumental for the functioning of international legal order. It is clear that *ius cogens* norms derive from international customary law and not from the international treaty law, as argued by the Croatian side. In the *South West Africa Case* before ICJ, the applicants, Ethiopia and Liberia, contended that South Africa “may not claim exemption from a legal norm which has been created by the overwhelming consensus of the international community, a

⁵⁴ Gabčíkovo-Nagymaros, *supra* note 16, at 50 ¶ 91.

⁵⁵ See Case Concerning the Land, Island, and Maritime Frontier Dispute (El Salvador v. Honduras: Nicaragua intervening) 1992 I.C.J. 351, 389 ¶ 45 (1992).

consensus verging on unanimity.”⁵⁶ In this respect, apartheid relates to genocide, and the nature of the law creating process in response to both has been remarkably similar. It is one in which the collective will of the international community has been shocked into virtual unanimity, and in which the moral basis of law is most visible.⁵⁷ If one accepted the argument of the Croatian side, one would dilute and distort the concept of *ius cogens* norms and would also prevent the declaration of the Piran Bay as historical bay even though it does not fulfill all the UN criteria since Croatia has jurisdiction over land on the other side of the Bay. It is submitted that Piran Bay can be considered as an historical Bay and that every Slovenian claim to draw the boundary in a way to exercise the sovereign jurisdiction over the entire Bay is not contrary to the conventional and customary international law and its principles.

Additionally, the 2001 agreement shows that Croatian government was willing to forget about the equidistance principle of the maritime delimitation. The agreement also allowed for re-characterization of the Croatian waters as high seas, creating a direct connection between the Slovenian territory and the high seas. It submitted that Croatia needs to observe the principle of *pacta sunt servanda*, enshrined in Article 26 of the Vienna Convention on the Law of the Treaties. The Croatian side should also take into consideration that a treaty needs to be interpreted in a good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the lights of its object and purpose. All of these requirements were clearly defeated by the Croatian National Assembly, which shows the Croatian state, if not in the breach of the international law, at least as an utterly unreliable partner under international law.

Finally, Croatia strongly opposes the Slovenian proposal about the corridor to the open seas through the Croatian territorial waters. Slovenia would be able through the achievement of a full jurisdiction over the Piran Bay to draw a geographical line to its west following the path of Croatian territorial sea borders that exist today. That line would extend to the point where the open sea commences, that is, the international waters in the Adriatic. Although neighboring states should conclude or at least try to conclude their lengthy boundary dispute by compromise, the Slovenian proposal is anything but a compromise for Croatians. However, the authors would submit that there are no reasons not to see this compromise to be in accordance with international customary and treaty law. The right of innocent passage of ships and also war ships is legally guaranteed in the UNCLOS. It is true that in theory there should not be any hindrance for a ship to travel from Slovenian port towards the open Adriatic, yet being in the Croatian territorial waters this innocent passage could be limited – potentially even arbitrarily having in mind the frequent Croatian deviations from the *bona fide* principle of *pacta sunt servanda* illustrated in this paper. This would mean a significant deterioration of the Slovenian position and of the present status quo following which Slovenia's territorial waters touch the high seas as it has been undisputedly the case since the time of the Yugoslav federation.

V. CONCLUSION: THE AUTHORS' PREDICTION ON THE OUTCOME OF THE POTENTIAL ARBITRATION PROCEDURE

The paper has endeavored to focus on the question of how to finally resolve the maritime border dispute in the Piran Bay. It is difficult to predict how the various factors will be taken into account in case of potential arbitration regarding border dispute in the Piran Bay. The courts usually refrain from indicating how the factors, which they considered, may combine with the chosen legal reasoning. In *Cameron v Nigeria*, ICJ dismissed the relevance of

⁵⁶ Statement by E.A. Gross, agent for the Governments of Ethiopia and Liberia, South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa) 38 I.C.J. Pleadings (Vol. 9) 305, 351 (1966).

⁵⁷ *Id.*

arguments of all parties and applied equidistance line approach, despite of the presence of a number of other factors that could also have been taken into consideration.⁵⁸ In the Piran Bay there are plentiful of reasons why the jurisdiction needs to be granted over to Slovenia. As the ICJ submitted in the *North Sea Continental Shelf* cases, the courts may take into account certain geographical peculiarities of maritime areas to be delimited. On the other hand, the Court is not required to take all such economic or geographical peculiarities into account in order to adjust or shift the provisional delimitation line. Therefore the real patterns in maritime delimitation may be described as mysterious. It is difficult to envisage that the Croatian side would go back to the *Drnovšek-Račan* agreement and accept the chimney corridor to the benefit of Slovenian access to the high seas. However, this might be possible if there was another wave of a positive political will for a compromise from which Croatia after all gets what it wants most: the maritime boundary with Italy.

However, if the suggestion that all waters in the Piran Bay are territorial or internal can be sustained, then the area could be subject to a special and particular régime. A joint sovereignty over a half of the Bay aiming towards Croatian shore might not be such an unrealistic solution. The waters of the half of the Piran Bay may be then regarded as the subject of the condominium or co-ownership, as *sui generis* area controlled by both countries. It is, however, unclear whether this solution would please both governments and their legal advisers and especially local population around the Bay.

VI. EPILOGUE: ANACHRONISM OF BORDER DISPUTES IN THE EU: SLOVENIA V. CROATIA?

In the light of the conclusion that no clear answer can be given to the Piran Bay conundrum, a useful a solution might be not drawing a border at all. Since there has never been one, it may never need one. The disputes about the borders should be seen as anachronistic in a contemporary Europe that strives for an ever-closer Union between its peoples. Borders are becoming more symbolic than functional. The law and the facts are that the maritime biological conservation is under exclusive competence of the EU. Within the fisheries sector, Member States are almost entirely pre-empted.⁵⁹ It follows from this that Member States have lost or in other words delegated their sovereign rights in these fields to a supranational body for their better exercise. If this is so, Slovenia and Croatia are quarrelling about something that Slovenia has already given up and Croatia has acquiesced, since it strives for as early accession to EU as possible. The core of the dispute between the countries is thus hollow and empty. In other words, there is nothing to dispute.

To clarify, if the Slovenian interests are in keeping the direct contact with the high seas for the unhampered functioning of its ports, preservation of the sea for the general well-being of the local inhabitants, and the development of tourism, these objectives can be achieved by not drawing a border. The same is true for Croatia, which also wants to preserve the environment and the well-being of its local inhabitants. Above all, it wants to have a direct contact with Italy which it can have since this border undisputedly exists from the time of ex-Yugoslavia.⁶⁰ Without drawing a border and replacing and complementing the regulatory regime in this area by the EU legal regime, which will soon bind both Slovenia and Croatia, both states will get what they want and actually what EU law dictates. The problems of the local fishermen will be

⁵⁸ Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon and Nigeria: Equatorial Guinea intervening) 2002 I.C.J. 303, 443-47 ¶¶ 293-306 (2002).

⁵⁹ See, e.g., the landmark case, Case 804/79, Commission v. United Kingdom, [1981] ECR 1045, [1982] C.M.L.R. 543 (1982), known as the Fisheries Case. Since then, the field has seen many other judicial decisions and legislative regulations. Art I-13 of the not-yet-ratified Treaty Establishing the Constitution for Europe thus explicitly provides that the “the conservation of marine biological resources under the common fisheries policy” falls within the exclusive competences of the Union.

⁶⁰ See Slovenian arguments, *supra* Part III.1., and Croatian arguments, *supra* Part III.2, respectively.

solved by the EU four fundamental freedoms, and the problems of the inhabitants in the four disputed villages will be solved in the same way and additionally by the provision of the EU citizenship. With respect to EU citizenship, the decision to award the disputed people in these four villages with a dual citizenship, as it was agreed in Drnovšek-Račan agreement, amounts to *contradictio in adiecto*. Under EU law it suffices to have only one citizenship of one Member State to enjoy the national and EU benefits.

In essence, the solution of the Piran bay conundrum lies in the abandonment of the old statist approach by facing the new reality that is brought about by the European Union as an ideal worth following. We claim that the border disputes within the EU of today are anachronistic, since they belong to the Westphalian understanding of the world, which is being incrementally, but for sure, transcended and rendered obsolete.

Slovenia and Croatia should, by having in mind their common destiny in the EU of tomorrow, rely on the agreements already reached and should just declare the waters ranging from Vrsar (Croatia) to Debeli Rtič (Slovenia) as their common waters, where common police control will be exercised, where EU exclusive policy will be implemented, and where it will not matter whether a boat is under Croatian or Slovenian flag. This kind of step forward would ease the tensions between the two nations. These tensions are completely artificial and have been used as a scapegoat for concealing problems internal to the political and economic situation of the both states. The local population, which has lived in peace since time immemorial should not be thrust in the middle of strategic political disputes, rather the culture of co-operation and mutual trust in the spirit of Europe without borders should be promoted.