

**TERRITORIAL DISPUTE BETWEEN CROATIA AND SLOVENIA IN THE BAY OF
PIRAN: INTERPLAY OF INTERNATIONAL LAW AND INTERNATIONAL
RELATIONS**

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ABSTRACT

This research is concerned with the border dispute between Croatia and Slovenia and the role that international law plays in interstate politics and resolving disputes. The methodology used is a qualitative research paradigm of document analysis. The main findings of the research based on this case are that international law and international relations are mutually interdependent and it is impossible to resolve a dispute without applying both of them. Although they might seem clear, the international legal provisions can be understood in different ways by opposing parties, which is why disputes of this kind cannot be resolved without some sort of political compromise.

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TABLE OF CONTENTS

ABSTRACT	I
ACKNOWLEDGEMENTS	II
TABLE OF CONTENTS	III
INTRODUCTION.....	1
CHAPTER 1- LITERATURE REVIEW	6
1.1 REVIEW OF THE THEORIES	7
1.2 MARTTI KOSKENNIEMI’S THEORY ON SOVEREIGNTY	10
CHAPTER 2- THE DISPUTE OVER THE MARITIME BORDER	13
2.1 THE DISSOLUTION OF YUGOSLAVIA	14
2.1.1 <i>What is the principle of uti possidetis iuris?</i>	16
2.2 THE CONTEXT	18
2.3 THE LEGAL ARGUMENTS	21
2.3.1 <i>The Slovenian Arguments</i>	21
2.3.2 <i>The Croatian Arguments</i>	26
2.3.3 <i>The Drnovšek-Račan Agreement</i>	28
2.4 THE ANALYSIS	30
CHAPTER 3- BILATERAL RELATIONS.....	34
3.1 EARLY DEVELOPMENTS	34
3.2 SLOVENIAN VETO AND THE MEDIATION BY THE EUROPEAN COMMISSION	38
3.2.1 <i>The Arbitration Agreement</i>	39
3.3 THE ANALYSIS	41
3.3.1 <i>What does the Arbitration Agreement offer?</i>	43
CONCLUSION	45
BIBLIOGRAPHY.....	47

INTRODUCTION

Croatia and Slovenia are the successor states of the former Socialist Federal Republic of Yugoslavia (SFRY). In former Yugoslavia, only external borders of the Federation were clearly defined, while no great attention was paid to the defining of the internal borders of the republics. The maritime borders between the republics were not at all defined, which now causes great incompatibilities in interpretations on where the border should be drawn. These incompatibilities in interpretations have caused a serious dispute between Croatia and Slovenia regarding the exact position of the state border.

The particular case between Croatia and Slovenia has become very relevant, as the question on where the border should be drawn caused serious political consequences. Slovenia, as a European Union member, was blocking Croatian accession negotiations, causing the delay in the accession process. The two countries have always been considered friendly, especially taking in consideration all the unfortunate events connected to the dissolution of Yugoslavia and the wars of the 1990s.

Both countries proclaimed their independence on the same day- 25th June 1991.¹ As successor states of former Yugoslavia, they also acquired some obligations. As members of the United Nations, the two countries are bound to settle all their disputes in a peaceful manner, which is clearly stated in the UN Charter.² However, what seems to be the essence of the dispute is not whether these countries will resolve the dispute peacefully, but which method they are willing to apply in resolving it. According to the UN Charter, there are several ways in which a dispute can be resolved, which is negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or

¹ Degan, Vladimir- *Đuro Maritime Frontiers of the Republic of Croatia*, in: Comparative Maritime Law, vol. 37, br. 1-4 (145- 148), Zagreb, 1995

² *Charter of the United Nations* Article 2, paragraph 3: "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.", available at: <http://www.un.org/en/documents/charter/chapter1.shtml> (last visited 29th May 2010)

other peaceful means of their own choice.³ As will be shown in the presentation of this particular case, Croatia and Slovenia have tried several methods, but to this day none of them has proved to be successful, which is why the exact position of the border between the two countries remains unresolved almost twenty years after their independence.

Even though Croatia and Slovenia are also disputing several points on the mainland border,⁴ the question of the maritime border has proven to be the most controversial. It has constantly received a great deal of attention by the politicians, jurists and the media, especially in the last two years, after Slovenia blocked the Croatian accession negotiations with the European Union.⁵ That was the moment when this legal question was transferred in the sphere of politics. From that moment on, it became even more important for Croatia to resolve the dispute as quickly as possible, as it was interfering with one of the main goals of its foreign policy. Nevertheless, Croatian politicians were not ready to make any territorial concessions to the Slovenians, constantly making statements that Croatia would not buy the membership in the European Union with its territory.⁶ On the other hand, Slovenia was not ready to give up on its main demands, claiming that Croatia was using documents and maps in the negotiation process that were prejudicing the border.⁷ That way, a purely bilateral issue has become an international dispute which also involved the mediating services of the

³ *Charter of the United Nations* Article 33, paragraph 1: "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice". available at:

⁴ Ministarstvo Republike Slovenije za zunanje zadeve, *Bela knjiga o meji med Republiko Slovenijo in Republiko Hrvatsko*, (Ljubljana: DELO- Tiskarna d.d., 2006)
(Ministry of Foreign Affairs of the Republic of Slovenia, *White Paper on the Border between the Republic of Slovenia and the Republic of Croatia*, Ljubljana: DELO- Tiskarna d.d., 2006; English translation)

⁵ BBC News, *Slovenia blocks Croatian EU talks*, 17 December 2008, available at: <http://news.bbc.co.uk/2/hi/7788646.stm> (last visited 29 May 2010)

⁶ Jutarnji.hr, *Slovenija presudila: blokada pregovora s EU u 13 poglavlja*, 17 December 2008, available at: <http://www.jutarnji.hr/slovenija-presudila--blokada-pregovora-s-eu-u-11-poglavlja/280307/> (last visited 29 May 2010)

⁷ Delo.si, *Slovenija vztraja pri svojih pogojih*, 10 December 2008, available at: <http://www.delo.si/clanek/72598> (last visited 3 June 2010)

European Union.⁸ At present, the political part of the dispute, regarding the negotiations with the European Union, appears to be resolved. The prime ministers of the two countries managed to reach an agreement on unblocking the negotiations⁹ and signed an Arbitration Agreement in which they agreed to resolve the dispute by setting up an Arbitration Tribunal.¹⁰ However, Slovenia has not ratified the Arbitration Agreement yet, so the legal resolution of the dispute is yet to come.

The dispute between Croatia and Slovenia is a good example of an interplay between international law and international relations. International law cannot function without politics, nor can international politics function without law. The question of the delimitation of the interstate border certainly cannot be strictly a legal question, as it is connected to sovereignty, control over territory and, as politicians like to stress it, national pride. In this particular case, the question lies in the fact that even though both countries have been invoking provisions of international law, the dispute has remained unresolved for twenty years. This paper aims to discover why that is the case.

Several authors wrote about the relation between international law and international relations. Although each school of thought has a say about the connection between the two disciplines, this particular case could be best explained with the critical constructivist theory, particularly using Martti Koskenniemi's theory on sovereignty. According to this theory, there are two approaches to sovereignty, the legal approach and the pure fact approach.¹¹ According to the legal approach, the legal order pre-exists the sovereignty and remains in control of it.

⁸ Jutarnji.hr, *Pahor: Nazvat ću Sanadera, inicijativa Europske komisije je dobra*, 27 January 2009, available at: <http://www.jutarnji.hr/pahor--nazvat-cu-sanadera--inicijativa-europske-komisije-je-dobra/284717/> (last visited on 29 May 2010)

⁹ Vlado Zagorac, *Kosor i Pahor dogovorili deblokadu pregovora pa otišli na kavu*, 11 September 2009, available at: <http://www.vecernji.hr/vijesti/kosor-pahor-dogovorili-deblokadu-pregovora-otisli-kavu-clanak-16909> (last visited 29 May 2010)

¹⁰ *Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia*, Stockholm, 4th November 2009, available at: http://www.vlada.si/fileadmin/dokumenti/si/projekti/2010/Arbitrazni_sporazum/10.a_Arbitra%C5%BEni_sporazum_-_podpisan_EN.pdf (last visited on 29th May 2010)

¹¹ Koskenniemi, Martti, *From Apology to Utopia . The Structure of International Legal Argument* (Helsinki: Finnish Lawyers' Publishing Company, 1989) 196

On the other hand, according to the pure fact approach, sovereignty is external to international law and it is considered to be a normative fact with which the law must accommodate itself.¹² This theory will be connected with the particular case in question, with Croatia supporting the legal and Slovenia the pure fact approach. That way it will become possible to theoretically explain why the two parties cannot seem to reach an agreement. Koskenniemi's theory, together with a brief description of the other theories of international law and politics, will be further elaborated in Chapter 1.

Based on the analysis of the legal documents and political events in the two countries, this paper will answer the question to what extent the international law affects the political decisions and vice versa, in what way the politicians use the international law. This case of a Piran Bay could be an adequate example for answering the research question, as even though both parties do use various international law institutes and conventions, the dispute has remained unsettled, because of different interpretations of the same conventions and the lack of political will for accepting the negotiating position of the other party.

When it comes to methodology, this paper is a legal case study of the border dispute between Croatia and Slovenia. I have used the qualitative research paradigm of document analysis. Although it might seem that law is very objective and straight forward, it is actually not true, which can be seen well in this case. Every legal document is subject of interpretation, therefore, there is no objective truth to be discovered and everything depends on the context and subjective interpretation of a person reading the given material.

After the literature review, the analytical part of the paper will be divided into two chapters. In Chapter 2, which will be the first part of my analysis, I will study the legal arguments presented by the two parties and compare them to the international legal conventions they are parties to. In Chapter 3, in the second part of the analysis, I will analyse

¹² Koskenniemi, 1989, 196- 199

political developments, by going through different agreements the parties have signed and unilateral statements they have issued through the course of the dispute. This will all be done in order to answer the research question and conclude in what way international law is used in interstate politics. Answering the research question could offer a better understanding of the status of the international law in contemporary international relations. Understanding the reasons why the dispute grew to be so complicated could facilitate the resolution of future cases of this kind, both for Croatia and other countries in the region.

CHAPTER 1- LITERATURE REVIEW

This chapter will offer an overview of the theories connected to the relationship between the international law and international relations. Anne Marie Slaughter claims that there should be a significant connection between the two disciplines:

“Just as constitutional lawyers study political theory, and political theorists inquire into the nature and substance of constitutions, so too should two disciplines that study the laws of state behaviour seek to learn from one another.”¹³

Although the connection between the two disciplines is not often very clear, they are united by common theoretical divisions. According to Armstrong, Farrell and Lambert, there is growing appreciation among IL and IR scholars that there is a lot to learn from each other's disciplines.¹⁴

The first theory to be presented in this chapter will be realism. The discussion it will not take much space, as realism does not believe international law to be relevant for international relations. All the other theories will be a response to this realist challenge to international law. These are the legal positivism, institutionalism and liberalism. The last theory elaborated will be critical constructivism, which I will use as the main theory for this particular case. As mentioned in the introduction, I will explain this case by applying Koskeniemi's theory on sovereignty, as it seems that the two countries use different approaches to it. Koskeniemi also used territorial disputes to apply his theory, so I will simply try to use a different case to apply the same theory. After the case is presented, in the conclusion of this paper it might become clearer whether the solutions he offered in other cases could be applied to this very case.

¹³ Slaughter Burley, Anne- Marie, *International Law and International Relations: A Dual Agenda*, American Journal of International Law, vol. 87, No. 2 (1993): 205

¹⁴ Armstrong, David, Farrell, Theo and Lambert, Helen, *International Law and International Relations*, (Cambridge, New York: Cambridge University Press, 2007), 69-70

1.1 Review of the Theories

The political realism gained its significance in the aftermath of World War II, after the Wilsonian ideas of world government had failed. Main representatives of the realist theory include Hans Morgenthau, E.H. Carr, George Kennan and more recently, Kenneth Waltz.¹⁵ As Waltz claims, there is no system of law enforceable among the states, each of them is judging its grievances and ambitions according to the dictates of its own reason, which is why conflicts, which are sometimes leading to war, are bound to happen. States, in order to achieve favourable outcomes, must rely on their own devices. He argues that there is no automatic harmony among states, as they live in the state of anarchy.¹⁶ Therefore, the realists do not see a place for international law in world politics, as according to them, states are guided by their own interests. The greatest criticism coming from the realist camp is the question whether international law could even be called law, as compared to the municipal law, it is lacking the possibility of sanctions.¹⁷ Slaughter claims that most of the theoretical scholarship in international law and international relations can be seen as a response to this “realist challenge”¹⁸

An overview of the legal theories cannot go without mentioning Hans Kelsen, who responds to the realist challenge by trying to answer to the question whether international law establishes sanctions in case of breach of its provisions. He believes that international law does have the power of sanctions, with the difference that these are formally directed against the state, not the individuals.¹⁹

One of the responses to the realist challenge is the institutionalist agenda, with the main idea that even without coercion, legal rules and decision making procedures can be used

¹⁵ Slaughter Burley, 1993, 206

¹⁶ Waltz, Kenneth: *Man, the State and War. A Theoretical Analysis* (New York, London: Columbia University Press) 1959

¹⁷ Malanczuk, Peter, *Akehurst's Modern Introduction to International Law* (London: Routledge, 1997) 5

¹⁸ Slaughter Burley, 1993, 206

¹⁹ Kelsen, Hans, *The Essence of International Law*, ed. Deutsch, Karl W. and Hoffmann Stanley (ed.), *The Relevance of International Law* (Cambridge, Massachusetts: Schenkman Publishing Company, 1968) 85- 87

to structure international politics.²⁰ One of the main representatives of this theory is Robert Keohane. In his work he argues that although realism does offer a good starting point for analysis, it is too narrow and confining.²¹ He claims that much of the state behaviour reflects certain norms, rules and conventions and that the states' ability to communicate and cooperate depends on human constructed institutions.²² He argues that in non-institutionalised international systems, states may have to rely on their physical capabilities, but in an institutionalised international system, there are norms they can rely on, such as diplomatic norms or alliances.²³ Despite the fact that the institutionalist agenda does offer a place for the international law in international politics, it is not capable of explaining this particular case, as both parties did stick to legal norms and it did not resolve the dispute.

Although institutionalist agenda did make a step away from realism, it still has the state in the centre of attention. Early representatives of a liberal legal theory include McDougal and Lasswell, as representatives of The New Haven School. They believed law to be a part of an international policy making process and decision makers are those whose decisions turn out to be controlling and authorising. McDougal believes that provisions of customary international law to be a result of an interaction of decision makers. They have to have some common interest to contribute to its development and sometimes, in cases of a disagreement, a third party might be required to intervene.²⁴ In this part, McDougal's theory might be successful in explaining the case of Croatia and Slovenia, as it was the third party, the European Union, which eventually got involved in the dispute. However, McDougal's approach is a sociological approach to international law, which does not see the significance

²⁰ Slaughter Burley, 1993, 221

²¹ Keohane, Robert O., *International Institutions and State Power*, (Boulder, Colorado: Westview Press, 1989) 9 8

²² Keohane, 1989, 1-2

²³ Keohane, 1989, 9

²⁴ Byers, Michael, *Custom, Power and the Power of Rules* (Cambridge: Cambridge University Press, 1999) 207-209

of legal rules.²⁵ Although legal rules alone are rarely successful in resolving the disputes in international law, they do have an important role.

Later representative liberal theory is Richard Falk, who believed that the most important value to be achieved by international law is the achievement of world peace. Therefore, the main purpose of international law is to ensure stability and smooth running of an international system, by providing rules and expectations for state conduct.²⁶ Falk's ideas are certainly a good starting point; however, law cannot always explain and determine the state conduct.

Slaughter can be seen as a follower of Falk's theory. Writing in favour of liberal theory and comparing it to institutionalist agenda, she believes it is necessary to have a theoretical framework which will make a step further and include individuals, corporations, nongovernmental organizations etc.²⁷ Liberal theory has the tools to determine when there will be mutual interests which could enhance international cooperation, which is a precondition for the establishment of successful institutions.²⁸ She also makes an important point which is relevant for the case presented here: because there is a higher volume of exchange among liberal states, it can make a web of interrelationships which could make violations of sovereignty more likely. However, she also points out that the willingness of states to subject the matter of the dispute to the court is also significantly greater if the state in question is a liberal state.²⁹ Although Slaughter might have a point, the problem could be slightly more complicated than that, as it is the case with Croatia and Slovenia, which are both considered liberal democratic states, and yet they have not been successful to resolve their dispute in a quick and efficient way.

²⁵ Byers, 1999, 210

²⁶ Armstrong, Farrell and Lambert, 2007, 89

²⁷ Slaughter Burley, 1993, 227

²⁸ Ibid., 233

²⁹ Ibid., 236

Both realism and liberalism offer rationalist views of world politics. For realism, this rationality can be understood as the distribution of power, for liberalism, it is the distribution interests. These two schools of thought were challenged by a new theory in the beginning of 1990s, according to which the world is constructed by the very ideas that actors share among themselves about the world they live in. Therefore, it is ideas that shape actions in world politics. Constructivists believe that actors are socialised into following certain norms. Actors follow norms, which include beliefs about what is right and wrong. Norms operate in a way to constitute any kind of meaningful action. Therefore, constructivism highlights the importance of prior social structures that give incentives for actions. Constructivism in international law is based on the premise that legal norms are crucial in the formation of actors. Martti Koskenniemi, whose theory I will apply in this case, does belong to the constructivist camp, although he is considered to be a “critical constructivist”, who believes there is no objective knowledge, as scholars project their own perspective on anything they study.³⁰

1.2 Martti Koskenniemi's Theory on Sovereignty

Koskenniemi's critical constructivist theory seems to offer one of the possible explanations of the border dispute discussed in this paper, which is why it is necessary to further explain it in the remaining part of this chapter.

Koskenniemi explains that self-determination, independence, consent and most importantly, the idea of the rule of law, are all liberal themes and anyone who wishes to engage in the debate about international legality cannot avoid accepting international legal liberalism. He also points out that liberalism does not accept for itself the status of a grand political theory, because it claims to be apolitical and even hostile to politics. However, as

³⁰ Armstrong, Farrell and Lambert, 2007, 100- 101

Koskenniemi points out, liberalism controls normative argument in international law in a way which creates unacceptable material consequences for international life.³¹

In his book he makes an attempt to understand why it is that arguments within theory constantly enter into oppositions which seem irresolvable. He does that by using the method of regressive analysis, according to which he went backwards from explicit arguments to their deep structure. He made use of conceptual oppositions, according to which certain expressions are not determined from the inside, but from the formal differences which separate them, which makes meaning completely relational. Each discursive topic is constituted by its conceptual opposition. The participants in the discourse try to establish the priority of one of the opposing terms, which usually turns out to be unsuccessful. This is because it is impossible to prioritize one of the terms, as the terms actually depend on each other. Therefore, it turns out that opposing positions are actually the same.³²

Koskenniemi applied the theory to different international legal terms, sovereignty being one of them. According to the definition, sovereignty is a “supreme authority within a territory”³³. Koskenniemi believes there are two different approaches to sovereignty. These two approaches offer opposing views on how to establish whether a state is free in some particular relationships or not. According to the *legal approach*, sovereignty is something determined within the law and therefore, it is a legally limited competence. In a way, the very concept of sovereignty loses its significance under legal approach, because a state cannot legitimize its action by referring to it, but it has to find a rule of law which gives it the right for certain action. On the other hand, the *pure fact approach* sees sovereignty as something external to international law, a form of a normative fact with which the law must accommodate itself. According to this approach, being a state is a question of fact, which

³¹ Koskenniemi, 1989, XVII

³² Ibid., 1989, XVII- XX

³³ Stanford Encyclopaedia of Philosophy, available at: <http://plato.stanford.edu/entries/sovereignty/> (last visited 31 May 2010)

cannot be controlled, but simply recognized. This view is present in an argument that a state has a certain sphere of domestic jurisdiction and that conflicts between jurisdictions must be solved by looking at what rights are entailed in sovereignty.³⁴

Koskenniemi applied these two approaches on territorial disputes, in which the question is whether sovereignty on a piece of territory is dependent on an effective possession or external recognition. He claims that the solution of the dispute cannot prefer either of these alternatives. The only way to find a solution is to adopt interpretations about the facts and the positions of the disputing states, which cannot be determined by the available arguments.³⁵

Coming back to the two approaches to sovereignty, Koskenniemi argues that in order to see which facts are relevant, it is necessary to look for a legal rule. Furthermore, to establish the content of that rule, it is crucial to refer to facts. Therefore, the pure fact approach depends on the legal approach and *vice versa*. This is why whenever it comes to disagreements of this kind, sovereignty is unable to cope with it.³⁶

In order to understand how this theory can be applied to the border dispute between Croatia and Slovenia, it is necessary to move to the case.

³⁴ Koskenniemi, 1989, 196- 200

³⁵ Ibid, 245- 246

³⁶ Ibid, 262- 263

CHAPTER 2- THE DISPUTE OVER THE MARITIME BORDER

“I do not want in Yugoslavia borders that will be separate. As I have said 100 times, I want borders to be those that will unite our peoples”³⁷

Josip Broz Tito

This chapter will provide the necessary legal arguments connected to the particular case in question. In order to understand the legal arguments, it is necessary to be introduced into the main facts connected to the dissolution of Yugoslavia. Otherwise it would be impossible to understand how and when the two countries became independent and under what legal titles. The historical overview will also serve as an introduction into the merits of the case.

Before the presentation of the legal arguments, there will be a section explaining the context- location of the disputed bay, situation with the maritime borders in former Yugoslavia and reasons why the dispute between the two countries exists in the first place. After that, legal arguments of the two parties will be presented, first the Slovenian, then the Croatian. The legal arguments will be based on the most important documents issued in respective countries, which offer the basis for the legal positions of the two governments. As it will be shown, the main reason of the dispute is the fact that the two parties very often offer completely different interpretations of the same international legal provisions- the 1982 United Nations Law Convention on Law of the Seas and the 1958 Convention on the Territorial Sea and the Contiguous Zone. After careful consideration of the legal arguments in this particular case, it will be rather clear that international law is not completely explicit and that each provision can be understood in a way which is convenient for the party in question. The end of the chapter will be dedicated to the analysis of the legal arguments based on the international law.

³⁷ Radan, Peter, *The Break-up of Yugoslavia and International Law* (New York, London: Routhledge, 2002) 152

2.1 The Dissolution of Yugoslavia

Socialist Federal Republic of Yugoslavia consisted of six federal republics: Slovenia, Croatia, Bosnia and Herzegovina, Montenegro, Macedonia and Serbia, which also included the autonomous regions of Kosovo and Vojvodina. The boundaries of the republics corresponded significantly with the historical boundaries established in the former Austro-Hungarian and Ottoman empires. The Federation was created in the aftermath of the World War II. The borders between the federal states were not determined by a resolution of any kind, but by the leadership of the Communist Party.³⁸ Internal borders of the country were purely administrative and had little practical consequences, since according to Partisan policies, the national problem in Yugoslavia had been resolved. At the beginning, Yugoslavia was practically a centralised state, but with frequent constitutional changes, the last one being in 1974, it became increasingly federalised.³⁹



Map 1. Internal administrative borders of Yugoslavia

Source: ICTY, available at:

http://www.icty.org/x/image/ABOUTimagery/Yugoslavia%20maps/3_%20yugoslavia_map_1991_sml_en.png
(last visited 1 June 2010)

³⁸ Radan, 2002, 149

³⁹ Radan, 2002, 152- 154

After the death of Tito, in the 1980s, there were several cases of overt nationalism. As a response to Serbian calls for the increased centralism, Slovenia and Croatia responded with the demands for the transformations of Yugoslavia into a confederation or, failing that, independence.⁴⁰ However, the Serbian authorities were against it. After negotiations among the republics had failed, Slovenia and Croatia expressed their desire to become independent and both states organized referenda. Both countries declared their independence on the same date- 25 June 1991, which was finally confirmed on 8 October 1991. These proclamations of independence were followed by Macedonia and Bosnia and Herzegovina. The remaining two republics, Serbia and Montenegro, established a new country, Federal Republic of Yugoslavia, in April 1992.⁴¹

The proclamations of independence made by Croatia and Slovenia were refused by central Yugoslav authorities, which led the federal army to enter Slovenia and Croatia. In the European Community there was a disagreement on whether to recognise the newly formed states or not. At the meeting in Brussels the European Commission agreed to convene an International Conference for Peace in Yugoslavia. The decision was made that the Arbitration Commission, called the Badinter Commission, should be created, where the relevant authorities could submit their differences. The Arbitration Commission delivered ten opinions, out of which Opinion no. 3 is the most relevant for the determination of borders. These opinions were not binding for any of the parties, since the decision by the Commission is not a treaty, so it does not have a binding legal force.⁴²

The first opinion is worth mentioning in order to understand the situation better. The Commission stated that the essential organs of the federation are no longer functioning, which led them to believe that Yugoslavia was in the process of dissolution and that if the case that

⁴⁰ Radan, 2002, 154

⁴¹ Ghebrewebet, Helen: *Identifying Units of Statehood and Determining International Boundaries* (Frankfurt am Main: Peter Lang, 2005) 81- 83

⁴² Ibid., 82-84

the issues of state succession arise, the republics should settle the problems on the basis of international law”.⁴³ The Commission also defined state succession as the “replacement of one state by another in the responsibility for the international relations of territory...” which occurs “whenever there is a change of territory in a state.”⁴⁴

In the Opinion No. 3 the Commission stated that “given Yugoslavia’s fluid and changing situation, the question of the status of internal boundaries must be founded on the principles and rules of public international law”.⁴⁵ The Commission established four principles according to which the issue of frontiers must be resolved. Firstly, it states that all external frontiers must be respected according to the Principles stated in the UN Charter. Secondly, boundaries between Croatia and Serbia, Bosnia and Serbia and possibly other adjacent states may not be altered, except in case of an agreement. Thirdly, former boundaries became protected by international law and finally, alteration of these frontiers or boundaries by force cannot have any legal effect.⁴⁶ The Badinter Commission in its third opinion cited the *Burkina Faso/Mali Dispute* resolved by the International Court of Justice, where it was noted that the *uti possidetis* principle was a general principle of international law⁴⁷.

2.1.1 What is the principle of *uti possidetis iuris*?

The principle of *uti possidetis* was originally defined in Roman law. Modern formulation of the principle is connected with the process of decolonization of Central and South America in the 19th century, when the newly established states agreed to adopt former Spanish administrative boundaries as their new international boundaries. The principle was

⁴³ Terret, Steve: *The Dissolution of Yugoslavia and the Badinter Arbitration Commission* (England: Ashgate, 2000) 151

⁴⁴ Ibid., 151

⁴⁵ Ibid., 155

⁴⁶ Ibid, 156

⁴⁷ Ibid.

also applied in the case of African decolonisation after the World War II.⁴⁸ As it can be seen from the Opinions of the Badinter Commission, the principle was applied again in the case of dissolution of Yugoslavia, in the sense that former internal boundaries of the Federation became frontiers protected by international law.⁴⁹ The main guideline for the Commission was to insure that the internationalisation of the situation in former Yugoslavia does not cause territorial fragmentation.⁵⁰ Therefore, the Badinter Commission is in favour of the preservation of the *status quo*.

As mentioned earlier, the Commission in its Opinion believes the *uti possidetis* principle to be the general principle of international law⁵¹. According to Shaw, general principles are relevant in cases where there is no law covering a certain point and the judge has to deduce a relevant rule by analogy from already existing rules or general principles that guide the legal system.⁵²

Slovenia uses the principle of *uti possidetis* as one of its main arguments, in order to show that it had jurisdiction over the entire Piran Bay even before the proclamation of independence in 1991, and that according to the given principle; its jurisdiction should be continued.

⁴⁸ Lalonde, Suzane: *Determining Boundaries in a Conflicted World. The Role of Uti Possidetis* (Montreal: McGill- Queen's University Press, 2002) 3-4

⁴⁹ Lalonde, 2002, 4

⁵⁰ Terret, 2000, 157

⁵¹ According to the Article 38 (1) of the Statute of the International Court of Justice, there are four main sources of international law, general principles being one of them:

Article 38:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law; available at:

http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_II (last visited 3 June 2010)

⁵² Shaw, M. N., *International Law (6th edition)* (Cambridge: Cambridge University Press, 2008) 98

2.2 The Context

The Piran Bay is located in the very northern part of the Adriatic Sea, which is shared by three countries- Italy, Slovenia and Croatia, called the Trieste Bay. The Piran Bay is a part of the Trieste Bay and is located between the Peninsula of Savudrija and the Peninsula of the town of Piran. On its north- west side, the Piran Bay is limited by the maritime border of Italy and the former Yugoslavia.⁵³



Map 2. The location of the Piran Bay

Source: <http://mapsof.net/croatia/static-maps/jpg/bay-of-piran-maritime-boundary-dispute>
(last visited 3 June 2010)

Before the collapse of Yugoslavia, there were only three riparian states in the Adriatic Sea: Albania, Yugoslavia and Italy. Yugoslavia and Italy were the first two countries to reach an agreement on the continental shelf, not only on the Adriatic, but in the whole Mediterranean. As Albania was a rigid communist state, it did not want to delimit its maritime boundaries. The agreement between Italy and Yugoslavia was signed in 1968 and it entered into force in 1970.⁵⁴ The boundary was basically equal to the equidistant line. The only border which was left open was the border in the Gulf of Trieste, as it was taken in consideration that the land border between the two countries had also not been fully resolved. That boundary

⁵³ Avbelj, Matej and Letnar Čeranič, Jernej, *The Conundrum of the Piran Bay: Slovenia v. Croatia - The Case of Maritime Delimitation*, The University of Pennsylvania Journal of International Law & Policy, Vol. 5, No. 2, 2007. Reprinted in A. Sabitha (ed.), *Marine Environment: Governance Concerns*, 2009, Amicus Books, Icfai University Press, ISBN 81-314-2285-4.. Available at SSRN: <http://ssrn.com/abstract=990183>, 2

⁵⁴ Blake, G.H., Topalović, D., *The Maritime Boundaries of the Adriatic Sea* (IBRU, Durham, 1996) 15

was determined in 1975 with the Treaty of Osimo.⁵⁵ Maritime delimitations remained in place even after the dissolution of Yugoslavia and were completely unaffected by it. On the basis of state succession, the former Italian- Yugoslav borderline has been inherited by Slovenia, Croatia and Montenegro and none of the parties expressed any complaint claiming revision.⁵⁶

However, the collapse of communism and the dissolution of Yugoslavia in the early 1990s caused a significant redrawing of the European political map and also affected the Adriatic Sea, as the number of coastal states doubled. The Former Yugoslav coastline was divided between Slovenia, Croatia, Bosnia and Herzegovina and Montenegro.⁵⁷ The Croatian part of the coast is by far the longest, taking up about 85% of ex- Yugoslav coast and practically all of the islands.⁵⁸ The core of the dispute between Slovenia and Croatia lies in the administrative division of former Yugoslavia. The land borders of the member states of the federation were only administrative in nature. However, after the collapse of Yugoslavia, these administrative borders became international borders between the newly formed countries, based on the principle of *uti possidetis iuris*.⁵⁹ This is why land borders between the Slovenia and Croatia are mostly not disputed, with the exception of several points.⁶⁰ On the other hand, maritime borders between the republics had never been clearly defined and were virtually nonexistent. As a result, territorial waters of the former SFRY needed to be delimited by the successor states.⁶¹

⁵⁵ Ibid., 16-17

⁵⁶ Mladen Klemenčić, Duško Topalović, *Morske granice u Jadranskom moru* (Zagreb: Leksikografski zavod Miroslav Krleža, 2009), 312- 314

⁵⁷ Montenegro has existed as an independent state since 2006, after collapse of SFRY it was a part of Federal Republic of Yugoslavia until 2003 and Union of Serbia and Montenegro from 2003- 2006

⁵⁸ Klemenčić, Topalović, 2009, 314

⁵⁹ Avbelj, Letnar Čerňič, 2007, 3

⁶⁰ These include the area south of the River Dragonja, which is also relevant for the maritime delimitation. Other disputed areas involve very small pieces of land, including the hill Snežnik, village Sekulići and the border on the river Mura. (according to the White Book of the Slovenian Ministry of Foreign Affairs)

⁶¹ Klemenčić, Topalović, 2009, 314

This said, and taking in consideration that Croatia has a border with all the three other riparian states of the former Yugoslavia, it is not surprising that it has unresolved disputes regarding the maritime border with each of them.

The border between Bosnia and Herzegovina and Croatia is a very peculiar case, as Bosnian coastline separates the Croatian territory in two parts and it concerns the town of Neum. The two countries basically resolved the dispute in 1999. The problems that have arisen subsequently are mostly concerning Croatian plans to build a bridge that would help join two parts of Croatia and prevent the need to pass through Bosnia and Herzegovina in order to reach the southernmost parts of the country.⁶²

The dispute between Croatia and Montenegro was seen as rather controversial. The boundary lies at the Bay of Kotor, near Prevlaka peninsula, leaving the peninsula in Croatia. The main reason of the dispute was the fact that the Bay was the key base for the ex-Yugoslav navy, and Federal Republic of Yugoslavia (of which Montenegro was a part after the dissolution of SFRY) wanted to control the entrance to the Bay. Since Montenegro gained independence, the dispute is no longer an open dispute.⁶³

The dispute with Slovenia is one of the most burning political questions in both countries. One of the reasons for that is certainly because Slovenia used its veto power as a European Union member to block Croatian accession negotiations, with the excuse that Croatia was using maps in the negotiation documents with which it was prejudicing the border. In order to understand the core of the dispute, it is necessary to go through the legal arguments of both parties.

Before the presentation of the legal arguments, it is necessary to stress the fact that Croatia and Slovenia have always been considered as friendly countries, who proclaimed their independence on the same day- 25 June 1991. As successor states of former

⁶² Klemenčič, Topalović, 2009, 320-321

⁶³ Ibid, 322- 323

Yugoslavia, both countries assumed some obligations. They agreed to respect the inviolability of frontiers, which was one of the provisions of from the Helsinki Final Act, signed at the Conference on Security and Cooperation in Europe, at which they were both participants.⁶⁴ The part of the Helsinki Final Act dealing with frontiers and territorial integrity is named *Inviolability of frontiers* and *Territorial Integrity of States*. According to the first principle “participating states regard as inviolable all one another’s frontiers...” and “...they will accordingly refrain from any demand for, or act of, seizure or usurpation of part or all of the territory of any participating state.” According to the second principle “...participating states will respect the territorial integrity of each of the participating states” and refrain themselves from occupation or use of force.⁶⁵ Although Helsinki Final Act is not a legally binding document, it does have significant political weight and therefore countries are guided according to these recommendations.

2.3 The Legal Arguments

2.3.1 The Slovenian Arguments

The first time Slovenian arguments regarding the border were clearly defined was in the Memorandum released on 7 April 1993 by the Slovenian parliament.⁶⁶ In the Memorandum, the Slovenian parliament claims that its border on the sea was never clearly defined and that the exact delimitation is to be done in the future. It is also said that the agreement is to be reached using only peaceful means, in accordance with all the international agreements to which both countries are parties.⁶⁷ The Memorandum consists of two main

⁶⁴ Degan, Vladimir- Đuro (1995), *Maritime Frontiers of the Republic of Croatia*, in: Comparative Maritime Law, vol. 37, br. 1-4 (145- 148), Zagreb, 1995, 25

⁶⁵ *Helsinki Final Act*, Questions Relating to Security in Europe, 1. (a) Declaration on Principles Guiding Relations between Participating States, recommendations III- *Inviolability of frontiers* and IV- *Territorial Integrity of States*; available at: <http://www.osce.org/item/15661.html> (last visited on 26 May 2010)

⁶⁶ Parliament of the Republic of Slovenia, *Memorandum on the Piran Bay*, Ljubljana, 7th of April 1993, available at: Government of the Republic of Slovenia:

http://www.vlada.si/fileadmin/dokumenti/si/projekti/2010/Arbitrazni_sporazum/2._Memorandum_o_Piranskem_zalivu.pdf (last visited 27 May 2010)

⁶⁷ Parliament of the Republic of Slovenia, *Memorandum on the Piran Bay*, second paragraph

Slovenian demands: territorial integrity of the Piran Bay under Slovenian jurisdiction and territorial exit to the high seas.⁶⁸ Concerning the first demand, Slovenia claims to have been exercising jurisdiction in the entire Piran Bay even before proclamation of independence of the two countries in 1991.⁶⁹

Slovenia believes that the principle of *uti possidetis iuris* should be applied, as it confirms the status quo and de facto exercise of sovereignty by Slovenia in the entire Piran Bay. The *uti possidetis iuris* principle was also confirmed by the Badinter Arbitration Commission.

Regarding the second demand, Slovenia invokes the equity principle and so called special circumstances, according to the Article 12 of the 1958 Convention on the Territorial Sea and the Contiguous Zone, which is almost identical to the Article 15 of the 1892 Convention.⁷⁰

⁶⁸ United Nations Convention on the Law of the Sea, *Article 87*:

“The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, inter alia, both for coastal and land-locked States:

- (a) freedom of navigation;
- (b) freedom of overflight;
- (c) freedom to lay submarine cables and pipelines, subject to Part VI;
- (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
- (e) freedom of fishing, subject to the conditions laid down in section 2;
- (f) freedom of scientific research, subject to Parts VI and XIII.”;

Available at: http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm (last visited 3 June 2010)

⁶⁹ Parliament of the Republic of Slovenia, *Memorandum on the Piran Bay*, fifth paragraph

⁷⁰ 1958 *Convention on the Territorial Sea and the Contiguous Zone*, *Article 12*: “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 provisions of this paragraph shall 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 with this provision.”, available at: http://untreaty.un.org/ilc/texts/instruments/english/conventions/8_1_1958_territorial_sea.pdf (last visited 26 of May 2010)

1982 *United Nations Convention on the law of the Sea*, *Article 15*: “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.”

Slovenia claims to be entitled to invoke special circumstances as it a geographically disadvantaged state that cannot proclaim its exclusive economic zone and therefore it finds it necessary to draw the border in a way which would connect Slovenian territorial waters with the high seas of the Adriatic. Direct access to the high seas would help Slovenia exercise all its internationally recognized fishery rights and communication to the world.⁷¹

As can be seen from the documents to be presented below, main Slovenian claims, which have been constantly invoked, ever since the publishing of the Memorandum, remain the same. The Slovenian government published *White Paper on the Border between the Republic of Slovenia and the Republic of Croatia*, repeating the main arguments from the Memorandum. It has to be noted that the Slovenian authors often invoke provisions from the Drnovšek-Račan agreement from 2001, which are actually the common positions established by the two countries regarding the border. However, the agreement never came into force, as Croatian parliament never ratified it and it is not legally binding. Main points of the agreement will be mentioned later.

The arguments introduced in the White Paper issued by the Slovenian foreign ministry repeat the main arguments from the Memorandum. However, arguments are much better elaborated.⁷²

According to the first argument Slovenia has sovereign jurisdiction over the entire Piran Bay. Slovenian arguments are based on three points. Primarily, Slovenia claims that the Bay of Piran had the status of internal waters in former Yugoslavia and still has it, if *uti possidetis iuris* is applied. Because the territory of the Bay is considered to be internal waters, it is under Slovenian sovereign jurisdiction. This is related to the certain provisions of the

⁷¹ Parliament of the Republic of Slovenia, *Memorandum on the Piran Bay*, Ljubljana, 7th of April 1993, available at: Government of the Republic of Slovenia:

http://www.vlada.si/fileadmin/dokumenti/si/projekti/2010/Arbitrazni_sporazum/2._Memorandum_o_Piranskem_zalivu.pdf (last visited 27 May 2010)

⁷² *White Paper on the Border between the Republic of Slovenia and the Republic of Croatia* 2006

Article 10 of the 1982 UNCLOS Convention.⁷³ Slovenia opposes the Croatian argument that invokes the equidistant principle and the median line, according to the first sentence of the Article 15 of the 1982 UNCLOS Convention.

Secondly, Slovenia believes Piran Bay to be a historical bay, which means that it is trying to invoke special circumstances, mentioned in the second sentence of the above mentioned Article 15 of the UNCLOS Convention.⁷⁴ The reasons for invoking the historic title is the fact that the Bay is named after Slovenian town of Piran, which has always exercised jurisdiction and taken care of property rights in the entire territory of the Piran Bay. The southern coast of the Bay was given to Croatia during the times of socialist Yugoslavia, in 1956. However, Slovenia claims that even after the Southern coast had come under Croatian jurisdiction, Croatia was not opposing to the territorial integrity of the Piran Bay under Slovenian jurisdiction.

Thirdly, Slovenia claims to have had jurisdiction in the entire Bay on 25 June 1991, when both states proclaimed their independence. In the White Paper, there is a variety of evidence proving that Slovenia had clear civil, administrative, legal, police, ecological and economic authority in the whole territory of the Bay.⁷⁵

The second main argument according to which Slovenia has the right to the direct access to the high seas is justified by three main points. Firstly, Slovenia claims to have had a direct access to the high seas as a member of former Yugoslavia and therefore, according to

⁷³ UNCLOS, Article 10- Bays:

1. This article relates only to bays the coasts of which belong to a single State.
2. For the purposes of this Convention, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain land-locked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.
4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed 24 nautical miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.
6. The foregoing provisions do not apply to so-called "historic" bays, or in any case where the system of straight baselines provided for in article 7 is applied.

http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm

⁷⁴ UNCLOS, Article 15 (see footnote 70)

⁷⁵ *White Paper on the Border between the Republic of Slovenia and the Republic of Croatia*, 2006

the principle of *uti possidetis iuris* principle, it still has the access to the high seas. Secondly, Slovenia is the successor of the Osimo agreement between Italy and Yugoslavia. According to Slovenia, this agreement establishes the border between Slovenia and Italy, and Slovenian jurisdiction should go all the way to the point T5, which is the point of Slovenia's territorial exit to the high seas. Thirdly, Slovenia also claims to have the epicontinental shelf, which goes south from the point T5, which is based on the succession of the agreement between Italy and Yugoslavia on the Continental Shelf. Fourthly, Slovenia claims to have had jurisdiction even outside the Piran Bay, for which it provides some documents. The last argument claims that Slovenia should have communication with the high seas is the maritime traffic towards the harbour of Kopar, which is important for the Slovenian economic development and shipbuilding.⁷⁶

The bottom line of the Slovenian second main argument is the fact that Slovenia does satisfy itself with the right that it does have, which is the innocent passage through Croatian territorial waters, but it wishes to have the direct access to the high seas without having to cross Croatian territory.⁷⁷

⁷⁶ *White Paper on the Border between Republic of Slovenia and Republic of Croatia*, 2006

⁷⁷ UNCLOS, Article 17- *Right of innocent passage*:

"Subject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea";

Article 18- Meaning of passage:

"1. Passage means navigation through the territorial sea for the purpose of:

(a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or

(b) proceeding to or from internal waters or a call at such roadstead or port facility.

2. Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by force *majeure* or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress."

http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm

2.3.2 The Croatian Arguments

Croatian arguments have been clearly defined by Professor Vladimir Ibler 1994, in his commentary of the Slovenian Memorandum issued a year earlier and in the paper by Kristian Turkalj from 2002. Ibler sums up Croatian arguments in a following way:

First, Croatia rejects any Slovenian argument according to which it would have to give up on a part of its territorial sea in the Bay of Piran. Second, Croatia rejects the possibility of diminishing its territorial waters. Third, until the other agreement is established, Croatia claims the median line in the Piran Bay to be the state border between the two countries, according to the principle of equidistance, based on the Article 15 of the 1982 United Nations Convention on Law of the Seas and Article 12 of the 1958 Convention on the Territorial Sea and the Contiguous Zone. Fourth, median line in the Piran Bay can be altered only after the negotiation process, which would have to include the determination of the point at which the state border on land runs to the sea.⁷⁸

Fifth, regarding the Slovenian territorial exit to the high seas, Croatia is not willing to cede parts of its territorial waters to Slovenia, but it is willing to establish a special navigation regime, more liberal than the right of innocent passage, based on Article 17 of the 1982 UNCLOS Convention. Sixth, based on the Memorandum, Ibler says that it could be concluded that Croatian authorities are denying Slovenia the right to communicate with the world, which would mean that Croatia is breaking the provisions of the international law. If that is the case, Slovenia should report these cases in order to establish the facts, as Croatia has always been determined to respect Article 17 of the given Convention.⁷⁹

In his paper, Turkalj often quotes Ibler, with the difference that he is much clearer in explaining why it is unacceptable for Croatia to accept the Slovenian demand for the

⁷⁸ Ibler, Vladimir, *Državna granica na moru između Republike Hrvatske i Republike Slovenije*, Zbornik Pravnog fakulteta u Zagrebu, god. 44, br. 5-6, Zagreb: Sveučilišna tiskara, 1994, 475- 476

⁷⁹ Ibid.

territorial integrity of the Piran Bay and the direct territorial exit to the high seas. The argument against the Slovenian demand is certainly Article 2 of the United Nations Law of the Seas Convention, according to which sovereignty over the sea is connected with the sovereignty over land adjacent to it.⁸⁰ The exact phrasing of the article is the following: “The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.”⁸¹ Avbelj and Letnar Čerňič claim that this is the strongest Croatian argument, especially regarding the possible Slovenian direct connection to the high seas.⁸²

Croatian positions have also been expressed in the Declaration on the Interstate Relations between the Republic of Croatia and the Republic of Slovenia, issued by the Croatian Parliament in 1999. In the article 4, the Declaration states that “while determining the maritime border between the territorial seas of the two countries, Croatian representatives are obliged to hold a position in accordance with the Article 2 of the given Convention (i.e. United Nations Convention on Law of the Seas)...”⁸³, further explaining that it involves the determining of the border according to the equidistance principle.⁸⁴

It has to be mentioned that after the publication of the *White Book* by the Slovenian Ministry of Foreign Affairs, Croatia published a so called *Blue Book* as a response to Slovenian demands. However, the book is not publicly available, as it is not an official

⁸⁰ Turkalj, Kristijan: *Razgraničenje teritorijalnog mora između Hrvatske i Slovenije u sjevernom Jadranu*, Croatian Legal Database, 2002, 24; available at: http://www.pravnadatoteka.hr/pdf/aktualno/hrv/20021015/Turkalj_Razgranicenje_teritorijalnog_mora.pdf (last visited 27 May 2010)

⁸¹ UNCLOS, Article 2 http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm

⁸² Avbelj, Letnar Čerňič, 2007, 13-14

⁸³ Zastupnički dom Hrvatskog državnog Sabora, *Deklaracija o stanju međudržavnih odnosa Republike Hrvatske i Republike Slovenije*, Croatian Official Gazette, No. 32/99, 2nd of April 1999, available at: <http://narodne-novine.nn.hr/default.aspx> (last visited 27 May 2010)

⁸⁴ Ibid.

document, but a collection of scientific texts, which would represent a basis for Croatian negotiating position.⁸⁵

According to Avbelj and Letnar Čerňič, the demands in the *Blue Book* can be summarized in four main points. Firstly, the Slovenian claims over the sovereignty of the Piran Bay are contrary to international law. Croatia believes that the border should be determined according to the principle of equidistance, which means that Croatia is invoking Article 15 of the United Nations Convention on Law of the Seas, first paragraph. Secondly, Slovenian demands for the direct contact with the high seas are also against the international law of the sea and completely unfounded. Thirdly, Croatia wishes to maintain its maritime border with Italy. Fourthly, the agreement signed between the two countries- *Agreement on Trans- Border Commerce and Cooperation* is according to Croatia, a satisfactory legal basis which protects the interests of the local population, especially the fishermen.⁸⁶ The *Agreement on Trans- Border Commerce and Cooperation* was signed between the two countries in 1997.⁸⁷

2.3.3 The Drnovšek-Račan Agreement

Before the analysis of the legal arguments, it is useful to be aware of the Drnovšek-Račan Agreement, as it is still often mentioned in the Slovenian public as the best solution to the dispute. The Agreement is known by that name, although it was never actually signed by the two prime ministers. What is known as the agreement is actually the establishment of the common positions. These common positions were established during the time when Slovenia was a candidate state for the membership in the European Union and was trying to resolve its border disputes prior to full membership.⁸⁸ The Croatian Parliament failed to ratify it, so the

⁸⁵ Nacional, 2nd February 2007, available at <http://www.nacional.hr/clanak/31177/predstavljena-plava-knjiga> (last visited 27 May 2010)

⁸⁶ Avbelj, Letnar Čerňič, 2007, 10

⁸⁷ Government of the Republic of Croatia, official webpage, available at: <http://si.mvp.hr/?mh=234&mv=1315> (last visited 27 May 2010)

⁸⁸ Slovenian Ministry of Foreign Affairs, *Non Paper- Chronology of Slovenia- Croatia Border Issue*, 22nd February 2009, available at: <http://www.esiweb.org/index.php?lang=en&id=406> (last visited 27 May 2010)

Agreement never came officially into force and is therefore not legally binding. However, provisions of the Agreement are often mentioned, which is why it is important to know what they are.

The subject of the Treaty is the determination of the maritime boundary and the establishment of the border on land. Article 3, 4 and 5 are concerned with the delimitation of the maritime boundary. Article 3 determines the boundary in the Piran Bay, which should go one fourth of the way from Savudrija, which is the northernmost Croatian tip of the Bay.⁸⁹ This means that Croatia had agreed to abandon the equidistance principle and allow Slovenia to exercise control over three quarters of the Bay.

Articles 4 and 5 determine the Slovenian exit to the high seas and the Croatian border with Italy. An agreement was made on administering a junction which would connect the high seas with the Slovenian territorial waters. The junction would be also be considered as high seas and no country would be allowed to exercise its sovereign rights in that area. Furthermore, Article 5 determines that this junction would be placed between the territorial seas of the Republic of Croatia, which is why Croatia would still have its sea border with Italy.⁹⁰

Explaining the second provision of the Agreement regarding the Slovenian exit to the high seas, it means that Croatia would provide a special corridor in form of the chimney, which would connect Slovenian territorial waters with the high seas. Within the corridor, there would be a legal regime of the high seas. Between the corridor and the high seas, there would be a strip of sea in form of a triangle, which would be a part of Croatian territorial waters. This way, Croatia could maintain its maritime border with Italy.⁹¹

⁸⁹ Government of the Republic of Slovenia, Official webpage, Drnovšek- Račan Agreement (English translation), Article 3, available at: Webpage of the http://www.vlada.si/fileadmin/dokumenti/si/projekti/2010/Arbitrazni_sporazum/4.b_Drnovsek-Racan_EN.pdf (last visited on 27 May 2010)

⁹⁰ Drnovšek- Račan Agreement (English translation), Articles 4 and 5

⁹¹ Avbelj, Letnar Čerňič, 2007, 11



Map 3.- the Račan-Drnovšek Agreement

Source: 24ur.com <http://24ur.com/novice/slovenija/slovenija-ima-mocne-argumente.html>
(last visited 3 June 2010)

2.4 The Analysis

The legal arguments presented by the both parties can be seen as somewhat problematic. When it comes to Croatian arguments, it can be said that they are mostly presented by academics, in comparison to Slovenian arguments, which are most clearly stated in their official documents. They have been expressed in a very clear and formal manner, strictly quoting various articles from the Conventions. The main problem is that articles from the United Nations Law of the Seas Convention are interpreted in a way which is only convenient to Croatia, using paragraphs which speak in favour of its arguments. Main example for this statement is the interpretation of the Article 15 of the 1982 UNCLOS Convention, where Croatia disregards the second sentence, which is, at the same time, the main argument of the Slovenian side.

Croatian Parliament in its 1999 Declaration wrongly quotes Article 2 of the 1982 UNCLOS Convention, introducing arguments which are actually stated in Article 15 of the

same Convention. As this Declaration is one of main Croatian legal statements, it is a failure of the legislator not to have checked the text of the Declaration and quoted the correct Articles from the Convention. Therefore, the Croatian legislator is invoking the application of the equidistance principle, which is the main Croatian argument regarding the delimitation in the Piran Bay.

When it comes to Slovenian arguments, the main problem regarding the first argument is the fact that Slovenia claims the territory of the Piran Bay to be its internal waters, as that is the status the Bay used to have in former Yugoslavia. Naturally, the bay did have this status while it was under the jurisdiction of one country, which is in accordance with Article 10 (1) of the 1982 UNCLOS Convention. However, after the dissolution it is likely for the Bay to be divided between Croatia and Slovenia. Slovenia claims the jurisdiction over the entire Piran Bay by stating that it belongs to the group of historical bays, according to the Article 10 (6) of the Convention.

United Nations Convention on the Law of the Sea does not define historical bays. Turkalj, in presenting Croatia's counter arguments, introduces four conditions needed for a bay to be considered a historic bay, based on the UN Memorandum on historic bays. Firstly, a state must effectively and continuously exercise jurisdiction for a longer period of time. Secondly, there must be an official demand for proclaiming a certain bay to be a historic bay. Thirdly, the other states have to accept that demand and fourthly, the whole coast of the bay should belong to only one state. Turkalj claims that Slovenia has been an independent state since 1991, so it cannot satisfy the first condition. Slovenia has satisfied the second claim in its Memorandum from in 1993. The third condition cannot be satisfied as Croatia rejects these demands in several official documents, while the fourth condition cannot be satisfied as Croatia rejects the Slovene claims for the sovereignty over the entire Piran Bay.⁹²

⁹² Turkalj, 2002, 28-29

The main problem regarding the second argument lies in the fact that Slovenia interprets the *uti possidetis iuris* principle in a way that if until the 25 June 1991 Slovenia had the access to the high seas, than it should continue having it even after the proclamation of independence. Moreover, Slovenia offers very slim evidence to prove that it actually did have jurisdiction even outside the Piran Bay and justifies them with the fact that in former Yugoslavia the sea boundaries were not determined and were considered to be common good.⁹³ If the internal maritime boundaries were not determined, how is it possible for Slovenia to unilaterally claim the position of its sea boundary with Italy without clearly establishing where the boundary between Slovenia and Croatia should be located? The most important question regarding Slovenian territorial access to the high seas is the argument that it is important for its economy and traffic to the port of Kopar. If Slovenia and Croatia are considered to be peaceful and democratic states that do adhere to the contracts signed, then why is Slovenia not satisfied with the right of innocent passage through Croatian territorial waters?

In conclusion, both countries seem to be offering arguments based on the provisions of international law. However, a certain amount of political will is needed so that the two parties can resolve the dispute. The case of Croatia and Slovenia seems to fit perfectly into Koskenniemi's theory mentioned in the first chapter. Croatia would fit into the legal approach, because it tends to search for the exact legal facts in order to explain its positions, while Slovenia invokes the *uti possidetis iuris* principle and tries to support its rights on the jurisdiction over the Piran Bay from the factual situation on the ground.

In domestic law, two opposing parties offering different legal arguments would most certainly go to court. However, in international law, the situation is slightly more complicated, as there are different ways to resolve a dispute and it does not necessarily need to be the court.

⁹³ *White Paper on the Border between Republic of Slovenia and Republic of Croatia*, 2006

This is again the same thing that Koskenniemi argues. In order to see which facts are relevant, it is necessary to search for the legal rule, but in order to apply the rule, we have to be certain about the facts. Therefore, the way to resolve this dispute is to combine the two approaches and try to show a certain amount of flexibility on both sides. Otherwise, the two states could remain in the *status quo* forever.

CHAPTER 3- BILATERAL RELATIONS

This chapter will offer the analysis of political developments between the two countries after becoming independent. Up to that moment, they had a common path and in the last years of Yugoslavia, they were united in the struggle against Serbian nationalism and attempts to preserve the Federation. However, as soon as they were no longer a part of the same country, they started focusing on their mutual differences and open issues.

The chapter will present bilateral agreements, documents and statements issued by the two governments in respect to the border. Special attention will be given to the recent developments connected to the blocking of the Croatian negotiations with the European Union, as this is the reason why the dispute gained extreme political significance. This section will include the attempt made by the European Commission in mediating the dispute. Before the analytical part which will come in the last section, it is necessary to look into the most recent political developments, which have shown significant improvement and announced the possible resolution of the dispute.

3.1 Early Developments

Croatia and Slovenia started negotiations in 1992 by establishing a group of experts who were supposed to determine the border between the two states, but the agreement was not reached.⁹⁴ From 1993 until 1998, a joint diplomatic commission was established in order to determine the border. This commission was successful in determining almost all the points on the land border, while the maritime border remained unresolved.⁹⁵ According to the Croatian government, that is because Slovenia frequently changed its position regarding the border. Croatia claims that the maritime border was not even considered problematic in 1991, when

⁹⁴ Klemenčič, Topalović, 2009, 316

⁹⁵ Government of the Republic of Slovenia, official website, *Zgodovina reševanja vprašanja meje*, available at: http://www.vlada.si/si teme_in_projekti/arbitrazni_sporazum/zgodovina_resevanja_vprasanja_meje/ (last visited 1 June 2010)

Slovenia was ready to accept the equidistance principle. Everything changed with the Slovenian Memorandum in 1993 when Slovenia expressed its two main demands which were described earlier⁹⁶. On the other hand, Slovenia points out that the two countries mutually recognized the legitimacy of their negotiating positions in 1995.⁹⁷ Since Slovenian negotiating positions were expressed in the Memorandum from 1993, these are obviously the ones Slovenia is referring to.

It must be said that although the border dispute between the two countries has existed ever since they proclaimed independence, there are not many official government statements coming from the first decade. This could be understood at least in two ways. Firstly, in Croatia, the first half of the 1990s was the time of the war, which is why the border with Slovenia certainly could not have been considered a priority. Secondly, those were the early years of independence, when both countries were still consolidating their democracies and going through the period of transition, so there were other things on the agenda. This can be concluded from the fact that the first substantial attempt to resolve the maritime border dispute came after the year 2000, at times of Slovenian accession negotiations with the European Union and after the change of government in Croatia in 2000.⁹⁸

In 2001 the negotiations between the two countries led to the Drnovšek-Račan agreement, which is actually not an official agreement, but the establishment of the common positions, as it was never actually signed by the two prime ministers. The resolution of the border dispute was one of the conditions for the Slovenian EU membership. Slovenia claims to have concluded the negotiations with the European Union in good faith believing that the border dispute had been resolved. Slovenia accuses Croatia of unilaterally refusing to

⁹⁶ Croatian Ministry of Foreign Affairs and European Integration, *Chronology of the Border Dispute between Croatia and Slovenia*, Zagreb, 16 March 2009 (presentation outlining Croatia's position and criticising Slovenia's), available at: <http://www.esiweb.org/enlargement/?cat=15#awp:::cat=15> (last visited 1 June 2010)

⁹⁷ Government of the Republic of Slovenia, *Zgodovina reševanja vprašanja meje*, http://www.vlada.si/si/teme_in_projekti/arbitrazni_sporazum/zgodovina_resevanja_vprasanja_meje/

⁹⁸ Office for Democratic Institutions and Human Rights- Elections, available at: <http://www.osce.org/odihr-elections/14356.html> (last visited 3 June 2010)

continue the ratification procedure of the given agreement.⁹⁹ Croatian position concerning the agreement is that no text has ever been signed or ratified by the Croatian parliament, which is why its provisions cannot be legally binding.¹⁰⁰ The truth is actually that Croatian Prime Minister Ivica Račan did not have the support from his coalition partners for the signing of the agreement and the ratification, not to speak about the opposition.¹⁰¹ Therefore, had there been more political will in Croatia, or a more stabile government, the agreement could have been reached.

In 2003 Croatia proclaimed the protected ecological and fishery zone in the Adriatic Sea, which included the sea above the continental shelf¹⁰² in central Adriatic, between the Croatian territorial waters and the border established by the agreement between Italy and Yugoslavia in 1968. This line was proclaimed as temporary until the final agreement on the border is established.¹⁰³ The proclaimed zone was similar to the exclusive economic zone defined by the Article 55 of the 1982 United Nations Convention on the Law of the Sea.¹⁰⁴ This move was not welcomed by the neighbouring states, Slovenia and Italy. Since at the same time Croatia was beginning its process of the accession to the European Union, Italy and Slovenia were using the EU bodies to suspend the application of the zone towards the EU

⁹⁹ Slovenian Ministry of Foreign Affairs, *Non Paper: Chronology of Slovenia- Croatia Border Issue* (22 February 2009), available at : <http://www.esiweb.org/enlargement/?cat=15#awp:::cat=15> (last visited 1 June 2010)

¹⁰⁰ Vidas, Davor, *Hrvatsko- slovensko razgraničenje. Međunarodno pravo je crta ispod koje se ne ide* (Zagreb, Školska knjiga), 2009, 47

¹⁰¹ Intervju with Joško Paro, Deputy Foreign Minister in the Račan government in Vjesnik, 24 August 2010, available at: http://www.mvpei.hr/custompages/static/hrv/templates/_ftr_govori.asp?id=57 (last visited 2 June 2010)

¹⁰² UNCLOS, Article 76(1): 1. "The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance."

¹⁰³ Hrvatski sabor: *Odluka o proširenju jurisdikcije Republike Hrvatske na Jadranskom moru*, Croatian Official Gazette, No. 157/2003, 6 October 2003, available at: <http://narodne-novine.nn.hr/default.aspx> (last visited on 2 June 2010)

¹⁰⁴ UNCLOS, Article 55:

"The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention."

http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm

countries.¹⁰⁵ In response, Slovenia proclaimed its own ecological and continental shelf zone, which also extends to the border established in 1968 between Yugoslavia, up to the point T5, which is the beginning of the high seas, while the border with Croatia is yet to be established.¹⁰⁶ Therefore, the two countries' exclusive economic zones were obviously overlapping on a part of the sea in the Northern Adriatic, as both took the border between Italy and Yugoslavia from 1968 as the external border.

In 2005 the prime ministers signed a Joint Statement on Avoiding Incidents. In the Article 1 they agree that the final decision on the border will take in consideration the situation on 25 June 1991.¹⁰⁷ However, as it turns out, the two parties interpret the situation in a different way, as they do with most of the international law provisions applicable on this case.

In 2007, as the issue remained unsettled, the two prime ministers, Sanader and Janša, met in the Slovenian town Bled, where they reached an informal agreement to settle the dispute before the International Court of Justice in The Hague. They also agreed to establish two joint commissions that would define a legal framework for the case that was to be referred to the Court.¹⁰⁸ However, the commission was unsuccessful in reaching the solution, as Croatia was unwilling to accept Slovenian conditions: firstly, the date of the independence, of both countries, 25 June 1991, was taken as a critical date; secondly, the entire border was

¹⁰⁵ Klemenčič, Topalović, 2009, 318

¹⁰⁶ Državni zbor Republike Slovenije, Zakon o razglasitvi zaštitne ekološke cone in epikontinentalnem pasu Republike Slovenije (ZRZECEP), Slovenian Official Gazette, No. 93/2005, 4 October 2005, available at: <http://www.uradni-list.si/1/objava.jsp?urlid=200593&stevilka=4021> (last visited on 2 June 2010)

¹⁰⁷ Skupna izjava o izogibanju incidentov (Slovenian version of the Statement), 10 June 2005, available at: Government of the Republic of Slovenia, official website:

http://www.vlada.si/fileadmin/dokumenti/si/projekti/2010/Arbitrazni_sporazum/6_Brionska_izjava_2005.pdf

¹⁰⁸ Government of the Republic of Croatia, official website, News and Announcements: *Legal framework for settlement of border disputes likely to be defined by year's end*, 26 August 2007, available at:

http://www.vlada.hr/en/naslovnica/novosti_i_najave/2007/kolovoz/pravni_okvir_za_prepustanje_spora_icj_u_vjerojatno_do_kraja_godine (last visited 2 June 2010)

to be subject of adjudication; thirdly, adjudication had to include the principle of equity.¹⁰⁹ This is why the commission was eventually dismissed.

3.2 Slovenian Veto and the Mediation by the European Commission

In December 2008 Slovenia decided to block the majority of the negotiating chapters Croatia was planning to open on an intergovernmental meeting of the European Council, with the explanation that Croatia was using the documents which were prejudicial to the location of the disputed border.¹¹⁰ That move by the Slovenian government was the peak of the deteriorating relationship between the two countries and it caused a significant delay in the Croatian accession process. The issue was in the centre of the heated debates in the media in both countries and it caused negative sentiments among the populations.

In order to speed up the resolution of the dispute that caused the delay in the negotiations, the European Commission decided to offer its mediating services, in the person of Olli Rehn, who was the EU Commissioner for Enlargement at the time. Through the series of intense diplomatic activities in the first half of 2009, he was trying to bring the positions of the two countries closer together. Croatia's position regarding Rehn's initiative was largely positive, with the condition that the resolution of the negotiation process is separated from the border question. Furthermore, the Croatian government insisted on resolution of the border dispute in accordance with the international law.¹¹¹ Rehn issued his Draft Agreement on Dispute Settlement and Joint Declaration, in which he proposes the *ad hoc arbitration*, and the continuation of the Croatian negotiation process. Croatia accepted the Draft Agreement, while Slovenia wanted to add certain points, in order to protect its vital interests. These remarks were added in Amended Draft Agreement. This time the Agreement was rejected by

¹⁰⁹ Slovenian Ministry of Foreign Affairs, *Non Paper: Chronology of Slovenia- Croatia Border Issue*

¹¹⁰ BBC News, 17th December 2008, available at: <http://news.bbc.co.uk/2/hi/7788646.stm> (last visited on 1 June 2010)

¹¹¹ Croatian Ministry of Foreign Affairs and European Integration, *Chronology of the Border Dispute between Croatia and Slovenia*, 2009, available at: http://www.esiweb.org/pdf/slovenia_CR%20MoFA-chronology.pdf ,

Croatia, which decided to step out of the Rehn's mediation process.¹¹² Croatia refused to accept the amendments, because Slovenia refused the judge of the International Court of Justice to preside the Arbitration commission and it insisted on the contact with the high seas.¹¹³

3.2.1 The Arbitration Agreement

Just as it seemed that the relations of the two countries have come to a dead end, Croatian political life went through severe changes that seem to have brought many positive events concerning the Croatian foreign policy and the resolution of the dispute. On 1 July 2009 Ivo Sanader, Croatian prime minister, decided to resign and was replaced by his deputy Jadranka Kosor.¹¹⁴

Kosor did not wait long to start working on the resolution of the border dispute. She initiated diplomatic activities which resulted in the removal of the Slovenian veto from the Croatian accession negotiations. Kosor made a written statement that no document submitted by Croatia will prejudice the border between the two countries and that Rehn's Amended Draft Agreement would be the basis for the resolution of the border dispute. This sudden improvement in bilateral relations continued with signing of the Arbitration Agreement on 4 November 2010 in Stockholm.¹¹⁵

Among the main provisions of the Arbitration Agreement is a decision that the dispute will be resolved by the Arbitration Tribunal, whose composition should be agreed by a mutual consent of the parties. The Tribunal will reach a decision which will be legally binding for the

¹¹² Government of the Republic of Slovenia, *Zgodovina reševanja vprašanja meje*, available at:

http://www.vlada.si/si/teme_in_projekti/arbitrazni_sporazum/zgodovina_resevanja_vprasanja_meje/

¹¹³ Vecernji.hr, *Kronologija hrvatsko- slovenskih odnosa od samostalnosti do danas*, 11 September 2009, available at: <http://www.vecernji.hr/vijesti/kronologija-hrvatsko-slovenskih-odnosa-samostalnosti-danas-clanak-17098> (last visited 2 June 2010)

¹¹⁴ BBC News, *Croatia's PM steps down*, 1 July 2009, available at: <http://news.bbc.co.uk/2/hi/8128746.stm> (last visited on 2 June 2010)

¹¹⁵ Government of the Republic of Slovenia, *Zgodovina reševanja vprašanja meje*, available at: http://www.vlada.si/si/teme_in_projekti/arbitrazni_sporazum/zgodovina_resevanja_vprasanja_meje/

parties and it will be the final settlement of the dispute.¹¹⁶ The main purpose of the Tribunal is the determination of the course of the maritime and land border between the Republic of Slovenia and the Republic of Croatia, Slovenia's junction to the high seas and the regime for the use of the relevant maritime areas.¹¹⁷ Article 4 states the legal provisions which shall be applied. For the land and maritime boundary these are the rules and principles of public international law, while for the determination of the junction and the regime of use for the relevant maritime areas these are the international law, principles of equity and good neighbourly relations.¹¹⁸

Croatian parliament ratified the Agreement on the 20 November 2009, with the addition of the following statement:

“Nothing in the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia shall be understood as Croatia's consent to Slovenia's claim to its territorial contact with the high seas.”¹¹⁹

Slovenian Parliament has ratified the Agreement, but the final decision whether it will come to power will depend on the referendum scheduled for 6 June 2010.¹²⁰ The question

¹¹⁶ Arbitration Agreement between the Government of the Republic of Slovenia and the Government of the Republic of Croatia (original English version), 4 November 2010, available at: http://www.vlada.si/fileadmin/dokumenti/si/projekti/2010/Arbitrazni_sporazum/10.a_Arbitra%C5%BEni_sporazum_-_podpisan_EN.pdf (last visited on 2 June 2010)

¹¹⁷ Arbitration Agreement, 2009, Article 3(1):

“(1) The Arbitral Tribunal shall determine

(a) the course of the maritime and land boundary between the Republic of Croatia and the Republic of Slovenia;
(b) Slovenia's junction to the High Sea;
(c) the regime for the use of the relevant maritime areas.”

¹¹⁸ Arbitration Agreement, 2009, Article 4:

“The Arbitral Tribunal shall apply

(a) the rules and principles of international law for the determinations referred to in Article 3 (1) (a);
(b) international law, equity and the principle of good neighbourly relations in order to achieve a fair and just result by taking into account all relevant circumstances for the determinations referred to in Article 3 (1) (b) and (c).”

Available at:

http://www.vlada.si/fileadmin/dokumenti/si/projekti/2010/Arbitrazni_sporazum/10.a_Arbitra%C5%BEni_sporazum_-_podpisan_EN.pdf

¹¹⁹ Hrvatski sabor, *Odluka o proglašenju zakona o potvrđivanju Sporazuma o arbitraži između Vlade Republike Hrvatske i Republike Slovenije*, 20 November 2009, Croatian Official Gazette, International Agreements, available at: <http://narodne-novine.nn.hr/medunarodni/default.aspx> (last visited 2 June 2010)

¹²⁰ Državni zbor Republike Slovenije, *Odloka o razpisu zakonodajnega referenduma o Zakonu o ratifikaciji Arbitražnega sporazuma med Vlado Republike Slovenije in Vlado Republike Hrvaške (OdZRBHRAS)*, Slovenian

has raised a lot of controversy in the Slovenian public, particularly because of the statement added by the government of the Republic of Croatia added to the parliamentary decision on ratification of the Agreement.

If it passes the Slovenian referendum, the Arbitration Agreement could be the solution of the problem that has been present for almost 20 years, though it remains to be seen in whose favour the judgement will go. However, the question remains whether this kind of agreement could have been reached before and why is it that the resolution came in this particular moment. Furthermore, it is useful to scrutinise it in order to see what it offers to the parties which has not been offered before.

3.3 The Analysis

The chronology of the political events has shown that not many significant initiatives came from either of the parties during the 1990s. Both countries were holding on to their positions and there was a clear lack of political will to reconsider them in order to reach an agreement. Therefore, Drnovšek-Račan agreement was the significant attempt to resolve all the points of the dispute on both land and maritime border. The issue of the border was raised during the Slovenian negotiation process with the European Union, so the question remains had there not been an external incentive, how long the question would have remained unresolved.

The Drnovšek-Račan agreement was long one of the main points of reference for Slovenia. Croatia was accused of being an unreliable partner because it withdrew from the ratification process. Avbelj and Letnar Čerňič accuse Croatia of not respecting the principle of *pacta sunt servanda*, according to the Article 26 of the Vienna Convention on the Law of Treaties. According to that article “every treaty in force is binding upon the parties to it

Official Gazette, 4 May 2010, No. 36/2010, available at: <http://www.uradni-list.si/1/content?id=97580&part=&highlight=zakonodajnega+referenduma> (last visited 2 June 2010)

and must be performed by them in good faith”.¹²¹ However, the Drnovšek-Račan Agreement was never in force and therefore it is not legally binding, because Croatia never expressed the consent to be bound by the treaty, according to the Article 14 of the same Convention, as the treaty was never even signed.¹²² Although it is clear that legally Croatia does not have any obligations, there is a certain political weight in the fact that the treaty was not ratified. It actually shows the weakness of the Prime Minister Račan, as he was obviously not able to gain support even from his own coalition partners.

The next interesting point is the proclamation of the exclusive economic zones by both of the countries. Although according to the Article 55 of the 1982 UNCLOS Convention, states do have the right to proclaim their economic zones, the timing of the Croatian proclamation can be seen as somewhat problematic, considering the unresolved border dispute. Therefore, Slovenian response can be justified as provoked by the Croatian action. However, as there is no clear maritime delimitation, how can any of the countries proclaim the economic zone, if they are not certain on the territory they have jurisdiction over. Proclamation of the economic zones can be seen as a step further in the deterioration of bilateral relations between Croatia and Slovenia. Furthermore, Slovenia can be considered as a geographically disadvantaged state according to the articles 57 and 70 (1) and (2) of the Convention, which should be able to share the surplus of the living resources

¹²¹ Vienna Convention on the Law of Treaties, 1969, Article 26, available at: http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (last visited on 2 June 2010)

¹²² Vienna Convention on Law of the Treaties, 1969,

Article 14:

1. The consent of a State to be bound by a treaty is expressed by ratification when:

- (a) the treaty provides for such consent to be expressed by means of ratification;
- (b) it is otherwise established that the negotiating States were agreed that ratification should be required;
- (c) the representative of the State has signed the treaty subject to ratification; or
- (d) the intention of the State to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation.

http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

from the coastal states of the same region or sub region. However, according to these articles, Croatia could also argue to be a geographically disadvantaged state.¹²³

3.3.1 What does the Arbitration Agreement offer?

As it was explained in the previous section, the Arbitration Agreement offers a solution to the border dispute between Croatia and Slovenia, both on land and the sea. For the purpose of this analysis, articles 3 (1) and 4 seem to be the most important.¹²⁴ The two parties have agreed to apply the provisions of international law to determine the land and maritime border. As both Slovenia and Croatia have invoked provisions of international law even earlier, this seems as a victory for both parties. It is on the Tribunal to decide how to interpret the international law provisions. Article 3 (1) (b) seems to be the most controversial, as it mentions the Slovenian ‘junction’ to the high seas. According to the Article 4(b), this question shall be resolved not only according to international law, but also according to the principles of equity and good neighbourly relations. Therefore, it would not be surprising if the Tribunal decides that Slovenia does have the territorial connection to the high seas. The importance of this provision can be seen from the fact that Croatian government added a supplement to the law ratifying the Arbitration Agreement, by making a statement that Croatia does not give consent for Slovenia’s exit to the high seas.

¹²³ UNCLOS Article 57:

„The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.“

The Adriatic Sea is not wide enough for any state to proclaim an economic zone 200 nautical miles wide.

UNCLOS Article 70:

1. Geographically disadvantaged States shall have 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, taking into account the relevant economic and geographical circumstances of all the States concerned and in conformity with the provisions of this article and of articles 61 and 62.

2. For the purposes of this Part, "geographically 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.

http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm

¹²⁴ See footnotes 117 and 118

However, if the Slovenian population confirms the Arbitration Agreement on the referendum and the Tribunal makes the decision in Slovenia's favour, it will be legally binding for Croatia to accept it. How the decision will affect Kosor's popularity remains to be seen.

What is also interesting about the events connected to the Arbitration Agreement is the speed in which the new Croatian prime minister managed to improve the situation that long seemed as impossible to resolve. Some newspapers claim that the reason why the agreement was reached has nothing to do with Kosor and Pahor, but with the fact that Slovenia was not only pressured by its European partners, but also by the United States. The reason in favour of this theory is the fact that Slovenian foreign minister had just returned from his trip to the United States prior to the meeting between Kosor and Pahor. Obviously, the two parties needed some external incentive to understand their positions in a more conciliatory way.¹²⁵

These events again fit into Koskenniemi's theory, according to which it is necessary to combine the two approaches in order to be able to resolve the disputes. It seems that it is exactly what the two prime ministers have done. The only question that remains to be answered is whether that was actually done as a result of an external incentive or a bilateral accord between the parties themselves.

¹²⁵ Vecernji.hr, *Žbogar: Nema pritiska od strane SAD-a oko graničnog spora*, 30 July 2009, available at: <http://www.vecernji.hr/vijesti/zakupci-ce-se-recesiji-suprotstaviti-povoljnim-cijenama-clanak-6108> (last visited on 2 June 2010)

CONCLUSION

This paper has shown the interdependence of international law and international relations, based on a case study of a border dispute between Croatia and Slovenia. Through the analysis of the legal arguments of the two parties, it became clear that the dispute cannot be resolved through strict application of law; it inevitably required a political decision, as the parties are frequently invoking the same legal provisions, but interpreting them in a different way.

The theoretical approach used in this paper was Koskenniemi's theory on sovereignty, which proved to be successful. Croatia is a clear example of the legal and Slovenia of a pure fact approach. As these two approaches are dependent on each other, it is impossible to resolve the dispute without combining them. When it comes to the political part, available arguments by the two parties were insufficient in reaching the solutions, which is why it was necessary to interpret the facts presented by the other party and make certain adjustments. The prime ministers of the two countries have made these adjustments, which is why the question has moved from the dead end. However, Koskenniemi's theory might not be able to explain the influence of the external factors, the European Union and The United States on the political resolution of the dispute.

Regarding the possible suggestions on the legal solution of the case, it is difficult to make predictions, but the decision will probably be a compromise between the positions of the two parties. It is highly unlikely that Slovenia will have the jurisdiction over the entire Piran Bay, but it is not impossible that it will gain access to the high seas, as the final decision will include the principle of equity and Croatia does have an extremely long coastline, in comparison to Slovenia.

Therefore, international law has without a doubt significant position in the international politics. However, due to the fact that it is different than the other legal systems,

no international legal provision can force a state to obey a certain rule under every circumstance. Therefore, in the end, even an international court cannot make a decision without a political decision and the will of the states.

In conclusion, this case can serve as an example for the states how not to conduct bilateral relations. With a certain amount of political will, international law could also be much more successful in conducting the relations between states. As there are more border disputes pending in the case of Croatia, some lessons could certainly be learned from the Piran Bay dispute, which could facilitate their resolution in the future.

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