2002

Stormy Waters On The Way To The High Seas: The Case Of The Territorial Sea Delimitation Between Croatia And Slovenia

Damir Arnaut

Follow this and additional works at: <http://digitalcommons.maine.maine.edu/oclj>

Recommended Citation

Damir Arnaut, *Stormy Waters On The Way To The High Seas: The Case Of The Territorial Sea Delimitation Between Croatia And Slovenia*, 8 Ocean & Coastal L.J. (2002).

Available at: <http://digitalcommons.maine.maine.edu/oclj/vol8/iss1/3>

This Article is brought to you for free and open access by the Journals at University of Maine School of Law Digital Commons. It has been accepted for inclusion in Ocean and Coastal Law Journal by an authorized administrator of University of Maine School of Law Digital Commons. For more information, please contact mdecrow@maine.edu.

STORMY WATERS ON THE WAY TO THE HIGH SEAS: THE CASE OF THE TERRITORIAL SEA DELIMITATION BETWEEN CROATIA AND SLOVENIA

Damir Arnaut*

..

I. INTRODUCTION

Territorial sea delimitation, while one of the most intensely debated issues prior to World War II, has largely been delegated to the sidelines of ocean and coastal law. Modern students of maritime delimitation mostly concern themselves with the delimitation of the exclusive economic zone (EEZ) and the continental shelf, and few, if any, significant diplomatic problems associated with territorial sea boundaries have been recorded in the last several decades. Indeed, while the literature on the delimitation of the EEZ and the continental shelf is abundant and readily available, questions concerning the territorial sea delimitation are seldom raised.

The reasons for these phenomena are not overly surprising. Primarily, in the last twenty-five years there have been few important judicial or arbitration case on the territorial sea delimitation.¹ Instead, the period has

---

* Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State. The opinions expressed herein are those of the author, and do not necessarily reflect the views of the Department of State. J.D. Boalt Hall School of Law (University of California, Berkeley), 2002; M.A., University of California, Berkeley, 1998; B.A., University of California, Berkeley, 1997.

** Eds. Note: Many sources used in this article are only available in the Croatian and Slovenian languages. Except where noted, the Author has provided translation of those sources that OCLJ has relied upon for editing purposes. Those translations are on file with OCLJ.

1. PROSPER WEIL, *THE LAW OF MARITIME DELIMITATION—REFLECTIONS* 135 (1989) [hereinafter *MARITIME DELIMITATION*]. Writing in 1989, Weil mentions a period of “the last fifteen years.” *Id.* Research of the 1989–2002 period has indicated that little has changed

been dominated by instances of negotiated territorial sea delimitation between the concerned parties. Also, delimitation of the territorial sea is a relatively simple affair, at least when compared to the EEZ or continental shelf delimitation. The modest twelve mile width of the territorial sea,² and the fact that the distorting effects of equidistance lines are "comparatively small within the limits of territorial waters,"³ both allow for a relatively smooth process. Finally, the EEZ and the continental shelf delimitation is largely governed by the customary law that, as courts have defined it, is based on the rule of equitable principles and equitable solution.⁴ The territorial sea delimitation, on the other hand, is governed by the equidistance and the special circumstances rule which is embodied in the United Nations Convention on the Law of the Sea (LOSC),⁵ and has been accepted without much controversy since the first territorial sea convention.⁶

Since the break up of the Soviet Union and the former Yugoslavia, however, there has been a dramatic rise of instances involving the need for the delimitation of territorial seas. The questions regarding such delimitation have emerged largely due to the fact that although land boundaries between the republics of these federal states were firmly established in most cases, delimitation was never carried out at sea. Problems regarding the delimitation of the territorial seas within the former Soviet Union have arisen in the Baltic, the Black Sea, as well as the Caspian Sea.⁷ Nonethe

---

since that time.

2. The Law of the Sea Convention declares twelve nautical miles as the maximum breadth of territorial sea. United Nations Convention on the Law of the Sea, opened for signature Dec. 10, 1982, 1833 U.N.T.S. 3 (entered into force Nov. 16, 1994) [hereinafter LOSC]. The LOSC is binding only upon those states that have ratified it—142 states as of the time of this writing. See *Table recapitulating the status of the Convention and of the related Agreements*, as at 28 February 2003, http://www.un.org/Depts/los/reference_files/status2003.pdf (last visited March 6, 2003). The twelve-mile limit, however, is now probably firmly established in international law. Indeed, only fifteen countries continue to claim territorial seas wider than twelve miles. See ROBIN CHURCHILL & A. VAUGHAN LOWE, *THE LAW OF THE SEA* 471 (1999) [hereinafter *LAW OF THE SEA*].

3. North Sea Continental Shelf Cases (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3 (Feb. 20), para. 59. Also, "owing to the very close proximity of such waters to the coasts concerned, these effects are much less marked and may be very slight. . ." *Id.* para. 8.

4. MARITIME DELIMITATION, *supra* note 1, at 136.

5. LOSC, *supra* note 2, art. 15.

6. MARITIME DELIMITATION, *supra* note 1, at 136.

7. For an account of the boundary disputes in the Caspian Sea and the Baltic Sea, see Paul Goble, *Russia: Analysis from Washington—When Borders are Disputed*, RFE/RL, Dec. 6, 1999, available at <http://www.rferl.org/nca/features/1999/12/F.RU.991206145039.html> (last visited Mar. 20, 2003). For an account of the need for delimitation in the Black Sea and the Azov Sea, see RFE/RL, *Ukraine, Russia Complete Delimitation of Land Border*,

less, despite of its relatively small size, the former Yugoslavia has produced some of the most contested territorial sea delimitation problems in recent history.

Croatia, in particular, having the longest coastline of all the former Yugoslav republics, has contested its territorial seas with all of its former republican neighbors—Bosnia, Slovenia, and Serbia-Montenegro.⁸ While the Croatian dispute with Bosnia was largely solved in 1999, and the boundary negotiations with Serbia-Montenegro have been restarted in recent months, Croatia's maritime dispute with Slovenia in the Bay of Piran and further in the Bay of Trieste has been the most controversial bilateral issue between the two countries ever since their independence in 1991. Despite the increased activity aimed at resolving this problem in the past three years, which included an agreement between the two countries' prime ministers,⁹ a solution is not in sight.¹⁰ Unless a negotiated solution satisfactory to both countries is reached soon, the issue will probably have to be submitted to an international judicial or arbitration body. This article makes a contribution by offering a detailed study of this unusual case of the territorial sea delimitation,¹¹ and by proposing several solutions for solving

RFE/RL NEWSLINE, Nov. 16, 2001, available at <http://rferl.org/newsline/2001/11/161101.asp> (last visited Mar. 20, 2003). See also <http://www.worldlanguage.com/Countries/Ukraine.htm> (last visited Mar. 20, 2003).

8. Both the land and the maritime boundary with Bosnia was contested around the only Bosnian outlet to the Adriatic Sea at Neum, the maritime boundary with Slovenia in the Bay of Piran and beyond has been one of the thorniest issues in the Croatian-Slovenian relations, and the land and maritime boundary between Croatia and Montenegro at the Prevlaka peninsula required the posting of a United Nations (UN) observer mission (United Nations Mission on Prevlaka—UNMOP) there. Serbia and Montenegro claimed the name "the Federal Republic of Yugoslavia" for their loose federation until March 2002, but have since agreed to the name "Serbia and Montenegro." For the purposes of clarity and brevity, this entity will be referred to as "Serbia-Montenegro."

9. Pogodba Med Republiko Slovenijo in Republiko Hrvaško o Skupni Dr avni Meji (Agreement between the Republic of Slovenia and the Republic of Croatia on the State Border) (translation from the Slovenian by Andrej Milivojević) [hereinafter Agreement]. The Agreement was initialed on July 20, 2001, but it must be ratified by the parliaments of both countries before it can enter into force. This agreement is not available in any library or electronic sources. A copy in the Slovenian language was obtained by author from the Ministry of Foreign Affairs of the Republic of Slovenia, and this copy is on file with the author.

10. Indeed, it appears that Croatia has backed away from the initialed agreement, and its government indicated that "it will soon begin to 'prepare new negotiating positions' because it is 'mindful of the fact that the majority opinion in the Parliament is against the Agreement.'" Marko Barišić, *Novi pregovori o granici sa Slovenijom?* [New Negotiations on the Boundary with Slovenia?], VJESNIK, June 14, 2002, at 3 [hereinafter *New Negotiations*] (quoting Dra en Budiša, Croatia's Deputy Prime Minister).

11. It appears that no academic study of the problem has been published in any English-

this problem through friendly, bilateral negotiations in order to avoid a costly and protracted dispute before an independent third body, an option that, as will be shown, would not benefit the interests of either country.

II. THE BAY OF PIRAN AND THE BAY OF TRIESTE: DEEP DIVISIONS IN SHALLOW WATERS

Croatian and Slovenian secession from the former Yugoslavia in 1991 brought about a need to delimit the boundaries of these two newly-independent states. While the land boundaries between the former Yugoslav republics were largely agreed upon well before the break up of the country, no delimitation was carried out at sea.¹² Boundary negotiations between the two countries began shortly after their independence, and were especially intensified following the end of the war in Croatia in 1995.¹³ Some land boundaries needed to be adjusted, mostly in order to take account of the needs of the population living in the border region, but this issue has not been nearly as perplexing or controversial as that of delimitation that needed to be carried out at sea *de novo*. Indeed, while practically every square inch of the land territory was officially included into one or another municipality, thereby indicating which republic exercised jurisdiction, no such official jurisdiction existed at sea.¹⁴ To be sure, there was little need for such delimitation during the life of the Yugoslav federation, as federal authorities exercised most of the control over the

---

language legal journal. While the issue of a territorial sea boundary between two small East European states may seem insignificant, and thereby unworthy of an academic endeavor, the specifics of the dispute, the solutions offered by the two sides, and the novelty of several issues surrounding the dispute, all call for a detailed examination of this problem.

12. See, e.g., Kristian Turkalj, *Razgraničenje teritorijalnog mora između Hrvatske i Slovenije u sjevernom Jadranu* [Delimitation of the Territorial Sea between Croatia and Slovenia in the Northern Adriatic], 51 ZBORNIK PRAVNOG FAKULTETA U ZAGREBU 939-40 (2001) [hereinafter *Delimitation*].

13. Davorin Rudolf, *Ribarskim svađama u piranskom zaljevu Slovenija nastoji Hrvatsku prisiliti na teritorijalne ustupke* [Slovenia is Attempting to Force Croatia to Make Territorial Concessions by Using Fishermen's Quarrels in the Bay of Piran], VJESNIK, Aug. 18, 2002, at 10.

14. *Delimitation*, *supra* note 12, at 939-40.

sea,¹⁵ but Croatian and Slovenian independence placed the matter into the realm of international law, calling for such delimitation to take place.

Map Exhibit A

15. For a very early argument in support of delimitation at sea between municipalities see LUCIAN KOS, *PODJELA NAŠEG OBALNOG MORA NA OPĆINE* [MUNICIPAL DIVISION OF OUR COASTAL SEA], (1970). To be sure, writing in the late 1960s, Kos was not so fortuitous as to propose that the potential break-up of Yugoslavia was one of the reasons for his advocacy of municipal delimitation of the sea. Nonetheless, he raised a number of important arguments in support of such delimitation, ranging from maritime safety, exploitation of natural resources, access to ship wrecks, fishing, pollution prevention, and, most importantly, legislative and enforcement jurisdiction. *Id.* at 16–23. Kos' proposal was not limited to mere advocacy that delimitation of the sea between municipalities be carried out. On the contrary, more than two-thirds of his study is devoted to making specific recommendations as to where municipal boundaries at sea should lie, and he used the equidistance method in all cases except for some specifically-mentioned islands. *Id.* at 27–8. As a result, Kos' proposal for the area of concern to this article uses the line of equidistance in the Bay of Piran and the Bay of Trieste, as evidenced both by the proposed coordinates for the Slovenian Piran municipality, *id.* at 52–3, and the Croatian Umag municipality, *id.* at 64, encompassing the area in question, as well as from a map app., *id.* insert. It must be borne in mind that this study was a *proposal* only, and that neither its general nor specific recommendations were ever adopted. Moreover, having been written at the time when the Yugoslav federation was still particularly strong, it can be safely assumed that this proposal never contemplated any problems arising under international law. As such, the value of the study to this article is not found in any of its specific recommendations regarding the lines of municipal delimitation at sea. Rather, Kos' study demonstrates that despite the existence of detailed and serious proposals on the topic, the Yugoslav federation never found it important enough to carry out such delimitation, underlining the fact that any territorial sea delimitation between what now are independent states must be carried out *de novo* either through negotiations or through third-body mechanisms.

The area subject to delimitation¹⁶ between the two countries lies in the northern Adriatic, namely in the Bay of Trieste. Included in this area is the small Bay of Piran, one coast of which belongs to Croatia and the other to Slovenia. The land boundary between the two countries follows the course of the Dragonja River which empties into the Bay of Piran roughly at its middle. The waters of the Bay of Piran were considered the internal waters of the former Yugoslavia, with the baseline stretching across its entrance. The coasts of the Bay of Trieste belong to the three coastal states situated around it: Italy, Croatia, and Slovenia. The former Yugoslavia and Italy delimited the waters in the bay into two roughly equal parts, with the entire area constituting the territorial sea of one or the other country. As a result, no delimitation issues exist between Italy on the one hand and Croatia and Slovenia on the other. The area of concern to this article, hence, is bordered with the Croatian and Slovenian coasts on one side and with the inherited Italian-Yugoslav territorial sea boundary on the other.¹⁷

As far as the other characteristics are concerned, there exists no problem of EEZ delimitation given the relatively small size of the area in question. The Bay of Trieste is only twenty-four nautical miles wide at its widest point, namely at the entrance into the bay, so each of the countries is entitled to territorial sea only.¹⁸ Also, the Bay of Trieste and the Bay of Piran are relatively shallow, with the average depth in the Bay of Trieste constituting twenty to thirty meters,¹⁹ while the depth in most of the Bay of Piran is less than fifteen meters.²⁰ The entrance into the Bay of Piran is only about three miles wide.²¹

Reduced to the basics, the dispute between Croatia and Slovenia includes two questions: 1) the place of the boundary in the Bay of Piran, and 2) the extent of the Slovenian territorial sea in the Bay of Trieste, including Slovenia's access to the high seas.²² With regard to the first question, Slovenia's underlining position is that the waters in the Bay of

---

16. See Map Exhibit A. Reproduced with the permission of the American Society of International Law (© American Society of International Law, 1993).

17. *Id.*

18. Croatia and Slovenia, as well as Italy, claim the territorial sea of twelve nautical miles. *LAW OF THE SEA, supra* note 2, app. 1, at 463-71.

19. *Delimitation, supra* note 12, at 953.

20. *Id.*

21. *Id.* Turkalj cites a figure of five kilometers which is roughly equal to three miles.

22. While it does not explicitly *define* the term "high seas," the LOSC states that its provisions relating to the "high seas" apply to "all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State. . . ." LOSC, *supra* note 2, art. 86. Since no country claims an EEZ in the Adriatic, any areas outside of the territorial seas of any particular country constitute the "high seas." *Delimitation, supra* note 12, at 967.

Piran constitute a single unit which should lie under Slovenia's sovereignty, despite the fact that one coast of the Bay undeniably belongs to Croatia. Croatia's position, in turn, has been that those waters should be delimited using the method of equidistance.²³ As for the second question, Slovenia has taken the position that its territorial sea should be extended to the point where it is at least partly adjacent to the high seas in order to avoid the "cut-off" of its territorial sea by the territorial seas of Italy and Croatia.²⁴ Croatia's position, again, has been that the territorial sea boundary between the two countries in the Bay of Trieste should follow the line of equidistance, the cut-off effect of Slovenia's waters notwithstanding.

III. INTERNATIONAL LAW OF THE SEA

A. Sources

The origins of the international law of the sea can be traced to 1609 when Hugo Grotius published a famous tract entitled *Mare Liberum*.²⁵ Grotius was a forceful advocate of the freedom of the seas, and he concluded that the seas were free and open for the purposes of navigation and fishing by any nation.²⁶ As the only exception to this general rule, Grotius admitted jurisdiction without property rights in the waters immediately adjoining coastal states.²⁷ This exception was in line with the generally accepted understanding of that time, that coastal states enjoyed some rights to regulate international activities in the waters immediately adjacent to their coasts.²⁸ Interestingly enough, Grotius' conclusions remained grounded in international practice for the next three centuries, and territorial waters remained practically the sole exception²⁹ to the unchallenged rule of full freedom of the seas.

The breadth of the territorial sea, however, was not at all certain. The most common tendency was to follow the so-called "cannon-shot" rule, which allowed the territorial sea jurisdiction up to the point at which those

---

23. The method of equidistance will be discussed in detail in Section III, *infra*.

24. If the method of equidistance is used, Slovenia's territorial sea will be entirely surrounded by the territorial seas of Italy and Croatia.

25. JOSEPH KALO ET. AL. COASTAL AND OCEAN LAW 321 (3rd ed. 1999) [hereinafter COASTAL AND OCEAN LAW]. *Mare Liberum* stands for "Free Seas" in Latin.

26. *Id.* at 322.

27. LAW OF THE SEA, *supra* note 2, at 71.

28. *Id.*

29. The other exception concerned the "internal waters," such as small bays and gulfs, where the coastal states exercised full jurisdictional and property rights. See COASTAL AND OCEAN LAW, *supra* note 25, at 323.

waters could be controlled by shore-based cannon.³⁰ This cannon-shot doctrine, however, was probably not intended to allow for the establishment of a continuous belt of territorial sea along the entire coast of a state, but rather to acknowledge the right to have pockets of jurisdiction at those places where the control by actual cannon was present.³¹ Eventually, the cannon-shot rule was replaced through the practice of claims and recognition of territorial sea width, and three nautical miles became a widely-accepted, though not universal, customary standard.³²

Save for custom, however, no official rules on the law of the sea were developed until after World War II.³³ The post-war period saw not only increased attempts at codification of customary rules, but also marked the end of an era of full freedom of the seas beyond the limited belt of territorial sea. The trend began with the Truman Proclamation in 1945 of exclusive jurisdiction over the natural resources of the United States' continental shelf, the claim that, although without any legal support, soon became embraced by most coastal states.³⁴ The claim and response process, however, was not to end with the Truman Proclamation, and very soon a number of coastal nations extended their territorial sea claims to twelve miles, while some others, such as Chile, Ecuador, and Peru, began to claim exclusive fishing zones within 200 miles off their coasts.³⁵

The number of the competing claims and counter-claims turned the simple and well-established law of the sea order into an uncharted territory indeed. Extensive claims to territorial seas and exclusive fishing zones by some nations, and refusals to recognize such claims by other states, increased the possibility for conflict, creating a dire need for codification of the international law of the sea. Such codification, to be sure, was made possible by the creation of a number of international institutions, most notably the United Nations (U.N.), following World War II. Hence, the First United Nations Conference on the Law of the Sea (UNCLOS I) was organized by the U.N. General Assembly in 1958 in Geneva, and more than eighty nations took part in the negotiations over the four draft treaties previously completed by the International Law Commission.³⁶ Known collectively as the Geneva Conventions on the Law of the Sea, the four

---

30. *Id.* at 322.

31. LAW OF THE SEA, *supra* note 2, at 77.

32. COASTAL AND OCEAN LAW, *supra* note 25, at 322.

33. Attempts to codify the existing customary rules were made by the League of Nations following World War I, but the League collapsed before any work was completed. *Id.* at 323.

34. *Id.* at 324.

35. *Id.* at 325-26.

36. *Id.* at 326.

law-making treaties³⁷ that were adopted at UNCLOS I constituted the first codification of any matter relating to the legal regime over the sea and ocean expanses and resources.

Notably, there could be no agreement at UNCLOS I regarding the breadth of the territorial sea, and the matter was left unresolved.³⁸ A subsequent attempt two years later at the Second United Nations Conference on the Law of the Sea (UNCLOS II) similarly produced no results,³⁹ leaving the fate of the breadth of territorial sea to the claim and response process for more than two decades. With the adoption of the U.N. Convention on the Law of the Sea⁴⁰ in 1982, this and a number of other matters were resolved and codified in the form of the most comprehensive treaty on the law of the sea in history. The negotiations leading to this Convention were held for nine years under the auspices of the Third United Nations Convention on the Law of the Sea (UNCLOS III), which began its work in 1973, including more than 150 states in its deliberations, and the Convention is now the most authoritative and the most comprehensive part of the international law of the sea. As already noted,⁴¹ the provisions of this Convention are binding only upon the 142 states that have ratified it, and they supersede the four Geneva Conventions as far as these states are concerned.⁴² Considering that the Convention applies to all states of concern to this article, the relevant provisions of this Convention only, and not those of the four Geneva Conventions, will now be discussed in greater detail.

---

37. Convention on the Territorial Sea and the Contiguous Zone, Feb. 27, 1958, 516 U.N.T.S. 205 [hereinafter Territorial Sea Convention]; Convention on the High Seas, Feb. 27, 1958, 450 U.N.T.S. 11; Convention on Fishing and Conservation of the Living Resources of the High Seas, Feb. 27, 1958, 559 U.N.T.S. 285; Convention on the Continental Shelf, Feb. 27, 1958, 499 U.N.T.S. 311.

38. See Territorial Sea Convention, *supra* note 37, declaring the coastal states' right to exercise sovereignty in the territorial sea, art. 1, and stating where the breadth of the territorial sea shall be measured from, art. 3, but setting no limit of that breadth. The Convention, however, stated that the territorial sea of a state whose coasts are opposite or adjacent to the coasts of another state shall not extend "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," absent a "historic title or other special circumstances" or an agreement between them to the contrary. See *id.* art. 12.

39. COASTAL AND OCEAN LAW, *supra* note 25, at 327. Interestingly, a proposal for a six-mile territorial sea followed by an additional six-mile exclusive fishing zone failed to be adopted at UNCLOS II by only one vote. LAW OF THE SEA, *supra* note 2, at 79.

40. See LOSC, *supra* note 2.

41. See *supra* note 2.

42. The four Geneva Conventions, however, remain binding on the states that have ratified them, but have not ratified the LOSC. Also, those parts of the LOSC that are recognized as customary international law apply to all states.

B. High Seas

One of the central parts of the dispute between Croatia and Slovenia concerns access to the high seas. Although the concept of the high seas is probably the least controversial in the area of maritime law, the peculiarities of this dispute warrant a brief discussion of the basic rules applicable to the high seas. Primarily, the high seas are defined as "all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State. . . ."⁴³ All states enjoy almost unrestricted rights on the high seas, including the freedom of navigation, freedom of overflight, freedom to lay submarine cables, freedom to construct artificial islands and other installations, freedom of fishing, and freedom to conduct scientific research.⁴⁴ The only restrictions pertain to such issues as preservation of ocean resources, piracy, drug trafficking, shipping of slaves, or unauthorized broadcasting,⁴⁵ and no state may exercise its sovereignty over any areas of the high seas.⁴⁶ Hence, the high seas represent a relatively unregulated area where only the flag state may exercise sovereignty over a ship, except in the aforementioned limited circumstances.

C. Territorial Sea

The LOSC established the right of states to claim territorial seas of up to twelve nautical miles,⁴⁷ but left unchanged the language of the Territorial Sea Convention that the waters of opposite or adjacent states must be delimited so that no state may claim any part of the territorial sea that is closer to the coast of another state than to its own, absent "historic title or other special circumstances," or an agreement between them.⁴⁸ Before anything can be said about the delimitation of territorial sea, however, the term itself and its implications must first be defined.

---

43. LOSC, *supra* note 2, art. 86.

44. *Id.* art. 87(1).

45. *See generally id.* Part VII.

46. *Id.* art. 89.

47. *Id.* art. 3.

48. 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. *Id.* art. 15. For almost identical language, *see* the Territorial Sea Convention, *supra* note 37, art. 12.

i.) Definition

The LOSC defines territorial sea as the belt of sea adjacent to the land territory of a coastal state, over which the sovereignty of such a state extends,⁴⁹ including the sovereignty over “the air space over the territorial sea as well as to its bed and subsoil.”⁵⁰ The territorial sea may not extend beyond twelve nautical miles from the baselines,⁵¹ and its outer limit is “the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea.”⁵² The normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast.⁵³ In the case of territories with reefs, the baseline is the seaward low-water line of the reef,⁵⁴ and in cases of “deeply indented and cut into” coastlines, or if there is a fringe of islands along the coast and in its immediate vicinity, “straight baselines joining appropriate points” may be employed in drawing the baseline from which the breadth of the territorial sea is measured.⁵⁵

ii.) Rights of Third States in a Coastal State's Territorial Sea

A coastal state's sovereignty over its territorial sea notwithstanding, ships of all other states enjoy the right of “innocent passage” through that sea.⁵⁶ This right of third states in another state's territorial sea, however, is the only exception to the coastal state's sovereignty over these waters. All other sovereignty rights that apply on the state's land territory are preserved. Ships belonging to third states are not allowed to fish, lay submarine cables, conduct research, exercises, or any other activity in another state's territorial sea. Furthermore, coastal states retain full sovereignty over the air space above their territorial seas, so no over-flight rights exists for the airplanes of third states.

As far as the meaning of “passage” is concerned, potential for uncertainty is low. The LOSC defines passage as navigation through the territorial sea in order to traverse that sea,⁵⁷ or in order to enter the internal

---

49. LOSC, *supra* note 2, art. 2(1).

50. *Id.* art. 2(2).

51. *Id.* art. 3.

52. *Id.* art. 4.

53. *Id.* art. 5.

54. LOSC, *supra* note 2, art. 6.

55. *Id.* art. 7. For rules on drawing straight baselines, *see generally* art. 7.

56. *Id.* art. 17. (applying to ships of all states, whether coastal or landlocked).

57. *Id.* art. 18(1)(a).

waters or ports of the coastal state.⁵⁸ Passage must be "continuous and expeditious,"⁵⁹ although it can include stopping and anchoring that is "incidental to ordinary navigation," or is caused by "*force majeure* or distress or for the purpose of rendering assistance" to others in distress.⁶⁰

As for the meaning of "innocent" passage, the general terms of the Territorial Sea Convention that "[p]assage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State"⁶¹ was preserved in the LOSC.⁶² However, the LOSC included additional detailed provisions in order to define the acts that are so "prejudicial."⁶³ The list includes weapons practice, spying, propaganda, launching or taking on board aircraft or military devices, embarking or disembarking persons or goods contrary to the customs, fiscal, immigration or sanitation regulations of the coastal state, willful and serious pollution, fishing, research, interference with coastal communication or other facilities of the coastal state,⁶⁴ but also "*any other* activity not having a direct bearing on passage."⁶⁵ Included in a separate provision, but related to the concept of innocent passage, the rights of submarines to traverse territorial sea is contingent upon their navigation on the surface and display of the flag.⁶⁶ It should be noted, however, that nothing in the Convention discriminates against warships with regard to the right of innocent passage.

iii.) Rights and Responsibilities of a Coastal State in its Territorial Sea

Primarily, the coastal state may adopt laws and regulations relating to innocent passage through territorial sea in respect of: the safety of navigation and the regulation of maritime traffic; the protection of navigational and other facilities; the protection of cables and pipelines; the conservation of living resources; the prevention of infringement of fisheries laws; the preservation of the environment; marine scientific research and hydrographic surveys; and the prevention of infringement of the customs, fiscal, immigration or sanitary laws.⁶⁷ Such laws and regulations must be

---

58. *Id.* art. 18(1)(b).

59. LOSC, *supra* note 2, art. 18(2).

60. *Id.*

61. Territorial Sea Convention, *supra* note 37, art. 14(4).

62. LOSC, *supra* note 2, art. 19(1).

63. *Id.* art. 19(2).

64. *Id.*

65. *Id.* (emphasis added).

66. LOSC, *supra* note 2, art. 20.

67. *Id.* art. 21(1).

in conformity with the Convention,⁶⁸ and all foreign ships must comply with them.⁶⁹

If necessary for the safety of navigation, the coastal state may also require foreign ships to use designated sea lanes while engaging in innocent passage,⁷⁰ particularly with respect to "tankers, nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances. . . ."⁷¹ The coastal State may not, however, "impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage,"⁷² or "discriminate in form or in fact against the ships of any State or against ships carrying cargo to, from or on behalf of any State."⁷³

The LOSC does allow coastal states to suspend innocent passage through their territorial seas.⁷⁴ However, such suspension must be temporary, it may occur only in specified areas, it must occur without discrimination, formal or factual, among foreign ships, and it must be essential for the coastal state's protection of its security, including weapons exercises.⁷⁵ Coastal states may not, however, impose any charges on foreign ships by reason of their passage through territorial sea, except insofar as any such charges are for specific services rendered.⁷⁶

As for a coastal state's enforcement jurisdiction in its territorial sea, the LOSC makes a distinction between criminal and civil jurisdiction. Regarding the former, a coastal state may exercise jurisdiction over crimes committed on board a ship during the course of its passage in very limited circumstances only.⁷⁷ A coastal state may not, however, exercise criminal jurisdiction over any crime⁷⁸ that occurred prior to the ship's entry into the state's territorial waters, unless the ship is either coming from its port or

---

68. *Id.*

69. *Id.* art. 21(4).

70. *Id.* art. 22(1).

71. LOSC, *supra* note 2, art. 22(2).

72. *Id.* art. 24(1)(a).

73. *Id.* art. 24(1)(b).

74. *Id.* art. 25(3).

75. *Id.*

76. LOSC, *supra* note 2, art. 26(1)&(2).

77. The consequences of the crime extend to the coastal state; the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; the assistance has been requested by the master of the ship or by a diplomatic officer of the flag state; or such measures are necessary for the suppression of illicit drug trafficking. *Id.* art. 27(1). These limitations do not, however, apply when ships are passing through the territorial sea after leaving the internal waters of the same coastal state.

78. Some exceptions relating to pollution and the EEZ are provided in Parts XII and V of the Convention respectively. *Id.* art. 27(5).

internal waters, or is on its way there.⁷⁹ Regarding a coastal state's civil jurisdiction, levying execution against or arresting a foreign ship for the purpose of any civil proceedings is allowed only in connection with obligations or liabilities incurred by the ship itself in the course of, or for the purpose of its passage through the territorial sea, unless the ship is lying in that sea or passing through it after leaving internal waters of the state concerned.⁸⁰

Finally, it must always be kept in mind that some breaches of a coastal state's laws and regulations may result in loss of innocence, depriving the foreign ship of its right to innocent passage, and allowing the coastal state to "take the necessary steps in its territorial sea to prevent passage which is not innocent."⁸¹ In such cases, the coastal state is entitled to arrest the ship and institute proceedings before its courts, but a more convenient alternative would be to simply exclude the ship from its territorial sea.⁸² Emanating from this clause, but also well enshrined in international practice, is the rule that ships not engaged in innocent passage, whether because they are passing, or are passing but are not innocent, are subject to all laws and regulations of the coastal state, and enforcement action may be taken against them regardless of whether they have violated only those laws and regulations that pertain to innocent passage, or any other laws and regulations.⁸³

Warships and other government-operated non-commercial ships, however, are not subject to the coastal state's enforcement jurisdiction, regardless of the circumstances due to the immunities that they enjoy under customary international law.⁸⁴ They are, however, subject to the coastal state's legislative jurisdiction pertaining to the passage through the territorial sea. Hence, they are required to obey such laws, with their immunity precluding only their enforcement, but a coastal state may require any disobeying ships to "leave the territorial sea immediately."⁸⁵ Further, the flag state of ships to which immunity applies is required to compensate the coastal state for any damage caused as a result of non-compliance with the coastal state's laws concerning innocent passage.⁸⁶ The right to self-defense was not included in the LOSC, but this is a general right well

---

79. *Id.*

80. *Id.* art. 28(2)&(3).

81. LOSC, *supra* note 2, art. 25(1).

82. See LAW OF THE SEA, *supra* note 2, at 99.

83. *Id.* at 95.

84. LOSC, *supra* note 2, art. 32.

85. *Id.* art. 30.

86. *Id.* art. 31.

recognized under international law, and coastal states facing imminent attack are allowed to exercise it.⁸⁷

iv.) Delimitation of the Territorial Sea

Territorial sea delimitation, when compared to delimitation of the EEZ or the continental shelf, appears to be a simple affair. Unlike the EEZ or the shelf delimitation, which is governed by customary law as developed by courts and based on the rule of equitable principles/equitable solution,⁸⁸ territorial sea delimitation is entirely governed by the equidistance/special circumstances rule, contained in the LOSC.⁸⁹ Hence, while there is a common law for the purposes of the EEZ and the shelf delimitation, there does not appear to be a common law for the delimitation of the territorial sea.⁹⁰ Moreover, in delimiting the EEZ or the shelf, courts have reduced the equidistance method to "just one among many,"⁹¹ with "no obligation to use it or give it priority."⁹² In delimiting territorial sea, on the other hand, the rule of equidistance does not apply *only* if there exist "historic title or other special circumstances."⁹³

When carrying out delimitation of the territorial sea, the first issue that must be considered is the legal title over those areas of the sea that are to be delimited. For a state to exercise title over a particular area of the sea, the state must primarily be a coastal state, as "[t]he land is the legal source of the power which a State may exercise over territorial extension seaward."⁹⁴ Furthermore, the legal link between a state's territorial sovereignty and its rights to certain maritime areas is established by "means of its coast."⁹⁵ As a result, the coastline determines not only the existence of maritime rights, but also their extent and their shape. Finally, critical to the determination of title are the concepts of adjacency and distance.

87. See LAW OF THE SEA, *supra* note 2, at 99.

88. MARITIME DELIMITATION, *supra* note 1, at 136.

89. LOSC, *supra* note 2, art. 15.

90. MARITIME DELIMITATION, *supra* note 1, at 136.

91. Award of the Arbitral Tribunal in the Third Party Settlement of the Maritime Boundary between Guinea and Guinea-Bissau, 25 I.L.M. 251, para. 102 (1986) [hereinafter *Guinea/Guinea-Bissau Award*].

92. *Id.*

93. LOSC, *supra* note 2, art. 15.

94. North Sea Continental Shelf Cases (F.R.G. v. Den.; F.R.G. v. Neth.) 1969 I.C.J. 3, para. 96 (Feb. 20). See also the Fisheries Case where the International Court of Justices, in connection with the territorial sea, stated: "It is the land which confers upon the coastal State a right to the waters off its coasts." Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116, 133 (Dec. 18).

95. Continental Shelf (Libyan Arab Jamahiriya/Malta), 1985 I.C.J. 13, 49 (June 3).

"[I]nternational law confers on the coastal State a legal title to . . . a maritime zone *adjacent* to its coasts,"⁹⁶ and, for the purposes of territorial sea, the legal title over this adjacent belt of sea can extend up to twelve nautical miles.⁹⁷

Only after the legal basis of a state's title to certain maritime areas has been determined, can boundaries of those areas be set. Naturally, if there were only one state, maritime areas adjacent to its coast could project as far as it is allowed by international law, that is twelve miles for the territorial sea,⁹⁸ twenty-four miles for the contiguous zone,⁹⁹ and two hundred miles for the EEZ.¹⁰⁰ But when the coasts of two states are opposite or, especially, adjacent to each other, the maritime area that is adjacent to those coasts must normally be divided despite the fact that one state would have the legal title over all of it if the other state did not exist.¹⁰¹

That any division of territorial sea must be carried out according to the equidistance and special circumstances rule, has already been noted. In the case of maritime delimitation between Croatia and Slovenia, there is at least a claim, if not a fact, that historic title and/or special circumstances exist. If such a claim was absent, the dispute between these countries would not exist either, as their territorial seas would then have to be divided by applying the rule of equidistance.¹⁰² It would be useful to provide a list of all special circumstances that have been identified by courts, arbitral bodies, or academics, but that any such list could not possibly pretend to be exhaustive and authoritative within the scope or the purpose of this article. Rather, it will be sufficient for the present purposes to analyze the Croatian-Slovenian dispute in detail, and identify the special circumstances that are either being claimed or may otherwise be present here, in order to predict whether the territorial seas in question should be delimited by following the method or equidistance, or whether the rule of historic title and/or special circumstances should govern.

---

96. Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1984 I.C.J. 246, para. 103 (Oct. 12).

97. LOSC, *supra* note 2, art. 3.

98. *Id.*

99. *Id.* art. 33(2).

100. *Id.* art. 57.

101. *Id.* art. 15. For an illustrative comment that "delimitation is a matter of amputating the projections of two States by comparison with what each of them would be legally entitled to if the other did not exist," see MARITIME DELIMITATION, *supra* note 1, at 62.

102. LOSC, *supra* note 2, art. 15.

IV. POSITIONS OF CROATIA AND SLOVENIA ON THE DELIMITATION OF THEIR TERRITORIAL SEAS

A. Slovenia's Position

Slovenia's position regarding the territorial sea delimitation with Croatia was most clearly stated in a Memorandum on the Bay of Piran, adopted by the Slovenian Parliament in March 1993.¹⁰³ The Memorandum articulates two basic Slovenian demands: 1) "maintaining the unity of the Bay of Piran under Slovenia's sovereignty and jurisdiction," and 2) "access to the high seas based on the established criteria of international law and respect for the specific situation of Slovenia."¹⁰⁴ As far as the first demand is concerned, the Memorandum declares that Slovenia considers the Bay of Piran as "the case *sui generis* which demands strict respect for the historic title and other special circumstances, and categorically rejects the use of the equidistance method."¹⁰⁵ In support of this position, the Memorandum declares that Slovenia exercised jurisdiction in the Bay of Piran during the life of the former Yugoslavia, that such state of affairs existed at the time of the two republics' independence, and that Slovenia also exercised economic rights in the Bay, as well as "cared for its biological balance and ecological protection."¹⁰⁶ Finally, the Memorandum claims that the Bay of Piran "historically belonged to the Piran Municipality,"¹⁰⁷ and that its resources were under the "exclusive use of the population" of this municipality, and that of the entire area of the Bay only the Slovenian side was ever populated.¹⁰⁸

As for the second Slovenian demand, the Memorandum states that "considering the specificity of the situation, it is necessary to respect the principle of equity and, with that, the so-called special circumstances, articulated in Article 12 of the Territorial Sea Convention."¹⁰⁹ The

---

103. *Delimitation*, *supra* note 12, at 953 (citing the Croatian translation of the Memorandum).

104. *Id.* at 954 (reprinting a portion of the Croatian translation of the Memorandum).

105. *Id.*

106. *Id.*

107. *Id.* The Piran Municipality is based in the Slovenian town of Piran, and it encompasses only the Slovenian territory.

108. *Delimitation*, *supra* note 12, at 954 (reprinting a portion of the Croatian translation of the Memorandum).

109. *Id.* Two issues are peculiar regarding this statement. Primarily, it is unclear why Slovenia cites the Territorial Sea Convention, as opposed to the LOSC to which it is also a party. However, considering that art. 12 of the Territorial Sea Convention is identical to art. 15 of the LOSC, this issue is of little importance. More peculiar is the fact that the Memorandum cites "the principle of equity" which is contained neither in the Territorial Sea

Memorandum further states that Slovenia is to be considered a "geographically-disadvantaged state" which cannot declare its EEZ,¹¹⁰ and that the issue is crucial for "obtaining sufficient amounts of natural resources for the survival of the Slovenian people."¹¹¹ Thereby, the Memorandum continues, Slovenia believes it necessary, "in accordance with the principle of equity and taking into account special circumstances,"¹¹² to draw the maritime boundary with Croatia in a way that

would allow the territorial sea of Slovenia to, "at least in a narrow region, touch upon the high seas in the Adriatic."¹¹³

Slovenia advanced two proposals to achieve the second demand.¹¹⁴ According to the first, all of the waters in the Bay of Piran would constitute Slovenia's territorial sea, notwithstanding the fact that one coast of the Bay undeniably belongs to Croatia. The boundary would then turn towards the south-west from Cape Savudrija which is Croatia's northernmost point at the entrance into the Bay, until it reached the high seas. All waters between this line and the inherited Yugoslav-Italian territorial sea boundary would constitute Slovenia's territorial sea.¹¹⁵ The second proposal is far less radical. It envisions a boundary line going through the Bay of Piran,¹¹⁶ continuing in the same north-west direction toward the inherited Yugoslav-Italian territorial sea boundary, and then turning towards the south-west until it reaches the high seas.¹¹⁷ In addition, the proposal would leave for Croatia a triangle-shaped territorial sea "enclave" which would border the Italian territorial sea on one side, and that of Slovenia on the other.¹¹⁸ This proposal would have the effect of creating a "corridor-like" portion of Slovenia's territorial sea which would extend to the high seas.

B. Croatia's Position

Croatia outlined its position in 1999 through the Declaration on the State of Inter-State Relations between the Republic of Croatia and the Republic of Slovenia.¹¹⁹ Croatia's position, to be sure, is very simple when compared to that of Slovenia. It declares that due to the fact that both Croatia and Slovenia are parties to the LOSC, Croatian representatives, such as the Government and the State Committee for Borders, are obligated to advance positions in accordance with the Convention, that is, to insist that the maritime boundary line in the Bay of Piran be determined

---

113. *Delimitation*, *supra* note 12, at 954–55.

114. *Id.* at 956.

115. See Map Exhibit B. Reproduced with the permission of Zbornik Pravnog Fakulteta u Zagrebu (© Zbornik Pravnog Fakulteta u Zagrebu, 2001).

116. It is unclear from this proposal where exactly the boundary in the Bay of Piran would lie. It is evident that it would not go through the middle of the Bay, and it appears that it would leave some waters in the Bay to Croatia. See Map Exhibit B.

117. See Map Exhibit B.

118. *Id.*

119. *Deklaracija o stanju međudravnih odnosa Republike Hrvatske i Republike Slovenije* [Declaration on the State of Inter-State Relations between the Republic of Croatia and the Republic of Slovenia], 32 NARODNE NOVINE 1089–90 (1999), reprinted in *Delimitation*, *supra* note 12, at 957 [hereinafter *Declaration*].

following the rule of equidistance.¹²⁰ The Declaration further states that until the boundary is established, the coastal states are “obligated to refrain from exercising any type of jurisdiction beyond the line of equidistance,”¹²¹ and that the Croatian government is authorized to seek an advisory opinion from international institutions if the dispute is not resolved within twelve months.¹²²

C. The Prime Ministers' Agreement: Initials Only

After several years of negotiations that began on the basis of the Slovenian Memorandum and the Croatian Declaration, the Prime Ministers of the two countries reached an agreement on their maritime boundary in July 2001.¹²³ The Agreement is in many ways a compromise between the positions contained in the Memorandum and the Declaration respectively, but is nonetheless much closer to Slovenia's positions than those of Croatia. Specifically, the Agreement declares that the boundary in the Bay of Piran shall begin at the river Dragonja's outlet into the Bay (Point A), and continue in a straight line to Point B, located at the Bay's entrance, three-quarters of the distance between the northernmost points of Cape Savudrija¹²⁴ and Cape Madona,¹²⁵ measured from the northernmost point of

---

120. *Id.* The Croatian Parliament's Declaration only mentions the border in the Bay of Piran, but not further in the Bay of Trieste. It seems implicit, however, that the position was that the entire boundary between Croatia and Slovenia should be determined using the rule of equidistance, since such a rule would allow the boundary to simply continue its course even after it leaves the Bay of Piran. See also Map Exhibit B for the illustration of the Croatian proposal. Moreover, a thorough examination of the Croatian press shows that Croatia's representatives and the media almost exclusively refer to the entire area in question as “the Bay of Piran,” probably for reasons of simplicity. Also somewhat unclear is the Declaration's statement that the rule of equidistance is contained in “article 2” of the LOSC, see Declaration, *supra* note 119. The said provision is, in fact, contained in art. 15. Perhaps this is simply a *lapsus calami* considering that art. 15 is contained in Part II of the LOSC. See LOSC, *supra* note 2, Part II. On the other hand, art. 2, which defines the territorial sea and its breadth, is also contained in Part II. See *id.* Hence, this may indicate some lack of familiarity with the LOSC on the part of the Croatian deputies.

121. Declaration, *supra* note 119.

122. *Id.* The Declaration specifically allows the Government to seek an advisory opinion “from the International Tribunal for the Law of the Sea in Hamburg, or from another appropriate institution.” *Id.*

123. See Agreement, *supra* note 9.

124. Point Savudrija is on the Croatian coast bordering the Bay of Piran.

125. Point Madona is on the opposite side of the Bay, on the Slovenian coast.

Map Exhibit C

Cape Savudrija.¹²⁶ From this point, the boundary line shall turn to the west and continue in a straight line to Point C, which lies on the territorial sea boundary established between Italy and the former Yugoslavia,¹²⁷ “except in the area where the territorial sea of Slovenia is adjacent to the high seas” (between the points C1 and C2 on the Point B to Point C line).¹²⁸ With respect to this last provision, the agreement stipulates that the two countries agree to create a high seas corridor between Slovenia’s territorial sea and the currently-established high seas, noting that “the sea area demarcated by points C1, C2, T5, and T6 constitutes the high seas.”¹²⁹ Finally, the Agreement creates a small triangle patch of Croatian territorial sea bordering the territorial sea of Italy, stating that “the sea area demarcated by points C, C2 and T5 constitutes the Croatian territorial sea.”¹³⁰ Hence, the boundary line outside of the Bay of Piran is basically divided into three parts: the first part being the boundary between the Slovenian and Croatian territorial seas, the second part constituting the border between Slovenia’s

126. See Agreement, *supra* note 9, art. 3(1) and map app. I (included as Map Exhibit C).

127. *Id.*

128. See *id.* art. 3(1).

129. See *id.* art. 4(1) and map app. I (included as Map Exhibit C).

130. See *id.* art. 5(1) and map app. I (included as Map Exhibit C).

territorial sea and the high seas, and the third again being the border between the territorial seas of the two states.

Reduced to the basics, the practical effects of the Agreement are as follows:

The method of equidistance is not employed at all. Slovenia receives as its territorial sea approximately eighty percent of the Bay of Piran¹³¹ and a substantial portion of waters outside of the Bay.¹³² In total, Slovenia's territorial sea under the Agreement is around 113 square kilometers larger than it would be if the method of equidistance were to be employed.¹³³ Furthermore, the Agreement establishes a 3.6 kilometer by 12 kilometer¹³⁴ "high-seas corridor," bordered by the Slovenian territorial waters in the north and the high seas in the south-west.¹³⁵ The eastern side of the corridor is bordered by the Croatian territorial sea, and Croatia also retains a "triangle" of territorial sea which is squeezed between the corridor in the east, the Italian territorial sea in the west, the Slovenian territorial sea in the north, and barely touching the high seas in the south.¹³⁶ The Agreement finally stipulates that it must be ratified by the two countries' parliaments before it can enter into force. Almost a year after it was initialed, however, the Agreement does not appear to have a chance to receive a two-thirds majority of the Croatian Parliament, and the Croatian media has noted on more than one occasion that the Parliament "does not even want to seriously discuss the Agreement."¹³⁷ The Croatian deputies' approach is

131. RFE/RL, *Slovenia and Croatia Reach Border Agreement*, 5 BALKAN REPORT 54, Aug. 3, 2001, available at <http://www.rferl.org/balkan-report/2001/08/54-030801.html> (last visited Feb. 5, 2003).

132. See Map Exhibit C.

133. See Goran Vojković, *Sporazum sa Slovenijom iz 2001* [Agreement with Slovenia from 2001], available at http://www.lawofthesea.net/parafirani_sporazum_2001.htm (last visited Feb. 5, 2003).

134. See RFE/RL, *supra* note 131.

135. See Map Exhibit C.

136. See Agreement, *supra* note 9, art. 4(1) and map app. I (included as Map Exhibit C). Maintaining the territorial sea boundary with Italy was important to Croatia for two reasons. Primarily, that boundary was established between Italy and the former Yugoslavia through the Treaty of Osimo, which Croatia succeeded to, and Croatia did not want to jeopardize its rights under that Treaty by ignoring one of its provisions, that is by removing its territorial sea boundary with Italy. Also, Croatia's territorial sea boundary with Italy is at present its only boundary with a European Union country, and this fact carries symbolic, but also some tangible strategic and political connotations.

137. See, e.g., Marko Barišić, *Jesu li moguć i dodatni pregovori o granicama i nuklearki?* [Are Additional Negotiations on Boundaries and the Nuclear Plant Possible?], VJESNIK, Feb. 17, 2002, at 5 [hereinafter *Are Additional Negotiations Possible?*]. Also, as already noted, the Croatian government has now signaled that, faced with the opposition in Parliament, it will most likely abandon the Agreement and present Croatia's new negotiating

not overly surprising. It is not only the appearance of the relative advantage gained by Slovenia that is troubling to them, but it is also the media coverage of the issue and the resulting public outcry that have made ratification a risky political move at best. There is a general perception in Croatia, among the public and in the Parliament, that the Government was primarily motivated by political and economic considerations, rather than by concern for preserving Croatia's territorial sea.

Such perception, to be sure, is not entirely without merit. Primarily, the Croatian Prime Minister, in commenting on the Agreement, has noted that Croatia's aspirations to join the European Union and NATO cannot be fulfilled as long as unresolved territorial disputes with the neighboring states persist.¹³⁸ Moreover, he also noted, one week prior to initialing the Agreement, that "Slovenia is situated on the road from Croatia to Europe, literally and figuratively."¹³⁹ More problematic than these rational calculations, however, were various speculations in the Croatian media and by the opposition that the Government "traded" the territorial sea for Slovenia's promises to return the savings of Croatia's citizens left in the Slovenian banks upon the break-up of Yugoslavia,¹⁴⁰ to build roads leading to the Croatian borders,¹⁴¹ or to make some compromises on the land boundary¹⁴² and the issue of the jointly-owned nuclear power plant.¹⁴³

---

positions. The government has not yet formally adopted this approach, but the statement by the Deputy Prime Minister that it "soon will" indicates that Croatia has probably rejected the Agreement for all practical purposes. See *New Negotiations*, *supra* note 10, at 3.

138. Konferencija za štampu Premijera Ivice Račana [Prime Minister Ivica Račan's Press Conference], Sep. 17, 2001, available at <http://www.vlada.hr/racan-press.10.html> (on file with OCLJ).

139. Frenki Laušić, *Ribarska rtva* [Fisherman Victim], SLOBODNA DALMACIJA, July 27, 2001, available at <http://www.slobodnadalmacija.hr/20010727/kolumne.htm> (on file with OCLJ) [hereinafter *Fisherman Victim*].

140. See, e.g., Marko Barišić, *Inflacija sporazuma koji uglavnom proizvode nove nesporazume* [Inflation of Agreements which Usually Create New Disagreements], VJESNIK, Jan. 6, 2002, at 4 [hereinafter *Inflation of Agreements*]; Vinka Drezga, *Spekulacije o "trgovanju" sa Slovenijom nisu utemeljene* [Speculations on "trade" with Slovenia are Baseless], VJESNIK, July 1, 2001, at 6.

141. *Inflation of Agreements*, *supra* note 140, at 4. This would increase the tourist flow into Croatia.

142. Fueling the tensions was an article in the Slovene press that declared that the Croatian Prime Minister promised to give Slovenia three villages in return for "300 meters of sea" along the Croatian coast of the Bay of Piran. Particularly problematic for the Croatian public is the fact that while it cannot be ascertained whether these three villages belong to Croatia or Slovenia, Croatia appears to have a claim to them that is just as valid as that of Slovenia (the villages were officially included into a Slovenian municipality, but the judicial and law-making jurisdiction was exercised by Croatia). This caused the sentiment that Croatia was giving Slovenia its territories to receive what already belongs to it (the 300 meters, if not more, in the Bay of Piran). See Marko Barišić, *Hrvatska ne može*

While categorically denied by the government, and probably well-exaggerated, these speculations nonetheless created a wave of anti-Agreement feelings in Croatia.¹⁴⁴ The lowest point, however, came following the address of the Slovenian Foreign Minister to the Croatian Parliament's Foreign Affairs Committee, at which he spoke about the division of the "Yugoslav sea," causing the Croatian Foreign Minister to compare his views to those of Slobodan Milošević.¹⁴⁵ The combination of all of these developments was probably what caused the Croatian government to indicate that it would soon formally reject the Agreement by forming new negotiating positions, and some have suggested that the issue would remain dormant for at least five to six years absent a major breakthrough.¹⁴⁶ This prediction may well prove to be correct. Immediately following Croatia's Deputy Prime Minister's announcement that Croatia would present its new position on the matter,¹⁴⁷ the Slovenian Foreign Ministry stated that "Slovenia's stance is clear and it will not be changed. The agreement on boundary with Croatia was initialed and we stand by this."¹⁴⁸ If such conflicting positions remain, Croatia and Slovenia will likely soon revert to the deadlocked stage they were at prior to the Agreement. Thus, the two countries should seek another mutually-acceptable solution. Failure to do so will probably result in the resolution of the dispute by a judicial or arbitral body, a course that both countries would prefer to avoid. Accordingly, the analysis of the current agreement, as well as of the possibility for alternative solutions, is discussed below.

---

trgovati teritorijama sa Slovenijom po načelu "svoje za svoje" [Croatia Cannot Trade Territories with Slovenia on the Principle "Ours for Ours"], VJESNIK June 16, 2001, at 3.

143. *New Negotiations*, *supra* note 10, at 3.

144. Especially damaging were the constant accusations by the opposition that the Government "gave ours to receive what had already been ours." See, e.g., Ilija Šarić and Gordana Dujčić, *Presedan pod maskom demokracije [Precedent under a Mask of Democracy]*, DOM I SVIJET, Sep. 24, 2001, available at <http://www.hic.hr/dom/353/dom02.htm> (last visited Jan. 30, 2003). For accusations that Slovenia pressured Croatia into accepting the Agreement by threatening to involve EU diplomats, see *Inflation of Agreements*, *supra* note 140, at 4.

145. *Inflation of Agreements*, *supra* note 140, at 4.

146. *Are Additional Negotiations Possible?* *supra* note 137, at 5.

147. *New Negotiations*, *supra* note 10, at 3.

148. *Id.* (quoting Nataša Prah, the spokesperson for the Ministry of Foreign Affairs of Slovenia).

V. INTERNATIONAL LEGAL ANALYSIS OF THE PROBLEM

A. *Reverting to the Memorandum and the Declaration?*

Despite of its shortcomings and wide rejection in Croatia, the Agreement can certainly be considered as the first step on the way to solving the maritime boundary between Croatia and Slovenia. It is, of course, entirely possible that, should the dispute be taken to an international judicial or arbitral body, the two countries will back away from the positions set out in the Agreement, and adopt their previous positions, as set out in the Slovenian Memorandum and the Croatian Declaration.

It is not, however, entirely necessary to analyze those positions in detail, for several reasons. Primarily, Slovenia's pre-Agreement positions that all of the waters in the Piran Bay should be declared its territorial sea, and that its territorial sea should stretch all the way to the currently-established high seas are probably unsustainable under international law. As for the Bay of Piran question, it is very unlikely that any judicial or arbitral body would deliver an award that would have the effect of extending Slovenia's jurisdiction all the way to the Croatian beaches on the opposite coast.¹⁴⁹ Regarding the second issue, both of the Slovenian proposals that are based on the Memorandum appear clearly unsustainable under international law for one simple reason: the currently-established high seas are more than fourteen nautical miles away from the closest point on the Slovenian coast.¹⁵⁰ Hence, Slovenia's proposals to extend its territorial sea all the way to the point where it would be adjacent to the current high seas is contrary to the LOSC which unequivocally declares that the territorial seas may not extend further than twelve nautical miles from the baselines.¹⁵¹ Slovenia's government and negotiators most likely understand these limitations that international law dictates, which perhaps was one of the reasons why they departed from the Memorandum in the Agreement with Croatia.

The second reason why Slovenia is unlikely to revert to the positions contained in the Memorandum is that its government and the public are more than satisfied with the Agreement,¹⁵² so there is little reason to insist

---

149. For the discussion of historic title and special circumstances, see Part V(B) *infra*.

150. *Delimitation*, *supra* note 12, at 959. Slovenia does not have, and in all likelihood cannot claim, any baselines that would extend the line from which the breadth of the territorial sea is measured.

151. LOSC, *supra* note 2, art. 3. Again, the normal baselines, that is, the low water line along the coast will probably have to be used, as Slovenia could not claim any other baselines. See *id.* art. 5.

152. For the discussion of how favorably the Slovene fishermen look upon the

on the more stringent Memorandum demands, especially in light of its deficiencies under international law. Whether Croatia will adopt the position from its Parliament's Declaration, however, is an entirely different question. Almost no one in Croatia, apart from the Prime Minister Račan's Government immediately following the initialing, has offered any praise for the Agreement, causing an atmosphere that almost dictates that any argument before a third body be concentrated on the demands that the line of equidistance be used.¹⁵³ Moreover, it is questionable whether any independent body decision could possibly be less beneficial than the Agreement for Croatia, which may motivate Croatian representatives to argue for the best solution possible – that is for the line of equidistance.¹⁵⁴ The merits of any such approach will be considered along with analyzing the Agreement's relation to international law.

B. The Agreement and International Law

i.) Legality of the Negotiated Agreement

It is undisputed that maritime delimitation has an international character, and that its validity must be appraised in terms of international law.¹⁵⁵ This rule notwithstanding, governments can, if they so desire, depart from legal considerations and adopt any boundary line that is agreeable to them. Indeed, the ICJ has declared that "it is well understood that, in practice, rules of international law can, by agreement, be derogated

---

Agreement, *see Fisherman Victim*, *supra* note 139. Also, for the Slovenian Government's praise of the Agreement, *see* Slovene Press Agency, *Press Release: Slovene and Croatian Governments Pass Draft Agreements on State Border and N-Plant*, July 20, 2001, available at http://www.uvi.si/eng/new/press/data/press/2001-07-20_2001-07-20-094308.html (last visited Jan. 30, 2003).

153. Indeed, as noted *supra*, only condemnation of the Agreement has emanated from the Parliament, the press, public, and noted academics. For a veiled opposition to any line other than equidistance, *see* the interview with Croatia's foremost international law expert, Vladimir Ibler, in Mihailo Nićota, *Popusti li Hrvatska na moru, izgubit će i dio istarskog kopna* [Should Croatia Acquiesce on the Sea, it will Lose a Portion of the Istrian Land], *VJESNIK*, June 6, 1999, at 5, available at <http://www.vjesnik.com/html/1999/06/06/Clanak.asp?r=unu&c=4> (last visited Jan. 15, 2003). Professor Ibler argues that should Croatia "give in" to Slovenian demands, it would risk losing its land territory bordering the Bay of Piran. *Id.* While this argument has little merit, it has created fears among the public, and thereby the politicians.

154. By "beneficial" and the "best solution," it is solely the boundary issue that is considered here. That is, no other considerations such as economic, EU relations, etc. are given weight considering that they would probably not matter extensively unless a negotiated solution is reached.

155. *See Fisheries Case (U.K. v. Nor.)*, 1951 I.C.J. 116, 118 (Dec. 18).

from. . . .¹⁵⁶ Hence, states enjoy complete contractual freedom in making boundary agreements between them. For that purpose, they may choose any delimitation method they wish, a combination of methods, or no method at all, but simply draw a boundary that is most satisfactory to both of them. Indeed, a number of negotiated boundary agreements are silent as to the methods employed, emphasizing only the joint desire of the parties to reach an agreeable solution.

Moreover, when international judicial bodies are asked to provide advisory opinions, or even when courts issue rulings, states are at liberty to disregard such advice or decisions in their subsequent negotiations. For example, the agreements concluded between Germany and its neighbors following the ICJ's *North Sea* judgment rest primarily on economic and convenience considerations not connected to the Court's legal guidelines.¹⁵⁷ The Court has indeed upheld states' rights to depart from its decisions, declaring that "they may . . . still reach mutual agreement upon a delimitation that does not correspond to the decision,"¹⁵⁸ and that "their accord will constitute an instrument superseding their Special Agreement."¹⁵⁹

Hence, the validity of the Croatian-Slovenian Agreement cannot be questioned under international law. This, however, does not at all indicate that a judicial or arbitral body is bound by this, or any other, agreement in any way. On the contrary, such bodies must maintain the "objective legal reasoning,"¹⁶⁰ and must apply "justice according to the rule of law,"¹⁶¹ rather than "justice" as it may be viewed by negotiating states. Indeed, states may take into their negotiations a number of factors unrelated to the legal settlement of the dispute, such as political, economic, or any other,¹⁶² but "although there may be no legal limit to the considerations which States may take account of, this can hardly be true for a court. . . ."¹⁶³ Hence, the

---

156. *North Sea Continental Shelf Cases* (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, para. 59 (Feb. 20).

157. See MARITIME DELIMITATION, *supra* note 1, at 112–13.

158. *Id.* at 113 (quoting the Application for Revision and Interpretation of the Judgment of 24 February 1982, 1985 I.C.J. 219).

159. MARITIME DELIMITATION, *supra* note 1, at 113. The parties were committed through a Special Agreement to effect the delimitation in accordance with the rules handed down by the Court, but later departed from those rules. *Id.*

160. *Guinea/Guinea-Bissau Award*, *supra* note 91, at 294, para. 102.

161. *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, 1985 I.C.J. 13, para. 48 (June 3).

162. This, indeed, may have been the case for the purposes of the Croatian-Slovenian Agreement, at least if the some of the Croatian media accounts are correct, but also given the statements by the Croatian government. See *supra* notes 137–47 and accompanying text.

163. *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, 1985 I.C.J. 13, para. 48 (June 3).

legality of the negotiated Agreement notwithstanding, it is necessary to analyze the legal implications of its provisions if the dispute were to be presented to a judicial or an arbitral body.

ii.) *Legality of the Agreement's Provisions when Determined by a Third Body*

It must be noted from the outset that several of the Agreement's provisions are unprecedented, both as a matter of state practice and international law. The question of the delimitation in the Bay of Piran itself is not overly controversial, despite the fact that one state (Slovenia) receives eighty-percent of its waters as its territorial sea. The real controversy, however, emerges when the questions of the high seas corridor, and especially Croatia's triangle of territorial sea not bordered anywhere by its coast or any other part of its territorial sea, are considered. Finally, the fact that Slovenia receives a substantial portion of waters for its territorial sea, to which it would not be entitled to if the method of equidistance were used, is not without controversy either. These three issues will be considered in turn.

As for the Bay of Piran, it must be reiterated that, in territorial sea delimitation, the line of equidistance should not be used when historic title or other special circumstances dictate otherwise.¹⁶⁴ With regards to the existence of special circumstances, Slovenia's claim that such circumstances exist, is not, to be sure, entirely without merit. Primarily, it is an undisputed fact that it is only the Slovenian side of the Bay that has ever been significantly populated, so the waters have been more extensively used by the Slovenian population.¹⁶⁵ Moreover, it appears that in the last years of the existence of the former Yugoslavia, Slovenia's police exercised control over the entire Bay.¹⁶⁶ This is not without significant importance because the Badinter Commission, an arbitration commission for issues emanating from the dissolution of Yugoslavia, including boundary issues, decided that the principle of *uti possidetis* "applies to the republican borders of Yugoslavia in the context of its current dissolution."¹⁶⁷ Hence, Croatia's claims that it exercised jurisdiction and control within the Bay up

---

164. LOSC, *supra* note 2, art. 15.

165. See *Fisherman Victim*, *supra* note 139.

166. Marija Pulić, *Treba li Sabor poduprijeti ugovor o razgraničenju sa Slovenijom? [Should the Parliament Support the Delimitation Agreement with Slovenia?]*, ARENA, Aug. 2, 2001, available at http://www.franic.info/arena_20010802.htm (last visited Jan. 30, 2003).

167. *Badinter Commission Opinion 3*, reprinted in 3 EUR.J.INT'L.L. 182, 184-85 (1992).

to the line of equidistance for much of the life of the Yugoslav federation may not be as important as the fact that Slovenia's control over the entire Bay may have been present in the years leading up to the independence of the two republics.¹⁶⁸

Whether special circumstances warranting a departure from the equidistance method indeed existed is, hence, a factual question, and cannot be answered with certainty in this article. It is sufficient to state that there is at least a potential that such circumstances existed, and that Slovenia may be entitled to some portion of the Bay beyond the line of equidistance, although it is questionable whether any such special circumstances demand that as much as eighty percent of the Bay's waters are awarded to Slovenia.

With respect to historic title of the Bay, Slovenia's claim stands on weaker grounds. The LOSC defines the status of bays, but its relevant provisions apply "only to bays the coasts of which belong to a single State,"¹⁶⁹ and also do not apply to "so-called "historic" bays."¹⁷⁰ As a result, Slovenia may depart from the LOSC, arguing that the Bay of Piran should be declared a "historic bay," a designation which could allow it to claim all of its waters. Any such argument, however, possesses little merit. The U.N. General Assembly prepared a Memorandum on historic bays,¹⁷¹ which states that in order for a bay to have a "historic" status, a state must effectively and continuously maintain its sovereignty for a significant period of time, that the state officially made a "historic bay" claim, that it is evident from the practice of other states that they have accepted this designation, and that the entire coast surrounding the bay belongs to only one country.¹⁷² Considering that all of the requirements must be met for a bay to be declared historic,¹⁷³ the mere fact that the coasts of the Bay of Piran belong to two states indicates that Slovenia's position that the Bay should be considered a historic bay is probably unattainable. Again, this

---

168. On the other hand, a documentary video filmed by a Serbian television station in 1988, three years prior to the demise of Yugoslavia, shows a Slovenian police officer explain to a Yugoslav Army officer (also of Slovenian nationality) that an Italian fishing boat must be towed to Umag (on the Croatian coast), and not to Piran (on the Slovenian side) because it was caught fishing "in the Croatian territorial waters" within the Bay. See *Delimitation*, *supra* note 12, at 965-66 (quoting the conversation from *Videozapis televizije Novi Sad namijenjen češkoj nacionalnoj manjini o uhićenju talijanskog ribarskog broda Pantera Prima* [Video of the Novi Sad Television Geared toward the Czech National Minority Regarding the Arrest of the Italian Fishing Boat Pantera Prima], July 8, 1988).

169. LOSC, *supra* note 2, art. 10(1).

170. *Id.* art. 10(6).

171. The General Assembly Memorandum Concerning Historic Bays, A/CONF.13/1.

172. *Id.*

173. *Id.*

carries little importance in light of the fact that special circumstances may exist that would allow Slovenia to claim a larger portion, if not the entire Bay, and that Croatia is probably willing to accept a line other than that of equidistance within the Bay of Piran itself.

The larger questions, however, loom when the issue of the corridor to the high seas is analyzed. As was already noted, states are free to delimit their territorial seas as they wish, so the declaration of one part of the sea as the high seas is not invalid under international law, whether that decision is based on considerations of giving another state access to the high seas, or simply limiting the breadth of territorial sea. It is an entirely different question, however, whether a judicial or arbitral body would make such a determination.

To be sure, the practice of states indicates that corridors to the high seas are not a novel concept, especially when their purpose is to grant to a coastal state access to the high seas from its territorial sea which it would not have if a line of equidistance were employed. So, for example, France and Monaco concluded an agreement in 1984¹⁷⁴ delimiting their territorial seas in a way that provides Monaco with a corridor to the high seas. The agreement came about because, after the territorial seas of the two countries were enlarged from three to twelve nautical miles, an equidistance line would have resulted in cutting off the Monegasque territorial sea from the high seas, as well as in converging boundary lines that intersect less than twelve miles from Monaco. In order to avoid this scenario, the two countries agreed to attribute to Monaco a full twelve mile corridor of territorial sea, not following any particular method of delimitation, and a further corridor of continental shelf, to which it would not have been entitled either had the equidistance method been used.¹⁷⁵

---

174. Maritime Delimitation Agreement between the Government of His Most Serene Highness the Prince of Monaco and the Government of the French Republic, Feb. 16, 1984, Fr.-Monaco, *reprinted in* 9 L.O.S. Bull. 58 (1987) [hereinafter France-Monaco Agreement].

175. *Id.* The method of delimitation, in fact, did not even use Monaco's coastline as the base because, if it had, the corridor would have continued toward the Italian territorial sea, and no access to the high seas would have been possible. *Id.* Equidistance was only used in closing Monaco's continental shelf corridor, as the line that closes it is equidistant from the coasts of Monaco and the French island of Corsica. *Id.* See also Map Exhibit D. Reproduced with the permission of the American Society of International Law (© American Society of International Law, 1993).

Map Exhibit D

MAP Exhibit E

This agreement was not unprecedented, however. The Gambia and Senegal agreed in 1975¹⁷⁶ to use the parallels of latitude instead of equidistance in order to avoid the cut-off of The Gambian maritime area, including its territorial sea, from the high seas.¹⁷⁷ The circumstances of this agreement are very similar to those found in the France-Monaco case. Just like Monaco, The Gambia is bordered by the sea on one side, and by another country (Senegal) on the other three sides. The projections of the Senegalese coast would, as a result, cut off The Gambia's maritime areas from the high seas if the line of equidistance were used (although, unlike with Monaco, The Gambia would have retained full twelve miles of territorial sea). The agreement avoids this scenario by giving The Gambia a corridor to the high seas.¹⁷⁸

The existence of these precedents notwithstanding, three important factors must be noted. Primarily, these precedents do not seem to have been warranted by international law. Indeed, it has been noted that Monaco's cut-off, as disadvantageous as it was, was not explicitly

176. Agreement between The Gambia and the Republic of Senegal, June 4, 1975, Gam.-Sen., available at <http://www.law.fsu.edu/library/collection/LimitsinSeas/Is085.pdf> (last visited Jan. 30, 2003) [hereinafter The Gambia-Senegal Agreement].

177. *Id.* See also Map Exhibit E. Reproduced with the permission of the American Society of International Law (© American Society of International Law, 1993).

178. The Agreement did not distinguish between different zones of jurisdiction, and may, hence, be considered to have created an all-purpose boundary. No outer limit to the boundaries is specified in the delimitation. Gambia-Senegal Agreement, *supra* note 176.

prohibited by international law.¹⁷⁹ The second, and perhaps more important factor, is that none of the sides to either of the agreements asserted rights under international law, and all were instead motivated by desires to strengthen and improve relations with their neighbors. For example, the France-Monaco Agreement expressly mentions the "privileged relations of friendship" existing between the two countries,¹⁸⁰ and the French rapporteur stated before the French Senate that "because of the tight and exceptional nature of the French-Monegasque relations, France has accepted provisions that the rules of international law did not oblige it to accept."¹⁸¹ As for Gambia and Senegal, the two countries also avoided international law claims, and were instead motivated by an effort to establish and maintain favorable conditions for development and cooperation between them.¹⁸²

Finally, the third factor is as important, if not more so, as the second. Both Monaco and Gambia were bordered on three sides by another state, France and Senegal respectively. This allowed for the agreements to grant them corridors to the high seas without at the same time effecting cut-off of the territorial seas of the other states. While both France and Senegal lost portions of their maritime areas to which they would have been entitled under the method of equidistance, they nonetheless retained an uninterrupted access to all of their remaining territorial seas directly from their coasts.¹⁸³ Given the nature of the boundary between Croatia and Slovenia, however, Slovenia cannot achieve a corridor to the high seas without either cutting-off a portion of the Croatian territorial seas from its territorial seas directly adjacent to its coast, or eliminating Croatia's territorial sea boundary with Italy, something that Croatia is probably not willing to lose.

These two precedents, hence, should not be viewed in light of international law, but rather in political and diplomatic terms. The question that remains, then, is whether an international judicial or arbitral body would reach the same or similar conclusion as that contained in the Agreement between Croatia and Slovenia. The answer is difficult to predict, but some light can be shed by examining the relevant principles.

Slovenia insists that the line of equidistance should not be used because special circumstances exist that warrant a departure from that line.

---

179. JONATHAN CHARNEY AND LEWIS ALEXANDER, INTERNATIONAL MARITIME BOUNDARIES 1584 (Vol. 2, 1993) [hereinafter INTERNATIONAL MARITIME BOUNDARIES].

180. France-Monaco Agreement, *supra* note 174, preamble.

181. INTERNATIONAL MARITIME BOUNDARIES, *supra* note 179, at 1582 (quoting the Records of the meeting of the French Senate of June 26, 1985).

182. Gambia-Senegal Agreement, *supra* note 176, preamble.

183. See Map Exhibits D & E.

Slovenia's argument, in short, is that the existence of special circumstances dictates both the establishment of a corridor to the high seas, but also enlargement of its territorial sea beyond what the country would be entitled to if the equidistance method were employed. The rule of special circumstances as it relates to territorial sea delimitation is probably among the least developed in the body of international law of the sea. Not only does the LOSC fail to provide any guidance as to what those special circumstances may be,¹⁸⁴ but, due to the fact that it is seldom litigated or arbitrated, the world of territorial sea delimitation has not produced any substantial body of case law. This article does not attempt to offer a contribution to the debate as to what kinds of circumstances warrant a designation as "special" circumstances. Instead, only those circumstances that pertain to the dispute at hand will be considered and analyzed, and a conclusion will be reached as to whether they, in this particular context, do indeed constitute "special circumstances."

As to Slovenia's desire to have an access to the high seas, the arguments contained in the Memorandum indicate that the special circumstances that warrant such a solution are the freedom to fish, the freedom to navigate, and Slovenia's position as a geographically-disadvantaged state.¹⁸⁵ With respect to the first two issues, the Memorandum declares that the:

access to the high seas would enable . . . Slovenia to continue an uninterrupted exercise of its internationally-recognized right to fish in the high seas in the Adriatic, and would prevent further fishing incidents. This is the only way to enable . . . Slovenia to retain the basis to exercise its right to communicate with the world, the right which it always had, and which is one of the basic rights of every sovereign state.¹⁸⁶

As previously noted, however, the right to fish on the high seas is a right that is well established in international law, both its customary component, but also as codified through the LOSC.¹⁸⁷ The exercise of this right does

---

184. The LOSC only declares that equidistance shall not be used when special circumstances exist. See LOSC, *supra* note 2, art. 15.

185. *Delimitation*, *supra* note 12, at 954 (citing the Croatian translation of the Memorandum). While it cannot be predicted what the official Slovenian position would be in any arbitration or litigation, it must be reiterated that the Memorandum, having been adopted by the Slovenian Parliament, is the most official articulation of the Slovenian position to date.

186. *Id.* at 955 (citing the Croatian translation of the Memorandum).

187. LOSC, *supra* note 2, art. 87(1)(e).

not depend on any corridor to the high seas, and all states, coastal and landlocked,¹⁸⁸ enjoy the right to fish on the high seas. Hence, separation of Slovenia's territorial sea from the high seas would not diminish Slovenia's indubitable right to fish.

As far as access to the high seas and the related concept of freedom of navigation are concerned, it has already been explained, and need not be repeated here, that the ships of all states enjoy the right of innocent passage through the territorial seas of other states.¹⁸⁹ It is true that coastal states may regulate passage through their territorial seas, but only for limited purposes and with no discrimination against the ships of any one state. That Slovenian ships would have to abide by any such regulations while traversing Croatia's territorial sea on their way to the high seas is a matter of substantial concern, but probably does not rise to the level of special circumstances under the international law of the sea. However, while international law does not appear to mandate the establishment of a corridor connecting Slovenia's territorial sea with the high seas for the purposes of preserving Slovenia's fishing and navigational rights, Slovenia's concerns cannot be lightly dismissed.

As far as the Memorandum's characterization of Slovenia as a geographically-disadvantaged state is concerned, Slovenia undoubtedly meets the definition of such states contained in the LOSC.¹⁹⁰ However, the only rights that geographically-disadvantaged states may receive pertain solely to the EEZ, and not to territorial seas or the high seas, especially with respect to delimitation. Indeed, the LOSC grants these states only "the right to participate . . . in the exploitation of an appropriate part of the surplus of the living resources of the exclusive economic zones of coastal States of the same subregion or region."¹⁹¹ Again, no state bordering on the Adriatic Sea has declared an EEZ in that sea, so the middle part of the Adriatic continues to have the status of the high seas.¹⁹² The only right that Slovenia has under its status as a geographically-disadvantaged state cannot, hence, be exercised in the Adriatic due to the absence of an EEZ of any state there. Furthermore, it appears that no judicial or arbitral decision

---

188. *Id.* art. 87(1).

189. *Id.* art. 17.

190. "[G]eographically disadvantaged States" means coastal States, including States bordering enclosed or semi-enclosed seas, whose geographical situation makes them dependent upon the exploitation of the living resources of the exclusive economic zones of other States in the subregion or region for adequate supplies of fish for the nutritional purposes of their populations or parts thereof, and coastal States which can claim no exclusive economic zones of their own. *Id.* art. 70(2).

191. *Id.* art. 70(1).

192. *Delimitation*, *supra* note 12, at 967.

pertaining to the delimitation of the territorial sea has ever taken the geographically-disadvantaged status into account when making a decision. In light of the aforementioned analyses, it appears that a judicial or arbitral body called upon to decide the dispute between Croatia and Slovenia would probably not favor the creation of a corridor that would give Slovenia access to the high seas, especially if any such corridor had the effect of compartmentalizing a portion of Croatia's territorial sea into a triangle that does not touch Croatia's coast or any other portion of its territorial sea.

Finally, the third issue regarding the Agreement stems from the fact that Slovenia receives a substantial portion of territorial sea which it would not be entitled to if the line of equidistance were used. What is especially peculiar about this fact is that such enlargement of Slovenia's territorial sea is not even necessary for the establishment of a corridor, as any such corridor could simply extend further north until it reached Slovenia's territorial sea that Slovenia would receive following the method of equidistance. Indeed, a map that would establish such an arrangement is the only kind that could have been discovered in the Croatian media immediately following the Agreement,¹⁹³ so the question remains as to whether the Croatian Government purposefully provided a wrong map in order to deflect even greater criticism.¹⁹⁴

This issue, however, is not as controversial as that of the corridor. It can be argued that the principle of non-encroachment dictates that equidistance not be used in the Bay of Trieste when delimiting Croatian and Slovenian territorial seas. The principle of non-encroachment is well-established in international law, and it aims to ensure that a delimitation line does not have the effect of cutting-off one of the states from part of its maritime projection. Or, in the words of the ICJ:

the use of the equidistance method would frequently cause areas which are the natural prolongation or extension of the territory of one State to be attributed to another when the configuration of the latter's coast makes the equidistance line swing out laterally across the former's coastal front, cutting it off from areas situated directly before that front.¹⁹⁵

---

193. See Marko Barišić, *Što dobiva Hrvatska u zamjenu za odricanje od dijela svoga teritorija* [What does Croatia Receive in Return for Relinquishing a Part of its Territory], VJESNIK, July 21, 2001, map, at 3.

194. It is, indeed, evident that the map appearing in the Croatian media is incorrect. Primarily, Map Exhibit C depicts the official map appended to the Agreement. Furthermore, by comparing the coordinates contained in the Agreement, it is evident that the map found in the Croatian media sources does not correspond to those coordinates.

195. North Sea Continental Shelf Cases, (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J.

It is questionable whether the line of equidistance would have this effect on Slovenia, but the argument can be made that such a line is situated directly before at least a portion of its coast.¹⁹⁶ This issue is also not overly controversial because it involves a relatively small area which Croatia can probably afford to cede to Slovenia in the interest of good neighborly relations, and without a significant public opposition.

VI. BRIDGING THE GULF:

RECOMMENDATIONS FOR A NEGOTIATED SOLUTION

A. Potential Likelihood for a Diplomatic Settlement

In light of the preceding analysis, it can probably be argued that the likelihood of an independent tribunal handing down an award as favorable to Slovenia as the provisions of the Agreement, is very low. It should not be assumed, however, that this conclusion will lead Croatia to submit the dispute to a third body. While it may well be true that Croatia stands to gain substantially in any such litigation or arbitration, those gains would correspond to the territorial sea boundary only, and would not include any political, economic, or other gains that may be obtained through an agreement. Moreover, any dispute before a third body would be certain to bring Croatia's relations with its probably most important neighbor to a very low point indeed. Thus, potential for a negotiated settlement continues to exist despite the fact that the Agreement in its current form will probably not constitute such a settlement. While compromises must be made by both sides, the interests of both states dictate that the dispute be resolved amicably through negotiations. Indeed, Slovenia is probably eager to avoid a mediated or litigated solution because the results of any such solution would likely be detrimental to its primary interests, while Croatia, although in a better position in terms of international law, needs to preserve friendly and cooperative relations with Slovenia in order to advance its European integration ambitions.

3, para. 44 (Feb. 20).

196. See Map Exhibit B. Any encroachment that may be present here, however, is not nearly as evident as that which was present in the dispute between Guinea and Guinea-Bissau. See *Guinea/Guinea-Bissau Award*, *supra* note 91.

*B. Gunboat or Fishing Boat Diplomacy?:
Defining the Two States' Objectives*

In order for the two countries to reach an agreement, they must acknowledge their mutual concerns, and take them into account when presenting their respective positions. Reduced to the basics, the two countries' primary objectives are as follows: In the Bay of Piran, Slovenia is willing to forego its initial claim to the entire maritime area of the Bay, but it refuses to accept the line of equidistance. As a result, Slovenia is adamant about receiving at least eighty percent of the Bay's waters, and this request can probably be accommodated considering the fact that Croatia is willing to cede some area in the Bay beyond the line of equidistance. As for the boundary line further in the Bay of Trieste, Slovenia wishes to receive an additional patch of territorial sea to which it would not be entitled if the line of equidistance were employed, but its overarching objective is that its territorial seas touch upon the high seas "at least in a narrow region."¹⁹⁷

As for Croatia, its primary objectives are probably largely political, economic and strategic in nature, and are secondary to the actual place of the maritime boundary with Slovenia. Hence, Croatia is probably more interested in achieving an amicable solution that is satisfactory to Slovenia, which would lead to gains in other fields, than in preserving all of the rights to which it is arguably entitled under the terms of the international law of the sea. However, the political, economic, and strategic objectives that Croatia hopes to achieve by offering concessions to Slovenia will be largely frustrated if such concessions are not limited at least to a certain extent. This is so because these objectives can be achieved only by striking a careful balance between accommodating Slovenia's objectives on the one hand, and taking into account Croatia's concerns on the other. Hence, any solution must also take into account the political opposition in Croatia, security concerns associated with relinquishing a portion of the territorial sea so close to the Croatian coast, and the strategic issue of preserving Croatia's territorial sea boundary with Italy.

Thus, in order to reach a solution that is satisfactory to both sides to the dispute, the following recommendations are in order. Primarily, Croatia should be sensitive to the Slovenian demands for an access to the high seas, and the opposition politicians, as well as the media and the public should understand their legitimacy, rather than continue to view them as unwarranted concessions on Croatia's part. It is, indeed, debatable whether the

---

197. *Delimitation*, *supra* note 12, at 954-55 (citing the Croatian translation of the Memorandum).

Slovenian demands for a high seas corridor are exclusively grounded in matters of convenience rather than tangible concerns.¹⁹⁸ It is technically correct that fishing and navigational rights can be exercised almost as effectively by traversing another country's territorial seas as by accessing the high seas directly. However, countries enjoy significant sovereign rights in their territorial seas, and it is at least possible that Croatia could attempt, at some future point, to use those rights to the fullest extent, or even abuse them at the expense of the Slovenian ships traversing Croatia's territorial seas.¹⁹⁹ The only recourse available to Slovenia in such a situation would be costly, protracted, and uncertain proceedings against Croatia before international legal institutions, causing Slovenia's fishing, shipping, and other interests to suffer during any such period.

Enabling Slovenia to reach the high seas without traversing Croatia's territorial seas, on the other hand, would entirely eliminate the possibilities

---

198. The importance of being able to reach the high seas without traversing the territorial seas of other states cannot be dismissed as an issue of convenience, as opposed to a tangible concern, in light of the relevant precedents and state practice. Monaco, for example, was concerned about being able to reach the high seas without having to cross France's territorial seas, despite the exceptionally friendly nature of relations between the two countries. Moreover, much of the ongoing territorial dispute between Belize and Guatemala has focused on the Guatemalan demands for access to the high seas. This factor even caused Belize to limit the breadth of its territorial sea in the area bordering Guatemala to three nautical miles in order to provide a framework for a definitive boundary solution with Guatemala. See <http://www.cdera.org/Countries/belize.htm> (last visited Feb. 2, 2003). See also http://www.belize-guatemala.gov.bz/belize_position.html#2 (last visited Feb. 2, 2003). The difference between the Belize-Guatemala and the France-Monaco cases on the one hand, and Croatia-Slovenia on the other, is that the latter case is considerably more difficult to resolve if all of the major objectives of both states are to be met. The complexity of the problem, however, does not indicate that Slovenia's demands for access to the high seas are any less justified than those of Monaco or Guatemala.

199. The vague wording of the LOSC could allow Croatia to harass ships going to and from Slovenia's ports by, for example, claiming that such ships are not engaged in passage, see LOSC, *supra* note 2, art. 18, claiming that they are engaged in passage that is not innocent, see *id.* arts. 19 & 25, or arresting a ship by using one or more LOSC arrest authorizations, see *id.* arts. 27-28. Additionally, Croatia could order Slovenia's warships to leave its territorial sea by claiming that they are not complying with Croatia's "laws and regulations." See *id.* art. 30. Croatia's approach toward military vessels is particularly troubling. As recently as 1998, the U.S. Navy conducted operational assertions in Croatia's territorial sea, challenging Croatia's requirement that foreign military ships obtain permission prior to entering its territorial sea. See http://www.defenselink.mil/execsec/adr1999/apdx_i.html (last visited Mar. 22, 2003). Croatia is one of only thirteen countries that made this clearly excessive claim, forcing the U.S. Navy to challenge it. Among the other twelve states are such unsavory regimes as Yemen, Vietnam, Syria, Sudan, Somalia, United Arab Emirates, and Iran. *Id.* Although the undemocratic rule of Croatia's President Franjo Tudjman is now a thing of the past, this precedent helps to illustrate why Slovenia is wary of having to traverse Croatia's territorial sea on the way to the high seas.

for such abuses. Indeed, it is the potential for such abuses, not the peripheral advantages, that has largely motivated Slovenia's calls for a high seas corridor. One such peripheral advantage that a *high seas* corridor would provide would be an additional patch of sea in which Slovenia's fishermen could fish. Slovenia, however, probably does not even view this as a considerable advantage, considering the fact that a corridor is meant to be just that: portion of the sea used for navigation leading to and from Slovenia's territorial seas. Moreover, the relatively small size of the corridor minimizes this peripheral advantage even further. Although not articulated by Slovenia, and understandably so, an additional factor that must nonetheless be considered concerns the issues of sovereignty, national pride, and a desire to be a full-fledged coastal state.²⁰⁰ These are likely among Slovenia's primary concerns, and while its ability to sail its warships and submarines, or fly its airplanes in any way it desires²⁰¹ has little practical effect in the region flanked by NATO and the EU countries, symbolic effects of possessing such rights cannot be discounted.

As for Croatia's concerns, the public outcry over the Agreement appears justified at least in some respects, particularly when it is considered that international law appears to operate in favor of Croatia's original positions. Perhaps the thorniest issues are the existence of a high seas corridor and a small triangular patch of the Croatian territorial sea not connected to the rest of Croatia's territorial waters. These concerns, to be sure, cannot be dismissed. As for the corridor, the Agreement transforms a portion of the Croatian territorial sea so close to the Croatian coast into an area where the ships of *all* nations have almost *unlimited* rights, including the right to fish, exploit submerged resources, erect research and exploration platforms, conduct military exercises, etc.²⁰² While it may be the intention of both Croatia and Slovenia to treat the area in question primarily as a corridor, they must understand that the international law will

---

200. Although never officially articulated as an overarching interest, this factor has very often been emphasized by Slovenia's officials. For example, the Slovenian Prime Minister, commenting on the Agreement shortly after it was initialed, stated that the Agreement confirms Slovenia's "position as a maritime state . . . allowing it to reemphasize its sovereignty, and to ensure additional stability and security." Mihailo Nicota, *Slovenija prvi put dobiva izlaz na otvoreno more* [Slovenia Gains Access to the High Seas for the First Time], VJESNIK, July 21, 2001, at 3.

201. This cannot be done in or over the territorial sea of another country. See LOSC, *supra* note 2, art. 17-20.

202. These scenarios are not very likely, to be sure, but the effect of their hypothetical existence on a country's psyche cannot be discounted. Moreover, while the scenarios appear unlikely at the moment, a change in geopolitical circumstances could make this high seas corridor a very troublesome area for Croatia, but also for Italy, and even for Slovenia.

view the area as the *high seas* first and the corridor second, at least as far as third states are concerned.

Moreover, with respect to the triangle of Croatia's territorial sea, it is very debatable whether Croatia could continue to exercise sovereign rights over that area in the absence of recognition by other states. Indeed, international law confers upon a coastal state "a legal title to a maritime zone *adjacent* to its coasts."²⁰³ Moreover, the LOSC declares that "[t]he sovereignty of a coastal State extends, beyond its land territory and internal waters . . . to an adjacent belt of sea, described as the territorial sea."²⁰⁴ It is, then, at least foreseeable that other countries would be entitled to ignore Croatia's exercise of sovereignty in the triangle area, arguing that international law does not recognize as territorial sea any waters which are not adjacent to the coast. This could have the effect of extending the high seas designation from the corridor into the triangle, at least for the purposes of third states that might wish to extend such a designation.²⁰⁵ This possibility is particularly likely when it is considered that, as best as can be determined, there exists no precedent of a country claiming as territorial seas waters that nowhere touch upon the rest of its territorial sea. Naturally, this problem would not exist if the necessity for retaining Croatia's territorial sea boundary with Italy could be addressed in some other way. In such a case, the high seas corridor could simply be adjacent to the Italian territorial sea, leaving the Croatian territorial sea as a contiguous unit. That fact notwithstanding, it has been made abundantly clear by Croatia's officials that they do not wish to even contemplate the possibility of losing the territorial sea boundary with Italy, both in order to preserve its sole border with an EU country, but also in order to avoid any potential usurpation of the Treaty of Osimo.²⁰⁶

---

203. Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1984 I.C.J. 246, para. 103 (Oct. 12) (italics in original).

204. LOSC, *supra* note 2, art. 2(1).

205. Slovenia, of course, would not be entitled to make such a claim because the Agreement would preclude it from doing so. The Agreement, however, would be binding on Croatia and Slovenia only, and would have no legal effect on other states that might, for one reason or another, wish to usurp Croatia's claim to the triangle area.

206. While the desire to preserve a border with an EU state is largely motivated by symbolic considerations, the usurpation of the Treaty of Osimo is a more tangible concern. Were the high seas corridor to be adjacent to the Italian territorial sea, Italy could, theoretically, declare the area its territorial sea because the corridor would lie less than twelve nautical miles from its shores. In making such a claim, Italy could assert that Croatia voluntarily relinquished its rights to the area as given to it by the Treaty of Osimo, and that Italy was free to claim the area for itself, Croatia's and Slovenia's assertion that the corridor constitutes the high seas notwithstanding.

Finally, it must be borne in mind that the boundary with Slovenia is not Croatia's only remaining open boundary question, and any precedents that are established within the context of negotiations with Slovenia may affect the resolution of disputes with other Croatian neighbors. A very serious and ongoing dispute exists with Serbia-Montenegro over the Prevlaka peninsula, Croatia's southernmost point. The land boundary is not the only source of the dispute, as the maritime boundary in this region will also need to be determined. While the Croatian officials have strongly indicated that any solution that is reached in the dispute with Slovenia will not have the slightest bearing on the negotiations with Serbia-Montenegro over Prevlaka,²⁰⁷ it is possible that the Serbian and Montenegrin officials might fortify their positions with a hope that Croatia would be willing to offer concessions similar to those that it agreed to within the context of the dispute with Slovenia. While this possibility, admittedly, is relatively small, the greater problem for the Croatian government concerns the very likely possibility that the public and the opposition will react very strongly against *any* compromises that might be made in the dispute with Serbia-Montenegro, however slight such compromises may be, if the perception remains that Croatia's interests were substantially hurt in the settlement with Slovenia.

C. Striking the Middle Ground: The Adriatic Meets the EEZ

Considering the aforementioned limitations and considerations, and in light of the fact that the Agreement is not likely to be ratified by at least one of the parties, several recommendations for a negotiated solution of the dispute are in order. Primarily, the boundary in the Bay of Piran should probably not follow the equidistance line due to the special circumstances created by the greater Slovenian use of and interests in the Bay, especially considering the Bay's small size. To be sure, it is not only fishing and other rights that Slovenia would exercise in the Bay, but would also bear the responsibility for maintaining its biological and ecological balance, something that can be done more effectively by a single country, especially when such a country has more compelling interests than the other, and when the size in question is so small. This does not mean that Slovenia

---

207. Shortly after the Agreement was initialed, Ivica Račan, Croatia's Prime Minister answered a reporter's question as to whether the settlement with Slovenia might in any way serve as a precedent in solving the dispute over Prevlaka by stating: "it cannot, I say that categorically, hold me to my word." HRT Vijesti, Konferencija za novinare Premijera Ivice Račana [Prime Minister Ivica Račan's Press Conference], July 25, 2001, *available at* <http://www.vlada.hr/racan-press.09.html> (on file with OCLJ).

should be awarded the entire maritime area of the Bay, so that its sovereignty would extend to Croatia's beaches. Rather, the line from the Agreement should either remain, or be slightly modified to address the Croatian concerns that an eighty-twenty division is too drastic.

The additional territorial sea outside of the Bay of Piran that the Agreement gave to Slovenia by deviating from the equidistance method should be awarded to Slovenia in any subsequent negotiations, primarily in order to satisfy the principle of non-encroachment, but also to take into account the relatively small size of Slovenia's territorial sea and the needs of its fishermen and population. As already noted, the additional territorial sea that Slovenia so gains in the Bay of Trieste, to which it would not be entitled if the line of equidistance were used, constitutes a relatively small area, especially as far as Croatia is concerned.²⁰⁸ Moreover, the opposition to the Agreement in Croatia did not focus on the loss of this small patch of sea, but was mostly directed towards the creation of the high seas corridor and its implications for the "triangle" separated from the rest of Croatia's territorial sea. With that in mind, those two thorny issues deserve special attention.

With respect to the corridor, Croatia should understand Slovenia's desire to have an access to the high seas, but Slovenia should also take into account the dangers that creating the high seas in the middle of one country's territorial seas connotes. Considering these two concerns, it would seem natural to propose that Croatia should grant Slovenia an easement, long term or even perpetual, to traverse Croatia's territorial sea on the way to the high seas. It would not be difficult to word any such easement agreement in a way that would provide Slovenia's ships, military and civilian alike, with a right to use certain portions of Croatia's territorial sea as if it was the high seas. Moreover, a comprehensive easement agreement could easily extend such a right to any ships traversing Croatia's territorial sea on the way to or from Slovenia's ports, thereby satisfying Slovenia's objectives to have access to the high seas.

It must, however, be reiterated that Slovenia's primary and overarching objective is not access, but rather a *direct* access to the high seas. For the reasons already discussed, Slovenia is probably not willing to accept any arrangement that would require it to pass through Croatia's territorial sea on the way to the high seas, regardless of any special rights that an easement agreement could confer. In fact, Croatia has offered such an

---

208. The area in question is not larger than 100 square kilometers. See *supra* note 133. In contrast, the total area of Croatia's territorial sea is 23,870 square kilometers large. See <http://www.hr/hrvatska/geography.en.shtml> (last visited Jan. 30, 2003).

option to Slovenia during the negotiations,²⁰⁹ but the Slovenian officials have been adamant in their demands that the territorial sea of Slovenia should "at least in a narrow region touch upon the high seas in the Adriatic."²¹⁰ Indeed, it is not only the psychological concerns associated with having direct access to the high seas that motivate such Slovenian approach, but some tangible legal issues exist as well.²¹¹ Regardless of how carefully any easement agreement may be worded, Croatia would continue to exercise *sovereign* rights in its territorial sea for the purposes of international law, the existence of an easement notwithstanding. Slovenia, hence, would be entitled to very few protections in an easement area under the relevant law of the sea conventions, and its rights would hence be dependent on the continued observation of this hypothetical easement agreement by Croatia. Moreover, a change in economic, political and strategic circumstances could eventually motivate Croatia to erode the rights that an easement might grant to Slovenia, or even to abrogate the easement altogether.

As a result, and in order to satisfy both countries' primary objectives and concerns, a compromise solution must be offered. While it is true that Slovenia is adamant about receiving a *direct* access from its territorial waters to the high seas, the practical side of this objective is that Slovenia wishes to avoid having to traverse the territorial seas of another country as its only way to the high seas. This, to be sure, is a tangible concern. As already discussed, countries enjoy substantial sovereign rights in their territorial waters, and other states are subject to considerable limitations while using those waters, or, as importantly, the air space above them. Croatia, on the other hand, is justifiably concerned about the connotations that the creation of a high seas corridor so close to its shores would entail. Hence, the middle ground between an easement in Croatia's territorial sea and a high seas corridor running through that sea must be found.

Considering that the EEZ is usually the middle ground between the territorial sea and the high seas, it is only appropriate that any middle-ground solution involve that creation. Simply stated, the corridor envisioned in the Agreement should be declared Croatia's EEZ, and the triangle should remain its territorial sea. Before anything further can be said, it must be reiterated that a less complicated solution simply does not exist if all of the primary objectives and concerns of both states are to be

---

209. *Are Additional Negotiations Possible?* *supra* note 137, at 5.

210. *Delimitation*, *supra* note 12, at 954-55 (citing the Croatian translation of the Memorandum). For Slovenia's refusal to accept Croatia's easement offers, *see Are Additional Negotiations Possible?* *supra* note 137, at 5.

211. *See supra* note 199.

met. Without a corridor of some kind, Slovenia cannot reach the high seas without traversing the territorial seas of Italy or Croatia. Unlike with the Monaco-France and the Gambia-Senegal agreements, Croatia, if it wishes to preserve a border with Italy, cannot maintain unity of its territorial sea. Hence, both the corridor and the triangle remain the necessary components of any potential settlement between Croatia and Slovenia, however unprecedented and unorthodox the combination of these two creations may be. Without such a combination, one of the states will be forced to relinquish its main objectives, destroying the possibility for a mutually-acceptable negotiated solution.

Once these factors are taken into account, it becomes readily apparent that the only possibility for an agreement that would be satisfactory to both states involves the creation of a corridor that would constitute Croatia's EEZ, and that would run through the middle of Croatia's territorial sea. In other words, the only major difference between this proposal and the Agreement is that the high seas corridor envisioned in the Agreement would instead be declared an EEZ belonging to Croatia. The triangle of Croatia's territorial sea lying west of that corridor would remain in order to preserve Croatia's territorial sea boundary with Italy. While it is true that this proposal differs from the Agreement in only one respect, the importance and value of that difference cannot be overemphasized. By following this method, Croatia and Slovenia will ensure that both countries' primary objectives and concerns are satisfied, allowing both of them to view the solution as a full-fledged compromise that will not leave either party with a feeling that it had compromised its national interests. As for Croatia, not only will its border with Italy be preserved, but the proposal ensures that third states are not given the possibility to engage in fishing, research, mining, construction, and other activities incompatible with the status of the EEZ²¹² so close to its coast. Slovenia, for its part, will enjoy practically all of the navigational rights in this zone that it would enjoy if the zone were to be considered the high seas.²¹³

Indeed, the legal regime that is applicable in the EEZ provides the coastal states with very limited rights. Conversely, the rights of the third states in this zone are substantial, and most of them cannot be abrogated by the coastal state. Convenient to the dispute at hand is the fact that the rights that coastal states have in their EEZs are sufficient to address Croatia's major concerns, while the rights of the third states in this region are broad enough to satisfy practically all of Slovenia's objectives. The arrangement allows Slovenia to receive far more than it could probably

---

212. LOSC, *supra* note 2, art. 56.

213. *Id.* art. 58.

hope for under arbitration or litigation, while it gives Croatia an opportunity to resolve the dispute with its closest and strategically most important neighbor in an amicable manner.

The LOSC defines the EEZ as "an area beyond and adjacent to the territorial sea."²¹⁴ The sovereign rights of a coastal state in the EEZ are limited to the exploration and exploitation of natural resources,²¹⁵ and jurisdiction with regard to: (i) the establishment and use of artificial islands, installations and structures,²¹⁶ (ii) marine scientific research,²¹⁷ and (iii) the protection and preservation of the marine environment.²¹⁸ In addition, the coastal state has the exclusive right to construct and to authorize and regulate construction and use of artificial islands and other installations in its EEZ.²¹⁹ The coastal state may carry out enforcement measures, but only "in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the EEZ."²²⁰ This includes rights to "determine the allowable catch of the living resources,"²²¹ and jurisdiction over artificial islands or structures "with regard to customs, fiscal, health, safety and immigration laws and regulations."²²² Unlike with the territorial sea, however, the coastal state may not institute or enforce any laws that do not pertain to these limited rights. Moreover, the coastal state is not allowed to impose imprisonment, "or any other form of corporal punishment," for violations of fisheries laws and regulations in the EEZ.²²³

As for the rights of third states in the EEZ, they all enjoy the freedoms of navigation and overflight, the freedom to lay submarine cables and pipelines, as well as "other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines."²²⁴ Hence, the only rights that

---

214. *Id.* art. 55. The implications of this provision for the legal status of the triangle will be discussed *infra*.

215. *Id.* art. 56(1)(a). In the exclusive economic zone, the coastal State has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds.
.. *Id.*

216. LOSC, *supra* note 2, art. 56(1)(b)(i).

217. *Id.* art. 56(1)(b)(ii).

218. *Id.* art. 56(1)(b)(iii).

219. *Id.* art. 60(1).

220. *Id.* art. 73(1).

221. LOSC, *supra* note 2, art. 61(1).

222. *Id.* art. 60(2).

223. *Id.* art. 73(3).

224. *Id.* art. 58(1).

states enjoy on the high seas but not in the EEZ of another state involve freedom to construct artificial islands, freedom to fish, and freedom of scientific research.²²⁵ With respect to the corridor, however, the freedoms associated with the EEZ are more than sufficient to satisfy all but the most symbolic Slovenian objectives,²²⁶ while the absence from the EEZ of the additional rights found on the high seas serves to protect not only Croatia's interests, but those of Slovenia as well. As was already noted, the corridor declared the high seas by the Agreement would, for purposes of international law, and as far as third states are concerned, be seen primarily as the high seas. Under LOSC, however, "no State may validly purport to subject any part of the high seas to its sovereignty."²²⁷ The Agreement between Croatia and Slovenia notwithstanding, the ships of all nations would be free to engage in almost any activity they desire,²²⁸ including unlimited fishing, construction, research, and exploration, and there would be nothing that either Croatia or Slovenia could do to stop them.

While it is true that Croatia, should the corridor be declared its EEZ, will be free to engage in these activities itself, it is understood that any effects that one country may produce would likely be far less harmful than those produced by a number of countries, especially when the one country in question is so close to the affected area and probably does not wish to engage in any harmful activity.²²⁹ In fact, Croatia, by having the corridor as its EEZ will be fully able to ensure that no such harmful activities are carried out by third states. Moreover, while Croatia's rights in the EEZ corridor proposed here can be easily restricted in reference to Slovenia by the two countries through a comprehensive agreement on this dispute, the

---

225. *Id.* Compare with the freedom of the high seas as defined in LOSC, *supra* note 2, art. 87(1).

226. Perhaps having a *direct* access to the high seas is important for a country's psyche, but, as will be shown, adequate mechanisms can be employed to ensure that only purely symbolic, and no substantive, interests of Slovenia will suffer.

227. LOSC, *supra* note 2, art. 89.

228. Excluding such limited actions which are prohibited even on the high seas, such as piracy, unauthorized broadcasting, slave trade, illicit drug trade, etc. *Id.* arts. 99–109.

229. For example, were Croatia to construct artificial islands or structures in this corridor, it would be obligated to give "[d]ue notice . . . of the construction," maintain "permanent means for giving warning of their presence, . . . establish reasonable safety zones around such . . . installations," and "take appropriate measures to ensure the safety both of navigation and of the artificial islands, installations and structures." *Id.* art. 60. While similar measures appear to apply for such installations on the high seas, these provisions are far more ambiguous, and their enforcement would be significantly more difficult against third states than it would be against the coastal state in its EEZ. See *id.* art. 87(d), (referring to Part VI of the LOSC, art. 80, which declares that "[a]rticle 60 applies mutatis mutandis to artificial islands, installations and structures on the continental shelf." *Id.* art. 80).

rights of third states in a high seas corridor cannot be limited through an agreement between Croatia and Slovenia.

Indeed, Slovenia's argument that it is a geographically disadvantaged state would carry full weight if the corridor were to be declared Croatia's EEZ. The LOSC grants geographically disadvantaged states, which Slovenia arguably is,²³⁰ "the right to participate, on an equitable basis, in the exploitation of an appropriate part of the surplus of the living resources of the exclusive economic zones of coastal States of the same subregion or region."²³¹ Moreover, the LOSC declares that "the terms and modalities of such participation shall be established by the States concerned through bilateral, subregional or regional agreements."²³² While it may be shown that the corridor area will yield no "surplus of the living resources,"²³³ the LOSC, or international law, does not prevent two states to enter into an agreement that would allow for the sharing of resources even absent any such surplus.²³⁴ Hence, although it is not likely that the corridor would be used for fishing, Croatia and Slovenia may, through a comprehensive agreement, provide that both states will enjoy equal fishing, and perhaps other²³⁵ rights in this EEZ corridor. A practical result of such an agreement would be to grant Slovenia all of the benefits in the corridor that its designation as the high seas would allow, while at the same time allowing Croatia to preclude third states from exercising such rights. The most important Slovenian objectives, such as the freedoms of navigation and overflight over the EEZ corridor, would, of course, be ensured even in the absence of any additional specific arrangements.²³⁶

The only potential problem associated with the proposal raised here concerns the legal status of the Croatian triangle of territorial sea in the event that an EEZ corridor is created. As noted previously, the triangle, necessary to preserve Croatia's territorial sea boundary with Italy, will be separated from the rest of the Croatian territorial sea. The LOSC, again, provides that territorial sea is a belt of sea *adjacent* to a coastal state's land territory.²³⁷ The EEZ, in turn, is defined as "an area beyond and adjacent

---

230. The LOSC defines geographically disadvantaged states as "coastal States . . . which can claim no exclusive economic zones of their own." *Id.* art. 70(2).

231. *Id.* art. 70(1).

232. LOSC, *supra* note 2, art. 70(3).

233. *Id.* art. 70(1).

234. As already discussed, states enjoy complete contractual freedom when making boundary agreements. *See* Part V(B)(i) *supra*.

235. Such as research, exploration, erection of artificial islands and structures, etc.

236. *See* LOSC, *supra* note 2, art. 58(1). This also includes freedom of laying submarine cables and pipelines.

237. *Id.* art. 2(1) (emphasis added).

to the territorial sea.”²³⁸ While it is evident that these provisions do not contemplate an arrangement in which the territorial sea of a coastal state is divided by a belt of the EEZ, it appears to be a much more credible claim that a state has a right to preserve a divided belt of the territorial sea adjacent to a zone over which it possesses some sovereign rights (e.g., the EEZ) than to a zone where it has none (e.g., the high seas). To be sure, there exists no precedent that could answer this question, but a fair reading of the LOSC indicates that the arrangement is probably valid under international law. Namely, the freedoms of states are practically unlimited on the high seas, while they are subject to significant limitations in the EEZ of another country. With that in mind, it can be argued that Croatia is simply waiving *some* of its sovereign rights in the EEZ corridor, while preserving all of them in the triangle area. Preserving the triangle as its territorial sea, hence, is a significantly more valid exercise than if that triangle were adjacent to an area where *all* of Croatia’s rights have been waived. Third states, hence, will certainly not be able to claim that the triangle constitutes the high seas by extension from the corridor. At most, they will be able to assert that the area constitutes the extension of Croatia’s EEZ, the potential for which is far smaller, and significantly less problematic for Croatia.

VII. CONCLUSION

The dispute between Croatia and Slovenia over the territorial sea boundary in the Bay of Piran and the Bay of Trieste has reached a new level with the Croatian government’s indication that it would likely reject the Agreement and form new negotiating positions. Considering the amount of opposition to the Agreement in Croatia, both by the public and in the Parliament, this move was probably the only option that the government had despite its desires to resolve the dispute in an amicable manner and compensate the losses on the matter by gaining significant advantages in its strategic relations with Slovenia. Nonetheless, Croatia is probably not eager to seek a judicial or arbitral resolution of the dispute because any gains that it might so achieve over the boundary question would translate into serious losses produced by the souring of Croatian-Slovenian relations. Slovenia, for its part, is fully satisfied with the Agreement, but it probably knows that the Agreement cannot become operational until it is ratified by the Croatian Parliament, a move that has been unlikely from the moment the Agreement was initialed. Moreover, Slovenia is similarly reluctant to seek a third body resolution because the

---

238. *Id.* art. 55.

likelihood of any such body rendering a decision favorable to Slovenia is very low considering the provisions of international law.

As a result, the two countries should continue to seek a negotiated solution, but must, at the same time, take into account each other's primary interests and concerns, and seek a compromise based on them. The most satisfactory such compromise is an agreement that would grant Slovenia sovereignty over the larger portion of the Bay of Piran, provide it with more territorial sea further in the Bay of Trieste than it would be entitled to if the line of equidistance were to be used, and create a corridor constituting Croatia's EEZ, while leaving a triangle of Croatia's territorial sea beyond that corridor in order to preserve Croatia's boundary with Italy. By following this proposal, the two countries will achieve their major objectives, that is, Slovenia will have unlimited freedoms of navigation and overflight on the way to the high seas, while Croatia will preserve its territorial sea border with Italy and alleviate the concerns that the creation of a high seas corridor so close to its coast connotes. Moreover, Croatia and Slovenia may create an agreement sufficiently comprehensive to ensure that Slovenia would enjoy the freedoms in Croatia's EEZ corridor that are normally associated with the status of the high seas, by granting Slovenia fishing, research and other rights in this corridor, while at the same time ensuring that no such rights are accessible to third states. Considering the geographical features of the area in question, a less complicated solution, unfortunately, does not exist. This fact notwithstanding, the solution proposed here is the best possible means for ensuring that Croatia and Slovenia resolve the dispute in a friendly, negotiated manner, rather than submitting to a costly, protracted, and uncertain judicial or arbitral mechanisms.